

NORTH EAST LINK PROJECT
INQUIRY AND ADVISORY COMMITTEE
JOINT CLOSING SUBMISSIONS
BANYULE, BOROONDARA, MANNINGHAM
AND WHITEHORSE CITY COUNCILS

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INTRODUCTION

1. These submissions are made jointly on behalf of Banyule, Boroondara, Manningham and Whitehorse City Councils ('the Councils') generally, except as specifically stated.
2. The IAC's Terms of Reference ('Terms') require it to make findings on:
 - (a) The environmental effects of the Project; and
 - (b) The capacity of the Project to achieve acceptable environmental outcomes, having regard to legislation, policy, best practice, and the principles and objectives of ecologically sustainable development.
3. It is the Councils' joint position that, on the basis of the current material, the IAC is unable to properly carry out either of these tasks. The Councils submit that the task of the IAC has been rendered impossible by:
 - (a) The North East Link Project's ('NELP') reliance on a reference design, rather than a real project;
 - (b) The failure of the Environmental Effects Statement to adequately and comprehensively investigate the effects required to be investigated under the Final Scoping Requirements; and
 - (c) NELP's failure to advance any explanation of how the Reference Design was developed and the policy and design imperatives underlying it.
4. The only appropriate outcome would be for the Project to be deferred pending the preparation of a supplementary EES, which addresses the significant deficiencies identified in this process and provides a proper basis for the assessment of the Project.

5. If, contrary to the primary submission of the Councils, the IAC is prepared to recommend that the Project should proceed now, at the very least, it could not be approved without:
- (a) a planning control which guarantees that certain outcomes are achieved; and
 - (b) much more stringent EPRs – ones which require the Project to achieve clearly defined outcomes, and be subject to proper and independent scrutiny, (including where appropriate expressly stated conditions precedent, clearly delineated performance outcomes and requirements that matters to be done to the satisfaction of the Councils or other appropriate authorities.

That said, even with the most stringent EPRs, there is no guarantee that all of the deficiencies identified in these hearings could be cured.

The IAC's Task

6. The Terms require the IAC to carry out two fundamental tasks:
- (a) First, in its capacity as an inquiry under s 9 of the *Environment Effects Act 1978* ('the EE Act'), the IAC is required to consider and report on the potential environmental effects of the project, having regard to the evaluation objectives in the EES scoping requirements¹ ('Evaluation Objectives');
 - (b) Second, in its capacity as an advisory committee under s 151 of the *Planning and Environment Act 1987* ('the Planning Act'), the IAC is to review the draft planning scheme amendment GC98 to the Banyule,

¹ Clause 1(b), *Terms of Reference North East Link Project – Inquiry and Advisory Committee*.

Boroondara, Manningham and Whitehorse Planning Schemes and others ('the PSA'), which has been prepared to facilitate the Project and to provide a report to the Minister for Planning ('the Minister') as to whether the PSA contains provisions and controls that are appropriate for the Project.²

7. In addition, the Terms require that the IAC to prepare a report which sets out, relevantly:
 - (a) Its findings with respect to the environmental effects of the Project;
 - (b) Its findings as to the capacity for the Project to achieve acceptable environmental outcomes having regard to legislation, policy, best practice, and the principles and objectives of ecologically sustainable development;
 - (c) recommendations as to any feasible modifications to the alignment or design of the Project that would offer beneficial outcomes; and
 - (d) recommendations and/or specific measures that it considers necessary and appropriate to prevent, mitigate or offset adverse environmental effects having regard to legislation, policy, best practice, and the principles and objectives of ecologically sustainable development;

Assessment of Environmental Effects

8. Under the EE Act, the Minister for Planning is required to undertake an assessment of the environmental effects of the particular works under consideration. The end result of that assessment is not, however, to make a

² Clause 2(a) and (b), *Terms of Reference North East Link Project – Inquiry and Advisory Committee*.

decision but to inform other decisions that have to be made under other legislation.

9. The proper approach to the assessment required under the EE Act was explained by the Minister in his recent assessment of the Mordialloc Bypass where he observed that:
 - (a) It is 'essential' that his assessment 'deals robustly with the acceptability of the environmental effects of the project';
 - (b) While it was not necessary for a project to eliminate or avoid all environmental impacts,
 - (i) '[I]mpacts should be avoided or mitigated as far as practicable'; and
 - (ii) 'A judgment [must] be made about whether the impacts are acceptable, having regard to the nature of the affected environmental values'.³
10. In order to deal 'robustly' with the environmental effects of a project, it is necessary that the Minister (and those advising him) have sufficient information about the environmental effects of that project. As stated in the Second Reading Speech,

One aim of this proposed legislation is to enable and encourage those responsible for designing works and proposals to seek advice and take environmental matters into account when preparing these designs. An even more direct aim is to ensure that those making decisions about works

³ DELWP, *Mordialloc Bypass – Minister's assessment of environment effects* (June 2019), p. 11.

*and proposals do so in the full knowledge of their significant environmental effects.*⁴

11. This aim is reflected in the Scoping Requirement which, although it authorises the use of a reference design, still requires that the EES to:

*describe the project in sufficient detail to allow an understanding of all relevant components, processes and development stages and to enable assessment of their likely potential environmental effects.*⁵

12. It follows that, as identified in the then Department of Planning and Community Development's evidence to a Parliamentary Inquiry into the environmental effects statement process:

*A key question for the final assessment is whether there is sufficient information to enable decision-making on a proposal. If not, the minister might require a supplementary statement. Alternatively, if the minister considers that decision making can proceed, he or she might provide an assessment recommending that specific studies be conducted to resolve second-order issues. The latter response is typically translated into conditional requirements attached to approvals.*⁶

13. Ultimately whether conditions are appropriate depends on the nature of the gap in the information. The Department's reference to 'second-order' issues clearly indicates that it is not intended that there should be

⁴ Parliament of Victoria, *Hansard*, Volume 338, p. 3141.

⁵ Scoping Requirements for North East Link Project Environment Effects Statement (June 2018), section 3.3

⁶ Parliament of Victoria, Environment and Natural Resources Committee, Inquiry into the environmental effects statement process, transcript of evidence of Mr Gilmore and Mr Blake (3 May 2010), p. 4.

significant gaps in relation to critical issues which may determine whether or not particular works should proceed.

14. It is the position of the Councils that, consistent with the aims of the EE Act referred to above, the IAC should find that:
 - (a) There is insufficient material before the IAC to enable a full assessment of the significant environmental effects of the Project; and
 - (b) It is clear that environmental matters have not been given appropriate weight in preparing the design of the Project.

The Planning Assessment

15. In relation to the assessment under the Planning Act, the IAC is not just asked to assess the environmental impact (or mitigation measures) broadly.
16. The IAC is also asked to provide advice as to the extent of impact on the environment which might be **reasonable**; and the corollary of that question: whether there exist feasible alternatives to the Project which reduce the environmental impact to a reasonable level.
17. Whether or not the effects can be mitigated *per se*, is also a matter for assessment. But the extent of mitigation which is required (i.e. where **should** the line between an unreasonable impact and a reasonable impact be drawn?) is for decision makers exercising discretion under their own separate statutory and policy framework.
18. The IAC is expressly and impliedly asked to provide advice on this matter.
19. The assessment of the impacts, and the assessment of anything which may mitigate those impacts to a reasonable level, is necessarily informed by the

planning framework under which any approval might be given for the Project by the Minister under the Planning Act.

20. Both the size of the impact, and the capacity for mitigating the impact, are critical elements in deciding whether or not the planning discretion should be exercised, and if so how – i.e. subject to what conditions or constraints.
21. The approvals pathway here invites the Minister to grant the most important approval – the planning approval – by way of a Ministerial amendment.
22. When the Minister comes to exercise his power, the Minister is bound by the provisions of the Planning Act,⁷ and the Planning Scheme. The Minister is exercising a planning discretion – and he must do so in accordance with law.
23. This includes clause 71.02-3 – Integrated Decision making:

*Planningauthorities should endeavour to integrate the range of planning policies relevant to the issues to be determined and balance conflicting objectives in favour of **net community benefit and sustainable development** for the benefit of present and future generations.*

24. Relevantly, clause 71.02-1 provides that the purpose of the planning framework under which the Minister is to make his decision is to:

to ensure that the objectives of planning in Victoria (as set out in section 4 of the Act) are fostered through appropriate land use and development planning policies and practices that integrate relevant environmental,

⁷ Including the objectives of the Act set out in section 4.

social and economic factors in the interests of net community benefit and sustainable development.

25. In the context of the planning discretion, the size of the environmental impact is to be weighed against the strategic support (or planning need) for the Project.
26. The strength of the strategic support for the Project is an important factor in determining whether or not the environmental impact (even if significant) should be mitigated or not, and if so to what extent.

The Transport Integration Act

27. A further piece of legislation that is particularly relevant to the IAC's task is the *Transport Integration Act 2010* ('the TIA'). Section 25 of the TIA provides, relevantly, that an 'interface body' must have regard to:
 - (a) The transport system objectives set out in ss 8 – 13 of the TIA 'when exercising powers and performing functions under any interface legislation which are likely to have a significant impact on the transport system';
 - (b) The decision-making principles set out in ss 15 – 21 when 'making decisions under any interface legislation which are likely to have a significant impact on the transport system.'
28. The Minister is an 'interface body' for the TIA by virtue of the fact that:
 - (a) He administers the EE Act and the Planning Act, both of which are interface legislation within the meaning of the TIA; and
 - (b) He is a planning authority under the Planning Act.

29. The consequence of the Minister being an interface body is that this IAC should, in advising him, have regard to the matters that he is required to have regard to in making decisions and exercising powers and functions under those Acts.⁸

Irrelevant considerations

30. There are two matters which the IAC ought **not** to take into account in conducting its assessment.
31. The first of these is the perception that the Project is a committed government project – a perception which might be said to be reinforced by the decision of the State government to shortlist tenderers and enter into a \$200 million contract for “early works” while this process is ongoing.⁹
32. However accurate the above perception may be, it has no role to play in either of the assessments that the IAC is required to conduct under the Terms, nor the decision required to be made by the Minister. It is simply irrelevant both:
- (a) To the question of what are the environmental effects of the Project; and
 - (b) To the question of whether approval of the PSA will result in a net community benefit.

⁸ Compare *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, [88]. In that case, Minister for Immigration and Border Protection was bound by the requirements of the *Migration Act 1958* in making certain decisions. The High Court observed that, given that the Minister was bound by such requirements, advice which failed to have regard to those requirements would be ‘pointless’.

⁹ Tabled Document 303: Media Release – The Hon Jacinta Allen – 3 September 2019.

33. The IAC's attention is drawn to the provisions of the *Public Administration Act 2004*, which relevantly seeks:
- (a) To ensure the maintenance of an 'apolitical' public sector;¹⁰
 - (b) To foster a public sector that responds to government priorities 'in a manner that is consistent with public sector values', including the value of 'responsiveness', which requires the public sector to 'provid[e] frank, impartial and timely advice to the Government'.¹¹
34. The Councils here proceed on the basis that, whether or not the *Public Administration Act* strictly applies to the IAC, the IAC will fearlessly follow the evidence before it, and provide frank and fearless advice to the Minister.
35. The second issue that the IAC should **not** have regard to is any internal constraints that NELP or the Department of Transport ('DOT') may have chosen to impose on the Project that are not clearly justified by the relevant decision-making framework, or any evidence before the IAC.
36. The main example of this is the insistence of NELP / DOT on attaining Level of Service D ('LOS D') along the Eastern Freeway during the peak and at intersections.
37. Nothing in the policy framework supports the adoption of such an approach as mandatory criteria in the design or assessment of the Project:

¹⁰ *Public Administration Act 2004* (Vic.) s 3(a)

¹¹ *Ibid.* ss 3(b)(i) & 7(1)(a)(i).

- (a) As Mr Kiriakidis accepted, nothing in the public works declaration, Scoping Requirements or the Terms makes attainment of LOS D a mandatory requirement for the Project;
 - (b) It was Mr O'Brien's evidence that the use of LOS D at peak for the Eastern Freeway was an inappropriate criterion, having regard to the impossibility of adequately addressing peak demand and the fact that adopting LOS D at peak results in unnecessarily high levels of service throughout the rest of the day;¹² and
 - (c) As Ms Marshall observed, the use of LOS D for intersections is not supported by AustRoads Road Design manuals which specify the use of degree of saturation and queue lengths as the key criteria.¹³
38. In these circumstances, if NELP wishes the IAC to treat a particular requirement or design criteria as significant, then it should have sought to justify such an approach, by evidence rather than assertion, particularly having regard to the matters which the IAC is required to consider.

¹² Andrew O'Brien, Expert Witness Statement, p 32

¹³ Department of Transport Cross-Examination of Hilary Marshall, 22 August, at 1:03:22.

STRATEGIC RATIONALE

39. It is useful to begin by discussing the strategic rationale for the Project. This is because it is the strategic rationale which provides the justification for accepting the environmental costs of the Project, and the counterweight against which those costs are to be balanced.
40. In this submission, “environmental cost” is used in its widest possible sense and includes impacts on fauna and flora, impacts on human health, impacts on human society; impacts on business and impacts on the community generally.

Project rationale

41. NELP has been at pains to labour the strategic importance of the project, including through the evidence of Mr Barlow and the cross-examination of others.
42. The Councils do not contend that an orbital connection between the north and the south east is not required. None of the Councils have argued against an orbital connection along an appropriate alignment being desirable and necessary.
43. It is, however, critical to draw a clear distinction between:
- (a) The existence of strategic support for the notion of an orbital link from the north to the south east; and
 - (b) A conclusion that this particular project before the IAC results in a net community benefit and should proceed.

44. This is important because the submissions of both NELP and DOT appear at times to try to conflate these two, quite different, propositions.
45. The notion of an orbital link connecting the north to the south east has been discussed in general terms for more than 50 years.
46. At the same time, all of the Councils want to see a link which:
 - (a) is properly thought through; and
 - (b) balances the actual strategic justification for the project against the impacts of the project on the environment and local communities through which the project will pass.
47. NELP's case seems to be that the Project is strategically justified regardless of the impacts that the Project might have.
48. Indeed, the whole basis of the assessment seems to be premised upon the assertion that all of the impacts of the Reference Design are appropriate and reasonable having regard to the strategic importance of merely creating the orbital link *per se*. Or put another way, the Project is of such strategic significance that it results in a 'net community benefit' whatever impacts it may have.
49. There is no strategic support for such an assertion:
 - (a) Mr Barlow agreed that the strategic support for the link *per se* is not without limits. Strategic support is dependent upon ensuring that environmental and other values are appropriately preserved and/or dealt with;¹⁴ and

¹⁴ See transcript of cross-examination of Mr Barlow attached to these submissions.

(b) Mr Barlow also agreed, as a matter of principle, that if the strategic objective of the link can be achieved with less impact on the environment and local communities, then it should. He went on to agree that there is no planning justification for the Project having any greater impact than is necessary in order to achieve the strategic objectives. It is not a Project which must be achieved at all costs.¹⁵

50. The Councils agree that Mr Barlow's evidence on this point correctly synthesizes the framework within which the assessment must be undertaken.

Alignment between the project rationale and the Reference Design

51. Any assessment of environmental effects of the Project and whether they should be allowed must also consider the alignment between the project rationale and impacts produced by the Project.

52. In this respect the EES, and all of the historical discussion of a "North East Link" are quite clear. The justifications for the Project focus on getting trucks off the arterial road network and providing strategic links between the North and the East and Southeast of Melbourne.

53. Mr Barlow agreed that the greatest benefits of the Project in connectivity and economic terms are enjoyed during the business day, when commerce most depends upon the free flow of traffic movements away from existing and heavily congested arterial roads.¹⁶

54. Mr Barlow conceded that it is not a strategic planning policy objective to:

¹⁵ Ibid.

¹⁶ Ibid.

- (a) provide better freeway access to the CBD; or
 - (b) eliminate peak hour congestion on freeways, which he agreed was a fool's errand. Freeway demand expands to fill peak capacity almost as soon as construction is complete. Planning policy is diametrically opposed to the continual expansion of freeways to meet commuter capacity at peak times.¹⁷
55. It may well be a political imperative of governments to build roads to appease the masses. It has been thus since Roman times. The proper solution to the political problem is legislation passed by a democratically elected parliament. If, as is the case here, the planning decision is to be made having regard to the planning framework, resort to the pragmatism of statements like "if we don't build it now we'll only have to build it for more cost later" are completely irrelevant.
56. The environmental and other impacts of the Project will be significant - about that there can be little doubt.
57. In many cases the extent of impact would simply never be countenanced other than for a city shaping project of this kind.
58. The only way in which it can be said that the impacts are strategically justified is if it can be demonstrated that the impacts of the proposal have actually been minimised to an extent commensurate with the achievement of the actual strategic planning objective of the proposal. Only then can it be said that the appropriate balance has been struck in favour of net community benefit and sustainable development.

¹⁷ Ibid.

59. Neither the IAC nor the Minister will be in a position to reach such a conclusion on the current state of the EES or the evidence called in this proceeding.
60. If the IAC is not satisfied that the impacts of the Project are, in fact, necessary to achieve its stated strategic objectives, then it needs to say something definitive. The IAC needs to be decisive.

INADEQUATE INFORMATION FOR ASSESSMENT

61. The tasks which the IAC is required to carry out under the Terms require the following four steps:
- (a) Identification of the strategic rationale for the Project and the likely benefits that would flow to the community if the Project is delivered;
 - (b) Identification of the nature and extent of the environmental costs that would be imposed by the delivery of the Project;
 - (c) Consideration of feasible mechanisms for reducing the environmental costs imposed by the Project, including alternative designs; and
 - (d) Comparison of the costs and benefits to determine whether the benefits exceed the costs and thus deliver a net benefit. Although on one view this step might be considered irrelevant to the assessment of environmental effects, the Councils submit that assessment of acceptability of environmental outcomes required by the Terms necessitates a comparison between the environmental cost imposed and the benefit obtained.
62. In order to carry out these tasks properly, however, it is imperative that the IAC be provided with sufficient information to do so:
- (a) In the Second Reading Speech for the Environment Effects Bill, the Minister for Health observed that:

One aim of this proposed legislation is to enable and encourage those responsible for designing works and proposals to seek advice and take environmental matters into account when preparing these designs. An even more direct aim is to ensure that those making decisions about

*works and proposals do so in the full knowledge of their significant environmental effects.*¹⁸

- (b) In order to achieve these aims, it is necessary for the EES to contain sufficient information to properly identify and assess the effects of the Project. This is consistent with evidence, noted above, given by the then Department of Planning and Community Development before a Parliamentary Inquiry into the EES process, where the Departmental representative stated:

*A key question for the final assessment is whether there is sufficient information to enable decision making on a proposal. If not, the minister might require a supplementary statement.*¹⁹

- (c) Similarly, insofar as the Planning Act assessment requires the Minister to form a judgment about whether the Project will deliver a net community benefit, this requires the Minister to be provided with sufficient information to determine whether or not the benefits of approving the PSA will outweigh the costs of doing so.

63. The Councils consider that NELP has made it impossible – or at the very least far more difficult than it could have been – for the IAC to carry out the first three steps set out above by:

- (a) Choosing to present an unrefined reference design ('Reference Design') in tandem with a loose set of Environment Performance Requirements ('EPRs') which impose no meaningful constraints on the final form of the Project once developed ('the Final Project'); and

¹⁸ Parliament of Victoria, *Hansard*, Volume 338, p. 3141.

¹⁹ Inquiry into the Environmental Effects Statement Process, 3 May 2010, Transcript, p 4.

- (b) Choosing not to provide any explanation, whether through evidence or by way of submissions, of how the Reference Design was developed, what the design drivers were and what trade-offs were made (and how) in the design process.

64. It is necessary to comment on each of these matters in turn.

The Use of a Reference Project

- 65. NELP has asserted the use of a reference design is 'established practice'.
- 66. Conducting an environmental impact assessment via a reference design is a practice which has been followed in some cases, and not in others. Its appropriateness depends on the particular circumstances of the case.
- 67. The Reference Design advanced in this case does not permit an assessment of the effects of the Project.
- 68. That is not to say that a reference (or concept) design can never form the basis for an assessment of the impacts of a project under the EE Act. Whether a reference design will be appropriate will depend on a number of interrelated factors, including:
 - (a) The nature and complexity of the project in question;
 - (b) The extent to which the reference design has been refined; and
 - (c) The extent to which it is possible to identify the likely environmental impacts of the project based on the reference design.
- 69. In this regard, the level crossing removals at Edithvale and Bonbeach and the Mordialloc Bypass are examples of situations in which the use of a reference design was appropriate. In those cases:

- (a) The projects were relatively straightforward pieces of linear infrastructure, being:
 - (i) a lowered train track in an existing railway reserve; and
 - (ii) an at-grade freeway in an established (albeit not constructed) road reserve respectively;
- (b) The reference designs had been refined to the point where they were to a large extent complete. In neither case was there any real question about the design of the infrastructure to be provided – rather, the ‘uncertainty’ was confined to clearly defined areas (e.g. the final design of the station at Edithvale or the height of noise walls along the alignment for the Mordialloc Bypass);
- (c) Given the relative certainty over the infrastructure to be provided and the lack of complexity, identification of likely impacts (and mitigation measures) was possible and was generally confined to a relatively small number of matters.

70. On the other hand, the use of a reference design for East-West Link was the subject of trenchant criticism by the Assessment Committee considering that project. In its report, the Assessment Committee commented:

As the Reference Project is a concept and not a ‘real’ project, it has made it difficult to fully assess the impacts of the Project, as they may occur or not, depending on whether the final Project is quite similar or very different to the Reference Project. In practical terms this has caused the following issues:

- * *Lack of certainty on key technical issues such as tunnelling approach leading to difficulty in fully assessing potential impacts;*
- * *Lack of certainty on other issues such as social and economic effects;*
- * *The generation of significant community concern and stress about Reference Project elements that may not be in the final Project.*

The approach has also led to difficulties for expert witnesses from the LMA and other parties who have tried to provide an expert opinion based on a Reference Project whose impacts, as far as they can be assessed given the uncertain design, may be significantly different to the final Project.²⁰

71. Most relevantly here, the Assessment Committee continued:

The Committee considers that in a high intensity urban environment such as that to be encountered by the Project, a more transparent, measured and structured approach to options identification and discussion with the community would have resulted in a superior process and Project outcome.²¹

72. These criticisms arose despite the fact that:

- (a) The East West Link reference design included actual proposed physical designs for infrastructure, providing more of a basis for assessment than the Reference Design in this case; and
- (b) The East West Link reference design was significantly less complex than the current design with fewer surface elements.

²⁰ [2014] PPV 76, section 5.5.2.

²¹ Ibid.

73. The most recent major road project approved in this State – the West Gate Tunnel – was not a reference design.
74. Apart from those referred to above, the only other recent infrastructure project where a reference design (described there as a ‘concept design’) was used is the Melbourne Metro project:
- (a) At this time, it is not possible to know how effective the EPRs for that Project have been as it is still incomplete. It is noted that, in cross-examination, Mr Evans gave evidence that he had (at least initially) found dealing with the contractor for the Project difficult, notwithstanding the existence of EPRs aimed at dealing specifically with issues faced by his client, the University of Melbourne;
 - (b) In any event, the nature of the Melbourne Metro project – being two 9km underground tunnels with five stations – coupled with the heavily modified and urbanised nature of the project environment meant that the range of interests and values that could be affected by the project, and the ways in which they could be affected, were reasonably confined; and
 - (c) Here, the environment in which the Project is proposed delivered is in several important ways significantly more complex than the inner urban environment of Melbourne. In particular, the nature and range of values and interests that need to be considered and protected along the Project alignment are significantly broader than those that needed to be addressed in the Melbourne Metro project.
75. In advancing the Reference Design, NELP wants to have its cake and eat it:

- (a) On the one hand, it seeks to advance the Reference Design as the basis upon which the environmental effects of the Project can be assessed for the purpose of the EE Act.
- (b) On the other hand, whenever it has emerged that there might be difficulty with the Reference Design responding in some way to a critical issue, the IAC is invited to ignore the deficiency on the basis that the Reference Design is not really the design at all and there will be some other design that nobody in this process will ever see or have the opportunity to comment upon, the ultimate manifestation of which will be the product of applying EPRs of the broadest import.

76. The lack of certainty created by this approach makes assessment of the environmental effects of the Project impossible:

- (a) The fundamental purpose of the EE Act is to ensure that works to which the Act applies do not proceed without an assessment of their environmental effects;²²
- (b) In order to assess the environmental effects of 'works', however, it must be possible to say with some degree of certainty what those works are and what form they will ultimately take;
- (c) Here, it is completely unclear to what extent, if any, the Final Project will resemble the Reference Design. It could be identical – although NELP suggests that it will not be – or it could be significantly different;

²² *Environment Effects Act 1978* (Vic.) s 3(2).

- (d) As such, the extent to which any assessment of the environmental effects of the Reference Design can be said to reflect an assessment of the environmental effects of the Final Project is largely speculative at this stage; and
- (e) Similarly, to the extent that the Planning Act requires an evaluation of the costs and benefits of the Project in order to determine whether the Project produces a net community benefit, the lack of any necessary consistency between the Reference Design and the Final Project means that any advice about whether the Reference Design produces a net community benefit may or may not tell you anything about the net community benefit of the Final Project.

77. The reliance on the Reference Design in this case makes it impossible to make findings about a number of the significant environment effects of the 'works', being the Final Project.

The Draft EPRs

78. Conceptually, if a sufficiently rigorous set of controls were imposed on the Reference Design - being controls that required NELP and / or the Project to achieve specific outcomes in relation to specific matters - then it might be possible to assess the Reference Design on the basis that it represented a 'worst case' scenario.

79. The draft EPRs prepared by NELP do not provide a sufficiently rigorous framework for that to occur in this case:

- (a) With a few exceptions - e.g. EPR NV1 - the EPRs avoid committing NELP or the Project to achieving any particular outcome;

- (b) Rather, the EPRs frequently require impacts to be minimised or avoided, but without providing any criteria which might permit an independent assessment of whether those impacts have been minimised; and
 - (c) Further, many of the obligations to minimise or avoid impacts are highly qualified through the use of phrases such as 'as far as practicable', which leave the question of practicability in the hands of NELP and the contractor.
80. A significant difficulty with the draft Incorporated Document, the as yet prepared Environment Management Framework and the draft EPRs is that they, in effect, defer the assessment required now (to determine the appropriate level of minimisation) to the post-approvals stage.
81. It is questionable whether such an approach is lawful:
- (a) The fundamental purpose of the EE Act, as reflected in the Second Reading Speech, is to ensure that the environment effects of declared works are assessed so that an informed decision can be made on whether those works should proceed;
 - (b) In legal terms, this intent is manifested through ss 4 and 6(2) of the EE Act, which require that:
 - (i) Prior to the commencement of any works to which the EE Act applies, an EES be submitted to the Minister for his assessment of the environmental effects of the work; and
 - (ii) Once an EES has been submitted, no works referred to in that EES may commence *'until the assessment of the Minister with regard*

to the environmental effects has been considered by the relevant Minister'.²³

- (c) Deferral of questions of mitigation to the post-approvals stage undermines the framework established by the EE Act because it undermines the ability of the Minister to make an assessment of the environmental effects that the works will have, and to make a determination as to whether the works are capable of achieving acceptable environmental outcomes;
- (d) How, it may be asked, is the Minister to form a view on whether an environmental outcome is acceptable in circumstances where it cannot be demonstrated that the EPRs as drafted will lead to achievement of any particular outcome?
- (e) Notably, nothing in the EPRs commits the Final Project to materially reducing its impacts relative to the Reference Design. For example, while EPR LP1 requires the Final Project to 'minimise the design footprint', this would not prevent NELP and the contractor from adding further lanes to the Eastern Freeway (within the bounds of the Project boundary) if it was determined that this was necessary or desirable in order to achieve project objectives;
- (f) Needless to say, nothing about the EPRs, or the PSA, obliges either NELP or the contractor to minimise the footprint of the Freeway in a manner which is proportionate to the strategic planning imperatives of the Project. In its role as an Advisory Committee, the IAC needs to be able to provide the Minister with an assessment of whether the

²³ *Environment Effects Act 1978* (Vic.) s 6(2).

approval of the PSA will produce a net community benefit. That requires an evaluation of the costs imposed by the Project which again requires some understanding of what the costs will be, a task made significantly harder where mitigation is promised, but the likely future extent of mitigation is unknown.

82. Ultimately, the only way the IAC could be satisfied that the benefits of the Project outweigh the costs would be if it was satisfied that either:
- (a) The Reference Design represented a 'worst case' outcome, in that the EPRs would prevent the production of a Final Project which had greater impacts; or
 - (b) The benefits of the Project were so significant that any costs imposed by the Project would be outweighed by those benefits.
83. Neither conclusion is rationally open on the evidence in this case.
84. If the Project is to proceed on the basis of a reference design then either:
- (a) The reference design needs to provide more detail, and the impact of the Project itself be more closely assessed; and/or
 - (b) The EPRs need to be significantly tightened in order to specify particular outcomes to be achieved such that:
 - (i) there is a greater level of certainty as to the outcome of the Final Project; and
 - (ii) we can ensure that whatever is delivered will be no worse than the Reference Design.

