ASSESSMENT COMMITTEE

EAST WEST LINK

SUBMISSIONS ON BEHALF OF
YARRA CITY COUNCIL

Preliminary matters

1. The Committee has been appointed under the *Major Transport Projects Facilitation Act 2009* (Vic) ("Project Act") to assess the Comprehensive Impact Statement ("CIS") for the East-West Link (Eastern Section) ("the Project") and to make recommendations on whether or not the approvals required for the Project to proceed should be granted.

2. Generally speaking, Yarra agrees with the LMA that the Committee's assessment involves a weighing up of positive and negatives. Where Yarra differs from the LMA is on how the Committee should approach that task. This will be explored in more detail later in this submission, but it is useful to address two matters straight away:

   (a) The use of a Reference Project as opposed to a final design; and

   (b) The role of 'net community benefit' in the assessment process.

<u>Reference Project</u>

3. Much of the analysis in the CIS is based on the 'Reference Project' which is said to represent one possible way of achieving the outcomes that the LMA contends are desirable.

4. The use of the Reference Project approach by the LMA is, at best, inappropriate and, at worst, unlawful:

(a) On any view, the use of the Reference Project is inappropriate:

(i) The purpose of putting forward the Reference Project is said to be to enable members of the public to participate effectively in the CIS process;

(ii) Self-evidently, the best way to enable the public to participate in the CIS process would be to provide it with accurate and clear information about what is actually proposed to be developed. The Reference Project does not do that. Indeed, it does quite the opposite. Both the CIS, and the LMA in answer to the Committee's section 57(4) request, have generated confusion where accuracy and clarity was sought; and

(iii) As has been demonstrated throughout the hearing, the use of the Reference Project has done little, if anything, to enhance understanding of the Project. For example, we still have no clear idea whether the Eastern and Western sections will be developed at the same time – a basic fact upon which many of the alleged benefits of the project depend.

(b) It is likely that the use of the Reference Project is unlawful:

(i) Nothing in the Project Act describes or authorises the use of a Reference Project as part of the CIS process;

(ii) Instead, the Project Act distinguishes between:

(A) A "project proposal", which is defined as a 'description of [a] declared project and any associated works';[1]

(B) A "declared project", which is defined as a 'transport project declared under s 10 to be a declared project';[2]

(C) A "transport project", which is 'a project for the development of transport infrastructure'.[3]

(iii) It follows that that Project Act contemplates that what will be declared under s 10 is not simply a description of works, but a project for the development of a particular set of works;

(iv) Consistent with this, the Act proceeds on the basis that the declared project will be sufficiently detailed to provide a proper basis for assessment. For example, the word 'impact' is defined as including impacts from the development of the declared project. There is an obvious difficulty in assessing the impact of what will be built by reference to something that will not be built. This is a significant problem given the centrality of impact assessment to the Project Act;

(v) That is not to say that the use of a Reference Project will inevitably be unlawful. Whether it is will depend upon the nature of the project itself, the physical and policy context in which the project is to be assessed and the extent of definition provided in any reference project. Here both the physical and policy contexts are highly complex, and the level of

[1] Section 3, *Major Transport Project Facilitation Act 2009* (Vic).
[2] Id.
[3] Id.

information defining the project and its impacts disproportionately simplistic. In such a context, a reference project that is 95% certain, subject to specified variations, might be a valuable tool for assessment. A Reference Project that is really nothing more than one possible way of developing the project is not;

(vi) This interpretation is consistent with s 21 of the *Transport Integration Act 2010* (Vic) ("Transport Act"). That section requires that the public be given access to 'reliable and relevant information'. The Reference Project before the Committee is neither, and adds little or nothing to public understanding of what is proposed. Indeed, it is clear that it has resulted in considerable confusion, particularly concerning the application of the Urban Design Framework ("UDF"); and

(vii) As Counsel assisting the Committee has correctly stated, the Reference Project is, in substance, irrelevant and its inclusion serves only to obscure the extraordinary character of the decision that the LMA is asking the Committee to make: a decision to write a blank cheque for the development of a freeway of some kind through one of the most complex built form environments in Australia.

Net Community Benefit

5. All of the specified "public hearing matters" invite consideration of whether certain impacts have been appropriately managed and/or addressed.

6. The answer to that question cannot be delivered in a vacuum.

7. In a planning context, whether the impact of a proposal has been "appropriately addressed", is – as the epithet suggests, a question of degree and balance, having regard to the context in which the impact arises.

8. Once a negative impact is identified, the question is whether or not, having regard to the project as a whole – and the benefits which flow from that project, any mitigation of the impact is necessary at all, and if so to what extent.