85. In truth, both steps are required to achieve the right balance if a reference design is to be adopted.

The Absence of a Design Explanation

86. The IAC should be concerned by NELP's failure to call evidence on how the Project was developed, what the design drivers were and what trade-offs were made, and expose that evidence to be tested in these hearings.
87. The information contained in Chapter 6 of the EES regarding the Reference Design development is of such high level that it provides no meaningful explanation for, nor allows for proper analysis of, the process that has been undertaken.
88. NELP, as project proponent, is the only party capable of assisting the IAC in its understanding how decisions have been reached in relation to the design of the Project. It should not be permitted, as a litigant in adversarial proceedings might be, to withhold information that does not assist it.
89. The situation is analogous to that of a primary decision-maker in administrative review proceedings. As the Court of Appeal observed in *Transport Accident Commission v Bausch*, such proceedings are:

in no sense to be treated as raising a lis²⁴ or amounting to an adversarial contest in which the commission is entitled to engage in curial tactics. That is not to say that there cannot be disputed issues between the parties raised for resolution, or that the commission may not seek actively to support before the tribunal its decision which is under review. If it does seek to do so, however, it is a fortiori imperative that its reasons for its

²⁴ Latin term used in judgment which means a proceeding – in particular, a proceeding between two private parties to be resolved by the exercise of judicial (as opposed to administrative) power.

*decision, and the material that it considered in making it, should be squarely and unequivocally revealed to the tribunal.*²⁵

90. The Court noted that the giving of reasons for a decision also served an important function by enabling the decision in question to ‘be investigated and appraised’ and to be the subject of ‘intelligent criticism’.²⁶ Indeed, insofar as the information provided by NELP is insufficient to allow the investigation and appraisal of the merits of the Reference Design, it raises a procedural fairness issue as to whether the Councils have been provided with sufficient information to ‘know the case they have to meet’.
91. This issue is particularly acute in relation to the issue of ‘feasible modifications’ to the design of the Project:
- (a) Under the Terms,²⁷ the IAC is required to make recommendations as to any feasible modifications to the design of the Project that would offer beneficial outcomes;
 - (b) There is no framework, or evidence, within which the question of “feasibility” can be cogently or transparently assessed. The criterion by which any final assessment of “feasibility” is made is the naked assertion of NELP;
 - (c) In many cases, it is clear that certain modifications would offer beneficial outcomes relative to the Reference Design;

²⁵ [1998] 4 VR 249, pp. 259 – 260.

²⁶ *Ibid*, p. 260.

²⁷ Clause 31(c)

- (d) It is not clear how either the IAC or the Councils can evaluate whether a particular modification to the Reference Design is 'feasible' or, if not, why not; and
 - (e) In these circumstances, the failure to disclose an explanation for the Reference Design means that NELP effectively becomes the arbiter of feasibility, notwithstanding that the Terms expressly assign that role to the IAC.
92. It cannot be said that the involvement of the Councils in the Technical Reference Group process, provided any significant insight into the road design process.

Conclusion on Adequacy of Information

93. The approach adopted by NELP to the presentation of its case means that the IAC is not in a position to carry out its tasks under the Terms because it is not possible to make critical findings about the environmental effects that the Project is likely to have.
94. For a multitude of reasons, the principal recommendation of the IAC should be that a supplementary EES be prepared in accordance with the findings which the IAC is invited to make in these submissions.

ASSESSMENT OF PROJECT BENEFITS

94. It is not in dispute that the Project will deliver some benefits, both to Melbourne as a whole and to the affected municipalities. This is not surprising. Indeed, it would be a significant achievement if NELP could spend \$15bn without delivering some benefits to someone.
95. What is in dispute is:
- (a) Whether the benefits will outweigh the costs, particularly at a local level; and
 - (b) The extent of the benefits that will be provided.

How should metropolitan benefits be assessed against local costs?

96. The Economic Appraisal for the Project makes clear that many of the benefits of the Project are distributed across the metropolis. By contrast, the costs are confined entirely to those areas along the alignment of the Project.
97. Fairness demands that, in evaluating the costs and benefits of the Project, attention should be given to how equally the benefits and the burdens are shared.
98. This is called the principle of ‘intragenerational equity’ and is reflected in both the TIA²⁸ and the principles and objectives of ecologically sustainable development.²⁹ The principle applies in two ways in this case:
- (a) The first and most important way in which the principle applies means that, as alluded to by Dr Stubbs, a project may have to be refused if it imposes excessive local costs, notwithstanding that it may generate

²⁸ Section 17(a), *Transport Integration Act*, which requires ‘equity between persons irrespective of their ... location’.

²⁹ DSE, *Ministerial guidelines for the assessment of environmental effects* (7th ed., 2006), p. 3, quoting s 4(2)(a) and 4(3)(a) of the *Commissioner for Environmental Sustainability Act 2003*.

broader benefits. To do otherwise would be in effect to treat residents of the affected areas as mere means to a broader end.

- (b) In the second way in which the principle may be relevant is to the assessment of the weight to be given to benefits claimed by a project.

99. These comments are consistent with how the principle was applied by the NSW Land and Environment Court in *Bulga-Milbrodale Progress Association Inc v Minister for Planning* [2013] NSWLEC 48 (*'Bulga-Milbrodale'*) where the Court upheld an appeal against the decision of the Minister to approve the expansion of a coal mine near the village of Bulga in NSW. The Court observed:

*Distributive justice involves the just distribution or allocation of the benefits and the burdens of economic activity. ... In the context of environmental justice, distribution of environmental risks and harms should be equitable or fair.*³⁰

100. In *Bulga-Milbrodale*, as here, the proponent sought to argue that the economic benefits of the project were so significant that they outweighed any social or environmental costs imposed by the project.

101. In upholding the appeal and refusing to permit the extension of the mine, the Court found that:

- (a) The Project would generate substantial economic and social benefits 'in the broader area and region', but
- (b) These were outweighed by the immediate impacts of the project, including noise and social impacts on the village of Bulga.

³⁰ *Bulga-Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48, at [486].

102. In addition, the Court found that the failure of the proponent to consider issues of intragenerational (and intergenerational) equity in its benefit-cost analysis limited the utility of that analysis ‘for the purposes of evaluating, weighting and balancing the relevant matters to be considered’.
103. Applying these principles in this matter:
- (a) The IAC should be cautious of giving significant weight to the claimed benefits of the Project in circumstances where distributional issues have not been considered or assessed in any serious way; and
 - (b) In addition to any metropolitan level assessment, the IAC should consider the question of whether the costs of the Project outweigh the benefit at a local level and should recommend that the Project not be approved unless it is satisfied that the local benefits will exceed the local costs.

The extent of benefits is overstated

104. NELP chose not to lead any economic evidence regarding the benefits of the Project. Instead, Mr Barlow provided an analysis of the strategic justification for the Project and the benefits said to flow from it.
105. A number of observations can be made about the analysis provided by Mr Barlow:
- (a) The Victorian Transport Plan 2008 is the only strategic document which nominates the proposed corridor and alignment for the Project;
 - (b) There is no evidence about the process undertaken which resulted in the alignment depicted in that document. There was no public consultation or transparent analysis. Someone, somewhere seems to have made a “captain’s call”. The process by which the alignment

was chosen in the Victorian Transport Plan 2008 stands in stark contrast to:

- (i) The process which led to the rejection of the corridor in 1979;³¹
- (ii) The strategic planning steps taken to abandon the reservations which would have facilitated it occurring, and the creation of reservations in favour of the 1979 preferred alignment;
- (c) Contrary to the evidence of Mr Barlow, the 2008 Victorian Transport Plan is not the Transport Plan referred to in the TI Act, and in fact has no status whatsoever other than as a reference document;³²
- (d) Every subsequent approved policy statement records the need for an orbital link, but does nothing more than indicatively identify the current corridor – subject to the express qualification – “subject to environmental assessment”;
- (e) The first review approaching anything like an “options analysis” equivalent to that undertaken in 1979 was the Business Case. Importantly the Business Case contained nothing more than a cursory assessment of environmental constraints;
- (f) The fact that the corridor was not finally determined by the 2008 Victorian Transport Plan is borne out by the fact that the Business Case examined four alternative corridors;
- (g) At best, the Business Case stands for the proposition that the Project before the IAC would answer the broad strategic objective of an

³¹ Tabled Document 174.

³² Document 234 – Response of the Department of Transport to Questions raised by the Inquiry and Advisory Committee, 20 August 2019.

orbital connection, particularly directed at freight movement, producing economic benefits reflected in a Benefit Cost Ratio ('BCR') of 1.25;

- (h) Mr Barlow relies heavily upon the review of the Business Case by Infrastructure Victoria and Infrastructure Australia to demonstrate the economic benefits of this particular project, but accepts that if the Business Case is flawed, then there may be reason to question the economic benefits of this particular project;
- (i) Mr Barlow is not an economist; and
- (j) NELP has called no independent economic evidence to support its case that the economic benefits will be realised.

106. The Business Case represents the first detailed consideration of options, and on the strength of the economic analysis alone, identifies this alignment and this project as a potential candidate – subject to a detailed consideration of the potential environmental impacts.

107. Mr Barlow said that he relied upon the Business Case as a statement that the economic benefits of the Project are established by the BCR that the business case achieved. Mr Barlow acknowledged that:

- (a) The Business Case represented the very first time that any level of detail regarding the road proposal for the current alignment had been considered;
- (b) The Business Case did not consider in any detail the environmental effects;

- (c) He was not an economist or a transport modeler, and that if the approach taken in the Business Case was shown to be wrong, that would affect the weight to be given to it.³³

108. It should be noted that there are at least four factors which have the potential to affect the BCR relied upon by Mr Barlow:

- (a) The over-estimation of benefit that arises from counting travel time savings for short trips;
- (b) The propensity of the strategic traffic modelling to over predict traffic growth in future years, for a number of reasons yet able to be explained comprehensibly;
- (c) The failure to account in the Business Case for additional works identified through this process as necessary to ameliorate the environmental impact, thereby underestimating the costs significantly;
- (d) The very real possibility that the Simpson Barracks will or should become a “no-go zone” – with the consequence that the Lower Plenty Road interchange would need to be deleted from the Project, thereby:
 - (i) Removing economic benefits associated with the provisions of access to LaTrobe University (as spurious as that claim seems to be given the route from the proposed interchange to the University); and
 - (ii) More importantly, potentially fundamentally altering the catchment of the North East Link in ways that will likely

³³ Day 12 Audio: 1:17:00 – 1:19:58.

diminish its use and therefore the economic benefits which flow from it.

109. Mr Rawnsley gave evidence for the Councils. He was cross-examined extensively. He was not cross-examined at all on the basis of his evidence that, to the extent that the Business Case counts travel time savings for small trips of under 5 minutes as a benefit, it likely significantly distorts the economic analysis (BCR of 1.25 reduces to 0.6), particularly in an environment like the present, where the particular road project is likely to produce many examples of short trip travel time savings, and where the Zenith model is likely to over predict growth in this kind of trip/travel time saving.
110. The economic rationale underpinning the Business Case cannot be a justification for the impacts of the Project on its own:
- (a) In cross-examination, Mr Morris QC sought to advance the argument that the BCR included all the capital costs of the Project, including mitigation works (e.g. noise walls);
 - (b) In support of this contention, he directed Mr Rawnsley's attention to the estimated capital cost of the Project which was said to include all the costs of delivering the Project;
 - (c) It is difficult to see how this argument can be correct. The final capital costs of the Project can only be determined once the final form of the Project is known. The Reference Design is, as NELP has expressly stated, not intended to be the final form of the design;
 - (d) That the use of a Reference Design may lead to cost overruns has been definitively established by the Victorian Auditor-General's Office in the context of the Level Crossings Removal Project. Commenting on the

reference design used for the LXP business case, the Auditor-General observed:

As LXRA developed the reference options with limited stakeholder and community consultation, there was a significant risk that the proposed reference option could change and impact on program costs.

That risk has subsequently materialised. There have been multiple changes from reference options, resulting in increases to the total program cost.³⁴

- (e) The same logic applies here. Despite NELP's repeated references to consultation, it is the Councils' view that the consultation that has occurred to date has been completely ineffective and has not resulted in any obviously required improvements to the design. As a result, significant changes will be required to get the Project even within touching distance of net community benefit.
- (f) It is likely that delivering the proposed mitigation measures will increase the cost of the Project. In these circumstances, it cannot be assumed that the final Project will deliver the same – or even similar – BCR to that claimed in the Business Case.

111. Finally, it should be noted that insofar as an attempt has been made to rely on reductions in traffic congestion relative to the 'no project' scenario, no evidence has been led of how enduring those benefits are likely to be. In this regard, it is relevant to note that Infrastructure Australia's *Urban Transport Crowding and Congestion* report indicates that, notwithstanding construction of the North East Link, the Eastern Freeway is expected to remain among Melbourne's most congested roads.

³⁴ Victorian Auditor-General's Office, *Managing the Level Crossing Removal Program* (December 2017), p. 40.

PROJECT DESIGN

The Design Approach

112. At the heart of much of the dispute between the Councils and NELP is a dispute over the correct approach to the design of major freeway infrastructure:
- (a) The Councils' position is that the correct approach begins by identifying the strategic need for the Project – here, providing an orbital link between the north and the south east of Melbourne – and then seeks to provide the infrastructure necessary to meet that need at the lowest environmental cost achievable – this approach accords with that of NELP's planning witness Mr Barlow;
 - (b) By contrast, the approach of NELP appears to be to define certain traffic performance parameters that it regards as non-negotiable – attainment of LOS D during the peak hour – and then design the Project to meet those parameters. Only after this has been done is impact mitigation considered and only then to the extent that mitigation is compatible with the continued achievement of NELP's or DOT's unsubstantiated internal requirements.
113. The approach adopted by the Councils is consistent with:
- (a) The Evaluation Objectives contained in the Scoping Requirements for the EES, which provide no support for the prioritisation of traffic and transport benefits over other values, rather they seek merely that connectivity and capacity be 'increase[d]' while other impacts are minimised or avoided;

- (b) The transport system objectives contained in the *Transport Integration Act 2010*, which expressly seek to minimise the impacts of transport infrastructure, both on adjacent land uses and on the environment as a whole;³⁵
- (c) The objectives of planning in Victoria; and
- (d) *AustRoads' Guide to Road Design*.

114. This last point is important because it makes clear that even specialist publications aimed at road designers recognise the need for transport infrastructure to operate in harmony with the environment in which it is to be constructed.

115. Ultimately, as acknowledged by Mr Barlow, the guiding principle for the assessment of the Project is that it should have no greater impact on the urban form than is necessary to achieve the strategic objectives of the road.

116. Put another way, an outcome which truly responds to the planning framework would see a road designed to have the least impact possible upon the existing urban form, while at the same time ensuring that the profile and design of the road is sufficient to achieve its strategic objectives.

117. The Reference Design:

- (a) Inappropriately privileges the attainment of road design objectives over the minimisation of environmental outcomes by:

³⁵ Sections 10 and 11(4), *Transport Integration Act 2010*. The transport system objectives are relevant as the Minister for Planning is an 'interface body' within the meaning of the TIA when exercising functions under the *Environment Effects Act 1978*.

- (i) Catering for a level of demand that may not be experienced during the relevant timeframe (i.e. to 2036);
 - (ii) Designing to an unjustifiably high standard resulting in the imposition of unnecessary costs; and
- (b) Has failed to integrate urban design considerations with engineering considerations from the outset, meaning that impacts may not have been avoided and the potential to deliver better outcomes is lost.

118. In this context, any submission that it is 'conservative' to provide additional traffic lanes which are not justified by projected traffic demand should be rejected. The reality is that the creation of excess traffic lanes in anticipation of future traffic volumes that may or may not eventuate, which are likely to be underutilised for the foreseeable future and which impose immediate costs on the community and environment is not conservative on any view.

Modelling and Demand

119. The Councils acknowledge the skill and expertise of both Mr Veitch and Dr Willumsen, as well as the latter's international reputation.

120. At the same time, Mr McDougall is no slouch.

121. As Infrastructure Australia has demonstrated, the kinds of transport models used in this case are incredibly important in the development of any demand assessment for projects of this kind.³⁶

³⁶ See Infrastructure Victoria, *Victoria's 30-Year Infrastructure Strategy* (December 2016).

122. The Councils lament the brevity of the conclave, and the paucity of time to prepare for the cross-examination on these important issues following the conclave. The Councils had hoped that they could progress these matters expeditiously, and without the need for an adjournment.
123. It is apparent from what has transpired that there are significant issues, some which emerged in the mind of Mr McDougall only after the opportunity to cross-examine Mr Veitch and Dr Willumsen, within two days of the conclave completing.
124. These issues are complex, and time is required to explore them.
125. There is a significant difference of opinion between the experts about the correct approach to adopt in the four step modelling process.
126. Mr McDougall's evidence, which is supported in principle by some of the literature authored by people at VicRoads in the past and which is in turn also supported by Infrastructure Australia, is that the achievement of model convergence/stability is a key ingredient to the robustness of any model.³⁷
127. Mr McDougall harbours deep concerns about the appropriateness of the single loop method, and its propensity to systematically produce growth in vehicle movements, contrary to the reported trends and underlying predisposition of the policy framework – which seeks to achieve less reliance on vehicles through urban densification.

³⁷ See Tabled Document 231a - Mansel Rogerson and Frank Carnovale, *Introducing Convergent in the Melbourne Integrated Transport Model and Infrastructure Australia, Urban Transport Crowding and Congestion: Australian Infrastructure Audit: Supplementary Report* (June 2019) p 186.

128. Mr McDougall does not consider that his concerns are “swamped” by forecast population increases, but instead takes an appropriately scientific approach, which is that this forecast must be assessed in a properly validated and calibrated model, which has achieved an appropriate level of convergence. One might ask why any other approach should be countenanced in relation to a project of this size and significance?
129. NELP wants to brush Mr McDougall’s concerns aside as a matter which is of “academic” interest only.
130. This approach is glibly dismissive.
131. The importance of this type of modelling is recognised at all levels. Transport modelling for infrastructure projects has been a feature of both the assessment of the demand for such projects, and the economic benefits derived from them, for many years.
132. The Zenith model is proprietary. The inner workings of the model are not, or have not been, able to be transparently examined. It is, in substance, a black box. The fact that the methodology has never been the subject of critical academic review in peer reviewed journals, or the subject of an academic conference, is a factor which warrants a cautious, rather than dismissive, approach.
133. On any view, the approach taken by Veitch Lister is not conventional. Despite Dr Willumsen’s broad international experience, he had not come across the approach taken by Veitch Lister until his engagement here. Dr Willumsen’s peer review is the only time that this methodology has been publicly reviewed. The only peer review that has been undertaken is by that of a consultant engaged by NELP, as the project proponent.

134. The complexity of this field of modelling is underscored by Dr Willumsen's frank acknowledgement that over time methodologies have changed, and that approaches that he had once regarded as robust and appropriate have been proved to warrant change.
135. The IAC should place little weight on evidence that is led by NELP to suggest that "the proof of the pudding is in the eating" in that, it is said, the model has accurately predicted past events on other roads better than others. That evidence should be treated with considerable caution. Backcasting does not prove that the model is a good predictor of the future. A number of the examples relied upon to bolster the reliability of the model here involve the model being used to predict what would happen **after** the commencement of the road's operation. The details and the methodology employed to produce these "predictions" has not been available to examine or test.
136. In the same vein, the Veitch Lister model has been used for a number of projects around the country – but we are yet to see any post project verification of the forecasts. This would be a true test of the model's predictive ability.
137. It is true that Infrastructure Australia regard Veitch Lister as representing "best practice". That is a curious appellation attributed to a proprietary model in respect of which serious questions still exist – even if only among those with an "academic" interest in the subject. In any event, the appellation "best practice" is applied by Infrastructure Australia to the model generally, and not to the model developed for this particular case. Infrastructure Australia must be taken to still regard proof of model convergence as a critical requirement of its endorsement.

138. The Councils in no way criticise Mr Veitch, or his obvious abilities – the question is one of transparency, and about the proper application of the precautionary principle in environmental assessment – particularly in circumstances where the outcome of the modelling is so critical in setting project parameters.

139. In the Westgate Tunnel Case, the Panel properly made the following observation:

The IAC finds that:

- *The strategic model is reasonably fit for purpose and accepts that the peer review undertaken as part of the Business Case informed improvements to the model.*
- *Provision of a peer review would have been of assistance (for future projects modelling reports should be accompanied by a peer review or a validation against an alternative model).*

The IAC in making this finding, notes that models are just that and there are a myriad of factors that could influence the accuracy of forecasts that can be unknown, to even the most skilled forecaster at the time the forecast was made. This must be considered in all risk assessments that rely on modelling³⁸.

140. The following observations can be made in this case:

- (a) No one disputes the need for modelling of this type *per se* – it is a critical part of any transport planning project of this type;

³⁸ At [4.3.3]

- (b) The only way to combat the fact that “a myriad of factors can influence the accuracy of forecasts” is to seek to ensure the highest level of robustness in method, assumptions and data; and
- (c) Acknowledging that modelling is complex is not a reason to ignore the complexity – or to take a “near enough is good enough” or “pragmatic” approach.

141. In the Westgate Tunnel Case, the Panel observed that it would have been desirable for either:

- (a) a peer review to have been undertaken; or
- (b) the Veitch Lister results to have been validated against another model (such as the non-proprietary Victorian Integrated Transport Model).

142. The Councils agree, and make the point that:

- (a) There is no evidence of any validation of the Veitch Lister model against any other model, VITM or otherwise; and
- (b) The best kind of peer review is one conducted in a curial/adversarial process, where the peer reviewer is engaged by another party. In the Westgate Tunnel Case, the Panel had neither.

143. In this case, NELP has engaged the services of Dr Willumsen to undertake that review.

144. Importantly, the Councils also engaged an experienced modeller to undertake a critical review from outside the project team completely.

145. The efforts of the Councils to critically examine the content of the model and its workings have been hampered by the proprietary nature of the model, and the absence of adequate time and access to it.
146. It is a failing of this process that has prevented exactly the kind of examination that the Westgate Tunnel Case thought would be useful.
147. This Project represents the biggest infrastructure spend in the history of the State. Given the track record of modelling of this kind generally, and the questions that have been raised about it in every major road case since the East West Link, it is difficult to imagine a better time to properly and thoroughly explore the methodology than in a case like this. The fact that these matters might also be of interest at an “academic conference” underscores the importance of such an examination in a hearing like this when so much is at stake, rather than belies it.
148. Instead the IAC has the evidence of Mr Veitch and Dr Willumsen on behalf of the proponent, and a series of unanswered but valid questions or concerns raised by a highly qualified and experienced expert called on behalf of the Councils.
149. Preferring the evidence of the Mr Veitch and Dr Willumsen in the circumstances of this case is fraught with difficulty.
150. In the time available, the Councils’ review raises more questions about the approach than answers. The answers that have been achieved buttress a properly held concern that the model methodology employed has a tendency to over-estimate vehicle trips and lengths, and has been used in a way which exaggerates economic benefits derived from travel time savings.

151. The conclave went for only two days and was cut short by the “need” to produce a conclave report two days prior to the commencement of the Council’s cross-examination of the key witness.³⁹

Road Design

152. Even if Mr McDougall is wrong, and the demand for the road is as predicted by the Zenith model, there is still a proper basis for concern that the road is, in part at least, too big (and therefore has too great an impact) relative to the strategic objectives of the road.

153. The essence of integrated multi-disciplinary design demands that the road design is informed by identified constraints. Indeed, this approach reflected in the AustRoads’ *Guide to Road Design*:

(a) Part 2 of the AustRoads’ *Guide to Road Design* is entitled ‘Design Considerations’. It identifies ‘three critical aspects of road design: the design objectives that apply to a road project, context-sensitive design and the factors that influence road design’;⁴⁰

(b) Consistent with planning policy, the *Guide* states:

*The objectives of new and existing road projects should be carefully considered to achieve the desired **balance** between the level of traffic service provided, safety, whole-of-life costs, flexibility for future upgrading or rehabilitation, and environmental impact.*⁴¹ (emphasis added); and

³⁹ Direction 14 required expert witnesses to meet in the period after circulation of statements but prior to the first expert from the meeting being called at the hearing and Direction 29 required the conclave statements to be tabled on the first day of the hearing or at least two clear business days prior to the first witness in the meeting being called.

⁴⁰ *Guide to Road Design Part 2: Design Considerations*, Austroads (Edition 2.1, 2009) p i.

⁴¹ *Ibid.* s 1.1, p 1.

- (c) The section of the *Guide* addressing 'Context-Sensitive Design' provides further guidance. It states:

A road is but one element of a transport system, which operates in the natural and built environment to meet a range of expectations of the users and the broader community. The design cannot be carried out in isolation, but must be sensitive to the context in which the road will operate.

Context-sensitive design (CSD) is an approach that provides the flexibility to encourage independent designs tailored to particular situations. CSD seeks to produce a design that combines good engineering practice in harmony with the natural and built environment, and meets the required constraints and parameters for the project. The US Federal Highway Administration (FHWA) comments as follows:

Context sensitive design asks questions about the need and purpose of the transportation project, and then equally addresses safety, mobility and the preservation of scenic, aesthetic, historic, environmental, and other community values. Context sensitive design involves a collaborative, interdisciplinary approach in which citizens are part of the design team. (Federal Highway Administration n.d.)

The challenge is to develop a design solution that takes account of the competing alternatives and the tradeoffs that might be needed.⁴²

154. Any multi-disciplinary design process is iterative. First there must be a design. Then there must be engagement with the disciplines to test what the effect of the design might be.

⁴² *Guide to Road Design Part 2: Design Considerations*, Austroads (Edition 2.1, 2009) s 2, p 8.

155. But in this case, the starting point should have been a design which takes up as little space as possible to achieve the desired strategic objectives.
156. Instead, what NELP has produced is a design that is as fat as it possibly can be, favouring the achievement of arbitrary design specifications which:
- (a) Find no expression in any planning policy; and
 - (b) Run counter to established planning principle.
157. Despite designing the Reference Project, NELP has opted not to lead any evidence of how it was designed, what trade-offs were involved and how decisions were made about which interests to prioritise.
158. It is not possible for the IAC to determine whether, and to what extent (if any), other environmental values were taken into account in design beyond the bare minimum required to ensure that the impacts of the Project were not self-evidently unacceptable e.g. by placing the Project in tunnel to avoid areas of the Yarra River and surrounds which are of enormous environmental and cultural significance.
159. In fact, it was agreed by all the experts at the Ecology conclave that the evidence required to show that avoidance and minimisation of impacts had been taken into account in the Project design was 'unavailable',⁴³ although it should be noted that the body which controls the availability of the relevant material was and is NELP.
160. Environmental considerations aside, there is no evidence that the Reference Design of the road itself is fit for purpose, let alone an appropriate design

⁴³ Tabled Document 128: Statement of outcomes of the North East Link Project expert meeting: ecology, page 1.

in the context of a proper weighting of strategic objectives and environmental impacts.

161. Technical note 51 now confirms that there has been an “iterative” Road Safety Audit undertaken in relation to the Reference Design.⁴⁴ Despite it having been called for by the Councils, it still has not been produced, nor required for production by the IAC.
162. The refusal/failure to produce the Road Safety Audit warrants careful scrutiny, and in the end, trenchant criticism:
- (a) The process of an auditor coming to a conclusion is no doubt iterative – in the sense that it is part of any auditor’s role to question, probe and suggest changes;
 - (b) That said, the findings of the auditor at a point in time are not iterative; and
 - (c) The live, and unanswered question here is – at the time of the publication of the EES, which contained the Reference Design:

Did the design that was published pass an independent Road Safety Audit?

163. NELP has studiously avoided answering that question.
164. The evidence in this case to date supports the conclusion that the exhibited Reference Design for the road is, at the very best, a work in progress that may or may not be “safe” in any number of ways. This underscores the deficiency of using the reference design approach in this case. In addition,

⁴⁴ Tabled Document 291, paragraph 12.

it belies as disingenuous pleas by NELP and DOT to “road safety” which are said to underpin (indeed, amount to the sole justification for) specific road design features which drive the footprint of the Project.

165. The overall result is that the only road design evidence before the IAC is the evidence of Mr O’Brien and his alternative design. In a nutshell, that evidence demonstrates that:

- (a) The Reference Design is flawed in a number of key respects including in regard to traffic safety;
- (b) Mr O’Brien’s alternative design demonstrates ways in which the road design could be significantly improved; and
- (c) The same level of performance as that assumed as the criteria for the Reference Design – including LOS D during the peak hour – can be achieved by a design with a substantially smaller footprint.

166. This last point bears some elaboration:

- (a) NELP and DOT have adopted the need to attain LOS D on the Freeway in the peak as their lodestar in the development of the Reference Design.
- (b) Having said that, it is self-evident that if Mr O’Brien’s design can deliver NELP and DOT’s required LOS D at a lower environmental cost (in terms of footprint, etc.), that is a desirable outcome.
- (c) A microsimulation model of his alternative design had been prepared by NELP. Mr O’Brien’s evidence is that he attended with one of his employees to view and test the model. The conclusion reached by the modeller’s present (each representing NELP) was to the effect that the

O'Brien alternative design achieved or could be made to achieve LOS D in the peak hours.

- (d) Mr O'Brien gave direct evidence of the statements of these modellers. He was not cross-examined about any of this evidence.

167. Mr O'Brien's evidence completely answers the criticism of his design that it does not achieve an adequate level of service.
168. In many respects the rule in *Browne v Dunne* has had to give way to the exigencies of this case as information about which one might have cross-examined comes too late to be useful or even after the cross-examination. That said, Mr O'Brien's evidence of these concessions concerned statements that were known to NELP, or should have been known to it at the time of his evidence, and they were not challenged in any way.
169. As to Mr O'Brien's alternative design, the approach of both DOT and NELP has been nothing short of remarkable.
170. It is clear that more effort has been applied by NELP and DOT to criticising Mr O'Brien's alternative design ideas, than running a positive case to defend the whole premise of the environmental effects assessment - the Reference Design itself.
171. Rather than call a witness - who would have to withstand the scrutiny of cross-examination, the State has taken the shelter of the anonymous "Technical Note" to attack Mr O'Brien.
172. The use of technical notes seems to have become "established practice" in cases like this. The IAC should proceed with great caution. Where a "technical note" is used as the sole basis to contradict direct evidence called

and cross-examined by a party there is a serious risk that the party has been denied procedural fairness.

173. Notwithstanding that “technical notes” and “memoranda” have been advanced as the principal line of attack against Mr O’Brien’s alternative design –his **evidence** is that the matters raised in those documents are not to the point.
174. Mr O’Brien has responded in writing to every single criticism made of him and his design⁴⁵ – his response is the **evidence** that the IAC has to assess – not the assertions made under the cover of an anonymous technical note.
175. Insofar as Mr O’Brien was confronted about his opinions in cross-examination, in evaluating the criticisms made of him by NELP and DOT, however, it needs to be borne steadily in mind that **questions** asked in cross-examination are not evidence of the facts stated in the questions – it is the **answers** that matter.
176. In particular, a number of guidelines were put to Mr O’Brien in cross-examination by DOT on the basis that they had not been referred to in his report or in the preparation of his design, but no guidelines contained within any of those publications were advanced as critical flaws in the Mr O’Brien’s alternative design, except in the most general sense within Technical Notes 41, and subsequently Technical Note 51 after the cross-examination – all of which have been answered by Mr O’Brien in writing.

⁴⁵ Tabled Document 230: Andrew O’Brien response to Technical Note 41 dated 20 August 2019; and further responses to Technical Note 51 and memorandum responding to DOT documents, attached to submissions.

177. Mr O'Brien, at great expense, undertook an analysis of whether or not the proposed road could be designed to take up less land, and still achieve the same capacity.
178. He undertook that exercise notwithstanding that the Councils were denied access to properly dimensioned drawings of the Reference Design in plan, and long sections.
179. Both NELP and DOT chose not to lead any evidence about the road design, how it was developed, and whether it complied with the standards which they sought to impose on Mr O'Brien's design or what the cost of compliance with those standards was in terms of environmental impacts. In these circumstances, it is open to the IAC to infer that any such evidence, if called, would not have assisted NELP.
180. NELP produced Technical Note 41, which amounted to a litany of criticisms of the alternative design. On any view those criticisms range from being minor (which are perfectly understandable given the circumstances in which the design was produced), to being overtly hypocritical, criticizing the O'Brien alternative design for not complying with guidelines which both the Reference Design and other VicRoads projects around the state conspicuously do not adhere to.
181. It is true that none of the Councils' individual expert witnesses in environmental impact assessment have examined the O'Brien alternative design. But so what? The fundamental point of the O'Brien alternative design is to demonstrate that there is an alternative approach to the gold-plated yet still somehow underdeveloped Reference Design. It also provides an example of just how different the Final Design may be from the Reference Design and therefore how uncertain the final environmental

impacts of the Project are. Finally, it underscores the point that, if anything, the environmental effects are likely to be greater than necessary if anything like the Reference Design is actually constructed.

182. Something like the alternative design represents what should have been the starting point for assessment in a multi-disciplinary team – namely a project footprint which achieves the strategic objective of the Project, at the desired level of service – but considerably smaller than the Reference Design.
183. Other design innovations incorporated into the alternative design seek to resolve problems which the Reference Design makes no sensible effort to address.

Level of Service D

184. The evidence is that the design of the road was informed by the requirements and specification of VicRoads or DOT or both, although these requirements and specification are nowhere clearly stated within the EES.
185. A highly relevant, if not critical issue, in this case is whether or not the requirements of VicRoads are appropriate.
186. DOT stands behind its relatively recent publications, asserting that they are “ground breaking” and “world leading”. There is no evidence that anyone other than VicRoads regards them as such. On a review of the VicRoads documents it is apparent that they bring together practices and approaches to freeway design and management which have been in place in other parts of the world for many years – including those practiced by Mr O’Brien in Auckland 10 years ago.

187. These documents, upon which VicRoads and NELP purport to rely, enjoy no statutory recognition. They do not represent a code or a rule. At best they are internal working guidelines prepared by VicRoads for itself.
188. The Reference Design published with the EES reveals that its designers were obviously endowed with some latitude in the application of the VicRoads “guidelines”.
189. The true extent of that latitude is not known to anyone, because the Road Safety Audit of the Reference Design has not been released – despite an express request in the course of evidence for the production of the document.
190. What is known is that some obviously unsafe and non-compliant aspects of the Reference Design have been altered since the publication of the EES – such that there is a reasonable inference that when DOT appeared in front of the IAC bellowing the virtues of the published Reference Design, it was doing so in respect of a design which did not comply with its own “guidelines” and would likely have been regarded as containing a number of features which were “unsafe” in any functional layout.
191. A particular point of contention is DOT and NELP’s insistence that the Project attain LOS D throughout the peaks. The inevitable consequences of this is that, outside the peak periods, a much better level of service will be obtained.
192. The Reference Design has been designed, it is said, to achieve LOS D in the peak periods in 2036.
193. The achievement of LOS D in the peaks is not a planning requirement.

194. At best it is a guide, developed by VicRoads.
195. In this case it amounts to a level of service which prioritizes private vehicle travel at peak times over the conservation of parkland, freeway buffer separations and vegetation.
196. The parkland and vegetation are lost in order to produce less congestion at peak times.
197. In the tussle between competing planning objectives, the elimination of congestion at peak times ranks very low against the preservation of native vegetation.
198. A closer examination of the definitions of the level of service, and the reference design reveals something more:
- (a) LOS D is expressed as a range;
 - (b) Most of the Reference Design operates for most of the time in either the better half of the LOS D range, or otherwise at LOS C (see O'Brien note);⁴⁶ and
 - (c) Only a limited number of the segments of the freeway operate in the upper range of LOS D, and even then, only in the second hour of the peak.
199. If the road is not strategically required for the purpose of eliminating congestion in the peaks, but is instead required to facilitate freight

⁴⁶ Memorandum of Mr O'Brien dated 6 September 2019 regarding density and LOS D, attached to submissions.

movement in the off peaks – the off peak density of parts of the Eastern Freeway will be nothing less than luxurious!

200. To the extent that the Reference Design seeks to “plan for” traffic growth in 2036 and beyond, there is no strategic justification for the extent of planned growth, or any plan to accommodate free flowing or lower density peak volumes on the freeway at the peak times. Nor is there any modelling to suggest that what is provided is what will be required or any associated assessment of the impact on local roads through a longer time horizon.
201. It has been suggested that it is cheaper to add the capacity now, than to do it in 10 years’ time when the road is in place.
202. That is not a planning consideration – if anything it is a political consideration – in that it acknowledges that complaints will always be made about peak hour congestion. While it may be politically expedient to ease congestion in peak times, the planning truth is that new freeways fill to capacity in the peaks within a very short time of opening. There is good reason that the elimination or easing of peak congestion is not, by itself, a planning objective.
203. Even if the freeway were to descend to LOS F for parts of the peak, it would not distinguish itself in that regard from any other freeway in the world.

Collector-distributor lanes

204. Another problematic aspect of the Reference Design is the use of collector-distributor lanes separated by concrete barriers, known as New Jersey barriers.

205. The effect of adopting these lanes is to add considerably to the width of the Eastern Freeway – e.g. around Estelle Street, the width of the concrete barriers required to deliver a collector-distributor arrangement exceeds the width of Estelle Street following the acquisition of land to widen the Freeway.

206. Given the land acquisition impacts, any use of collector-distributor lanes would need to be clearly justified on the evidence. However, there is no empirical evidence of the benefits offered by collector-distributor lanes:

- (a) NELP, through Mr Kiriakidis sought to argue the use of collector-distributor lanes delivered benefits in terms of performance and safety;
- (b) In terms of safety, the absence of evidence for the safety benefits of collector-distributor lanes is expressly noted in Technical Report A – the Traffic and Transport Impact Assessment which states its assessment of crash rates:

does not take into consideration the further road safety benefits on the collector-distributor lane arrangements as there is insufficient data available to determine a suitable crash rate.⁴⁷

- (c) While the TTIA asserts that such benefits are likely, no basis is identified for these assertions and it is not obvious that the introduction of additional concrete barriers into a freeway environment which will need to be manoeuvred around when moving into the collector-distributor lanes will materially improve

⁴⁷ Technical Report A, Traffic and Transport Impact Assessment, p 342.0.

safety levels above the existing very high levels enjoyed on managed motorways;

- (d) In relation to performance benefits, the evidence is equally scant;
- (e) NELP and DOT have sought to rely on the VicRoads *Motorway Design Volume Guide* (2017),⁴⁸ which suggests that, for example, two carriageways of two lanes performed better than one carriageway of four lanes;
- (f) The *Motorway Design Volume Guideline* was based entirely on a review of the operation of the M1 corridor which does not contain significant collector-distributor elements;
- (g) In fact, no freeway in Victoria has been developed in the way that the Eastern Freeway is expected to be developed. It is presumably for this reason that the *Motorway Design Volume Guide* describes its performance figures as 'interpolated';
- (h) Moreover, it is apparent that the throughput figures for the collector-distributor roads (assumed to be represented by the '2+2' etc. lane configuration in Figure 10 of the *Motorway Design Volume Guide*) are derived by simply adding the throughput figures for two entirely independent carriageways; and
- (i) Of course, the express lanes and the collector-distributor lanes for the Eastern Freeway will not be entirely independent – vehicles that do not wish to go from one end of the Freeway to the other will inevitably have to move between them when they get on and when

⁴⁸ VicRoads, *Motorway Design Volume Guide*, December 2017.

they get off. In these circumstances, the approach of simply adding the throughput of two carriageways together is altogether too simplistic.

207. In absence of any clear benefits from the use of collector-distributor lanes, the costs that they impose on the surrounding environment – in terms of loss of parkland and loss of vegetated buffers – are entirely unwarranted.
208. Removal of the collector-distributor lanes would in fact produce immediate benefits by reducing the need to acquire this land, resulting in improved amenity outcomes.

Failure to integrate urban design considerations

209. Despite submissions to the contrary, the Reference Design has not sought to integrate urban design considerations into the Reference Design.
210. This is most clearly stated in the Group A submissions for NELP where NELP stated it would be ‘misconceived’ to try to evaluate the Reference Design against the proposed Urban Design Strategy because the Reference Design is not designed to respond to that Strategy.⁴⁹
211. NELP’s approach of deferring any consideration of urban design until the post-approval stages sits in stark contrast to the approach recommended by the NSW Road and Maritime Services (‘RMS’) urban design policy – *Beyond the Pavement* (‘BtP’).⁵⁰

⁴⁹ Document 96, para 18.

⁵⁰ NSW Roads and Maritime Services (January 2014) ‘*Beyond the Pavement: Urban Design Procedures and Design Principles*’ available online at: <https://www.rms.nsw.gov.au/documents/projects/planning-principles/beyond-pavement.pdf>

212. BtP provides express guidance not only on the urban design principles to be applied in the design of major transport infrastructure, but also the process to be followed in applying those principles. Relevantly:

(a) In summarizing the approach to be taken under the policy, it states:

*The development of a project's concept design should integrate engineering **and urban design**. (emphasis added)⁵¹*

(b) One of the 'Requirements for project managers' is to 'consider urban design at the start of a project'. The policy continues:

The project manager must take into consideration urban design from the early planning stages of a project. A common misconception is that urban design need only be considered in the latter stages of a project in order to 'dress it up' or improve the concept design.

On the contrary, urban design is a process that should contribute to all project phases:

- › *From frameworks, objectives and principles at the initiation phase of programs and projects.*
- › ***To route and options assessment and concept design and environmental assessment work in the development stage of programs and projects.***
- › *Through to the achievement of detailed design, workmanship and maintenance in the implementation, finalisation and operation phases.*

⁵¹ RMS, *Beyond the Pavement* (2014), p. 3.

...

The integration of an urban design perspective helps:

- › *Realise a program or project's potential.*
- › ***Avoid impacts (not just mitigate them).***
- › *Produce an integrated engineering and urban design (which represents an improved public domain). (emphasis added.)⁵²*

- (c) Another requirement is to 'integrate urban design with environmental assessment and project approval'. The policy states:

Environmental impact assessment is part of the project design process.

Ongoing design consideration and assessment should:

- › *Produce concepts that **inherently** avoid or otherwise minimise environmental impacts, thereby reducing the need for 'add-on' mitigation. (emphasis original)⁵³*

213. This last point – about how early integration of urban design can produce concepts that inherently avoid or minimize environmental impacts – is supported by the evidence of Mr Czarny. His evidence was that the Reference Design would require substantial modification in order to provide high quality urban design outcomes and meet the objectives of the UDS.⁵⁴

⁵² Ibid, p. 19.

⁵³ Ibid, p. 22.

⁵⁴ Tabled document 30b, p. 2.

214. The approach favoured in BtP is supported by the criticisms made by the West Gate Tunnel IAC of the lack of involvement of the urban design professional in the initial design of that project.
215. After acknowledging that the urban designers for that project had achieved a high-quality outcome ‘within the scope available to the design team’, the IAC observed:

However, the IAC considers that the design effort that is demonstrated in the concepts contained in the EES may have been able to achieve more effective mitigation and more beneficial effects if it had been deployed earlier in a more fundamental way in the design process, including in the development of the design principles.⁵⁵

216. Building on this, the IAC made the following relevant findings:

The size, mass and alignment of the Project could have benefitted from earlier input of urban design and landscape expertise.

A high standard of design has been achieved within the scope provided to the design team. The scope has limited the ability to mitigate the adverse impacts of the Project and leaves design elements open to the criticism of being cosmetic.

The restricted weight given to urban and landscape design has diminished the ability of the Project to meet the Built environment, landscape and visual evaluation objectives.⁵⁶

217. The key factual difference between the West Gate Tunnel and the present case is that the West Gate Tunnel was a highly resolved design by the time

⁵⁵ *West Gate Tunnel Project EES* [2017] PPV 115, section 6.3.2.

⁵⁶ *Ibid*, section 6.3.3.

it was presented to the IAC, meaning there was little opportunity for further refinement following assessment without incurring significant additional costs.

218. By contrast, it is clear that the current Project is not at that stage yet. It still possible for the IAC to recommend that NELP effectively go back to the drawing board and prepare a new design where urban design considerations are treated as first order concerns, rather than being relegated to a post-approval which may end up being a 'lipstick on a pig' exercise aimed at managing down the worst impacts.
219. Insofar as NELP has sought to justify the failure to offer an integrated design on the basis that to do so would inhibit the creativity of tenderers, this should not be accepted.
220. Despite NELP's assertions that the Reference Design is not a tender specification, the practical reality is that, as Mr Czarny said in evidence, tenderers will look to whatever comes out of this process – whether it is the Reference Design or a more refined design – as a basis on which to inform their tenders.⁵⁷
221. This is because, if the IAC finds that the Reference Design delivers a net community benefit, then tenderers know that, at the very least, if they deliver the Reference Design or something like it, the Final Project will be acceptable. In this situation, there is an obvious incentive to adhere closely to the Reference Design except to the extent necessary to meet currently unknown tender specifications and contractual incentives.

⁵⁷ Wednesday 21 August 2019 Audio at 3:51:45.

222. This reality really supports the value of incorporated urban design considerations into the Reference Design and thereby demanding that tenderers meet a higher standard.

Conclusion

223. The project design approach adopted by the NELP means that the IAC cannot be satisfied that the costs/impacts caused by the Project have been avoided and minimised in accordance with the Evaluation Objectives for non-transport values.

224. The Reference Design needs to be completely reviewed before it can be said to provide a justification for the land take and environmental effects that are proposed.

225. Once that occurs, it would be appropriate to use Mr O'Brien's alternative design as a starting point for a genuine and transparent multi-disciplinary assessment of whether the proposal can proceed on this alignment.

226. There are no guarantees, even if Mr O'Brien's alternative design amounts to a proper starting point for multi-disciplinary assessment, that acceptable environmental outcomes could be achieved.

227. The O'Brien alternative design might solve the problems of the Eastern Freeway part of the project, but it cannot address the impacts at the Simpson Barracks if an interchange at Lower Plenty Road is to be retained.

228. If the Lower Plenty Road interchange needs to be deleted from the Project for ecological reasons (and there is a real prospect that it should, which is explored in further detail later below) it remains unclear whether the Business Case options analysis would still prefer this alignment at all.

229. The fact that there are important environmental questions (e.g. the relationship between groundwater and groundwater dependant ecosystems and surface water management) remain unanswered at this stage of the process belies the suggestion that the Reference Design has been the product of a multi-disciplinary design approach.
230. If that has occurred - there is no evidence of it in the current state of affairs.

ECOLOGY, GROUNDWATER AND SURFACE WATER

Physical and Strategic Context

231. In 1979 consideration was given to the creation of an orbital road along almost exactly the same alignment as that proposed by the EES.⁵⁸
232. The corridor has become no less sensitive. Indeed, if anything, the last 40 years has seen considerable investment by the State and local governments in recognition of the significance of this area from an ecological, cultural, scenic and recreational perspective.
233. The ability to manage the sensitivities of the area may have improved. No doubt the more modern technical capability in tunnelling has meant that much of the potential impact upon this corridor can be ameliorated.
234. This process is, in part, concerned with whether the IAC can be satisfied that the evidence proves that the impacts along the proposed corridor can be appropriately managed so that they are acceptable.
235. In embarking upon that exercise, it is important to recognise just how sensitive the potentially affected areas are, and how important their conservation is under the presently applicable legislative and planning framework.
236. The Yarra River corridor is a critical element of the environment into which the Project is to be inserted. The significance of the Yarra to Melbourne as a whole, and to the north-eastern suburbs in particular, cannot be overstated.

⁵⁸ Document 174: Outer Ring Study: Diamond Creek to Ringwood Technical Report (July 1979), prepared by The Road Planning Liaison Committee by The Joint Road Planning Group.

237. The *Yarra River Protection (Wilip-gin Birrarung murrong) Act 2017* ('YRP Act') was enacted with a view to enshrine the importance of the river corridor. In the Second Reading Speech for the Bill that became the Yarra River Protection Act, the Minister for Planning explained:

The translation of the title of the bill 'Wilip-gin Birrarung murrong' is: keep the Birrarung alive.

That is precisely what this legislation is designed to do – keep the Birrarung, or the Yarra, alive.⁵⁹

238. The Second Reading Speech also states:

The Yarra is an inseparable part of our identity and crucial to Melbourne's economy, sustainability and liveability.

But it is about more than just water. Much more.

The Yarra is about the parklands and green spaces that line its banks.

The Yarra is about the traditional owners who have lived with and known the Birrarung since its beginning.

The Yarra is about the communities that live along its path.

The Yarra is about the sporting and recreational clubs that use its waters and lands.

The Yarra is about the flora and fauna to which it gives life.

The Yarra is about the port that drives our state's economy.

The Yarra is about all of us: who we are, where we come from, where we are going.⁶⁰

⁵⁹ Parliament of Victoria, *Hansard*, 22 June 2017 (Extract from Book 8) p 2022.

⁶⁰ Parliament of Victoria, *Hansard*, 22 June 2017 (Extract from Book 8) p 2023.

239. Amendment GC48 was gazetted on 24 February 2017 and applies to all land generally within 500 metres of the Yarra River between Punt Road Richmond and Warrandyte. It introduced new controls including a significant landscape overlay in six municipalities including Banyule, Boroondara and Manningham.

240. The observations made in the Second Reading speech are echoed in key planning policies:

(a) Policy 4.1.4 in *Plan Melbourne 2017 – 2050* states:

The Yarra River and its parklands shaped the development of Melbourne and are essential to the identity, liveability and prosperity of the city. The magnificent natural riverscape and network of parklands are a legacy of protection and planning decisions of the past.

...

As Melbourne's population grows, it will be vital to protect and enhance Melbourne's major water's edge parklands. As a first step, the establishment of the Great Yarra Parklands will be considered, encompassing 2,450 hectares stretching from Warrandyte to the Bay.

Stronger planning controls will also be put in place to protect water's edge parklands from intrusion and encroachment of development that impacts on open space and diminishes their natural landscape setting.

(b) Clause 12.03 of the VPPs also provides specific recognition of the values of the Yarra:

- (i) At the State level, clause 12.03-1S, 'River corridors, waterways, lakes and wetlands', has as its objective '*to protect and enhance river corridors, waterways, lakes and wetlands*' and includes the strategy:

Protect the Yarra, Maribyrnong and Murray River corridors as significant economic, environmental and cultural assets.

- (ii) At the regional level, clause 12.03-1R, 'Yarra River protection', has as its objective:

To maintain and enhance the natural landscape character of the Yarra River corridor

- (iii) Clause 12.03-1R includes the following relevant strategies:

Strengthen the Yarra River's natural environment, heritage and overall health by:

Protecting the river's riparian vegetation, natural riverbank topography and flood management capacity.

Ensuring development does not increase the rate or quantity of stormwater, sediment or other pollutants entering the river.

Protecting and enhancing both terrestrial and aquatic habitats and their linkages along the river corridor.

Promote a sense of place and landscape identity by:

Retaining a dominant and consistent tree canopy along the river corridor and in its broader landscape setting.

Ensuring that the appearance of development is subordinate to the local landscape setting, with any views of development being filtered through vegetation

- (c) These policies were strengthened in 2017 through the introduction of a series of Design and Development Overlays ('DDO') and Significant Landscape Overlays ('SLO') aimed at ensuring consistent protection of the Yarra River corridor, including its landscape setting, along its length from Warrandyte to Richmond.

241. Whilst the DDO only applies to privately owned land, the new SLO applies to both public and private land. The explanatory report to Amendment GC48 says that the amendment is required because:

The Victorian Government has committed to protecting the Yarra River from inappropriate development which encroaches on the landscape and environmental values of the Yarra River Corridor which is of State significance.⁶¹

242. Whilst there are some differences between the SLOs in Banyule, Boroondara and Manningham, generally speaking the landscape character objectives to be achieved and the Decision Guidelines are to the same effect.

243. The landscape character objectives to be achieved include:

- (a) to protect and enhance the natural landscape character of the Yarra River Corridor where the river, its topography, adjacent public open space and a continuous corridor of vegetation and canopy trees are the dominant features;

⁶¹ Amendment GC48, Explanatory Report, p 1.

- (b) to protect, rehabilitate and expand a continuous corridor of riparian and indigenous vegetation using appropriate indigenous species;
- (c) to maintain and protect linear public open space and provide for secluded areas of public open space with appropriate public access to the river and its public open space.

244. At a State Planning Policy level, clause 21.01-1S – Protection of Biodiversity requires decision making to

take account of the impacts of land use and development on Victoria's biodiversity including consideration of:

- *cumulative impacts;*
- *fragmentation of habitat; and*
- *the spread of pest, plants and animals and pathogens into the natural ecosystems.*

245. It also requires that impacts of land use and development on important areas of biodiversity are avoided.

246. Under clause 12.01-2S – Native Vegetation, the objective is “*no net loss to biodiversity,*” not no net loss to the quantity of vegetation. The three step process of avoid, minimise and offset is a strategy to achieve the objective that there be no net loss of biodiversity.

247. Significant progress has been made towards the publication of a Yarra River Strategy under the YRP Act. Melbourne Water has published a progress report for the Yarra Strategic Plan – October 2018 referring to the launch of the Yarra River 50 Year Community Vision in May 2018 and saying:

*We are now at a turning point in the river's history. In order to respond to these challenges we need a new approach to ensure the health of the Yarra is protected and improved for future generations.*⁶²

248. The Yarra River 50 Year Community Vision contains a joint Ministers' Foreword signed by the Minister for Water, the Minister for Planning and the Minister for Energy, Environment and Climate Change which foreword says, in part:

The Yarra River, Birrarung, is central to life in Melbourne.

...

With an increasing population, climate change and environmental impacts, now is the time to take action to ensure the river is protected into the future.

...

*The Yarra Community Vision set out in this document is the culmination of extensive community consultation and engagements.*⁶³

249. Melbourne Water has prepared the Yarra Strategic Map Book, which identifies that part of the Yarra from the intersection of the Eastern Freeway and Bulleen Road to approximately the intersection of Lower Plenty Road and Greensborough Road as being within the suburban reach of the Yarra River and comprising predominantly land identified for Yarra River conservation and land identified for parkland and recreation.⁶⁴

250. In addition to the Yarra River, the Project area includes a number of other important environmental assets, including:

- (a) Simpson Barracks, just north of Lower Plenty Road, which is home to both the largest known Victorian population of Matted Flax-Lily and

⁶² Progress Report for the Yarra Strategic Plan, October 2018, page 5.

⁶³ State of Victoria/Melbourne Water, *Yarra River 50-Year Community Vision: Wilip-gin Birrarung murrin* (2018) p 5

⁶⁴ VicRoads, *Yarra Strategic Plan Map Book: Current State Land Use for the Yarra Strategic Plan* (September 2018) p 19.

the only known population of Studley Park Gum which is known to be actively recruiting within this area; and

- (b) Other waterway corridors, notably Koonung Creek which runs parallel to the Eastern Freeway corridor and includes numerous endangered Ecological Vegetation Classes and the Banyule Creek which flows into the Banyule Flats.

251. Any proposal on the scale of the Project which adopts as its starting point the removal of all vegetation within the Project boundary, with the stated intention that NELP will only retain the vegetation that it can retain, to the extent that it does not interfere with the delivery of the Project, is wholly unsatisfactory.

Evidence

252. The evidence to date proves that the Reference Design is an unsatisfactory response to the ecological values of the waterway corridors through which the project passes and to the significant ecological values of Simpson Barracks and demonstrates why the IAC should conclude that the EES is inadequate and that it fails to respond to the relevant scoping requirements.

253. NELP's own witnesses concede that the environmental impacts will be extensive, that there has been no avoidance or minimisation of those impacts (the assumption being that all vegetation within the project boundary is removed). They each rely on an assertion that there will be opportunities to avoid and/or minimise the removal of vegetation at the detailed design stage. No witness was able to assist the IAC with any

information about the extent to which the removal of vegetation might be able to be avoided or minimised.

254. The only findings open to the IAC on the evidence are that:

- (a) The impacts on groundwater dependent ecosystems ('GDEs') are unknown;
- (b) Apart from the decision to place part of the road in a tunnel (which given the highly significant context of the Yarra River corridor might be described as a "no brainer") there has been no endeavour to avoid or minimise the loss of native vegetation let alone important or highly significant vegetation; and
- (c) The loss of "planted amenity vegetation" has significant unacceptable ecological impacts, together with significant and unacceptable impacts from the perspective of visual amenity, canopy tree cover, vegetative cooling and the intangible benefits to the public of a pleasant treed environment.

Matted Flax-Lily

255. The Matted Flax-Lily is listed as a threatened species under the *Flora and Fauna Guarantee Act*. The impacts on this species are therefore an important matter for the IAC to consider, regardless of the parallel assessment process arising under the *Environment Protection and Biodiversity Conservation Act 1999*.

256. The Project proposes to remove approximate 1/3rd of the population of the Matted Flax-Lily at the Simpson Barracks. More may also need to be

removed if the Department of Defence requires works to re-establish the fire tracks, etc. on the Barracks.⁶⁵

257. The Simpson Barracks population of Matted Flax-Lily is a highly significant, if not critical, one:
- (a) As agreed by Mr Miller in cross-examination, it is the largest known Victorian population of the species;
 - (b) It represents slightly over 10% of the population estimated in the National Recovery Plan in 2010; and
 - (c) Simpsons Barracks was described in the Ecology conclave statement as providing 'critical' habitat for the species.
258. These factors, especially in combination with the presence of a reproducing population of Studley Park Gum, ought to warrant Simpson Barracks being designated a 'no go' zone.
259. It is apparent from Technical Note 48 that there are options available to reduce or remove the surface impact of construction at Simpson Barracks and that the retention and design of the Lower Plenty Road Interchange has been given precedence over the environmental significance of Simpson Barracks on the basis of on the basis of 'project functionality' and 'requisite road design standards'.⁶⁶
260. Leaving aside the issue of a 'no go' zone, removal of the Matted Flax-Lily would ordinarily generate an offset requirement. However, despite the well-established presence of Matted Flax-Lily on the site, the Department

⁶⁵ The requirement to reinstate the tracks within the Project boundary is noted in the notes from the record of inspection of the Simpson Barracks on 16 August 2019: Document 302.

⁶⁶ Tabled Document 193: Technical Note 48.

of Environment Land Water and Planning ('DELWP') habitat modelling for the species suggests that there is no suitable habitat for the species in the areas directly affected by the Project. Nor, for reasons unknown, has DELWP sought to add a requirement to offset impacts on the Matted Flax-Lily, as it would be permitted to do in reliance on the Assessor's Handbook.