9. In arriving at a decision as to whether an impact has been appropriately addressed or managed, the planning decision maker is necessarily engaged in the process of balancing competing interests in favour of an outcome which best serves the objectives of planning. Whether that process is described as the application of the net community benefit test or something else, in substance the process is exactly the same.

10. It is necessary at the outset to address two submissions made by the LMA concerning the reasoning process to be adopted by this Committee – both of which are fundamentally flawed:

    (a) LMA asserts that the "net community benefit" test is not the appropriate test in the consideration of planning scheme amendments, but that instead, section 4 of the P&E Act is the "guiding light". This assertion could at best be described as an exercise in semantics, if it were not also entirely wrong:

        (i) Clause 10.02 of the SPPF seeks to ensure that the objectives of planning in Victoria (as set out in section 4 of the P&E Act) are

fostered through appropriate land use and development planning policies which integrate relevant environmental, social and economic factors in the interests of net community benefit. Clause 10 expressly lists the objectives of planning in Victoria contained in section 4 of the P&E Act;

(ii) Clause 10.04 directs planning authorities to endeavour to integrate relevant policies and balance conflicting objectives 'in favour of net community benefit';

(iii) Clause 10.01 states that the purpose of State policy in planning scheme is to inform *inter alia* "planning authorities" and provides the context in which decisions are to be made;

(iv) Clause 10.03 requires consideration of the SPPF in preparing amendments. Planning authorities must take account and give effect to these policies to ensure integrated decision making;

(v) The whole of the SPPF is part of the VPPs;

(vi) Section 4A of the P&E Act makes clear that the VPPs are to assist in providing a consistent and co-ordinated framework for planning schemes in Victoria;

(vii) The VPPs (and the SPPF in particular) are a natural extension of the objectives of planning as found in section 4 of the P&E Act;

(viii) Section 12(2) of the P&E Act expressly requires that in the preparation of a planning scheme amendment a planning authority must have regard to, *inter alia*:

(A) The VPPs;

(B) MSS, strategic plans, policy statement, code or guideline.

(ix) In the context of planning scheme amendments, the SPPF expressly invites consideration of the net community benefit test as that concept is commonly understood;

(x) It is true that the SPPF could be amended. Importantly, a special procedure must be followed for the amendment of the VPPs under Part 1A of the VPPs. No such amendment is proposed as part of this proposal;

(xi) It follows that the net community benefit test remains a fundamental part of the applicable law criteria in this case;

(xii) This was recently reaffirmed by the Planning Panel in its report on amendment C98 to the *Bayside Planning Scheme*. There, the Panel held that, notwithstanding recent decisions of the Victorian Civil and Administrative Tribunal ("Tribunal") regarding the role of 'net community benefit' as a test for the grant of a planning permit, net community benefit remains 'fundamental planning policy';[4]

(xiii) Indeed, the truth is that the "net community benefit" test has been an underlying premise in one form or another of

[4] *Bayside Planning Scheme Amendment C98* [2012] PPV 3, [3.2.1], p. 22.

planning decision making in this State since before the *Alfred Hospital Case*; and

(xiv) To the extent that the LMA has proceeded upon the basis that it does not apply, or is something other than the "guiding light", it has completely misunderstood its task.

(b) The LMA also asserts that this Committee should not concern itself with whether a better outcome can be achieved, but should simply determine whether or not the Project will deliver an "acceptable outcome". This submission should be rejected:

(i) It is true that the phrase 'acceptable outcome' appears in the Victorian Planning Provisions, but it is important to consider the context in which it appears;

(ii) As used in the Victorian Planning Provisions, the phrase 'acceptable outcomes' is only used in the context of decision-making by responsible authorities.[5] It is not used in the context of strategic decision-making by planning authorities;

(iii) This interpretation is consistent with *Knox City Council v Tulcany*. There, the Supreme Court held that an ideal outcome was not a requirement 'for the grant of a permit';

(iv) The simple answer to this submission is that the Project Act plainly contemplates that the Committee may consider alternative options to the 'preferred' option put forward by

[5] See clauses 31.02, 41 and 65, *Victorian Planning Provisions*

the project proponent and, in appropriate circumstances, recommend that they be the subject of a supplementary CIS;

(v) The clear purpose of this section is to enable the consideration of other designs which produce better outcomes, whether in terms of increased positive impacts or in terms of reduced negative impacts;

(vi) In these circumstances, to accept the LMA's submission would be to treat an entire subdivision of the Project Act as essentially non-existent – a course that is plainly not open;

(vii) By requiring the LMA to address alternatives to the extent required to remove them from consideration, the Scoping Directions might be read to have intended that the CIS should be prepared in a way as to avoid the possibility of the delay and process associated with a committee such as this recommending the need for a supplementary CIS;