261. Happily, it remains open to the IAC to impose conditions on the Project which either designate Simpson Barracks as a "no go zone" or require NELP to provide an offset that would be required if the Matted Flax-Lily population were accurately mapped.
262. If the IAC does not require the designation of Simpson Barracks as a 'no go' zone, it should at least require the provision of an offset. Mr Miller and Mr Mueck each indicated that an area of around 30 ha would be required.
263. To the extent it is suggested that the translocation of the plants removes the need for an offset, this should not be accepted:
 - (a) As the Ecology conclave statement records:

*Translocation does not compensate for the loss of habitat for individuals. It trades certain losses for uncertain gains.*⁶⁷
 - (b) This is particularly so because, as agreed at the conclave, and confirmed in evidence by Mr Miller and Dr Lorimer, sexual reproduction has not been observed in translocated populations of Matted Flax-Lily. In the absence of sexual reproduction, membership of the translocated population will inevitably decline over time. But

⁶⁷ Tabled Document 128: Ecology Conclave Statement, page 3.

for this Project, there is no reason to believe that the Simpsons Barracks population is likely to decline. In fact, Mr Miller's evidence was that he had observed pollination occurring at the Barracks.⁶⁸

- (c) The result is that there is a real risk that translocation will increase the extinction risk to the species, relatively to a scenario where the plants are not removed.
- (d) In these circumstances, provision of offsets is necessary to guard against the risk that the translocated population will simply decline over time, rather than becoming self-sustaining.
- (e) This approach is supported by the observations of DELWP in their letter of 25 July 2019 where it is stated that the:

*likelihood of translocation success should not be overstated given the current low success rate of other MFL translocations in Melbourne.*⁶⁹

- (f) Similarly, the *Guidelines for the Translocation of Threatened Plant Species in Australia* ('Translocation Guidelines') states that 'most' mitigation translocations 'will likely increase the extinction risk of the species'⁷⁰ and that:

Despite the massive increase in the number of translocations since the last edition of these guidelines (Vallee et al. 2004), there remain

⁶⁸ Tabled Document 24c: Expert Witness Statement of Cameron Miller, paragraph 3.1.1.

⁶⁹ Tabled Document 93, p. 1.

⁷⁰ Commander at al, *Guidelines for the Translocation of Threatened Plant Species in Australia* (3rd ed., 2018), p. 17.

*relatively few documented examples of translocation programs that have created self-sustaining populations.*⁷¹

264. It is noted that, while Mr Miller referred to a number of other relocation Matted Flax-Lily projects as being 'successful', this depended on the adoption of a definition of 'success' that was confined to successfully establishing the Matted Flax-Lily at the relevant location. It was not based on the population becoming self-sustaining, which is what the *Translocation Guidelines* state should be the objective of any translocation.⁷² Neither Mr Mueck nor Dr Lorimer supported this definition of success.

265. Turning to the draft translocation plan itself:

- (a) Nine potential relocation sites have been identified, although none of them have been finalised or endorsed.⁷³ It appears that a number of these have already been considered and rejected by DELWP,⁷⁴ although Mr Miller suggested this might have just been a versioning error; and
- (b) Paragraph 3.3 of the Salvage and Translocation Plan says that salvage and translocation should not occur between winter and early spring. It is not known whether NELP can make a commitment that vegetation within Simpson Barracks will not be cleared until after the Matted Flax-lily salvage and therefore until, at the earliest, July 2020.

266. Accordingly, the IAC should find that:

⁷¹ Ibid., p. 13.

⁷² Ibid., p. 10.

⁷³ Salvage and Translocation Plan, June 2019, page 32 (Attachment to Mr Miller's Expert Evidence - Document 24c).

⁷⁴ Document 93, Letter from DELWP to IAC dated 25 July 2019.

- (a) Simpson Barracks is critical habitat for the Matted Flax-Lily and should be designated a 'no go' zone and the Project redesigned accordingly; or
- (b) If the IAC does not designate Simpson Barracks as a 'no go' zone, then the IAC should find that:
 - (i) Translocation by itself is unlikely to adequately mitigate the impacts on the Matted Flax-Lily and is likely to increase the risk of the species becoming extinct in the long term; and
 - (ii) If translocation is to proceed, it may only proceed once an offset for the Matted Flax-Lily has been secured in accordance with the requirements of the Native Vegetation Removal Guidelines.

267. To the extent NELP may seek to suggest that designation of the Simpson Barracks as 'no go' zone would inevitably lead to the acquisition of residential dwellings, this should not be accepted:

- (a) It should be recalled that Technical Note 48 is not evidence. No witness has stated that the only choice is between removal of the Matted Flax-Lily and residential acquisition;
- (b) No one has examined the feasibility of the Project without the Lower Plenty Road interchange at all, or what the impact of such a proposal might be on the economic benefits accruing to the Project. That this has not occurred to date represents a limitation of the Business Case options analysis and the environmental assessments;
- (c) The removal of the Lower Plenty Road interchange may require NELP to revisit the available options, or to consider the possibility of

residential acquisition, or examine whether alterations to the traffic functionality can be made to achieve an appropriate compromise; and

- (d) It is entirely reasonable to expect that, if NELP is actually required to do so, it can deliver a design which accommodates the designation of Simpson Barracks as a 'no-go zone' and avoid the need for residential acquisition.

Studley Park Gum

268. The Studley Park Gum is advisory listed as endangered on the DELWP's Advisory List of Rare or Threatened Plants in Victoria (2014).⁷⁵

269. The Project is likely to have an unacceptable impact on the Studley Park Gum. As DELWP noted in their letter to the IAC, dated 25 July 2019,

*The project will potentially eliminate most if not all of the last surviving habitat where active recruitment is still observed.*⁷⁶

270. This is consistent with the evidence of Dr Lorimer, that the Project will remove a significant and reproducing population of Studley Park Gums and that the proposal to attempt to regrow a new population at an as yet unknown location, is unlikely to result in a self-sustaining reproducing replacement population.

271. No one can have confidence in the proposed Studley Park Gum Mitigation Framework (subsequently renamed as the Studley Park Gum Management

⁷⁵ DELWP (2014) Advisory List of Rare or Threatened Plants in Victoria, available online at: https://www.environment.vic.gov.au/_data/assets/pdf_file/0021/50448/Advisory-List-of-Rare-or-Threatened-Plants-in-Victoria-2014.pdf

⁷⁶ Tabled Document 93: Letter from DELWP to IAC dated 25 July 2019, paragraph 1.6.

Framework).⁷⁷ This Framework proposes the translocation of 98 Studley Park Gums to an “appropriate recipient site” and identifies 11 potential sites, including 9 within the Yarra Valley Parklands.

272. The evidence of Dr Lorimer is to the effect that attempts to propagate the Studley Park Gum at Yarra Park Bend have been unsuccessful and therefore the proposed propagation and planting of Studley Park Gums elsewhere should not be relied upon to conserve the hybrids.⁷⁸
273. Mr Miller conceded in cross-examination that what is proposed for the Studley Park Gum is, in effect, a form of translocation and suffers all the risks associated with translocation, including the possibility of increasing extinction risk.

Barrelling of Koonung Creek and Banyule Creek

274. The Project contemplates placing 1.5km of Koonung Creek into a barrel drain. The Project also contemplates barrelling part of Banyule Creek (if the Lower Plenty Road Interchange Reference Design, rather than the Alternative Lower Plenty Road Interchange, is developed). The Councils strongly oppose this. Placing either or both Koonung Creek or Banyule Creek in a drain would:

- (a) Require the removal of surrounding native vegetation;
- (b) Render that section of the Creeks unusable as habitat for aquatic fauna; and

⁷⁷ Tabled Document 104: Studley Park Gum Management Framework, North East Link, dated 29 July 2019.

⁷⁸ See evidence Dr G Lorimer, paragraphs 202 and 203.

(c) Reduce the amenity of the creek corridors.

275. The proposed placing of Koonung and Banyule Creeks in a drain is inconsistent with the strategic directions set out in Melbourne Water's *Healthy Waterways Strategy*, both for the Yarra Catchment generally and in relation to the Koonung Creek, the Koonung Creek sub-catchment specifically:

(a) The Yarra Catchment program for the Healthy Waterways Strategy identifies a number of 'regional performance objectives' which are directed to addressing 'region-wide threats to waterway values'.

Relevantly, these include:

RPO-15. Victoria's planning system is used effectively to protect and enhance waterway corridors.

RPO-19. Options to transform modified waterways by creating more natural, community-loved spaces are identified and implemented.⁷⁹

(b) The Councils consider that permitting the undergrounding of Koonung Creek or Banyule Creek would be inconsistent with the attainment of both these objectives.

(c) The 10 - 50 Year Targets for Key Values for the Koonung Creek sets the following targets:

Amenity, which is based on level of satisfaction, is currently high and expected to remain high; target is to improve to very high.

⁷⁹ Victorian State Government, *Working Together for Healthy Waterways: Co-designed Catchment Program for the Yarra Catchment*, 2018, p. 21.

Community connection, which is based on level of satisfaction, is currently high but likely to decline in the long-term if opportunities don't keep up with population growth; target is to maintain at high.

Recreation, which is based on levels of satisfaction, is currently high and is expected to remain high in the long-term if supply keeps up with population growth; target is to improve to very high.⁸⁰

- (d) If the Creek is placed in a pipe, the Councils would expect all these targets will be unable to be fulfilled and in fact to result in a reduction in levels of overall satisfaction.
- (e) A number of targets are also identified for the protection of flora and fauna all of which seek to either maintain or enhance the status of those values. Again, placing the Creek in a pipe will undermine the achievement of those objectives.

Removal of Native Vegetation

276. The Habitat Biodiversity Evaluation Objective requires the Project to 'avoid or minimise adverse effects on vegetation ... consistent with relevant State policies'.

277. Apart from the benefits of placing the Project in tunnel through the Yarra Valley floodplain, there is no evidence that the Reference Design has avoided or minimised adverse effects on vegetation to any significant extent. While it has been suggested avoidance and minimisation was considered in earlier phases, all of the ecology witnesses – including NELP witnesses – agreed that '[e]vidence of comprehensive assessment of

⁸⁰ Ibid. p. 35.

alternative options to avoid and minimise impacts on native vegetation and biodiversity is unavailable.’⁸¹

278. Instead, NELP has assumed that all vegetation within the Project area will be lost. On its face, this is inconsistent with the Evaluation Objective. This is all the more so because of the role played by native vegetation in contributing to the environmental and landscape values of the Yarra River corridor.
279. The IAC has no evidence before it on which it can assess the likely actual loss of either native vegetation or planted amenity vegetation:
- (a) The assumed loss of 52 hectares of native vegetation, 25,000 so called “planted amenity trees”, the loss of an unknown further amount of vegetation comprising understorey vegetation and trees less than 3 metres, must lead to the conclusion that the proposal will have a very significant impact on habitat and biodiversity;
 - (b) The native vegetation loss assessment in the EES, is likely to be an underprediction, however, due to the decisions made by the authors of the EES to exclude certain vegetation from their assessment. In particular, it appears that NELP has excluded vegetation it considers to be ‘planted amenity vegetation’ from the calculation of native vegetation loss on the basis of the “Planted Vegetation” exception in clause 52.17;⁸² and

⁸¹ Tabled Document 128: Ecology conclave, page 1.

⁸² Technical Report Q, paragraph 4.5.4, page 32.

(c) It is unclear how NELP made this determination.⁸³ However, it was established in cross-examination that NELP did *not* consult land managers to try to understand why the relevant vegetation was planted.

280. The Technical Report G (Arboriculture) published in the EES and Ms Caffin's evidence correctly identifies that the majority of the 'planted amenity vegetation' falls within the definition of native vegetation at clause 73.01.⁸⁴

281. In this context, there is a reasonable prospect that the actual amount of native vegetation being cleared and requiring offsets is even larger than the 52 hectares claimed in the Technical Report. This would mean that any offset based on the loss of 52 hectares was below what should be required under State policy.

282. It should also be noted that the conclave witnesses agreed that:

- (a) Loss of native vegetation had adverse impacts that were not compensated for by offsetting; and
- (b) Losses experienced in the impacted municipalities will not be compensated for by offsetting outside those municipalities. This is notwithstanding that the Native Vegetation Guidelines permit offsets to be provided outset the affected area.

⁸³ Mr Lane gave evidence that he thought that the decision on whether the vegetation planted or managed with public funding for the purpose of land protection or enhancing biodiversity was based on field observations by the persons assessing the vegetation.

⁸⁴ See: Technical Report G, page x, which states: "*The over-riding treed character within the study area is defined by planted indigenous, Victorian and Australian native trees, with relatively few exotic trees encountered. The scale and canopy cover provided by trees through the study area varies significantly, as described below.*"

Amenity Plantings

283. Whilst the EES identifies approximately 52 hectares plus 170 scattered trees as being removed and requiring offsets pursuant to clause 52.17, NELP advised Dr Lorimer that the so-called amenity plantings amount to some 184 hectares.⁸⁵
284. The amenity plantings assessed by NELP are restricted to trees more than 3 metres high and excludes anything that is not a canopy tree, such as shrubs, grasses and ground cover. It is not clear whether it is intended to replace what the EES calls 'non-medium long term viable' trees, which means with a life expectancy of less than 10 years.⁸⁶
285. This calculation is significantly flawed.
286. It relies on a time stamp of the vegetation at a particular date and ignores the fact that on a daily basis, vegetation is both dying and regenerating. For example, if all trees that will die before delivery of the Project are to be excluded then, as a matter of logic, all trees that are likely to be seeded in the same time must also be counted because they are replacing the senescent vegetation.
287. The approach taken by NELP to vegetation is to slice vegetation up and then to ignore relevant parts as follows: -
- (a) Native vegetation is first split into two categories a) planted native vegetation and b) naturally occurring native vegetation. Naturally occurring native vegetation is sent to the ecological report. Planted native vegetation is sent to the arboriculture report. The

⁸⁵ Evidence of Dr G Lorimer, paragraph 61.

⁸⁶ Technical Report G, Arboriculture, page xxi.

disaggregation of the vegetation artificially alters the nature of environmental effect and the assessment of it;

- (b) All vegetation except for trees over 3 metres in height are then excluded from the arboricultural assessment and therefore excluded from consideration in the context of determining any replacement plantings;
- (c) The remaining 25,947 trees over 3 metres are then divided into three sub-categories:
- medium and long term viable (MLTV) trees (i.e. those that are considered viable for 10 years or more);
 - non-medium and long term viable (non-MLTV) trees (i.e. those that are likely to die within 10 years);
 - trees within the Road zone;⁸⁷ and
- (d) A total of 25,947 trees are either planned for removal or potentially impacted within the project boundary. It is Ms Caffin's evidence that 30,000 trees are a 2:1 replacement ratio proposed to be planted as canopy replacement trees. It is apparent that Ms Caffin has assumed that not all of the trees in the tables at pages xii and xiii of Technical Report G will be replaced as part of the Tree Canopy Replacement plan. Combining MTLV, non MTLV and "within the road zone" for "*Planted Amenity Trees Planned for Removal with the Reference Project*", the total number of trees planned for removal is 27,273. If "*Planted Amenity Trees potentially impacted within the project boundary*" are added in then the total number of trees planned for removal or potentially

⁸⁷ See tables 8-1, 8-2, 8-3, 8-4, 8-5, 8-6 Technical Report G, pages 51-56.

impacted is 43,268. To say, on the one hand, that it is proposed to replace trees at a ratio of 2:1, and then to propose the provision of at least 30,000 trees, it is clear that not all the trees removed are being counted⁸⁸. The ratio of 2:1 and the total of 30,000 provided cannot both be right unless trees that should be accounted for have been excluded.

288. The proposed tree canopy replacement plan (a draft of which is not available for consideration by the IAC) will result in the replacement of only some of the amenity plantings being removed, being only those amenity plantings comprising some of the trees over 3 metres in height.
289. It is not known where this replacement tree canopy will be provided. The IAC has not been provided with even the “rudimentary opportunity canopy mapping” prepared by Ms Caffin.⁸⁹
290. The numbers of trees to be planted is irrelevant. Generally speaking, over planting occurs to allow for non-survival.
291. The real issue is: what should be the outcome at a designated time in the future?
292. At some target date, say 2036 or 2045, a tree canopy and related understorey and ground cover planting should be sufficiently established within the municipalities, which is generally in accordance with the proportion of vegetation lost to each municipality. The species, condition

⁸⁸ Arboriculture Technical Report Tables 10-1 and 10-2 and Tabled Document 24u: Ms Caffin’s Expert Witness Statement, at page 6.

⁸⁹ Evidence of M Caffin, paragraph 4.

and quality of that planting should be to the satisfaction of the Councils in question.

293. NELP or the DOT (it being the legal entity) should be the body responsible for: -

- (a) ensuring that all statutory offsets are provided; and
- (b) ensuring that the Urban Tree Canopy Replacement Plan is successfully implemented.

294. There is little point in leaving this to the contractor, given that the assessment dates are likely to be 10-20 years away following completion of the contract works.

Species Specific Offsets

295. The Councils are concerned by the removal of certain species-specific offsets from the Native Vegetation Removal Report. The Councils consider that an EPR should be imposed reinstating those requirements.

296. This course is open to the IAC because, while it must apply State policy, it is not required to – and should not – permit DELWP’s judgment about the appropriateness of the species-specific offsets to override whatever judgment the IAC may form.

297. In this context, the relevant policy is that supplied by the Assessors Handbook, which permits waiving of a species-specific offset requirement if the habitat is ‘clearly inconsistent’ with the requirements of the relevant species.

298. Despite an invitation from the IAC, DELWP have chosen not to explain their reasons for removing the species-specific offset in this case. The result is that, as the ecology conclave agreed, 'the decision cannot be analysed'.
299. The IAC has received evidence from Mr Mueck regarding the appropriateness of the removal of the species-specific offsets. In short, his evidence was to the effect that, apart from Small Golden Moths, he did not consider removal justified. This is especially so where the decision to remove rested on DELWP mapping. Given the evidence regarding the Matted Flax-Lily, such mapping can hardly be regarded as providing a satisfactory basis for excluding species.
300. It is also noted that DELWP had advised that the specific offset for the Australian Grayling was required to be retained, yet the revised native vegetation removal report refers only to species units of habitat for Grey Headed Flying Fox.
301. How the specific offset for Australia Grayling is required to be retained in DELWP's letter of 25 July 2019, but excluded from the native vegetation removal report is unknown.⁹⁰ Of the sole remaining species offset, DELWP observes:

The native vegetation credit register currently has only one offset available for grey headed flying fox totalling 0.31 units in the Shire of Yarra Ranges (attachment 2). Therefore the likelihood of finding the required offsets of 22.954 units for this species is currently very low (attachments 3 and 4).⁹¹

302. There has been no further news as to the progress of finding the species specific offset referred to in Appendix D of Mr Cameron's evidence.

⁹⁰ Tabled Document 24c: Evidence Cameron Miller, Appendix C.

⁹¹ Tabled Document 93: Letter from DELWP to IAC dated 25 July 2019, paragraph 3.5.

303. Whilst Ecology and Heritage Partners have identified the availability of general habitat unit offsets, it has not identified the actual location of those offsets or provided any information which would enable an independent assessment to be undertaken of its suitability.

Vegetation offsets in Greensborough Road

304. In 2007 VicRoads was granted planning permit P933/0206 to remove native vegetation on the east side of Greensborough Road for the purpose of constructing a shared pathway.

305. VicRoads originally proposed that offset planting for the removal of 11 trees would be provided “in the form of a few garden beds containing native grasses and shrubs”.⁹²

306. The application was referred to the then Department of Sustainability and Environment. Subsequently a Net Gain Assessment and Offset Plan, March 2007 was prepared and was approved under the conditions of the permit. The Net Gain Assessment and Offset Plan noted that:

- (a) 1,510 individual plants were to be recruited in a zone directly adjacent to the proposed path and a further zone in the eastern half of the Simpson Army Barracks’ land;
- (b) a further area of planting around tree ID 21B could not be secured in perpetuity because of the Department of Defence Fire Management and Security issues regularly slashing a zone 15 metres out from the Greensborough Road boundary fence;

⁹² Letter VicRoads to Banyule City Council, 17 November 2006.

- (c) planting areas had been identified along the southern section of the Greensborough Road boundary in a narrow parcel of Army Barracks land that is unfenced; and
- (d) offset plantings would be provided from the southern fenced boundary of Simpson Barracks south along Greensborough Highway to Drysdale Street.

307. These plantings were provided specifically as offsets under clause 52.17 for the purpose of the construction of the Greensborough Road shared path.

308. The Councils are concerned by the inappropriate precedent the removal of existing offset planting would set.

309. The Council support the notion that, at a minimum, if these offsets must also be replaced, requiring the vegetation within this area to be offset twice. This is consistent with the evidence of Ms Caffin.

Groundwater Dependent Ecosystems

310. The groundwater modelling relied upon for the protection of GDEs is not 'fit for purpose' and, consequently, that there is a real risk that the delivery of the Project will result in severe and irreversible impacts on GDEs:

- (a) Technical Report Q identifies a number of terrestrial wetland GDEs within the Project area, particularly in the Yarra River floodplain.

Discussing the ecology of these systems, it observes that:

- (i) For many wetland communities, their reliance on water sources and the degree of groundwater dependency is largely unknown;

- (ii) Dependency may vary over climatic conditions, as the constituent species of some wetlands may be completely dependent on groundwater discharge under all climatic conditions while others may have dependence only under dry conditions or at certain times of the year; and
 - (iii) Many of the species common in terrestrial wetlands have shallow root systems that are relatively intolerant of drying out.⁹³
- (b) In relation to River Red Gums specifically, Technical Report Q observes that:
- (i) Red Gums have the ability to rapidly increase root depth, but if a groundwater depth threshold is reached where tree roots are no longer able to access available soil moisture, tree condition is likely to deteriorate, and the trees may suffer premature death;
 - (ii) Importantly, evidence strongly suggests that declines in tree health are threshold related, with the threshold occurring at between 12 - 22m depending on the model uses, rather than a linear trend with decreasing health associated with decreasing groundwater levels;
 - (iii) The death of River Red Gums may result in an alteration of the structure and composition of the community of which they were part and further impacts on avifauna (including bats) which use the habitat those trees provide;⁹⁴ and

⁹³ Technical Report Q, section 10.1, p. 193.

⁹⁴ Ibid.

(c) The overall effect is that there is a real prospect that significant changes in groundwater level could have an impact on GDEs within the Project area.

311. In order to gauge the effect of the Project on environmentally sensitive receptors, GHD prepared a numerical groundwater model. The stated 'primary objective' of this model was 'to inform potential impacts and risks of the Project on these sensitive receptors.'⁹⁵
312. It was the evidence of Mr Smitt for the Councils that the model cannot be used to accurately predict impacts on sensitive receivers.⁹⁶
313. This is because, as agreed at the conclave, the location of the existing monitoring network is heavily aligned with the proposed tunnel alignment and areas proposed for cut and cover with most bores in the bedrock aquifer, and few bores in the alluvium that hosts many environmental receptors on the floodplain.
314. The consequence of this is that the model is biased towards parameters derived from the bedrock, notwithstanding that the sensitive receptors are mainly in the alluvium. As a result, there is a real risk that the model will fail to predict impacts on GDE that will occur as a result of the Project.
315. The existence of this risk was recognised at the conclave, where Mr Smitt and Mr Middlemis agreed that the following additional requirements were agreed to inform further modelling:

⁹⁵ Technical Report N, Appendix C, section 1.2.

⁹⁶ Tabled Document 257, slide 2.

- (a) Additional monitoring bores in the alluvium, especially within 100m of sensitive environmental receptors;
- (b) Some of the additional monitoring bores should be equipped with water level data loggers, to provide data on surface and groundwater interaction;
- (c) Monitoring of water balance input/output volumes to/from billabongs (if feasible) to provide input data for a detailed assessment of the water balances and the dynamics of wetland-aquifer flux exchanges; and
- (d) Ongoing monitoring is required of the Bolin Bolin Billabong and nearby bores for water level and quality, especially around watering events.

316. It appears that Mr Middlemis considers that these additional monitoring requirements should be implemented through the EPRs and the Project allowed to proceed on the basis that, at some point, it will undertake the work required to prepare a numerical groundwater model that is fit for purpose.

317. This is not an acceptable approach. The preparation of a functional numerical groundwater model that is fit for purpose 'to inform potential impacts and risks of the Project on these sensitive receptors' should be a prerequisite for approval, not something to be worked out once approvals are secured.

318. Further, as Mr Middlemis accepted in cross-examination, the proposed modelling has a significant margin of error, particularly for predictions away from the alignment:

- (a) The model used the VicMap Digital Elevation Model, which is stated in the Numerical Groundwater Modelling Report to have an accuracy of +/- 5m; and
- (b) The root mean square error for the groundwater model is up to +/- 2m.⁹⁷

319. In this context, the presentation of contour lines measured to one decimal place in Technical Report N risks creating a false sense of security regarding the scope for groundwater impacts.

320. In these circumstances, there is a real risk that:

- (a) groundwater drawdown will have an unknown but more extensive impact on large old trees within the Yarra River floodplain and on the Studley Park Gums at Simpson Barracks;
- (b) the groundwater drawdown over the tunnel (attributed to tunnel leakage) will have an unknown impact on Banyule Swamp and Banyule Billabong; and
- (c) groundwater drawdown in the vicinity of Bolin Bolin Billabong will have an unknown impact on that billabong.

321. It is noted that, in the event that the modelling underpredicts impacts over any significant period, there is little scope for mitigation. Technical Report Q identifies watering as one way of addressing reduced groundwater, but states that 'watering is unlikely to be a feasible long-term mitigation

⁹⁷ Tabled Document 257: C Smitt Evidence Presentation, slide 9.

measure'. Failing that, the only other mitigation measure offered is the provision of further offsets.⁹⁸

322. For the Bolin Bolin Billabong in particular, it is no answer to state that a watering regime *can* be instituted. There are important steps which are required before that can occur.
323. Firstly, Melbourne Water have not yet decided to institute a watering regime. Secondly, a watering regime involves significant cost in installing pumps, pipes and power supplies. Thirdly, an allocation of water must be obtained from the environmental allocation held by the Environmental Water Allocation Holder, under the Yarra River Environmental Water Management Plan.
324. Accordingly, the IAC should find that:
- (a) There is a real risk of unacceptable impacts on GDEs, although it is not possible to determine the extent of that risk on the basis of the material available; and
 - (b) Further groundwater modelling should be carried out prior to any approval decision being made.

Surface Water

325. The Catchment Values Evaluation Objective requires that the Project avoid or minimise adverse effects on the interconnected surface water, groundwater and floodplain environments. The Project has failed to do so – rather, it appears that what is proposed is that actual work of avoiding or

⁹⁸ See, e.g., Technical Report Q, section 10.3.1, p. 199.

minimising impacts will be deferred to the post-approval stage, presumably once a final design has been prepared.

326. The Councils consider such an approach to be unacceptable. Deferring these issues until detailed design creates two problems:

- (a) First, it creates risk of post-approval mitigation failure where a project is approved on the basis that a certain level of mitigation can and will occur and that mitigation then does not occur because it is not actually possible; and
- (b) Second, it undermines the EES process by removing any capacity to meaningfully interrogate the proposed mitigation works, their adequacy or their feasibility. As Mr Bishop observes:

The most challenging aspect of providing an informed opinion on the reference design with respect of surface water is the lack of evidence to support claims that impacts identified, be it an increase in flood level, decrease in water quality or reduction in access to water supply, will be mitigated within the detailed design phase of the project.⁹⁹

Flood impacts

327. In relation to the issue of flooding, a range of policy documents and planning controls establish that, where works are to be undertaken on a floodplain,

- (a) There must be no loss of flood storage;
- (b) There must be no increase in flood levels;

⁹⁹ Expert Witness Statement, Warwick Bishop, section 8.4.1.

- (c) There must be no increase in flow depths;
- (d) There must be no increase in flow velocity; and
- (e) The existing flood hazard must not be increased.¹⁰⁰

328. While modelling has been undertaken for Technical Report P, both Mr Bishop and Mr Dunn have expressed concern about the quality of that modelling, including the use of different modelling approaches across the affected area and the failure to provide sufficient details.

329. Such modelling as has been undertaken demonstrates that the Reference Project will, in fact, lead to significant increases in flood depth at various points around the Project, including changes of up to 600mm.¹⁰¹

330. It should be noted that the size of the impacts from the Project are generally only identifiable where expressly described in Technical Report P. As both Mr Bishop and Mr Dunn note, the way that NELP has chosen to present the information in that Technical Report makes it extremely difficult to identify the properties that will be affected by additional flooding or the extent of additional flooding to which they will be subject with any precision.¹⁰²

331. Nor is adequate information provided on how any increase in flood levels or loss of flood storage will be addressed. While it is repeatedly asserted that, through reliance on EPR SW6, impacts will be mitigated at the detailed design stage, there is no evidence that proposed flood

¹⁰⁰ See Melbourne Water, *Standards for Infrastructure in Flood Prone Areas*; and Melbourne Water, *Guidelines for Development in Flood Prone Areas*. See also the purposes of the Urban Floodway Zone, the Land Subject to Inundation Overlay; and the Special Building Overlay, each of which applies to various parts of the area affected by the Project.

¹⁰¹ See generally Technical Report P – Surface Water, section 9.1.1. to section 9.1.6. The increase of 600mm is recorded on a service road in the Watsonia Station drain area: p. 136.

¹⁰² Tabled Document 30e: Expert Witness Statement, Warwick Bishop, section 8.2.3; Tabled Document 30c: Expert Witness Statement, Scott Dunn.

management measures can feasibly be implemented at the locations that they are required. Examples where the proposed flood management measures are proposed but may not be possible include:

- (a) Eram Park, which is a former landfill site;
- (b) Borlase Reserve, which is a former landfill site; and
- (c) AK Lines Reserve.

332. As Mr Bishop states in his evidence, detailed modelling of flood impacts from works and any mitigation solutions are typically undertaken at the planning stage, in order to avoid the risk that mitigation may prove infeasible. The proposed approach of deferring feasibility testing until the post-approval phase means that it is simply unknown whether the Project can, in fact, mitigate its impacts.

Water Quality

333. The material before the IAC does not allow a conclusion that impacts on water quality have been, or will be, adequately addressed.

334. First, there is inadequate baseline data. NELP appears to have relied exclusively on a small body of existing water quality measurements to draw conclusions about the current water quality in the affected water bodies. Some of this information dates back as far as the mid-1990s. Correspondence from NELP, referred to in Mr Dunn's evidence, expressly states that no additional water quality information was gathered during the preparation of the EES or after its finalisation.¹⁰³

¹⁰³ Tabled Document 30c: Expert Witness Statement, Scott Dunn, p. 30.

335. Second, while EPR SW4 contemplates water quality testing to commence prior to construction and continue during construction, it is unclear whether this will produce adequate information in the time allowed.¹⁰⁴
336. Third, the material before the IAC provides only very limited information on how water quality impacts from the Project – primarily run-off, but also spills – will be addressed. In particular, no information has been provided that would make it possible to determine whether the proposed water quality treatment infrastructure is fit for purpose or how much land will be required to provide that infrastructure. Mr Bishop’s witness statement sets out a list of additional information that would be required in order to make a judgment about the adequacy of the proposed mitigation.¹⁰⁵
337. This omission is particularly significant because the protection and enhancement of waterways, including expressly the Yarra, is a specific policy contained in *Plan Melbourne*. It states:

Stormwater run-off from roads, roofs and pavements picks up pollutants (such as nutrients, heavy metals and litter) and discharges directly into our urban waterways and bays, impacting on water quality and ecosystem health and increasing flood risk.

It is estimated that stormwater washes 37,000 tonnes of sediment and 1,400 tonnes of nutrients (such as nitrogen from fertiliser) into the Yarra River each year, as well as litter, heavy metals and pathogens.¹⁰⁶

338. In this context, the Councils consider that significant attention ought to have been devoted to clearly demonstrating what the surface water

¹⁰⁴ Ibid.

¹⁰⁵ Expert Witness Statement, Warwick Bishop, section 8.1.4.1.

¹⁰⁶ State of Victoria, *Plan Melbourne: 2017-2050 Strategy*, p 121.

impacts of the Project are, how they will be managed and what management of those impacts requires.

Surface Water Mitigation

339. The material before the IAC provides insufficient information to properly evaluate either:

- (a) The effectiveness of the surface water management measures proposed in achieving suitable outcomes; or
- (b) The consequences of adopting the proposed surface water management techniques.

340. The lack of detail in the surface water material is a significant defect – even Mr Fuller, who appeared for NELP, is recorded in the conclave statement as being concerned about the level of the detail in the EES and supporting documents.¹⁰⁷

341. In relation to the issue of the effectiveness of surface water management methods, Mr Bishop concluded that, relevantly, it was not possible on the information available ‘to form a firm opinion on the feasibility of mitigating any surface water impacts that may arise from the project.’

342. He continued:

*Hydraulic mitigation modelling should have been undertaken to provide clarity as to whether (or not) mitigation solutions to the predicted flood and water quality impacts of the project **can be achieved at each location** in question for the reference design.*

¹⁰⁷ Tabled Document 119: Surface Water Conclave Statement (Revised) 1 August 2019, para 5.

Further, rigorous assessment into the feasibility of the WSUD assets proposed including earmarked locations and asset configurations to provide all stakeholders with a clear understanding of what may potentially form part of the detailed design is missing from the EES documentation.

An assessment into whether BPEMG water quality treatment targets can be met at a catchment scale rather than at a holistic project scale to ensure the even distribution of stormwater treatment between all receiving waterways is needed.¹⁰⁸

343. Mr Dunn expressed similar views.
344. The inability to assess the feasibility of the proposed mitigation measures underlines the defects in the use of the Reference Design in this kind of complex environment. It necessarily means that there can be no certainty over the final surface water impacts until the post-approval stage.
345. Moreover, in the absence of clearly defined and satisfactory surface water management measures, there is a real risk of further and unintended consequences arising from the need to adequately manage surface water impacts:
- (a) The Minister requires that adoption of a 'systems approach' to mitigation. Such an approach requires that 'actions to mitigate certain impacts do not exacerbate other impacts to an unacceptable or unnecessary degree';¹⁰⁹
 - (b) At its most basic level, in the absence of any articulation of the land take required for the proposed water management measures means

¹⁰⁸ Tabled Document 30e: Warwick Bishop Expert Witness Statements, 15 July 2019, pg 25.

¹⁰⁹ Minister Assessment of the environmental effects of the Mordialloc Bypass (June 2019), p. 11.

that there is a real question about what additional impacts the Project will have on public land (given that water management measures have been preferentially sited on public land). As one example, there remains a lack of clarity around the use of an existing retarding basin in the AK Lions Reserve – which presently serves to retard flows in high rainfall events. On one hand Banyule City Council understands that the Reference Design needs additional water storage in this location, such that the basin may be deepened, on the other hand, it is proposed that the same area be used for WSUD purposes – the two options cannot co-exist sensibly;

- (c) More significantly, the failure to identify what is required and whether it can be feasibly delivered means there is a real risk of additional impacts, including on environmentally sensitive areas such as the Banyule Flats:
 - (i) One of the likely consequences of barreling Banyule Creek is to increase flows and velocities of flows south of Lower Plenty Road. These impacts would need to be mitigated as part of the Project;
 - (ii) However, given the uncertainty over the mitigation measures proposed, it is unknown whether the proposed mitigation is adequate or can be feasibly delivered in the location proposed.

346. If the mitigation is inadequate or proves infeasible, then there is a real risk that, during high flow events, additional flooding will occur into Banyule Flats, notwithstanding this is ostensibly a ‘no go zone’.

Conclusions on ecological and water impacts

347. The ecological, groundwater and surface impacts of the Project are demonstrably unacceptable, contrary to the provisions of the YRP Act, contrary to State and Local Planning Policy and contrary to the controls recently included in the Planning Scheme for the purpose of protecting the Yarra River environs.
348. It defies belief that an authority charged with a duty to act in the public interest would prepare an EES that merely assesses the extent of the impact, rather than, as is required by the EES Scoping Requirements, consider firstly how those impacts are to be avoided and secondly, how those impacts are to be minimised.
349. It is wholly inappropriate that a Project such as this is approached by the NELP on the basis that NELP's own evidence proves that the impacts of the Reference Design are unacceptable, but endeavours to avoid the inevitable consequence that the IAC should not support the proposal, by arguing that this isn't the Final Project and whatever the problems are, they will be addressed behind closed doors, through the delivery process. This is not the process required by the EE Act and it is not the process required by the Planning Act. This IAC is unable to make any recommendations regarding the EES or as to whether the Minister should approve the PSA, based on the ecological information that is currently available to it.

VISUAL IMPACT AND URBAN DESIGN

350. Inserting such a substantial project into an established urban environment and valued landscape gives rise to significant urban design and visual impact concerns.

351. NELP's response to these concerns has been remarkable:

- (a) It was the evidence of Craig Czarny for the Councils that, in essence, the Reference Design:
 - (i) would require substantial modification to meet the ambitions of the UDS; and¹¹⁰
 - (ii) is land hungry and has the capacity to have serious negative impacts on the existing environments, neighbourhoods and activity precincts.¹¹¹
- (b) This was not seriously challenged by NELP through cross-examination; and
- (c) Neither was it countered in the evidence of NELP's own urban design expert, Kevin Begg. It was Mr Begg's evidence that the Reference Design was a 'functional' design only which had not been informed by any consideration of urban design, landscape design or architectural design.¹¹²

352. Indeed, both Mr Begg and NELP expressed the view that it would be in some way incorrect or inappropriate - misconceived, even - to evaluate the

¹¹⁰ See Tabled Document 30b at p 2 and paras 36, 40, 48, 53, 57, 63, 69, 79, 86, 93 & 98.

¹¹¹ Ibid.

¹¹² Tabled Document 24q at p 5.

Reference Design against the Urban Design Strategy ('UDS') on the basis that the 'actual design' of the Project would be resolved at a later 'secondary' stage, apparently outside of and after the EES process.¹¹³

353. While Mr Begg expressed confidence that the competitive tender and Urban Design Advisory Panel ('UDAP') processes together with the UDS will ensure the Project achieves an acceptable urban design outcome, the Councils do not share his confidence.
354. The Councils submit that the measures proposed by the Project are insufficient to ensure a high quality urban design outcome and to ensure that adverse visual impacts are avoided or minimised. The measures leave a substantial uncertainty as to what the Project will deliver in terms of urban design.
355. The Terms require the IAC to specifically address whether the UDS published in the EES should be changed. The IAC also has the broader tasks of considering the capacity for the Project to achieve acceptable environmental outcomes and any necessary or appropriate measures to prevent, mitigate or offset those impacts; and recommending any feasible modifications to the alignment or design of the Project that would offer beneficial outcomes.
356. As with many other aspects of the assessment of the Projects, NELP's choice to use a Reference Design - and particularly one which does not even attempt to respond to the UDS - challenges the ability to assess the appropriateness of the urban design strategy or to assess the Project's visual impacts.

¹¹³ Ibid.

357. How can the IAC be confident that the challenge of inserting such a land hungry design into a highly constrained and sensitive urban environment can be resolved to achieve the urban design principles set out in the UDS without substantial modification (or at all) without testing it? The answer must be that it cannot be so satisfied.

The Urban Design Strategy

358. The Project relies on the UDS and EPRs to deliver high-quality design outcomes.¹¹⁴ The UDS, however, has a number of critical shortcomings. Without amendment, there can be no assurance that the contractor's design will provide the desired outcome.

359. The principles and objectives of the UDS are generic – they are applicable to most infrastructure projects. By themselves, they will not ensure that the Project delivers particular outcomes.

360. The broad identification of three character types across the whole of the Project does not assist in identifying appropriate responses to local contexts.

361. The place-specific requirements similarly provide only general guidance for the identified locations. Craig Czarny identified that the following adjustments should be made to provide genuine urban design guidance and to assist in achieving the desired high quality outcome:

- (a) The requirements should be more 'granular' – that is, they should respond to the particular character of each location, recognizing the

¹¹⁴ Chapter 7, EES, page 7-12.

differences between neighbourhoods such as Watsonia and Simpson Barracks, Manningham Interchange and Bulleen Park;¹¹⁵

- (b) The requirements should be more 'articulate'. They are presently fundamentally functional and design neutral. They provide no or little guidance on form or appearance;
- (c) The requirements, whilst 117 individual design references in total, are universal in nature and do not provide clear outcomes. They should be embedded in the Reference Design in order to enable proper assessment; and
- (d) All of the requirements should be more 'committed'. A Project of this scale should provide for certainties rather than opportunities.

Application of the UDS to the Reference Design

362. NELP has sought to argue that the Reference Design should not be evaluated against the UDS. This should be rejected, if only because it is otherwise impossible to gain any understanding of whether visual impacts from the Project have been appropriately avoided or can realistically be mitigated.
363. Moreover, assessment of the Reference Design against the UDS, and the EPRs has the potential to reveal the shortcomings in both. It allows some assessment to be made of likely environmental effects of the Project and whether or how they might be mitigated. If the Reference Design does not have the capacity to meet the principles or objectives or to deliver the

¹¹⁵ Tabled Document 30b at para 20.

place-specific requirements, it must be questioned whether the Project can deliver its aim of high quality outcomes.

364. Mr Czarny has evaluated the Project components, by precinct, against the UDS principles and objectives and the EPRs. He identifies how the Reference Design does not comply with the UDS principles and objectives. It is a comprehensive assessment. The failings are substantial.
365. It is not an answer to say that the application of the UDS, through the EPRs, will address these non-compliances or will result in a compliant Final Project. Many of the non-compliances are not matters that are likely to be resolved in that way.
366. In his presentation to the IAC, Mr Czarny focused on a number of particular examples where the Reference Design fails the UDS and where there is substantial uncertainty as to whether a contractor's design will or can achieve a materially better outcome.¹¹⁶
367. Those examples include:
- (a) The Watsonia Neighbourhood Activity Centre: the principle of identity and its objectives are challenged. The Project does not enhance the identity of the place, rather it increases the severance to the local community. The open cut trench does not make a positive architectural contribution to the setting of Watsonia. The principle of urban integration is similarly put in issue by this design. There is little prospect that a contractor's design will 'minimise negative

¹¹⁶ Tabled Document 240.

impacts on the community and the environment by minimising the design footprint' of the trench;

- (b) The Simpson Barracks: The removal of significant endangered vegetation and construction of a 40-metre ventilation stack opposite residents is neither a sensitive enhancement of the landscape or a high quality design outcome responding to the existing landscape character;
- (c) Manningham Road interchange: the Reference Design in this location would seriously jeopardise achievement of the UDS urban design principles and objectives relating to identity, urban design integration, resilience and sustainability, amenity and vibrancy. That a whole industrial precinct might be displaced and no urban design framework placed on the table for the residual land is, as Mr Czarny put it, 'quite mystifying'. Additionally, it is regrettable to say the least that neither the UDS nor the EPRs demonstrate any commitment to retain the historic and iconic River Red Gum;
- (d) Bulleen Park precinct: placement of the portal, ventilation stack and flood wall in this location will have detrimental long-term impacts on the amenity, function and arrangement of the public open space in this precinct. Simply applying the place specific design requirements in the UDS to the Reference Design will plainly not be enough to ensure achievement of the urban design principles in the UDS. Rather, this is a location where a feasible modification to the Reference Design, namely an extended tunnel to the Eastern Freeway, would offer beneficial outcomes and is worthy of serious consideration;

- (e) Eastern Freeway Interchange: Objectives under each of the eight principles are challenged. The siting and scale of infrastructure within public open space does not protect, enhance and maintain the local identity of the parklands. Elevated roadways and noise walls will not make a positive architectural contribution to the surrounds. The loss of active recreation facilities does not result in an enhanced urban amenity or a successful site-specific response; nor is it supportive of active and healthy lifestyles; and
- (f) Koonung Creek Reserve Corridor: The imposition of the new roadway will substantially diminish open space character values. The notable natural wetland assets will be seriously imposed upon. The existing urban design contribution of freeway infrastructure will be lost. The barrelling of segments of Koonung Creek will significantly diminish the qualities of the trail.

368. Mr Czarny's assessment can be contrasted with the approach of Mr Begg. Mr Begg defers all urban design considerations to the process that is yet to take place and which will not be the subject of review by this IAC. Mr Begg acknowledged the Project had 'hot spots' which kept him awake at night. His solution, however, is not to build into the process at this stage specific or detailed design responses but rather to leave it to the contractors to devise a solution.

369. Mr Begg puts considerable faith in the process being guided by the UDAP. The use of an UDAP is clearly warranted. It is unrealistic, however, to expect the heavy lifting for urban design will or can be carried out by the UDAP. It has an advisory role only.

370. Mr Begg suggested that the UDAP process will involve consultation with the Councils. However, 'consultation' by itself does not give any certainty that Council concerns and requirements will be listened to or acted upon. A significant portion of the urban design actions are proposed on land owned by the Councils and therefore the Councils should be provided with a meaningful role in the process.
371. The proponent has not produced an independent assessment of its approach to urban design. Mr Begg is the principal author of the UDS. Unsurprisingly, he was an enthusiastic supporter of the merit of the UDS and the approach taken by himself and his colleagues within NELP's team to separate urban design considerations from the Reference Design.
372. It is true that the Victoria Planning Provisions ('VPPs'), in general, facilitate a performance-based approach. It is also true that, in doing so, the VPPs facilitate the possibility of allowing creative solutions. That said, no meaningful analogy can be made between the performance based approach contemplated by the VPPs, and the nature of the controls proposed here. Such an analogy amounts to a wild over-simplification:
- (a) First, the VPPs provide a framework for the consideration of a specific application - a real proposal. Whether or not the outcome is "creative" is also has to be "acceptable" - and this is dependent upon an assessment of whether the creative proposal meets the policy and regulatory imperatives. By contrast, the proposal here is not a real project;
 - (b) Second, the application of the VPPs and compliance by developers with the standards in the VPPs is the subject of independent oversight in the form of Councils as responsible authorities at the permit stage

and the Victorian Civil and Administrative Tribunal on review.

Under the proposed EPRs, UDAP does not serve a comparable role to those bodies; and

- (c) Finally, the VPPs are, by their nature, designed to be generic because they are intended to be applied across the entirety of Victoria. In truth, the planning framework comprises more than just the VPPs. It also comprises the local framework for the municipal area, which provides specific guidance about what are and are not appropriate responses to specific contexts – depending on the sensitivity of the area that guidance can be very prescriptive. In that context the scope for a “creative” response is circumscribed by the context and the controls.

373. There is no ability in this process to undertake a public assessment of the outcome of the kind undertaken by a responsible authority or the Tribunal because, although the time for public assessment is now, NELP have chosen not to produce an assessable design.

374. The UDS’s ambition of minimising the new road footprint might not result in the saving of one lane’s width. It is an untestable aim – there is no way to assess objectively whether the UDS objectives have been applied.

375. Mr Begg acknowledges there are difficulties all along the corridor that will require particular attention. He is optimistic as to the prospect of solutions arising from the procurement and detailed design process. That involves a degree of trust. The assessment of the Project should not be dependent on trust.

376. Unless urban design responses are mandated, and with some specificity, in the UDS and EPRs, it can be expected that urban design considerations will play a secondary role to functional considerations as they have to date. There will be no certainty as to urban design being high quality. There will be no certainty as to what the urban design outcomes will be.

Visual Impact

377. Technical report H – Landscape and Visual sets out the Project’s Landscape and Visual Impact Assessment (‘LVIA’). This analyses the visual impacts of the Project works based on the Reference Design, both during construction and operation. The impact assessment is summarised at section 11.2 of the LVIA.¹¹⁷ It concludes that the Project is well sited to minimize impacts to landscape and visual amenity during its construction and operation. It says that, where there are high impacts, landscape treatments may visually screen proposed infrastructure or the infrastructure may be designed to visually integrate with the existing landscape.
378. The Councils challenge the assessment. The methodology of the LVIA and judgments made within it are flawed. Properly, the LVIA does not support the stated conclusions.
379. The LVIA assesses just three landscape character types along the whole of its length. This fails to recognise the actual landscape character at many points along the project’s path. It means that the assessment of impacts is made against a broad character type, rather than against the specific character of the particular area or neighbourhood in question.

¹¹⁷ Technical Report H, page 284-285.

380. The logic of a large project being assessed against large-scale character types breaks down where the impact assessment necessarily must be made of a range of quite different physical contexts.
381. For example, the assessment of viewpoint 1 – Healy Court, Bundoora (pp 174-176 of the LVIA) does not identify the character of this residential precinct. An understanding of that character is material to the assessment of impact. The impact of a 10 metre high noise wall sitting at the top of a bank at the end of a residential street with buildings of a one to two storey scale should be assessed in the context of the character of that area.
382. The LVIA does not appropriately identify the values or sensitivity of landscape areas likely to be affected by the Project. The evaluation objection for landscape and visual impact requires consideration of landscape values. The LVIA does not identify, for example at the selected viewpoints, what values are present or how those values affect the assessment rating.
383. The identification of sensitivity of landscapes is generalised, without considering local influences which may affect sensitivity to change.
384. The Zone of Theoretical Visibility ('ZTV') assessment used 10 metre contours, instead of available 1 metre contour mapping. With structures under 10 metres in height, this approach may have substantially understated the extent of infrastructure visibility throughout the affected municipalities. It is no answer to say that Project infrastructure disappears from view one or two houses back from the alignment. There are many streets that provide public realm views towards the Project alignment.

385. There is an uncertainty as to the application of infrastructure heights in the ZTV modelling. If the modelling has used a proportion of height, there will be a substantial understatement of (theoretical) visibility.
386. The rationale for viewpoint selection is opaque. The LVIA does not provide an adequate explanation of as to why selected viewpoints were considered representative of views from other locations (where an assessment of impact was not undertaken).
387. The LVIA relies in part on sections rather than photomontages. There is no justification for not using a photomontage at all viewpoints. It is the most tangible method of demonstrating what the Project will look like and what the extent of impacts will be on a particular location.
388. The presentation of photomontages is not in accordance with the stated parameter in the LVIA of using an 80 degree field of view. The presentation provides in many instances a narrower field of view. This undermines the purpose of using a photomontage.
389. The LVIA relies upon planting of new vegetation as the means of mitigating visual impacts. In not one assessment of visual impact over the 81 viewpoints reviewed has the LVIA recommended a reduction in built form. This raises concerns as to the objectivity of the assessment. Even where the assessment is of a high impact that will not be mitigated by planting, there is no recommendation for project re-design.
390. The LVIA assumes ameliorating effects from a planting program, yet no landscape plan has been prepared. In the Koonung Creek 'hot spots', for example, it might be asked how can any impact assessment sensibly be made without an investigation of the scope for replacement landscaping. It

is a given that there will be substantial intrusion into these highly valued locations. Without a landscape plan, it is unknown how the intrusion might in any sensible way be mitigated.

391. The LVIA methodology has regard, in the assessment of public viewpoints, to the number of viewers. A 'low' number means that the assessment of impact, whatever the values or sensitivity, will never be high. That is a self-imposed constraint that cannot sensibly be justified. It distorts the assessment of impacts.
392. In evidence, Mr Wyatt tempered this approach, saying that judgment needed to be exercised. This of itself creates doubt as to the usefulness of the stated methodology. It also serves to emphasise the subjective nature of the LVIA's assessments.
393. The LVIA generally assumes in its assessment of impact that there will be effective screen planting and/or improved design of new infrastructure. This is not a valid approach. The assessment should be made of the impact, and then there can be a consideration of the prospect of that impact being improved. It is a prospect, not an assured outcome.
394. The assessment of visual impacts in many instances at specific viewpoints has been poorly conceived, inaccurate or misleading. Steve Schutt on behalf of the Council identified issues with 31 of the 81 assessments of viewpoints.¹¹⁸ The assessments should therefore not be relied upon in considering the likely visual impact of the Project. By way of example:

¹¹⁸ Tabled Document 30d: Steve Shutt Expert Witness Statement.

- (a) All assessments fail to identify the rationale for selection of the viewpoint;
- (b) Viewpoint 1, Healy Court, Bundoora (LVIA pp 174-176): The assessment does not say whether this viewpoint is representative of other street views in this area or is to be considered solely for the impact on this view. The assessment reduces the impact because 'viewer numbers would be low'. This is not an appropriate reduction if the viewpoint is representative of a number of similar viewpoints;
- (c) Viewpoint 5, shared use path adjacent to M80 (LVIA pp 186-188): The proposed change is identified as a new noise wall of about 8 metres high adjacent the shared use path. The assessment says landscaping will establish between the path and noise wall and reduces the assessment of impact due to landscaping. The section shows, however, no planting between the path and noise wall;
- (d) Viewpoint 8, Hamlet Street and Saxon Court, Greensborough (pp 195-198): The existing condition is a well landscaped verge with a view towards a house at the end of the street. The photomontage shows all existing vegetation on the west side of the image removed with a 7 metre noise wall extending unrelieved to the middle distance. The new work is visually dominating, yet the assessment is 'medium' impact. It is simply an untenable assessment. (Oddly, the year 10 impact is also assessed as medium, notwithstanding the growth of canopy trees);
- (e) Viewpoint 10, Greensborough Road, north of Teresa Street (LVIA pp 201-203): The assessment of a medium impact at year 0 is difficult to accept given the replacement of a densely vegetated verge with a 7

metre noise wall and a 10 metre high shared use overpass. The assumption that the structures will 'complement the surrounding area' is optimistic. There is no demonstration that a design treatment will materially ameliorate the impact of these substantial structures that will sit a short distance from the viewer;

- (f) Viewpoint 18, Fairlie Avenue, Macleod (LVIA pp 224-226): The chosen viewpoint in Fairlie Avenue has no direct line-of-sight view of the proposed ventilation structure. Sydney Street does. The assessment of impact should not be taken as representative of local impacts;
- (g) Viewpoint 26, Heidi 1, Heidi Museum of Modern Art, Bulleen (LVIA pp 51 - 53): It is unclear if this viewpoint is intended to be representative of broader impacts and if so, what the likely extent of those broader impacts is. The assessment of visual impact as 'negligible' in this location is questionable on the basis that a 9 metre sub-station and smoke duct with an anticipated height in the order of 14 metres is proposed in visual proximity to this viewpoint. Further, the photomontages produced are unlikely to represent the full extent of vegetation loss within the view having regard to the extent of works at the TBM retrieval or launch site, the proposed elevated shared use path and new road alignment at Manningham Rd;
- (h) Viewpoint 40, Columba Street, Balwyn North (LVIA pp 87-89): The assessment of a medium impact is unrealistic. The existing medium and long range views are of a well vegetated landscape. They will be replaced with viewlines dominated by short range views of a flyover and noise walls. The existing 1.9 m high noise wall along the road side will be replaced with a 6 m noise wall. The existing second noise

wall, that borders the path, will be replaced by a 9 m noise wall. The tree in the foreground of the photomontages will be sandwiched between the new 6 m and 9 m noise walls. There is next to zero prospect of that tree being retained, yet it is a principal mitigating feature of the year 0 and year 10 montages; and

- (i) Viewpoint 65, Koonung Creek Trail, adjacent to Eram Road, Box Hill (pp 157-159): The LVIA provides a section, not a montage. The section shows a path offset from the new road by buffer planting and no noise wall. The assessment, of medium impact, acknowledges the new 8 m noise wall but assumes landscaping. This highlights the inappropriateness of trying to assess visual impacts with insufficient tools. The photomontage subsequently produced at the request of the IAC, in technical note 23 (document 57) shows a vastly different impact to that suggested by the section and text.

395. This is just a sample of the valid criticisms that are properly made of the impact assessment.

396. The confronting photomontages produced by the proponent in Technical Note 23,¹¹⁹ in response to the IAC's request, further undermine the impact assessment. None of those outcomes can be regarded as acceptable in visual impact terms. The IAC is asked to assume that the impacts will be ameliorated through design or planting. That is asking too much.

397. The LVIA was not submitted to an independent review as part of the preparation of the EES. Allan Wyatt has supported the LVIA before the

¹¹⁹ Tabled Document 57.

IAC. He is the principal author of the LVIA. It is not surprising he defends it.

398. The review conducted by Mr Schutt is independent. His review identifies substantial shortcomings in methodology and approach. These are matters that cannot be addressed by application of EPRs. They require, in effect, the process to be started again.
399. Finally, but of equal importance is the fact that the assessment of visual impacts is undermined, like other aspects of the Project's assessment, by the use of a reference design. There is little value in assessing the impact of something that will not be built.

TRAFFIC AND TRANSPORT

Impacts not assessed

400. The IAC should be concerned that the picture that it has of the impact or effect of the Project is not complete.
401. The EE Act and the Terms invite consideration of what the effect of the Project will be on the existing environment.
402. In the context of traffic and transport considerations in this hearing, the proper inquiry is to ask: what changes in the existing conditions will the Project bring about?
403. The logical starting point is to examine what the present condition is, by reference to measured data, objectively ascertainable in the field.
404. The starting point is to record that the EES was published with a good deal of important information about the existing condition not included – many of which were properly identified by Mr Kiriakidis in his peer review as “open items”.
405. The evidence establishes that in relation to some of the matters, these “open items” were not closed out to Mr Kiriakidis’ satisfaction until days before evidence was circulated in these hearings.¹²⁰
406. Some items were not even examined at all.

¹²⁰ See transcript of cross-examination of John Kiriakidis attached to these submissions, page 4.

407. The IAC has no credible assessment of the impact of the Project on traffic flows and congestion levels on significant north/south arterial roads, particularly in Whitehorse.
408. While the EES spruiks the good news story about the significant (short term) reduction of traffic and congestion in Rosanna Road, it fails to produce enough evidence to properly assess where traffic congestion will increase in the network outside the arbitrarily drawn areas of influence.
409. It is quite extraordinary that an EES would be published without the raw data that explains the existing conditions.
410. How can it possibly be said that the Councils, or the community, have had a proper or fair opportunity during the exhibition period to consider the effects of the Project when the baseline assessments have not been complete.
411. NELP seems to have taken the position that, to the extent that the Project results in impacts to the road network, these will (or may) be matters that will need to be addressed by the road manager – VicRoads.
412. That is all good and well, but with no way of properly calculating the extent of the impact, nor any timeframe for the completion of any works necessary to address these matters, the true effects cannot be examined.
413. The EE Act requires consideration of the effect of the works. There is no limitation imposed upon that requirement. There is no implied assumption that because VicRoads is somehow responsible for the roads arbitrarily regarded as “outside” the Project, that the impact upon those roads don’t need to be considered.

414. The proper approach is to ask: what is the impact?
415. If the impact of the Project is to add to congestion, then that impact must be examined, as must the need for mitigatory works. Mitigatory works should be considered in any case where:
- (a) The impact of the Project itself creates a new problem; and
 - (b) An existing congestion problem already exists, but where the contribution of any new traffic caused by the Project creates a situation that makes mitigatory works necessary.
416. Instead, the EES assumes, as does NELP, that most of these mitigatory works, whatever they might be, will be undertaken at some time in the future, when the budget of VicRoads permits.
417. In substance, many of these unanalysed, unspecified but obviously necessary future mitigation road projects outside the area considered in the microsimulation model amount to unfunded costs of the Project in both economic and environmental terms.