(viii) The power to consider alternatives also gives the lie to the LMA's submission that all that it is required to demonstrate is an "acceptable outcome". If that were correct, the power to consider alternatives would be unnecessary, except possibly in some borderline cases as – once a project was demonstrated to be acceptable – that would be the end of the enquiry;

(ix) Plainly, at least in the context of decision making under the Project Act, this is not the case. It follows that it is open to the Committee to demand something more from the LMA;

(x) In the Council's submission, what is required is for the LMA to demonstrate that the Project is 'optimal', in that it maximises benefits whilst minimising disbenefits;

(xi) Such an approach is consistent with the vision, transport system objectives and decision-making principles contained in the Transport Act, particularly the principle of triple bottom line assessment, which requires trade-offs between benefits and costs to be made explicitly;[6]

(xii) To the extent a 'prudent and feasible' alternative exists – or may exist – which may have lesser impacts, it would not be open to the Committee to be satisfied the Project was 'optimal';

(xiii) An example of how this principle would operate in the context of this decision is in relation to noise impacts on public open space. To a very large extent, the LMA's response to this issue amounts to, essentially, telling park users to buy headphones. What the Committee should require, in order to be satisfied that this is the appropriate response, is a demonstration that it is not feasible or practical to provide sound attenuation to public open space, either because it is not possible or because it is too expensive relative to the benefits derived. It is not enough for the LMA to say, as it seems to, "Oh well, some of Royal Park can't be used for some forms of recreation anymore" and leave it at that; and

[6] Victorian Government, *Towards an Integrated and Sustainable Transport Future* (2009), p. 50.

(c) If the LMA has proceeded on the basis that all it has to do is to cross the line with a barely "acceptable proposal" then it has seriously misunderstood its obligation.

11. In fact it is self-evident from the content of the CIS and the material before this Committee that the LMA has approached its task on the premise that:

(a) Net community benefit is not relevant; and

(b) A barely acceptable proposal will do.

12. So much can be inferred from the:

(a) opening submissions of the LMA;

(b) the objections which have been taken to questions posed in cross examination; and

(c) the methodology employed by experts (and those instructing them) in approaching both the preparation of the CIS and their evidence before this Committee.

13. In the result, the approach of the LMA to the CIS generally, and to the matters raised for consideration in this hearing, has created significant impediments to the proper consideration of both:

(a) The applicable law criteria as a whole; and

(b) Whether the various impacts of the proposal have or can be appropriately addressed and/or managed.

14. The proper consideration of the hearing matters, as framed, ultimately involves a judgment as to whether the impact of what is proposed is addressed or managed "appropriately". The appropriateness of the response cannot be measured in isolation. It necessarily involves an inquiry as to whether the impact is proportionate to the benefit which is derived. By their very nature, the hearing matters invite consideration of two things:

    (a) The net community benefit test; and

    (b) Where a conclusion is reached that an impact of the project has not been adequately addressed, a search for a better alternative.

15. The proper application of the net community benefit test necessarily requires:

    (a) The application of weight to competing factors;

    (b) A balancing of considerations depending upon the weight to be given to those factors; and

    (c) An ultimate determination as to whether the negative effects of the proposal are outweighed by the beneficial impact of the project on the basis of a weighted consideration of the policy framework within which the decision is to be made.

16. In this kind of assessment there are two critical factors which must be known:

    (a) How big is the negative impact?; and

    (b) How great is the beneficial impact?

17. There are significant problems with the LMA's assessment of both sides of the equation, and the evidence adduced in relation to both in this hearing.

The Benefits

18. The LMA asserts that the benefits are obvious.

19. It is common ground that, speaking in the broadest of generalities, the notion of creating an east west link will bring some benefit.

20. The critical question is: how much?

21. That this is a critical question in the assessment of any transport project of this order of magnitude anywhere in the country is beyond argument:

    (a) The Scoping Directions require the LMA to assess the impacts of the Project, including any impacts not specifically identified in the Scoping Directions, and to document those on the basis of best practice methodologies;[7]

    (b) Both of the *Planning and Environment Act 1987* (Vic)[8] and the Transport Act[9] require planning authorities (and this Committee, specifically) to balance all of the environmental, social and economic consequences of adopting a planning scheme amendment in decision-making, a process which can only be done if those impacts are, in some way, quantified;

[7] *Scoping Directions* (May 2013), pp. 6 and 7
[8] Section 12, *Planning and Environment Act 1987* (Vic).
[9] Section 16, *Transport Integration Act 2010* (Vic).