Project Elements

418. Beyond their concerns with NELP's approach to road design in general, particularly the proposed Eastern Freeway widening, the IAC should be concerned about specific elements of the Project - either included or excluded.

Northern Tunnel Extension - Grimshaw Street

419. Banyule wants the IAC to consider the extension of the tunnel from the Lower Plenty Road interchange towards Grimshaw Street. There are significant benefits from an extension of the tunnel.
420. The EES at chapter 6.4.1 explains that two options for the link were considered for the section from the M80 to Lower Plenty Road: Option A was a tunnel continuing from Lower Plenty Road under Greensborough Bypass to the north of Grimshaw Street; and Option B was the trench from the Watsonia railway station carpark to Blamey Road. Option B is the selected Reference Design.
421. The stated reasons for rejecting Option A were:
- (a) The gradient of the ramps from the tunnel would be too steep for vehicles to exit at Grimshaw Street and Lower Plenty Road (ramp gradients of around eight per cent). The Lower Plenty Road interchange could not be constructed, and ramps could only be provided to the north at the Grimshaw Street interchange;
 - (b) To avoid impacting the Hurstbridge rail line, the tunnel would need to be well below the rail corridor near the intersection with Greensborough Road. This would mean the tunnel would be too deep to provide entry and exit ramps to Grimshaw Street that have appropriate and safe gradients for vehicles; and
 - (c) The option would require acquisition of residential properties on the east side of Sellars Street to facilitate the at grade interchange at the M80 Ring Road and Greensborough Bypass.¹²¹

¹²¹ EES chapter 6, p 6-19 to 6-20

422. This is quite a different option to that developed by BabEng. The BabEng option resolves or avoids these issues.
423. The BabEng option, option A2,¹²² was developed before the EES was published. It adopted the then-available Project design. That was relevantly the same as the Reference Design save for the length of cut and cover at the Lower Plenty Road Interchange – under the Reference Design, the cut and cover has been extended to the north to Blamey Road.
424. The BabEng option provides for a bored tunnel commencing at the northern end of the Lower Plenty Road interchange and extending north to a tunnel portal at Doris Street, south of Grimshaw Street. From that point the road emerges from the tunnel in cut, extending under Grimshaw Street in similar profile to the Reference Design.
425. The BabEng option has the following aspects:
- (a) It provides a full interchange at Grimshaw Street. The portal at Doris Street allows appropriate space for traffic on a south bound ramp from Grimshaw Street to merge with Link traffic. The option maintains Grimshaw Street at the same existing level as the Reference Design, with the link passing underneath in a similar profile;
 - (b) At the southern end, the new tunnel connects to the northern end of the cut and cover of the Reference Design at the Lower Plenty Road interchange; and
 - (c) The extended tunnel has a gradient between 1% and 1.7%.

¹²² Option A2 is referred to as option B in the April 2019 report attached to the witness statement of Lars Babendererde.

426. NELP has had access BabEng design for many months. It published its first review of the proposal in Technical Note 30 ('TN30'). It acknowledges that the option maintains functionality of the Grimshaw Street interchange, the Kempston Street underpass and the Lower Plenty road interchange.
427. TN30 sets out some comments and criticisms of the option:
- (a) It notes that, at the Lower Plenty Road interchange, the TBM launch would need to be further north than indicated, given the location of the merge and diverge lanes. This is accepted – the option was designed prior to the publication of the EES and the current Reference Design. The tunnel would commence at the northern end of the now extended cut and cover section;
 - (b) NELP says that the cut and cover structure would need to be deepened to connect to the tunnel. Mr Babendererde explained that the option took the connection to the south as a given – that is, he did not seek to redesign that element of the project. He noted that an integrated design, applying design principles consistently across the project, would likely result in improvements. He noted that the overburden at this location would allow the tunnel to be raised, allowing for less excavation and shallower ramps;
 - (c) NELP notes that BabEng does not provide a detailed layout for the Grimshaw Street interchange. That is correct – the task for BabEng was to show whether an extension of the bored tunnel to the north was feasible in engineering terms. BabEng adopted for indicative purposes a layout of the Grimshaw Street interchange developed by a community group;

- (d) Maintaining the functionality of Greensborough Road is an issue that has to be resolved. That is a task for the road designers. The design at figure 4 of TN30 relates to a different tunnel option, with the portal further to the north than Doris Street. The issues set out in TN30 relate to that design, not to the BabEng option. It does not follow that the BabEng option will necessarily result in greater use of the AK Lines Reserve or the schools' grounds. This is a matter that needs to be investigated but the construction impacts may be dealt with through the phasing of road works around the portal;
 - (e) TN30 says that ground stabilization works may be required around the railway line. This is acknowledged in the BabEng report. It is not an issue of particular difficulty;
 - (f) The note refers to a need for further ventilation structures and increased ventilation systems. That may well be required. Inevitably, an extended tunnel will result in a different range of mechanical and engineering treatments to a trench; and
 - (g) TN30 says that there may be a need to acquire more residential land to the north of Grimshaw Street. It is not clear that this will be required – the BabEng option has the same or similar road profile as the Reference Design once it reaches Grimshaw Street.
428. TN30 attaches Banyule City Council's agenda of 29 April 2019 which sets out an assessment of the 'long tunnel'. The agenda identified pros and cons of the BabEng option. It assumed various matters such as a need to have a curved north bound off ramp, the extent of road reservation required to accommodate TBM extraction, and increased land acquisition. The assessment was made without the benefit of a detailed and resolved

traffic design. The assessment sought to identify, for the community, issues that may arise from the project.

429. In terms of costs, the BabEng report makes clear that it does not seek to identify the actual cost of the extended tunnel. It identifies that particular costs of tunnelling would increase, but resulting in a lesser rate per tunnelled metre given the TBMs would already be on site. It also identified area and volume differences that would arise between the project design and the project with an extended tunnel. The overall cost increase noted in the Council agenda was not assessed by BabEng. NELP, in TN30, asserts that its version of the tunnel extension would cost an extra \$1.49 billion.
430. The cost of the extended tunnel is one element in the assessment of feasibility. The extended tunnel option provides a range of benefits which warrant a proper assessment of its feasibility being undertaken.
431. TN30 acknowledges that the replacement of the trench:
- would result in considerably fewer surface impacts along this part of the alignment and would avoid the range of urban design, severance, and connectivity impacts associated with the trench during constructions and operation. There would also be a reduction in noise and surface road air emissions along this portion of the alignment.*
432. The point of the BabEng assessment is to identify the engineering feasibility of an extended tunnel that can meet the physical constraints of the alignment and allow the full range of functionality sought by the Project with interchanges at Grimshaw Street and Lower Plenty Road. The BabEng option with a road gradient of under 2% may provide a more

economical and less energy-intensive operation than the Reference Design with its steeper grades.

433. Banyule City Council submits that NELP's dismissal of an extended tunnel is unwarranted on the information set out in the EES and that the BabEng option should be the subject of a full assessment.

Banyule response to the Watsonia alternative design

434. At the very least, if Watsonia is going to be further divided by a trench to accommodate the road, then serious consideration should be given to the improvements which Banyule seek for Watsonia Village.
435. The alternative design prepared by Mr O'Brien creates the opportunity for a very important re-connection of the centre and establishment of it as an important public transport hub.
436. Technical Note R32 ('TN R32') sets out an updated alternative design for Watsonia. Banyule accepts that the updated alternative design is a better response than the Reference Design, although it submits that Mr O'Brien's design should be preferred. If the updated alternative design is adopted or recommended, Council seeks the changes set out below to the updated alternative design contained in TN R32.
437. The updated alternative design provides an additional traffic lane for vehicles exiting the station car park and bus interchange and provides additional traffic capacity at the Elder Street westbound exit. However, as the size of the land bridge is not increased, the additional lane reduces the available space for planting and urban design improvements.

- (a) **Changes sought** - Increase the width of the land bridge to provide enhanced planting and a satisfactory urban design.
438. Paragraph 13 of TN R32 states '*the updated alternative design improves vehicle, pedestrian and cyclist access to Watsonia Station*'. The design requires cyclists and pedestrians to negotiate two sets of traffic lights to cross Greensborough Road, and then to negotiate the traffic within the car park area to reach the existing pedestrian bridge over the railway cutting. The bridge is not DDA compliant.
439. The proposed pedestrian and cycling connection does not meet the UDS objectives 2.1 (Connectivity), 3.1 (Integration with context), 5.3 (High quality) and 6.1 (Putting people first).
- (a) **Changes sought** -Generally, improve the level of connectivity for pedestrians and cyclists between Elder Street and the Watsonia Village;
- (b) Provide for pedestrian priority in the car park, by way of a pedestrian crossing or like; and
- (c) Provide a DDA compliant pedestrian and cycling bridge over the railway cutting.
440. One access point to Watsonia Station car park from Greensborough Road is insufficient. The Greensborough Road access opposite Elder Street is likely be heavily used by pedestrians/cyclists. Increased concentration of vehicles here would increase the potential for conflicts between pedestrians, cyclists and vehicles.

- (a) **Changes sought** - Provide a left in/left out access to the new car park building on Greensborough Road, approximately midway between Elder Street and Watsonia or alternatively from Watsonia Road to the car park. This will relieve pressure at the Elder Street intersection and provide a safer environment for pedestrians and cyclists.
441. The Watsonia Precinct road network does not address changes to traffic, cyclist and pedestrian movements following the introduction of the North East Link.
- (a) **Changes sought** - Generally, provide opportunities for safe, efficient connections between the south end of the precinct and the rest of the centre;
 - (b) Square-off Greensborough Road bridge over NEL to provide a land bridge and direct shared user path. Re-design this intersection to discourage through vehicle traffic using Watsonia Road;
 - (c) Provide an integrated bus/rail interchange with pedestrian and cyclist access;
 - (d) Remove the roundabout at Lambourn Road and convert the intersection to a staggered T- intersection; and
 - (e) Provide a footpath on the western side of Greensborough Road between Powley Parade and Watsonia Road.
442. The Traffic and Transport report indicates that Watsonia Road will experience significant increase in traffic (+2000 each direction). This is likely to increase local traffic movements in other local roads within Watsonia.

- (a) **Changes sought** - Options for local area traffic management need to be considered. These works need to be completed prior to NEL construction.

443. It is unsafe to mix pedestrians and cyclists on the footpath connections between the Lambourn Road roundabout and the pedestrian bridge over the rail line.

- (a) **Changes sought** - Convert the shared path to a footpath.

444. The Project reduces connectivity from the east side of Watsonia to the west.

- (a) **Changes sought** - Formalise Lenola Street and provide a new land bridge at that point to provide a connection between Greensborough Road and Watson Street; and
- (b) Provide a new land bridge over the link at a point between Wattle Drive and Watsonia Road.

Manningham response to Manningham Road interchange design

445. Manningham City Council (**Manningham**) considers that design of the Manningham Road interchange is unsatisfactory in that:

- (a) It requires drivers to undertake a variety of counterintuitive manoeuvres to access the Project in what will become a complex road environment; and
- (b) It does not permit access southbound to the NEL for vehicles travelling south along Templestowe Road or west along Manningham Road without the need for a u-turn on Manningham Road.

446. Manningham does not support the adoption of an interchange design that provides reduced functionality (relative to an ordinary diamond interchange) unless it is clearly justified (e.g. by unavoidable environmental constraints such as at Simpsons Barracks).
447. More than that, Manningham does not support a design which has the potential to interfere with the effective operation of Manningham Road – which is a major arterial – by causing drivers to undertake dangerous u-turns in order to access the Project.
448. In submissions and questioning, NELP repeatedly asserted that there was no meaningful demand for movement westbound along Manningham Road or southbound along Templestowe Road. Such an assertion ought to be easily demonstrated through modelling data. As Mr Kiriakidis conceded in cross-examination, however, no such data appears in the Traffic and Transport Impact Assessment and, to date, no such data has been produced.
449. Having regard to the road network, it would seem entirely realistic to expect that there will be some level of demand for access to the Project for vehicle travelling southbound on Templestowe Road or westbound along Manningham Road:
- (a) For many people living north of Templestowe Road and travelling into the city, travelling west on Templestowe Road until it reaches the Project may well be the most intuitive way to access the freeway network, rather than travelling south through Doncaster and then east along the freeway; and

(b) Similarly, for people living west of Thompsons Road, Templestowe Road and Manningham Road may provide a more intuitive route for people travelling west to the city via the Project than travelling east to Thompsons Road and then south-west back towards the Eastern Freeway.

450. Nor does Manningham regard it as realistic to assume that everyone travelling along Templestowe Road or Manningham Road would choose to use Bulleen Road to access the Eastern Freeway in preference to the North East Link. While there will obviously be a toll associated with the use of the North East Link, a driver paying that toll would be able to immediately to enter a recently upgraded freeway network, designed to provide a comfortable driving experience, rather than having to navigate Bulleen Road which would, in the 'with Project' scenario, require the driver to traverse various signalized intersections, a number of 40km/h school zones and increased levels of the traffic relative to the 'no Project' scenario.

451. In this context, Manningham does not regard reliance on the Reference Design as providing an acceptable outcome.

452. Nor does Manningham regard the 'alternate' design included in the EES as providing an acceptable outcome. Mr Kiriakidis' presentation to the IAC described the right turn entry onto NEL included in that design as 'substandard'.¹²³ Manningham would say this is putting it mildly:

(a) The right turn lane has a length of around 55m, which is relatively small, raising the risk of queuing back into the intersection if vehicles are unable to make a right turn quickly; and

¹²³ Tabled Document 135, slide 56.

(b) The right turn itself requires a vehicle to traverse three lanes of oncoming traffic. Given the absence of signalization, there is a real prospect that, when traffic is heavy, this manoeuvre may be impossible. There is also a risk that westbound traffic may queue back from the intersection and interfere with the ability of vehicles to make a right turn.

453. In these circumstances, Manningham considers that the preferred option should be Ms Marshall's 'Ratio Alternative' design as it provides a fully functional diamond interchange whilst still appropriate performance against relevant metrics as well as NELP's arbitrary LOS D target. Manningham notes that Mr Townshend, for NELP, accepted that the Ratio Alternative should be 'on the table' for further consideration.

454. Indeed, Manningham would say that, if the Project can obtain full functionality without comprising the attainment of performance targets and without causing additional impacts, then it should do so.

455. Manningham considers that it would be appropriate for the Ratio Alternative to be further refined to avoid impacting on the Bridge Road River Red Gum. Given the area of land to be acquired at the Bulleen Industrial Precinct for the Project, there would appear to be ample scope to make small, but consequential, adjustments to the location of key elements (the central intersection, ramps, etc.) of the interchange to facilitate retention of the Gum tree without comprising road function.

Manningham City Council response to Templestowe Road Duplication

456. Manningham Council considers that the Project should be required to duplicate Templestowe Road if it has not been duplicated prior to construction commencing.
457. As Mr Veitch acknowledged, all of the strategic modelling for the Project was conducted on the basis of the Reference Design, which assumes that duplication of Templestowe Road will occur by 2031. This was required by the Department of Transport's modelling Reference Case.
458. In the absence of duplication, projected 2036 traffic volumes for Templestowe Road will exceed the physical capacity of the road. That traffic will not simply disappear if the capacity is not there nor will drivers simply sit patiently on Templestowe Road for as long as it takes for congestion to clear.
459. Rather, as Ms Marshall said in her evidence, drivers will change their behaviour to respond to the fact that Templestowe Road is excessively congested, effectively transferring those excess volumes to other roads in the networks. The likely consequences of this for the Project have not been modelled, but one obvious possibility is that east and westbound vehicles may seek to utilise Manningham Road instead. This in turn will have consequences for operation of intersections in and around the Manningham Road Interchange.
460. Manningham accepts that project volumes exceed capacity in both the 'no Project' and 'with Project' scenarios. This does not mean, however, that there is no nexus between the Project and the upgrade. While the most obvious way in which a nexus may exist between the Project and the need for a road upgrade is where the need for an upgrade is caused by the

Project, another way in which a nexus may arise is where the upgrade is required by the Project to function as predicted.

461. Manningham considers that the upgrade of Templestowe Road falls into the second category. At time of writing, NELP has not produced any modelling demonstrating that the Project would function at the same or similar levels if Templestowe Road was not upgraded. It is reasonable to expect that if such modelling existed it would have been produced, given that the issue of Templestowe Road has consistently been raised by Manningham throughout the EES process.

Boroondara and Manningham Proposal for Southern Tunnel Extension – Eastern Freeway Interface

462. The Councils remain of the view that the option identified in Chapter 6 of the EES as Option B.1 for the southern end of the tunnel, which entails using tunnel boring machines to tunnel to the Freeway and placing the portal there, is likely to provide a demonstrably superior outcome to the current proposed design for the southern portal.
463. This is because extension of the tunnel using tunnel boring machines (as opposed to cut and cover) would avoid:
- (a) Many surface-level impacts along and adjacent to Bulleen Road, including visual, noise and other amenity impacts associated with the presence of elevated structures; and
 - (b) Land use and social impacts resulting from the permanent acquisition of land at Bulleen Park for the Project.

464. It is noted that the EES clearly regarded Option B.2 as 'feasible' in the sense of being technically deliverable, and this is consistent with the comments of Mr Babendererde.
465. While the EES suggested that Option B.2 would raise a traffic functionality issue,¹²⁴ no evidence was led to support this contention and, perhaps more importantly, no evidence was led to suggest that the problem that was identified was insoluble.
466. To the extent it might be said that extending the tunnel would add costs, the Councils would observe:
- (a) It was the evidence of both Mr Weston and Dr Stubbs that the Project should be required to internalise its own costs; and
 - (b) It was the evidence of Dr Stubbs that, if those costs were properly internalised upfront, then options such as extending tunnels may appear more economically attractive than otherwise.
467. In this context, any cost of extending the tunnel would need to be weighed against the economic costs of acquiring replacement open space and constructing replacement facilities as well as the amenity costs imposed by the viaducts.
468. In the absence of evidence showing that Option B.2 cannot deliver an acceptable outcome having regard to the whole range of relevant considerations, the IAC should ensure that the NELP's assertions about the viability of Option B.2 be tested by requiring either:

¹²⁴ EES Chapter 6, p. 6-25.

- (a) A supplementary EES addressing the topic (possibly among others);
or
- (b) A review of the design of the southern tunnel portal as part of the detailed design process.

469. It would be the Councils' preference for the first option, as this would ensure that the analysis could be properly and transparently scrutinised.

470. Failing that, the Councils consider the issue could be addressed by requiring an independent and multidisciplinary review of the design of the Eastern Freeway interface, funded by NELP, to determine whether a tunnelled option could produce a superior outcome, having regard to all affected values.

471. This approach is somewhat similar to that adopted by the West Gate Tunnel IAC which recommended that a review be undertaken of the design of the Wurundjeri Way extension with a view to reducing the impacts of the West Gate Tunnel Project on the E-Gate urban renewal site. Indeed, it is interesting to note that that review, once undertaken, concluded that Wurundjeri Way could be lowered and that doing so in fact provided 'a demonstratively [sic] superior outcome while further minimising the environment effects of the WGTP and facilitates greater transit connectivity options'.¹²⁵

472. That said, the Councils consider that it would be imperative for any review in this case be independent from NELP. Unlike the West Gate Distributor Authority which was open to prospect of lowering Wurundjeri Way if it

¹²⁵ WDA, *West Gate Tunnel Project Assessment Report -Alternative design to lower Wurundjeri Way Extension*, p. 19.

was feasible, NELP appears to be unwilling (or unable) to justify any of its road design choices or to countenance alternatives that do not meet its arbitrary level of service requirements. In these circumstances, an independent review is required to ensure that Option B.2 is fairly and objectively considered.

Whitehorse Arterial Roads

473. The predicted negative impacts for major arterial roads and local roads within Whitehorse need to be addressed, not as complementary (and therefore discretionary) projects, nor on a “wait and see” whether DOT gets around to it in the ordinary course. Instead, the proper approach to this issue is to properly assess whether or not the Project will or is likely to cause an adverse effect on the function of the intersections in question. If the answer to that inquiry is that the Project will cause significant disruption to the level of service of major arterial or local road connections, then those impacts, and the costs associated with mitigating them, should be regarded as costs of the Project, and not arbitrarily excluded as externalities.

474. The intersections of most concern to Whitehorse are the:

- (a) Intersection of Middleborough Road and Katrina Street Blackburn North (where the predicted impact will take the intersection from LOS D 2036 without project and LOS E with project in AM);
- (b) Intersection of Station Street and Woodhouse Grove (where the predicted impact will take the intersection from LOS D 2036 without project and LOS E with project in AM);

- (c) Intersection of Surrey Road and Grosvenor Street (where the predicted impact will take the intersection from LOS C 2036 without project and LOS E with project in PM); and
- (d) Elgar Road, southbound at Belmore Road Box Hill North (where the predicted impact will take the intersection from LOS B 2036 without project and LOS D with project in AM).

475. It is also the case that traffic signals should be installed on Elgar Road at the entrance to Elgar Park, to address increased vehicle access to the Project laydown area and improved safety during and post construction activities. It will also be necessary to assess, with input from Council officers, the need for traffic signals at the laydown areas accessed from Springvale Road, Nunawading.

Integrated Transport

476. The Councils acknowledge that the delivery of the Project has the potential to enhance public and active transport provision along the Project corridor. At the same time, the Project also has the potential to adversely impact on both public and active transport if it is not sensitively implemented.

Busway

477. The Councils support the proposed busway but note that it appears to provide limited benefit in the absence of complementary measures.

478. The TTIA identifies three issues with existing DART bus services:

- (a) Inadequate parking capacity at the Doncaster Park and Ride;
- (b) Insufficient frequency of services; and

(c) On-road congestion.

479. The Project itself does not guarantee any material improvement on any of these issues:

- (a) In relation to inadequate capacity, the Councils agree this is a problem and it renders the Park and Ride less useful and less attractive for commuters. However, it is noted that the TTIA does not commit to an improvement in capacity, stating that it is proposed to 'maintain or increase' the number of car parking spaces at the Doncaster Park and Ride.¹²⁶ The Project should be required to deliver an improvement in capacity at the Park and Ride;
- (b) In relation to frequency of services:
 - (i) This is also a significant issue because it limits the number of people who can actually use bus services, particularly during peak times;
 - (ii) Again, however, there is no commitment to improved service as part of the Project. The TTIA states that 'frequencies will increase', but this is based on work done by Transport for Victoria - rather than NELP or the Project - and is qualified by the observation that the proposed frequencies 'do not necessarily represent Victorian government policy or commitments'¹²⁷ and
 - (iii) In the absence of increased frequencies, the utility of the busway will obviously be reduced as it will service less buses and less commuters. In addition, the utility of the Bulleen Park and Ride will be reduced in the AM peak if buses coming westbound from

¹²⁶ TTIA, section 9.6.8.

¹²⁷ Ibid, section 9.6.1.

Doncaster Park and Ride are already full to capacity and unable to be boarded.

- (c) In terms of on-road congestion:
- (i) The TTIA indicates, and Mr Kiriakidis agreed, that buses utilising the Freeway currently travel at approximately 60km/h inbound from the Doncaster Park and Ride during the peaks, travelling the 12km from the Park and Ride to Hoddle Street in 12 minutes.¹²⁸ It should also be noted that this appears to be the *maximum* recorded travel time during the peak, with the average being 10 minutes;¹²⁹
 - (ii) Even the maximum travel time represents a bus travelling at close to the maximum speed that buses can safely travel along the Freeway. The TTIA notes that, during the period 7 – 10:30am, inbound buses are subject to an advisory speed limit of 70km/h;¹³⁰
 - (iii) It is anticipated that the provision of the busway would result in a reduction of average travel times to 7 ½ minutes (although this is questionable given that the *minimum* travel time is specified to be 8 ¾ minutes), relative to the existing situation, and a reduction of maximum travel times to 10 ½ minutes;¹³¹
 - (iv) Any gains along the Eastern Freeway are, however, dwarfed by the impact of delays at the Hoddle Street end of the Eastern Freeway, where it currently takes 22 minutes to travel 4.6km (equivalent to an average speed to approximately 15 km/h);

¹²⁸ TTIA, section 6.3.5.

¹²⁹ Ibid, section 9.6.7, Table 9-28 – the maximum travel time is 725 secs (approx. 12 mins), while the average is 600 secs (10 mins) and the minimum 496 secs (approx. 8 mins)

¹³⁰ Ibid, section 9.6.1.

¹³¹ Ibid, section 9.6.7, Table 9-28.

- (v) Nothing in the Project is intended to, or is likely to, improve conditions at the Hoddle Street end of the Project and, given projected increases in traffic volumes across the metropolis, can reasonably be expected to worsen; and
- (vi) In these circumstances, the utility of the busway is significantly reduced if all it means is that commuters reach a wall of traffic faster.

480. The Reference Design has also not given sufficient consideration to ensuring that pedestrians and cyclists can easily and safely access to the Park and Ride facilities. In cross-examination, Mr Kiriakidis accepted the need for further review of the Park and Rides and non-vehicular access should be an important consideration in those reviews.

481. Further, it should be noted that the provision of the Busway imposes costs on the community, both in the form of immediate costs and in terms of opportunity costs:

- (a) The provision of a dedicated busway results in a wider freeway profile than if buses continued to use general purpose lanes;
- (b) There is an opportunity cost involved in losing the opportunity to construct Doncaster Rail along the median strip of the Eastern Freeway:
 - (i) It has long been proposed that a rail line could be developed along the median of the Eastern Freeway. The median will be lost as part of this process and with it the opportunity to construct Doncaster Rail there;
 - (ii) However, NELP claims that the loss of the median will not preclude the construction of Doncaster Rail because the width of the busway has been designed to allow for a future rail line;

- (iii) In order to deliver that rail line, however, it would be necessary to then remove the busway. Choosing to do so would be extraordinarily wasteful in circumstances where time and resources will have been spent not only constructing the busway, but constructing additional infrastructure (such as the Bulleen Park and Ride) to be serviced by the busway, as well as the impact on the bus service being removed for the construction of the railway;
- (iv) Beyond this, the Councils consider it inappropriate to effectively trade off the already limited public transport options in the middle-ring eastern suburbs against one another in order to deliver a better level of service for private vehicles; and
- (v) In these circumstances, the IAC should include among the costs of the Project the loss of any realistic opportunity to deliver Doncaster Rail. Even if it were to occur in future, the costs of delivering it are likely to be materially higher as a result.

482. In the absence of any commitments to improve parking capacity at Doncaster Park and Ride, to enhance service frequency or to improve the situation at Hoddle Street, or improve pedestrian and cycling access to the Park and Ride facilities, the benefits of the Busway must be considered to be limited, albeit the Councils remain supportive of anything that seeks to improve public transport.

483. This is especially so given that the TTIA does not provide a comparative evaluation of the 'with project' scenario both with and without the busway, which would enable a clearer understanding of what the busway adds in terms of benefits. If, for example, similar benefits could be achieved simply as a result of the proposed freeway widening, then the need for a busway is

open to question. Once again, however, the information in the EES is inadequate to enable this judgment to be made.

Public transport

484. In relation to public transport, one of the significant issues in the affected municipalities is the limited range of public transport options. In this context, bus services are particularly important.
485. As noted above, proposed enhancements to the Doncaster Park and Ride and the provision of a Bulleen Park and Ride are generally supported by the Councils. But the Councils remain concerned by the potential for the Project to impact on bus services along arterial roads which are expected to experience an increase in traffic as a result of the Project. It would be a perverse outcome of the Project – and not one supported by policy – if it reduced the level of utilisation of public transport.
486. Nor are the Councils comforted by the promise of some future review of public transport services following the Project. There should be a clear commitment by the Project to ensure that there is no reduction in the frequency, extent or quality of bus services relative to the existing scenario. As well as further exploration of other public transport improvements which could be incorporated into the Project design, such as improvements from the Doncaster Park and Ride to Springvale and improvements to the arterial road network that lead to the North East Link and Eastern Freeway to give priority to buses.

Active transport

487. Whitehouse City Council in particular is concerned about the extent of provision of improved active transport within its municipality. In contrast

to the position of the other affected councils, no new walking or cycling projects are proposed in Whitehorse. Rather, all that is proposed is to replace existing sections of the active transport network where these are lost through the widening of the Eastern Freeway.

488. Whitehorse considers that, as discussed subsequently, the provision of new active transport infrastructure is one way of offsetting the residual impacts of the Project on the Whitehorse community and should be required.

489. In particular, Whitehorse seeks, as part of the Project:

- (a) The construction the Strategic Cycling Corridor that connects the Koonung Creek Trail to the Box Hill Metropolitan Activity Centre (to the south) and to Doncaster (in the north) to partially offset the increase in vehicle traffic along arterial roads;
- (b) Improvement to the connectivity of the Koonung Creek Trail on the east side of Middleborough Road Blackburn North;
- (c) Grade separation of the Koonung Creek Trail on the south side of the Eastern Freeway at Middleborough Road, Surrey Road and Springvale Road; and
- (d) The construction of a new crossing across Koonung Creek within Eram Park to improve walking and cycling access to Tram Road Reserve.

490. Banyule has similar concerns regarding the lack of committed cycling infrastructure, particularly to LaTrobe NEIC. Key connections include:

- (a) East-west path connecting the Austin Hospital/Heidelberg Station to Heide including the Main Yarra Trail; and

- (b) associated improved grade separated crossing of Banksia Street.

HUMAN HEALTH, NOISE AND AIR QUALITY

491. The Councils acknowledge that there is scope for mitigation of some of these impacts and that these impacts by themselves may not be unacceptable. That does not mean that they should be ignored, however. They are real costs that will be experienced by the local population of the municipalities along the Project corridor, including along the widened sections of the Eastern Freeway. It follows that they must be considered in the balance when determining whether or not to recommend the Project proceed.

Air and Noise Impacts during Construction

492. It is not in dispute that the Project will have air quality and noise impacts during the construction period.

493. Nor can it be disputed that the lack of information about staging and construction methodologies to be adopted means that it is difficult to predict what the construction impacts will be or provide prescriptive regimes for their management.

494. In this context, the Councils acknowledge that the proposed construction noise and air impacts EPRs generally provide an appropriate framework for the managements of impacts.

495. Having said that, the Councils have some concerns about reliance on Appendix C of the NSW Road and Maritime Services *Construction Noise and Vibration Management Guidelines* (2016) in the context of the EPR NV4:

- (a) Many of the 'additional mitigation measures' identified in Appendix C (letter drops, specific notifications, phone calls, individual briefings)

consist of little more than telling residents that they are about to have their amenity significantly disturbed. This does not constitute 'mitigation' nor do they constitute consultation, in the Councils' view;

- (b) In respect of the mitigation measures properly so-called (respite offers, duration respite, and alternative accommodation), the Table C.1 in the CNVMG sets out triggers for the application of these measures that appear to the Councils to be unduly onerous and do not appear to take into account the frequency with which impacts may be occurring (i.e. an exceedance of the relevant noise management level by 10 dB(A) for an hour on one day – it is another if it is for three hours three days a week). In these circumstances, the Councils consider EPR NV4 should require the CNVMP to clearly identify the circumstances / triggers which will result in different mitigation measures being utilised.

496. EPR NV13, relating to the construction of noise walls and the demolition of existing walls, is not sufficient. The use of the language of 'feasibility' and 'practicability' in the EPR leaves too much to the contractor's discretion. At a minimum, the EPR should be redrafted to provide some third-party scrutiny (e.g. the Independent Reviewer and Environmental Auditor) of claims of infeasibility or impracticality.

497. At the same time, it must be recognised that, even with the best will in the world, exceedances of emissions standards and noise management levels are an inevitable part of a Project like this. The IAC should recognise that such exceedances do impose a cost on the affected community and that, particularly in the context of a Project like this, which has a construction period of 7 years, these costs can be significant.

Air Impacts during Operation

498. The Councils consider that the Project is likely to have a net negative impact on human health and that additional mitigation should be required to help address this.

499. There is, unsurprisingly, strong legislative and policy support for protecting and enhancing air quality in Victoria. Notably,

- (a) The stated Policy Intent of *State Environment Protection Policy (Air Quality Management)* is that:

*Emissions to the air environment will be managed so that the beneficial uses of the air environment are protected, Victoria's air quality goals and objectives are met, our air quality continues to improve and we achieve the cleanest air possible, having regard to the State's social and economic development.*¹³²

- (b) The *Transport Integration Act 2010* provides that the transport system should 'actively contribute'¹³³ to environmental sustainability, including by 'avoiding, minimising and offsetting ... transport related emissions and pollutants';¹³⁴ and
- (c) Similarly, clause 13.06-1S aims to 'assist the protection and improvement of air quality', including by ensuring that transport infrastructure contributes to enhanced air quality.¹³⁵

500. The objective of improving air quality and protecting health requires something more than simple compliance with relevant standards. The

¹³² *State Environment Protection Policy (Air Quality Management)*, clause 8.

¹³³ *Transport Integration Act 2010*, s 10

¹³⁴ *Ibid.*

¹³⁵ Victorian Planning Provisions, clause 13.06-1S.

rationale for this was explained by the Assessment Committee for the East West Link which stated:

The approach to the air quality assessment in the CIS is focussed on meeting the standards in the SEPP (AQM), not minimisation of emissions. Compliance with the standards in the SEPP is the minimum requirement (after controlling emissions) as many of these pollutants do not have a threshold for adverse health effects. All of the pollutants of concern for the Project are considered to be non-threshold pollutants, so there is no 'safe' level of exposure. Even meeting the standards has some level of risk associated with them. The level of risk inherent in the standards is that which Government deemed 'acceptable' at the time of making the SEPP. The focus of the SEPP on minimising emissions and not just meeting numbers is due to the fact that any increase in pollution is linked to an increase in risk in potential health effects associated with exposure to air pollution.¹³⁶

501. The pollutants of concern for the Project are, fundamentally, the same as those for the East West Link, being PM₁₀, PM_{2.5} and NO₂.
502. It is acknowledged that, where the Project results in a reduction in traffic levels, it is likely to contribute to a reduction in emissions, albeit there are some qualifications to this general principle around speed and frequency of stopping.
503. The converse of this is that, as acknowledged by Dr Flear, where traffic increases as a result of the Project, air quality will worsen and health impacts will be greater. The Project is expected particularly to add to traffic along freeways and north-south arterials leading to and from the

¹³⁶ *East West Link (Eastern Section) Assessment Committee Report [2014] PPV 76, p. 244.*

Eastern Freeway. By way of example, and using figures taken directly from the EES itself:

- (a) Along Bulleen Road, around the Manningham Road Intersection, the modelling predicts increased maximum concentrations for pollutants, with 24 hour average PM₁₀ and PM_{2.5} increasing 29 – 33% across the modelled years 2026 and 2036;¹³⁷
- (b) Along the Eastern Freeway, the modelling again predicts increased maximum concentrations for all pollutant, with increases ranging from:
 - (i) 27 – 36% for PM₁₀, PM_{2.5} and NO₂ between Bulleen Road and Hoddle Street in 2036 relative to the ‘no project’ scenario; to
 - (ii) 145 – 152% for 24 hour average PM₁₀ and PM_{2.5} 96% for one-hour average NO₂;¹³⁸ and
- (c) On Greensborough Road, between Lower Plenty Road and Grimshaw Street,
 - (i) 24 hour average PM₁₀ and PM_{2.5} are expected to increase by 93 – 110% in 2035 relative to a ‘no project’ scenario; and
 - (ii) Average annual PM₁₀ and PM_{2.5} is expected to increase by 104 – 129%.¹³⁹

504. This is, of course, assuming that the modelling undertaken for the Project is technically correct, both in relation to the extent of road traffic microsimulation modelling and, the consequent air modelling.

¹³⁷ EES, Chapter 10, p. 10-24.

¹³⁸ EES, Chapter 10, p. 10-25.

¹³⁹ Ibid, p. 10-27.

505. Dr Cowan's evidence in relation to air modelling was that the model underestimates, or is likely to underestimate, emissions from the Project. If this is accepted, then the impacts would be even larger.¹⁴⁰
506. Overall, it appears to the Councils that the effect of the Project is best described as a reallocation of air quality impacts, rather than an improvement. Unfortunately, that reallocation appears to result in increased emissions occurring along those routes which are already experiencing the greatest traffic volumes (e.g. freeways and arterials) and, by extension, the greatest emissions. The effect is that the Project appears to be concentrating adverse air quality emissions in those areas already most at risk of adverse health impacts.
507. Insofar as Dr Wright undertook a Health Impact Assessment, this is of limited utility in assessing the health impacts of the Project:
- (a) The assessment was used to show changes in health outcomes at a population level, both for metropolitan Melbourne and for each of the affected municipalities. This is of limited use because the changes caused by the Project are not evenly distributed across those areas. For example, the prospect of the Project materially affecting health outcomes through air quality impacts in Warrandyte is remote; and
 - (b) As conceded by Dr Wright in cross-examination, there is no base line data as to the impact that existing emissions from the Eastern Freeway and the Metropolitan Ring Road or from specific heavily trafficked surface roads such as Rosanna Road, Greensborough Road or

¹⁴⁰ Expert Witness Statement, Dr Iain Cowan, sections 3.1.2, 3.1.3 and 3.1.5.

Middleborough Road are having on the health of the population located within the direct influence of air emissions from those roads.

508. In saying this, the Councils acknowledge, as was agreed in the West Gate Tunnel Health Conclave, that there are difficulties associated with obtaining robust data to assess health impacts on small areas.¹⁴¹ In the Councils submission, however, the proper way to address these shortfalls would be to undertake a data gathering exercise for the affected population as part of the preparation of the EES or as the case may be here, a supplementary EES.
509. In terms of mitigation, it does not appear that any specific mitigation is proposed. EPR AQ4 requires a short - medium term monitoring programme for five years after the Project commences operating. Monitoring, while desirable, does not address the impacts that the Project will have. The Councils consider that:
- (a) the monitoring programme should be a medium - long term programme rather than a short term one; and
 - (b) the monitoring data should be made freely available to the public on an interactive website.
510. The Councils consider that the Project should be required to develop and fund an air quality mitigation programme for roads (including freeways) which are likely to experience a significant increase in traffic. Such a condition was recommended by the West Gate Tunnel IAC and was supported by the Minister in his Assessment Report.

¹⁴¹ West Gate Tunnel EES, Tabled Document 71: Conclave Report - Health Impacts dated 11 August 2017.

511. Potential mitigation measures include designing noise walls to try to confine air emissions and providing sufficient room for planting vegetation.¹⁴² A 'smoky vehicle' program of the kind recommended by the West Gate IAC may also be desirable.
512. Even with mitigation, however, the fundamental fact remains that the Project is likely to result in an increase in air emissions along certain major routes and that, whether or not the change in risk reaches a particular level of statistical significance, the Project will have additional health impacts above and beyond a 'no Project' scenario. These are costs that the IAC will need to take into account in considering whether to approve the Project.

Residential Noise Impacts during Operation

513. It is well-recognised, including in the EES, that traffic noise, including night time traffic noise, can have health effects including mortality, cardiovascular effects, noise annoyance and sleep disturbance.
514. For these reasons, the Project proposes to adopt a traffic noise limit of 63 dB(A) L10,18hr at residential buildings from 6pm to midnight for traffic noise from the Freeway. Where residences are affected by noise from the Project and another road, it is proposed to limit noise increases to 2dB(A).
515. The figure of 63 dB(A) L10, 18hr is drawn from VicRoads' Traffic Noise Reduction Policy ('TNRP'). The limitations of the TNRP are by now well-established – so much so that in his assessment for the Mordialloc Bypass, the Minister concluded bluntly:

¹⁴² As contemplated by Technical Report B, Chapter 13.2, pp. 273ff

*Lack of a contemporary traffic noise policy in Victoria hinders the assessment of major road construction projects.*¹⁴³

516. The Minister's recommendation was that the completion of the review of the TNRP, commenced in 2015, be a priority. The difficulty with waiting for VicRoads or the DOT to complete that review of the TNRP is that they have absolutely no incentive to do so. The only plausible outcome is an increase in the stringency of the standards and this is very much not in the interests of DOT as the road manager for freeways and major roads. One does not have to be a conspiracy enthusiast to contemplate that the very slow progress of this review may not be accidental.
517. One of the principal deficiencies of the TNRP is that there is no clear justification for the adoption of the noise targets adopted. In particular, they are clearly not designed to be health protective, but appear simply to be based on a judgment of what was feasible at the time the TNRP was adopted.
518. In this regard, the Councils note the position of Mr Tardio¹⁴⁴ that the appropriate standard to achieve through off-reservation treatment (ORT) was that internal noise levels should be those specified in the Better Apartment Design Guidelines,¹⁴⁵ being:
- (a) 35 dB(A) Leq 10:00 pm – 6:00 am for bedrooms; and
 - (b) 40 dB(A) Leq 6:00 am – 10:00 pm for living rooms.

¹⁴³ DELWP, *Mordialloc Bypass – Minister's Assessment of Environmental Effects* (June 2019), p. 44.

¹⁴⁴ Expert Witness Statement, Darren Tardio, [29].

¹⁴⁵ Now incorporated into the Victorian Planning Provisions as Standard B40 in clause 55.07-6.

519. These standards apply specifically within a noise influence area. Table D3 describe a noise influence area as being within 300 metres from the nearest trafficable lane of a freeway, tollway and other road carrying 40,000 annual average daily traffic volumes.
520. Even allowing for the conversion of L10 to Leq (say, +3dB(A)) and the effect of noise attenuation from outdoors to indoors (say, 10 dB(A)), the Better Apartments standard offers significantly more generous protection to residential amenity than the standard embedded in TNRP and NV1. It is difficult to see why, if this standard is the right standard for developers of buildings near freeways across Victoria and, in Mr Tardio's view, an appropriate standard for existing buildings to be treated to, it is not the right standard for all residences. One might ask why the State should be allowed to take advantage of a lower standard than the State considers to be appropriate for a private developer?
521. Turning to the health impacts of noise, the Human Health report considered that an acceptable change in population highly annoyed by traffic noise was equal to or less than 5% and an acceptable change in population highly sleep disturbed, was equal to or less than 3%.
522. The fundamental difficulty with this assessment is that it is a population level assessment, not an assessment of the persons affected by noise from the Project. In this regard, the odds are unfairly stacked in favour of the Project and against the local communities most affected by the Project.

523. It is also observed that the impacts on health from noise referred to above in part rely on there being a small overall decrease in median traffic noise levels at residences within the Project corridor.¹⁴⁶
524. This noise reduction is used to reach the conclusion that, apart from the Whitehorse LGA, the number of persons who will be either highly annoyed or highly sleep disturbed in 2036 will be slightly reduced.¹⁴⁷
525. However, at a localised level and after at receptor attenuation at 159 individual properties, it is estimated that the highly annoyed proportion of the local population will increase by up to 5% and the highly sleep disturbed population will increase by up to 2%.¹⁴⁸ This is potentially thousands of persons who will be highly annoyed and/or highly sleep disturbed.¹⁴⁹ The Technical report then concludes:
- “On the basis of the above, localised noise impacts are not considered to be of significance in relation to health.”¹⁵⁰*
526. While this may be true at the population level, it does not change the fact that for a not insignificant percentage of the population, the Project will have adverse health impacts. The localised assessment has no baseline data and are therefore only semi-quantitative.¹⁵¹
527. In these circumstances, the Councils commend the approach taken by the Westgate IAC of requiring a night time noise limit and recommend that a

¹⁴⁶ Technical Report J, page 141.

¹⁴⁷ Technical Report J, table 9.4, page 156.

¹⁴⁸ Technical Report J Table 9.6 page 158

¹⁴⁹ Ibid. Demographics table 6.1 p34, the Boroondara LGA population is 167,230. 5% increase in highly annoyed per table 9.6 therefore equals 8361 persons.

¹⁵⁰ Technical Report J, page 158.

¹⁵¹ Ibid, page 157 and see peer review appendix F page 4 where the peer reviewer describes the noise annoyance risk assessment as being “based on more nebulous endpoints”

similar condition be adopted here, noting that Mr Butera recommended an external limit of a 50 dB(A) Leq (9-hour) between 10:00 pm and 7:00 am.¹⁵²

528. As in West Gate, the Project here seeks to concentrate freight vehicles on freeways, raising the risk that night time noise levels experienced by nearby residents, during some hours of the night period, may not be significantly below day time levels.
529. In saying this, the Councils acknowledge of course that the Minister did not impose that condition because he preferred to allow VicRoads to continue its TNRP review. The Committee is referred to the subsequent comments of the Minister in Mordialloc By-Pass.¹⁵³ The Councils would say, if at first you do not succeed, try again. There is no plausible justification for exposing affected residents to excessive night time noise levels simply because DOT has chosen not to, and may choose never to, complete its review of the TNRP.
530. The Councils also consider that the noise limits should be applicable at the upper floors of an affected building. The Councils do not accept the assertion that the TNRP does not contemplate the target being met on upper floors:
- (a) The TNRP does not expressly state, one way or another, where the target is to be met. Clause 2.3 states that, relevantly,

Where arterial roads and freeways are built on new alignments, or where existing arterial roads or freeways are widened by two or more lanes and buildings previously protected from traffic noise are

¹⁵² In accordance with NSW Road Noise Policy, section 3.4.13.

¹⁵³ See para 257 above

exposed by removal of buildings required for widening, the traffic noise level will be limited to the objectives set out below or the level that would have prevailed if the road upgrades had not occurred, whichever is the greater.

Category A: - For residential dwellings, aged persons homes, hospitals, motels, caravan parks and other buildings of a residential nature, the noise level objective will be 63 dB(A) L10 (18hr) measured between 6 am and midnight,¹⁵⁴

- (b) The statement that the traffic noise level ‘will be limited’ to the applicable target is in no way qualified by any reference to the ground floor level. Further, Appendix F to VicRoad’s *Road Design Note 06-01 – Interpretation and Application of the VicRoads Traffic Noise Reduction Policy 2005* does expressly state that:

All levels of a multi-storey building are subject to attenuation under Australian Standards and the Policy, which may have significant cost implications. While often only the two most exposed levels of buildings require treatment, attenuation of multi-storey buildings should be carefully considered.¹⁵⁵

- (c) The mythical ground floor restriction on the application of the TNRP appears to derive from the requirement, in Appendix C of *Road Design Note 06-01*, that the position for placing a microphone to measure noise levels at an affected sensitive receiver should be one metre from the centre of the most affected window at the lowest habitable level.¹⁵⁶ There is no obvious reason to interpret a requirement in relation to

¹⁵⁴ Quoted in VicRoads, *Road Design Note 06-01 – Interpretation and Application of the VicRoads Traffic Noise Reduction Policy 2005*, Appendix A, p.8.

¹⁵⁵ Ibid, Appendix F, p. 15.

¹⁵⁶ Ibid, Appendix C, p.11.

how noise impacts are to be measured to be a qualification on the objective of achieving certain noise limits.

- (d) The simple point is that if VicRoads had wished to restrict the levels at which noise limit are to be achieved under the TNRP, they could have specified where those levels are to be achieved. They did not and there is nothing to suggest, especially given the TNRP is at least 14 years old, that that omission is or was accidental.
- (e) In these circumstances, it is a fair reading – indeed, it is a reading the Westgate Tunnel IAC adopted – that the TNRP does in fact require achievement of the noise limits at upper levels as well as at the lowest habitable level.
- (f) Moreover, this is a sensible approach. As Dr Wright acknowledged in cross-examination, the health effects of noise do not vary depending on whether you are upstairs or downstairs. In fact, many houses have their most noise sensitive rooms – bedrooms – on the upper floor. It would somewhat farcical if these rooms were excluded from consideration simply be a quirk of architectural design.

531. Mr Tardio spoke to the potential to ‘optimise’ the height of the noise walls post-approval so as to provide a better balance between visual and noise impacts. The implication appears to be that this would usually involve a reduction of the noise wall heights to improve visual impacts.

532. In principle, the Councils do not object to a process of optimisation provided it is controlled by the affected communities, rather than the NELP or the contractor, and allows for the possibility that noise wall heights may be increased as well as decreased.

533. However, the potential for optimisation of wall heights – including reductions – means that it cannot be assumed that the reductions in noise which were taken into account by Dr Wright in her health assessment will necessarily occur as part of the Final Project.
534. It is submitted that, insofar as noise is concerned, the appropriate aspiration should be to site, design, mitigate and manage the Project to minimise the generation of traffic noise, including engine brake noise in accordance with part 4.3 of the EES Scoping Requirements. It should not be to do no better than to meet an outdated, arguably self-serving and euphemistically entitled VicRoads Traffic Noise Reduction policy.
535. Insofar as it was asserted that the Project provided a benefit by not allowing noise levels to reach 68 dB(A), this should not be accepted. Given the absence of any rational basis for adopting that policy, departures from that arbitrary standard should not be regarded as a benefit *per se*.

Noise impacts on Public Open Space

536. There was some discussion at the Noise Conclave of the issue of noise protection for public open space.
537. The Councils consider that an EPR should be adopted which requires noise levels at public open space not to exceed those predicted in the EES.
538. The Councils consider this is a satisfactory middle ground between:
- (a) Adoption of a prescriptive numerical target which has not been done in other major projects in Victoria; and
 - (b) Requiring the provision of noise walls of specific heights and lengths at specific locations with a view to achieving certain outcomes which

was adopted in both the Westgate Tunnel matter and the Mordialloc Bypass matter.

539. Ultimately, the Councils are not especially concerned with *how* noise levels at public open space are managed to the levels in the EES, so long as they *are* managed to the levels in the EES.
540. In this regard, the Councils were concerned by the line of cross-examination advanced by NELP that anything short of 63 dBA would be acceptable and so no constraints ought to be imposed on noise levels at public open space. The Councils consider that, if it is said that the Reference Design represents a 'worst case' scenario, then it is appropriate for VicRoads to be held to the representations made in the EES regarding the level of noise that is likely to be experienced in public open space.

BUSINESS IMPACTS

Manningham City Council – Bulleen Industrial Precinct

541. A critical aspect of the Project from Manningham’s perspective is the impact of the Project on the Bulleen Industrial Precinct (‘the BIP’).
542. There was no real contest over the likely effects of the Project on the BIP. Subject to any reduction in the footprint of the Manningham Road Interchange and the associated construction compound to avoid impacts on businesses, it is expected that the Project will result in the loss of 80 businesses and 770 jobs with the potential for up to 1,200 additional flow-on job losses.¹⁵⁷
543. In the absence of mitigation, these losses are plainly unacceptable. The scale of the losses is larger than those associated with the closure of the Ford plants in Geelong and Broadmeadows, which caused the loss of 600 jobs,¹⁵⁸ and only slightly smaller than the losses associated with the closure of Queensland Nickel refinery in Townsville, which caused the loss of 800 jobs.¹⁵⁹
544. Moreover, as the relevant experts acknowledged, there are demographic features that make the worker population at the Bulleen Industrial Precinct particularly vulnerable to longer term unemployment if their jobs are lost.
545. It should be noted that here, as elsewhere, the failure to provide a refined design is unhelpful. The uncertainty over what businesses will be acquired,

¹⁵⁷ Tabled Document 29a: Brian Haratsis Expert Witness Report, page 3.

¹⁵⁸ SBS News, ‘Two years on from the Ford factory closure, how are workers coping?’, 15 September 2018. Available at: <https://www.sbs.com.au/news/two-years-on-from-ford-factory-closure-how-are-workers-coping>

¹⁵⁹ SBS News, ‘Call for Palmer to give back nickel jobs’, 6 June 2018. Available at: <https://www.sbs.com.au/news/calls-for-palmer-to-give-back-nickel-jobs>

whether those businesses will be able to be relocated and whether employees will lose their job creates obvious difficulties in planning for these eventualities. This is important because relocation and transition packages are likely to benefit from long lead times as highlighted by the Acil Allen review of the Ford Transition Plan, which was implemented following the decision to close the Ford plants.¹⁶⁰

546. In these circumstances, Manningham considers that it is vital that a framework be put in place that provides all reasonable assistance to businesses and workers affected by the acquisition of the BIP to ensure that they are not disadvantaged.
547. EPR LP1 requires the minimisation of the design footprint of the Project to avoid temporary and permanent impacts on the commercial and industrial sites. Manningham strongly supports the application of this requirement as a means of avoiding impacts, but anticipates that, with the best will in the world, significant impacts on the BIP are still likely to occur.
548. Manningham considers that, as currently drafted, the Business EPRs are inadequate to avoid an unacceptable outcome and do not commit the Project – as the agent of change – to achieving any particular outcomes.
549. Manningham submits that the following additional EPRs are required:
- (a) An EPR which requires the preparation of a business relocation plan which seeks to facilitate the relocation of as many businesses as possible from the BIP. Both Mr Barlow and Mr Haratzis recognised that a planned relocation process is preferable to an *ad hoc* process.¹⁶¹ Such an

¹⁶⁰ Acil Allen, *Ford Transition Program Evaluation* (April 2017), section 2.1.6.

¹⁶¹ Business conclave statement.

EPR should involve close cooperation between Manningham, NELP and the affected businesses to identify which businesses wish to move and any special needs that businesses may have which may affect their ability to move (including whether the business is part of a cluster), followed by a process for identifying suitable locations for each business (or cluster), and the provision of assistance in making that move; and

- (b) An EPR which requires the preparation of a transition plan for potentially affected workers in consultation with Manningham Council. Manningham does not have expertise in the preparation of transition plans and cannot say definitively what should or should not be included, but notes that the items agreed at the conclave would appear to provide a good starting point. In addition, Manningham notes the review of the Ford Transition Plan by Acil Allen identified a range of services that were provided to workers.¹⁶² Manningham does note the observation that:

A key element of the Ford Transition Program has been the provision of individual case management assistance to workers.¹⁶³

550. One crucial issue arises as to the time that should be allowed for relocation to occur under the EPRs:

- (a) Manningham understood the evidence of Mr Barlow and Ms Stoettrup to be that planning for relocation should begin immediately because

¹⁶² Ibid, section 2.1.1. Manningham does not suggest that all these elements are necessarily relevant to the BIP, but considers that they provide an indication of what may be required. Manningham would anticipate that, if an EPR was imposed, NELP would seek appropriate expert advice in the design of any program.

¹⁶³ Ibid.

the 'window of opportunity' for relocation was limited by the need for the Project to be able to use the BIP by a certain date; and

- (b) Manningham does not regard it as acceptable for the Project to, in effect, time limit its own mitigation obligations in this way. The priority should be to exhaust opportunities for relocation – thus mitigating business impacts as far as possible in accordance with the Evaluation Objectives – over the delivery of Project according to the Project's own predefined timeframe.

551. In order to assist in maximising the scope for successful relocation of businesses, Manningham supports the rezoning of council owned land at Websters Road and its development for industrial use.

552. Building on this commitment, Manningham submits that the IAC should recommend to the Minister and NELP that:

- (a) NELP continue to cooperate with Manningham to make land at Websters Road available for relocated industrial uses, including by rezoning, subdividing and developing the land as necessary; and
- (b) The Minister for Planning give serious consideration to assisting this process by fast-tracking any rezoning required in order to enable the use and development of the Websters Road land and to the amendment of the Urban Growth Boundary to encompass the green waste site.

553. In terms of the movement of the Urban Growth Boundary, Manningham considers that movement of the Urban Growth Boundary is justified in this instance:

- (a) The land is already highly modified and partially developed, meaning there is unlikely to be any loss of green wedge values (in contrast to the forested land to the immediate north).
- (b) Further, the unique circumstances of the Project and its impacts on the BIP means that any adjustment to the UGB at this point is unlikely to provide a 'precedent' for any other changes to the UGB.
- (c) In particular, any change to the UGB at this point could not be regarded as providing precedent for expanding the UGB to allow further residential development which is what the UGB primarily aims to constrain.

554. At this time, Manningham does not have a firm view on the appropriate zoning of the Websters Road land. While the IN1Z would appear an obvious choice, it may be that the application of that zone excludes non-conforming uses which might otherwise seek to relocate to Websters Road. It may be that a Special Use Zone with a bespoke schedule would provide the best outcome.

Post-construction use of the BIP

555. The post-construction future of the BIP land – in terms of zoning, etc. – will be decided as part of the future *Yarra River – Bulleen Precinct Land Use Framework Plan* Advisory Committee process.

556. As with any strategic planning process, this will involve considering a range of competing objectives, but it is Manningham's current intention that the land would be used for a mix of employment and cultural uses.

557. Nonetheless, in order to ensure that the process proceeds smoothly,

- (a) Manningham supports the adoption of EPRs which aim to maximise the amount of residual land available for development post-Project; and
- (b) Manningham also supports provision of access to the residual land as part of the detailed design phase from the Manningham Road Interchange.

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558. The EES Scoping Requirements have as an objective:

To manage effects of the project on land use and the social fabric of the community with regard to wellbeing, community cohesion, business functionality and access to goods, services and facilities.

559. A key issue is:

Potential effects on functionality of individual businesses and commercial precincts (e.g. resulting from changed access requirements) and the implications for employment and the local economy.

560. Watsonia Village will be affected in the short term by construction activities and in the long term by changed access arrangements and additional barriers between East Watsonia and West Watsonia.

Long Term Opportunities

561. Watsonia Village (Watsonia Neighbourhood Centre) is identified as a neighbourhood level shopping centre of strategic significance.¹⁶⁴ It competes with the nearby Greensborough Activity Centre to the east and Heidelberg Activity Centre to the south and performs a mostly local shopping function.

¹⁶⁴ Banyule Planning Scheme, clause 21.08

562. A structure plan for Watsonia Village has not yet been incorporated into the Banyule Planning Scheme however, Banyule Council has adopted “*Picture Watsonia – A Vision for Watsonia Village*”. This policy was adopted by Banyule City Council on 15 December 2014.

563. The policy identifies the following key challenges for Watsonia Village:

- *managing growth;*
- *future land uses;*
- *creating connections (which recognises the existing barriers created by the Greensborough Highway, the power easement and the Watsonia Railway cutting);*
- *bikes, cars and pedestrians;*
- *commuter carparking;*
- *the power pylons which are described as “inescapable and ugly”.*

564. The Opportunities map¹⁶⁵ identifies 17 key opportunities, some of which the Project could deliver to mitigate the short and long terms impacts of the Project on Watsonia Village, including:

- *simplify duplicated roads to make land availability for different uses, and to make Watsonia Road more pedestrian and bus friendly;*
- *extend carparking area to the west to make some of the eastern end available for other uses;*
- *use land under the pylons for a range of possibly permissible uses;*
- *promote parking located on the edge of the centre;*

¹⁶⁵ Picture Watsonia, page 38 and 39.

- *simplify the intersection to Greensborough Highway to make the area more pedestrian friendly and to slow traffic;*
- *strengthen connection between the western side of Watsonia to the Village and train station;*
- *make use of the power easement land to form connections within Watsonia and to the surrounding areas;*
- *find additional uses for the commuted carpark land in the longer term by building over carparking land, link to Main Street with multiple walkways. Explore uses that would create job opportunities locally such as office space (shown with pink dotted line).*

565. The following opportunities are identified:¹⁶⁶

- *create a permanent public space in the Ibbottson Street Road Reserve between the library and the church;*
- *create a public open space with a forest of trees to obscure the view of the pylons and overhead cables;*
- *reconfigure Morwell Avenue as a two-way street;*
- *replace the pylons near the library with functional sculptures;*
- *create a permanent village green outside the library;*
- *develop land on the eastern side of the railway line;*
- *build a deck over the railway line to link the development on the eastern side of the railway line to the main street;*
- *underground the power lines from Greensborough Highway to the intersection of High Street and Morwell Avenue.*

¹⁶⁶ Pages 42 – 47.

566. It is appropriate that the design of the Project be such as to assist in achieving the above objectives and, where appropriate, implement the recommendations of Picture Watsonia, to ensure the long-term prosperity of Watsonia Village.

Construction Impacts

567. Significant parts of the Watsonia Village Shopping Centre lie within the Project boundary including all of the land from the west side of Watsonia Road eastward, south of Ibbottson Street, part of the land in Watsonia Road north of Ibbottson Street and the whole of Morwell Avenue to beyond High Street, including the main shopping centre carparking area.

568. The reconstruction of the Greensborough Road/Watsonia Road intersection, the reconstruction of Greensborough Road, the construction of the North East Link roadway in trench, and the reconstruction of the carpark and the proposed public transport infrastructure upgrade, all have the potential to have a significant and adverse impact on Watsonia Village, particularly as a consequence of:

- (a) changed and restricted vehicle access;
- (b) construction traffic; and
- (c) loss of carparking.

569. Ms Stoettrup's evidence recognised the potential for construction activity to dissuade customers from the east side of Greensborough Road to patronise the businesses in Watsonia, resulting in potential loss of trade.¹⁶⁷

¹⁶⁷ See evidence of M Stoettrup, paragraph 5.2. This theme was expanded on paragraph 7.3.5.

570. In cross-examination by Mr Peake, Ms Stoettrup agreed that: -

- (a) maintaining access to Watsonia Shopping Centre should be given high priority during construction; and
- (b) maintaining carparking should be given high priority during construction.

571. Banyule agrees with these observations.

572. The problem is that the proposed EPRs give priority to the needs of the project, and not to the needs of traders. EPR B4 provides:

Any reduction in the level of access, amenity or function of any business or commercial facility must be minimised to the extent and duration necessary to carry out the relevant construction related work ...

573. To put this EPR in other words, the Project can disrupt access amenity or function of any business to the extent necessary for the purposes of the project.

574. It is submitted that the risk assessment,¹⁶⁸ is misguided in that, when viewed from the perspective of the affected business, risks BU08, BU09, BU10, BU11 and BU12 have a major or severe consequence leading to a risk level of high or very high. Accordingly, the initial risk level which is generally assessed as medium is incorrect. It is then submitted that EPRs B1, B2, B4, LV1, NV3, NV4 and AQ1 do not mitigate the overall consequence and therefore the risk levels remain high or very high.

575. Accordingly, to mitigate the risk to medium, the following EPR is required:

¹⁶⁸ Technical Report F, Appendix A.

- (a) temporary occupation of sites for construction must not:
 - (i) reduce the viability of nearby businesses;
 - (ii) cause adverse amenity impacts to views and amenity experience from nearby businesses;
 - (iii) increase travel time from the residential areas to Watsonia Village;
 - (iv) reduce carparking available to shoppers and traders in Watsonia Village.

576. Such an EPR gives priority to the traders and will require NELP to work around the requirements of maintaining appropriate trading conditions rather than the trading condition being adversely affected to whatever extent is required to facilitate the project.

577. Banyule also calls on NELP to explain why the Project area includes Morwell Avenue between Watsonia Road and High Street and seeks a guarantee that Morwell Avenue will not be used for construction activity and that existing access and vehicle parking in Morwell Avenue will not be affected.

PASSIVE AND ACTIVE OPEN SPACE

578. The Reference Design is predicated on an assumption that public open space is available for the construction of the Project without any specific constraint, other than that the amount of open space either temporarily or permanently acquired for the Project is “minimised to the extent practicable”. Put another way, the Project does not have to be adapted to the constraints of public open space. Rather, public open space will be compromised to the extent necessary to accommodate the Project.
579. The consequence of the Project taking priority over the retention of public open space is that:
- (a) significant areas of public open space will be occupied by the Project for up to seven years; and
 - (b) significant areas of public open space will be permanently acquired to accommodate the project.
580. In the first case, a generation of children will commence and conclude their primary schooling during construction of the North East Link. If the whole or even part of their local park is used for a construction compound for a period up to seven years, this should not be lightly dismissed on the basis that is only a “temporary” impact.
581. In the second case, public open space will be permanently lost. Whilst the Proponent has submitted that the North East Link will deliver a net increase in public open space¹⁶⁹ the new public open space cannot truly be considered as “additional” or “replacement” because:

¹⁶⁹ Document 24va: Michael Barlow Expert Witness Report – Land Use Assessment Report, p 3.

- (a) it is proposed to be delivered in areas a significant distance from the public open space to be lost, particularly for some residents of Boroondara, Manningham and Whitehorse City Councils; and
- (b) is land already marked for use as public open space and therefore cannot truly be said to be “new” or “additional” as a result of the Project.

582. Further, the public open space that will be either temporarily or permanently lost adjacent to the Eastern Freeway is likely to have been understated by NELP.

583. In calculating the amount public open space lost to the Project, Mr Barlow proceeds on the assumption that land zoned for road purposes (such as along the Eastern Freeway corridor) ought not be counted as open space.¹⁷⁰ This is despite acknowledging that such land forms part of the current ‘open space’ network along the Eastern Freeway,¹⁷¹ and is seen as such by local residents because it is not currently used for road purposes.¹⁷²

584. Any assertion that the extensive tract of Road Zone land along the Eastern Freeway should not be considered as public open space is disingenuous. The land in question has formed part of the Koonung Creek Linear Park since its transfer from VicRoads as “surplus” land to Boroondara, Whitehorse and Manningham City Councils following the extension of the Eastern Freeway. To assist the IAC, the Councils have prepared land ownership maps for the Koonung Creek Linear Park.¹⁷³ Further details about the transfer of this land

¹⁷⁰ Document 24va: Michael Barlow Expert Witness Report – Land Use Assessment Report, pp 13, [76] and [77], 28 [145], [147] and 29, [162].

¹⁷¹ Document 24va: Michael Barlow Expert Witness Report – Land Use Assessment Report, p 29, [136].

¹⁷² Document 24va: Michael Barlow Expert Witness Report – Land Use Assessment Report, p 13, [76].

¹⁷³ Attachments to Joint Closing Submissions.

is also set out in Manningham City Council's *Koonung Creek Linear Park Management Plan*.¹⁷⁴

585. While it might be “desirable” for public open space to be rezoned from the Road Zone to a Public Park and Recreation Zone, it is by no means a prerequisite for land to attain the status of public open space. Indeed, the definition of ‘Open Space’ in the Glossary and Abbreviations section of the EES makes no mention of zoning of land. It simply defines “open space” as:

*Land that provides outdoor recreation, leisure and/or environmental benefits and/or visual amenity.*¹⁷⁵

586. The IAC can be in no doubt that the publicly accessible land comprising the Koonung Creek Linear Park serves such a purpose, is properly characterised as public open space and should be considered as such in calculating the net impact of the Project on the provision of open space in the affected municipalities.

587. In this regard, the Councils seek the recalculation in any supplementary EES, of the amount of public open space permanently lost (including road zoned land used for public open space) to satisfy Clause 19.02-6S and demonstrate that there is no net loss of public open space.

588. Technical Note 44 sets out the areas of public open space that will be occupied for extended periods of time to facilitate the construction of the project. Very little is known about the use of these areas during construction. The design, use and reinstatement of these areas are governed by EPR LV2 and section 7.2 of the Urban Design Strategy.

¹⁷⁴ (2011); <https://www.manningham.vic.gov.au/koonung-trail>

¹⁷⁵ Glossary and Abbreviations EES, p 12.

Temporary Occupation of Public Open Space and Sporting Facilities

589. In the northern section the Project will occupy:
- (a) AK Lines Reserve;
 - (b) Gabonia Avenue Reserve; and
 - (c) Winsor Reserve.
590. In the vicinity of Manningham Road it will occupy part of the Yarra River Reserve.
591. At the southern portal, it will occupy those parts of the existing Bulleen oval No 1 that are west of the proposed southern portal;
592. East of Burke Road it will occupy the Musca Street Reserve and part of the Yarra Flats Reserve on the north side of the freeway;
593. West of Burke Road it will occupy part of Chandler Park at the Chandler Highway, a public open space recently impacted by Melbourne Water sewer works and the Chandler Highway upgrade project;
594. East of Bulleen Road it will occupy:
- (a) extensive areas of the Koonung Creek Reserve and Koonung Reserve in vicinity of Bulleen Road and Thompsons Road;
 - (b) part of Katrina Reserve, Doncaster;
 - (c) further areas of the Koonung Creek Reserve at Doncaster Road;

- (d) the northeast sporting oval at Elgar Park, and the northwest oval will be decommissioned for conversion into an enlarged drainage detention basin;
- (e) the Eastern Freeway Linear Reserve (Junction Road Reserve) at Springvale Road; and
- (f) Eram Park

595. The Councils have been working with NELP to investigate relocation options for the sporting and recreation groups who currently use facilities at these locations. No formal agreements have been secured and more significant further work is required to ensure suitable outcomes for all involved. It is vital that there is ongoing consultation with the Councils and the sporting clubs and that all necessary relocations, including all upgrades required in order to give effect to the relocations, occur prior to the commencement of construction impacting the existing grounds. At its meeting on 5 August 2019, Banyule City Council resolved as to its preferred relocation sites for facilities impacted within its municipality. A letter from Banyule to NELP providing an update on this resolution, dated 9 September 2019, is attached to these submissions.

596. There are also sporting facilities that, whilst not requiring relocation, will still be impacted by being in very close proximity to a construction zone (such as the Hockey Club at Elgar Park). Strong EPRs are required to ensure that these facilities remain viable and are not unreasonably impacted during the construction period.

Permanent Acquisition of Public Open Space and Sporting Facilities

597. In addition to the above extensive temporary occupations, the Project permanently appropriates significant areas of existing public open space and sporting facilities for the purpose of the project, including:

- (a) Part of AK Lines Reserve;
- (b) Borlase Reserve;
- (c) Boroondara Tennis Centre;
- (d) Bulleen Park Oval No. 1;
- (e) part of the Freeway Golf course;
- (f) Banyule Creek River Gum Walk (for the construction of drainage features);
- (g) parts of Banksia Park north of Manningham Road and Bridge Street;
- (h) part of the Yarra River Parklands for ramps associated with the Manningham interchange;
- (i) part of the Kew Golf Club for the construction of drainage features;
- (j) part of the Leonis Avenue Reserve for the construction of drainage features; and
- (k) extensive parts of the Koonung Creek Reserve and Linear Park for both road widening and the construction of drainage features.

598. Some of these impacts are identified in TN6 and TN15.

599. There will be other impacts, including the removal of extensive areas of vegetation, the replacement of pleasant vegetative outlooks for passive open space with noise walls and increases in the noise impacts on open space and existing wetlands (e.g. Valda Avenue Wetlands).
600. In relation to the permanent effects of the acquisition of public open space, whilst there is a commitment by NELP to minimise acquisition, there is no reason for an expectation that the acquisition footprint of the Project will not be as shown in the Reference Design.
601. If anything, it is likely to exceed that shown in the Reference Design, when unworkable noise wall/bike path interactions are resolved and the extent of stormwater retardation and treatment is properly designed.
602. Further public open space is likely to be appropriated to accommodate the extensive tree canopy replacement and water management works required by the Project, therefore further reducing the amount of usable open space.
603. Mr O'Brien has presented functional design alternatives to the committee, that would reduce the loss of public open space.
604. Public open space is recognised as a valuable contributor to urban amenity and the impact of the losses of the scale proposed by NELP on the residents of Banyule, Boroondara, Manningham and Whitehorse is significant. That impact cannot be reversed and there is no opportunity to provide for replacement public open space within these municipalities. Accordingly, whilst the benefit of the Project falls largely on persons wishing to use the orbital route from the southeast to the northwest of Melbourne, the burden of the Project falls on the residents of the affected councils.

605. To compensate (to some extent) the permanent loss of public open space, the municipalities seek a range of works to be undertaken by NELP to improve public open space areas, to provide additional walking and cycling connectivity and to generally restore the quality of life of residents of the municipalities that suffer the burden of the project. Additionally, Manningham City Council calls on the State Government to bring forward realisation of the State Government's strategic vision for additional public open space along the Yarra River corridor.
606. NELP considers such works and initiatives to be outside the scope of the project. The truth is that these works are necessary to ameliorate the impacts of the Project, and for that reason should be regarded as a core component of the Project. Indeed, Mr Barlow appeared to take great comfort from the prospect that the Project has the 'potential' to positively add to the supply of public open space and recreational facilities through various initiatives which are not currently part of the Project such as the acquisition of the Bulleen Golf Driving Range and its conversion to public open space activities.¹⁷⁶
607. In fact, the IAC should take no such comfort from these initiatives which are very far from commitments and are currently no more than 'opportunities'.
608. Full details of the works that the Councils say ought to be provided as part of the Project are tendered to the IAC¹⁷⁷.

¹⁷⁶ Document 24va: Michael Barlow Expert Witness Report – Land Use Assessment Report, p 29.

¹⁷⁷ As attachments to these submissions.

COMPLEMENTARY PROJECTS

609. The Business Case makes reference to Potential Complementary Projects.¹⁷⁸

The Executive Summary says, in part:

Complementary projects have been identified to capitalise on the opportunities created by North East Link to deliver further benefits for Melbourne's north east. These projects are designed to improve safety, enhance urban amenity, improve active transport and public transport services and provide better access to important local destination.

610. The projects referred to include road improvements, shared path opportunities, public transport and local projects including walking, cycling and open space initiatives proposed through community submissions and in local transport plans and strategies.

611. The only complementary projects that are included in the costing of the Project are some shared use path upgrades and the Watsonia station carpark.¹⁷⁹

612. Appendix L to the Business Case¹⁸⁰ contains definitions of the terms such as 'Core', 'Enabling' and 'Critically Interdependent' and defines works that fall within those terms as 'Within Project Scope'.

613. 'Critically Interdependent' includes projects that are 'essential to achieve objectives or mitigate unacceptable impacts'.

¹⁷⁸ See: NEL Business Case Executive Summary p.30 and Business Case Appendix I

¹⁷⁹ Business Case Appendix I p.4

¹⁸⁰ Ibid p.6

614. In truth, extensive complementary projects are required to achieve the Projects' objectives and in particular the objective of *'Improved liveability and thriving communities in the north east'*.¹⁸¹
615. Extensive complementary projects are required to mitigate the unacceptable impacts of the proposal.
616. The list of "identified complementary projects" in Appendix I¹⁸² is much more limited than the description in the Business Case. The only identified projects are:
- (a) Limited arterial road improvements (which exclude any of the north south arterial roads south of the M3);
 - (b) Limited shared path upgrades; and
 - (c) Watsonia and Greensborough train station upgrades.¹⁸³
617. The EES is wholly silent about complementary projects, they are not mentioned in the draft incorporated document or in the draft EPR's.
618. The approach taken to the provision of works, services or facilities in addition to the actual construction of the infrastructure is convoluted, confusing and in reality unguided by any principle.
619. The approval that is sought gives permission to proceed with the Project.
620. The conventional approach to the proper assessment of a Project, assuming it is to be approved, is as follows:

¹⁸¹ Business Case Objective 3.1.4 p.3-3

¹⁸² Business Case Appendix I p.7

¹⁸³ Ibid p.7 Also see "other opportunities" at P.27 and table 2 pp30-33

- (a) Assess the impact of the project;
- (b) Determine whether the project will cause impacts;
- (c) Determine whether the impacts are reasonable or not; and
- (d) If not impose conditions which require the mitigation of the impacts – works falling into this category are not “complementary” or “out of scope” - but instead are directly related to mitigating the otherwise unacceptable impacts caused by the project and are necessary conditions.

621. In this case it is important to reflect that the assessment of impacts has not been complete, such that it is not possible in many instances to identify exactly what is required to mitigate them.

622. Assuming that the required assessment is undertaken, and the mitigations properly identified, those works should be requirements or conditions of approval of the Project – and therefore be stated in unequivocal terms in the incorporated document.

623. It is sometimes the case that a project causes significant impacts that cannot be properly mitigated. In the end, if such a project is constructed there will be an overall diminution in the experience of an area. In such a case, it is not uncommon for a proponent to offer up additional benefits – unrelated to the direct impacts of the project, in order to make the argument that although the project on its own will deliver adverse effects overall, the package of additional “sweeteners” will compensate in some way for the losses in amenity or enjoyment of an area. These sweeteners aren’t “complementary” in the true sense of the meaning of that word. Nor are they “out of scope”. They are works, service or facilities which are

necessary to tip the balance in favour of a conclusion that the project will produce a “net community benefit”.

624. Likewise, these “sweeteners”, to the extent that they seek to level up the ledger of costs incurred by the local community to deliver metropolitan wide benefits, should be required as requirements of or conditions upon the approval.
625. They should all have been costed as part of the Business Case.
626. While NELP focuses on the asserted local benefits, being generally limited to a reduction in traffic on certain roads, most notably Rosanna Road and Greensborough Road,¹⁸⁴ it fails to account for the impacts of:
 - (a) In the order of 100,000 additional vehicles per day that will travel through the affected municipalities in the Project design year;
 - (b) significant increases in traffic that will be experienced on the north-south arterial roads particularly in Whitehorse, south of the upgraded M3;
 - (c) 52 hectares of native vegetation that will be removed and not offset within the affected municipalities;
 - (d) More than 25,000 planted amenity trees (not counting small trees under 3 metres, and anything that is smaller than a tree) that will be removed;
 - (e) existing areas of open space that will be disrupted;

¹⁸⁴ Although the traffic volumes on both these roads in 2036 are estimated to generally return to the current day volumes.

- (f) existing areas of open space that will be permanently appropriated;
- (g) some residents that will experience a worse noise environment than currently;
- (h) some residents that will experience a deterioration of air quality;
- (i) many residents that will experience an adverse change in their outlook, caused by the removal of vegetation and the construction of noise walls; and
- (j) the loss in land value that will be incurred by any individual or business that is affected by any of the local impacts of the project, but who is not compulsorily acquired.

627. There have been discussions between the Councils and NELP regarding so called “complementary” works to offset the localised impacts of the project. NELP’s position is that such projects are “optional extras”, that do not form part of the project and the municipalities not having any right to them.¹⁸⁵

628. Based on what it has heard, the IAC should proceed on the basis that anything that is required to mitigate or compensate for the effects of the Project should be specifically identified and recorded in writing in the planning control, in a manner which makes the requirements enforceable by the Councils.

629. While there has been much “consultation” regarding complementary projects, NELP has studiously avoided commitment.

¹⁸⁵ See Business Case Executive Summary p.30

630. In light of the progress in this matter to date, complementary projects are not an appropriate subject for EPRs. The obligation to provide complementary projects to 'deliver an overall positive impact to the community' within the affected municipalities' should be a condition of the permission being granted, and as such should be included in the incorporated document in a form which renders them enforceable.
631. A document containing examples of the complementary projects sought by each Council is attached to this submission.
632. The final list of complementary projects should be determined by agreement between the councils and NELP, or failing agreement determined by the Ministers for Planning and Local Government.
633. The list of complementary projects set out in the business case are too restrictive, incomplete, inadequate and fall significantly short of what is required to 'deliver an overall positive impact to the community'.
634. The Councils contend that all of the projects on their respective lists are necessary and appropriate for inclusion as conditions or requirements of the approval of the Project because of the significant impost upon the amenity of the area that the Project will have.
635. It is for the IAC to recommend whether all, some or none of the Projects are required as a condition on approval. The Councils accept that the current state of the evidence in this case makes the IAC's task particularly difficult in a number of ways. In this respect it would be open for the IAC to assume, in the absence of a complete understanding of the true nature of the impacts, that the impacts will be significant, and that as a consequence – the planning compensation for those impacts should be at the higher end.

RECOMMENDATIONS

636. In summary:

- (a) The published EES was so deficient as to not amount to a document that made it possible to properly assess the environmental effects of the Project;
- (b) The attempts by NELP to address matters in the running of this hearing have, for the most part, either:
 - (i) Highlighted the deficiencies in the environment effects analysis;
 - (ii) Identified further areas of deficiencies;
 - (iii) Raised more questions for consideration; or
 - (iv) Created insoluble procedural issues.
- (c) Consequently, the IAC's task, in making positive findings which would see the Project progress to the next phase, is fraught. The IAC is in a position where it is likely to be asked to:
 - (i) Make findings without evidence;
 - (ii) Make choices between witnesses when the process adopted to date has meant the process of choosing is either uninformed by logic or simply unfair;
 - (iii) Prefer assertion (in the form of Technical Notes or memoranda) over the evidence of witnesses who have been called and cross-examined; and

- (iv) Trust that, despite huge gaps in knowledge about the environmental effects of the Project, either NELP or some future contractor will be able to sort it all out, and strike the balance that – as a matter of law - the IAC is obliged to explore.

637. None of this is edifying – particularly given the lofty aspirations that a process like this is meant to achieve, namely: public confidence in a process of meaningful consultation that produces informed decision making.
638. It is self-evident that to date, the Ministers responsible for the delivery of this Project have only been exposed to the voices of their departmental and political advisers.
639. It has been said by the Minister for Transport that there has been “consultation” with the community for at least 18 months. No doubt that is what the Minister has been told. The progress of these hearings belies that assertion, if by the use of the term “consultation” it is meant that there has been an open, frank exchange of ideas that has informed Project outcomes.
640. It would be open for the IAC to conclude that NELP has been listening only for the purpose of obtaining reconnaissance. The conduct of the informal conclaves before the production of evidence provides just one example.
641. The IAC’s role is not to “rubber stamp” the Project. In substance, the IAC’s role is to synthesise the many voices which have been raised in this forum – this being their only opportunity to have a say in relation to the published EES - and to assess whether or not, in light of the submissions and evidence that have been brought forward, the assessment of the Project to date is sufficient for it to make the types of findings that the IAC are required to make under its Terms.

642. The suggestion that the issues raised can be dealt with by EPRs overestimates the power of the English language.
643. As presently drafted by NELP, the EPRs represent a dangerous deferral of the consideration of matters that are required, by every governing principle of the statutory planning framework, logic and common sense, to be assessed now.
644. The Councils' proposed amendments to the EPRs really do no more than highlight the deficiencies in the EES (and this process to date), rather than propose an alternative enforceable planning framework for the facilitation of the Project. On the current state of play, devising a planning control which would impose necessary enforceable and sensible requirements for this "project" as it presently stands is, while leaving an appropriate level of flexibility, impossible.
645. The volume of material that the IAC has received in the time frame available has been extraordinary.
646. The IAC should take comfort in its Terms.
647. There have been a number of statements during the course of this hearing, including from the IAC itself, to the effect that there are time constraints which have a bearing on how this process is being conducted. This is evident from as early as the Directions Hearing, the nature of the directions made, and observations made during the running of the case.
648. It is worth noting that what politicians say outside this hearing is irrelevant to both the matters ventilated here, and to the conduct of this process. Procedures that might be in place for the appointment of contractors,

government/cabinet timelines - none of those form part of the IAC's Terms.

649. In fact, the Terms do not prescribe a time within which the hearing of this matter is to be completed.
650. The Terms specify only that the IAC must commence the hearing within 35 business days of the completion of the exhibition of the EES. It is arguable that the hearing of the matter commenced with the Directions Hearing,¹⁸⁶ and therefore much sooner, and more efficiently, than the Terms required.
651. The Terms specify that the IAC's report must be finalised within 30 days of the completion of the formal hearing.¹⁸⁷
652. Importantly, the Terms do not prescribe a date by which the formal hearing must be concluded.
653. It is clear, from the government announcement and from the submissions made by NELP, that there it will be more than a year before the contractors are finally appointed. No case for urgency has been advanced here by NELP or DOT. The Terms do not impose any requirement to reach quick conclusions, over and above the need for well-reasoned, evidence based conclusions upon which the community and future decision makers can have confidence.
654. The Terms provide the IAC with the power to regulate its own proceedings.

¹⁸⁶ See *Buttigieg v Melton SC (No. 2)* [2004] VCAT 868.

¹⁸⁷ North East Link Terms of Reference, paragraph 40.

655. The IAC has the power to adjourn the proceedings at any point. It could, according to a proper reading of the Terms, adjourn the proceeding without formally closing the hearing, to consider its position.
656. The Terms present no barrier to the IAC preparing an interim ruling on the adequacy of the material before it, nor do they bar the making of further procedural orders for a second phase of the hearing.
657. The Terms only oblige the IAC to perform the tasks set out – production of a written report containing specified matters – in accordance with law.
658. The Terms oblige the IAC to expressly consider whether the hearing to date has been conducted in a manner that can be described as “open, orderly and equitable” and “in accordance with the principles of natural justice”.¹⁸⁸
659. That obligation rests with the IAC. It is an onerous responsibility having regard to the fact that:
- (a) many of the people appearing before it have not been represented by lawyers, where the Terms expressly encourage a hearing format where legal representation is not necessary and where the State has been extensively represented by lawyers; and
 - (b) even where parties are legally represented, “adversarial behaviour” is expressly required to be minimised.
660. What all of that means is no doubt open for debate – but they are matters that the IAC will need to address.

¹⁸⁸ Ibid, paragraph 24.

661. For their part, the Councils have got on with the business of attempting to present information for the IAC to “consider and explore”. They have approached the hearings in a non-adversarial way. They have not sought adjournments to cure what would, in any other context, be considered as denials of procedural fairness. They have for the most part overlooked the failures of their opponents to apply the usual rules of cross-examination, like the rule in *Browne v Dunne*. They have themselves been forced, by circumstance, to lead evidence from witnesses and address on subjects that they have not cross-examined about. All of these departures from the usual rules are all well and good for the conduct of a quick and efficient hearing – but they do leave the IAC in a difficult position.
662. At the end of the process, it is for the IAC to ask itself the double barreled question – given the way the evidence has emerged in the hearing –
- (a) have the hearings been conducted in an orderly and equitable manner?
 - (b) Is the state of the evidence upon which the IAC can fairly rely sufficient to make the kind of findings that the Terms contemplate?
663. Those questions do not suggest that the hearings have been conducted in any way that is less than cordial, polite, respectful or good humoured. Indeed the opposite is true. Given the passions in the case and the nature of the issues, the IAC has presided over a hearing which has been remarkably “orderly”: – if the meaning of that term is confined to “well behaved”.
664. But “orderly” doesn’t just mean “well behaved”. In the context of the tasks that the IAC has, and the Terms themselves – “orderly” means something more. Similarly “open” means more than just in a public place. “Equitable” means more than “in accordance with the principles of procedural fairness”.

665. At the commencement of this case there was a massive power, resources and knowledge imbalance. Can it be said that the conduct of the hearing has addressed that imbalance? Have all of the issues that need to be explored for the IAC to reach a conclusion been openly and transparently ventilated – so that others who disagree can properly explore the issues so that they can have an informed say? Has the flow of evidence and material been such as to provide a proper opportunity to respond in a cogent way to important issues?
666. The Councils say in unison that this hearing gives the IAC a good taste of the issues that need to be properly explored, but that at this stage the IAC is a long way from being able to reach findings of the kind contemplated by the Terms.
667. The IAC should take the time afforded to it by the Terms to properly consider its position.
668. The IAC should adjourn the hearing for a period prior to reaching a decision to declare the formal hearing at an end. It should consider the evidence to date, and reach a conclusion as to whether or not it is in a position to make the kind of findings required of it by the Terms, within the constraints imposed by those Terms.
669. The IAC should feel at liberty to publish an interim ruling on any matter which it regards as essential to being in a position to make findings. It should feel at liberty to make further directions and to set further hearing dates.
670. If the IAC were to decide to formally conclude the hearings on 16 September 2019, the Councils submit that the only course that is reasonably open to the IAC in all the circumstances is to recommend that a

Supplementary EES is prepared and exhibited – based upon a design that can be assessed, and replete with all of the actual information necessary to properly address the scoping requirements and evaluation objectives.

9 September 2019

Adrian J Finanzio

Graeme Peake

Paul Chiappi

Instructed by

Maddocks Lawyers

For Banyule, Boroondara and

Whitehorse City Councils

Rupert Watters

Instructed by

Harwood Andrews

For Manningham City Council

ATTACHMENTS

- Attachment 1** **Transcript of Cross-Examination of Michael Barlow**
- Attachment 2** **Transcript of Cross-Examination of John Kiriakidis**
- Attachment 3** **Andrew O'Brien Memorandums**
- Attachment 4** **Maps of land ownership along Eastern Freeway**
- Attachment 5** **Letter from Banyule City Council to NELP regarding
sporting group relocations**
- Attachment 6** **Banyule City Council Complementary Projects**
- Attachment 7** **Boroondara City Council Complementary Projects**
- Attachment 8** **Manningham City Council Complementary Projects**
- Attachment 9** **Whitehorse City Council Complementary Projects**