(c) In particular, the TIA requires consideration of 'value for money', a criterion which can only be considered in quantitative terms;[10]

(d) The need for a proper assessment of benefits is also emphasised by various government policy documents. In *Economic Evaluation for Business Cases: Technical Guidelines,* the Department of Treasury and Finance emphasises the importance of being able to rigorously demonstrate benefits in the context of high cost projects;[11] in fact, the Guidelines say that, in context of transport projects, 'robust, transparent and evidence-based decision' is essential;[12] and

(e) Similar views have been expressed by other Treasuries throughout Australia,[13] as well as Infrastructure Australia[14] and the Productivity Commission.[15]

22. That this is a critical question in any assessment as to whether the negative impacts of the proposal have been appropriately addressed and/or managed is also unarguable.

23. The Committee should reject any suggestion that the Government has already decided that the project has "benefit" and that as a consequence this is not a matter into which the Committee need inquire. There is nothing in the Terms of Reference ("Terms") to that effect. The only logical inference that can be drawn from the Terms taken at face value is

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[10] *Id*.
[11] Department of Treasury and Finance, *Economic Evaluation for Business Cases: Technical Guidelines* (August 2013), p. 4.
[12] *Ibid*, p. 18.
[13] See, e.g., Department of Finance (Commonwealth), *Handbook of Cost Benefit Analysis* (2006), p. 2; NSW Treasury, *NSW Government Guidelines for Economic Appraisal* (2007), p. 41; and Department of Infrastructure and Planning (Qld), *Project Assurance Framework: Cost-Benefit Analysis* (undated), pp 19 – 20.
[14] Infrastructure Australia, *Templates for Stage 7: Solution evaluation (Transport Infrastructure)* (undated), p. 4.
[15] Productivity Commission, *Draft Report: Public Infrastructure* (March 2014), volume 1, chapter 2.

that the Committee is required to undertake a fulsome assessment of all matters relevant to its Recommendations, including benefits (economic or otherwise). If it had been the case that the Minister had intended that the Committee should ignore or eschew consideration of such a fundamental matter to its deliberations, and such an intention was lawful, one would have expected the Terms to say so. They do not. It is also apparent that the LMA does not approach this case on the basis that benefits (including economic benefits) are irrelevant. The LMA's problem is that it has no real evidence substantiating the benefits it needs to rely upon to prove its case. In a sense, the LMA has ironically fallen victim to Government's unwillingness to disclose the business case, because in the absence of the business case the economic benefits and feasibility imperatives which are asserted simply cannot be proved.

24. The Committee should not proceed on the basis that the Project is a fait accompli.

25. Nothing in the Terms suggest that result (again, assuming that such a term of reference would be lawful).

26. The Terms make clear that the Committee's role is to make a recommendation as to approval or not. This is not just a "conditions appeal". If the Committee was to proceed on the basis that it was required to do anything less than a fulsome consideration of the evidence substantiating the alleged benefits of this project it would be falling into error, but worse still, failing to fulfil an important role which is conferred upon in by the Act as a check on the wilfulness of Government.

27. In that context it extremely important to be rigorous in assessing benefits. That is because, as the Productivity Commission has said, picking the wrong infrastructure project has significant – and ongoing – costs.[16] And the importance of being rigorous increases as the cost increases: that is the express requirement of the Transport Act, but it's also common sense;[17]

28. It follows that the Committee should insist that any benefits claimed by the LMA are substantiated by appropriate probative material. This is not just a matter of fairness and legality,[18] it is a matter of good governance.[19]

29. In particular, the policy framework established by the Transport Act contemplates an explicit balancing of costs and benefits.[20] This can't be done when what's before the Committee is based on untested assertion.

30. What does the CIS say about benefits? Not much. Certainly not much of any probative value:

    (a) Chapter 2 of the CIS is dedicated to discussing the benefits of the Project. Importantly, while it claims numerous benefits, it does not:

        (i) Contain, or refer to, any evidence which would support those claims; or

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[16] Productivity Commission, *Draft Report: Public Infrastructure* (March 2014), pp. 70 – 71, 78.
[17] Victorian Government, *Towards an Integrated and Sustainable Transport Future* (2009), p. 40.
[18] In *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, [16] – [18], the High Court emphasised that, notwithstanding provisions such as those found in s 245 of the *Major Transport Projects Facilitation Act 2010* (Vic), administrative decision-makers can only act on the material properly before them.
[19] Victorian Competition and Efficiency Commission, *Managing Transport Congestion* (2006), p. 277; Productivity Commission, *Draft Report: Public Infrastructure* (March 2014), Chapter 2.
[20] Victorian Government, *Towards an Integrated and Sustainable Transport Future* (2009), p. 50.

(ii) Seek to quantify or in any way calculate the extent of those benefits.

(b) The individual chapters of the CIS also claim various benefits. These claims, although narrower than those claimed in Chapter 2, are frequently unsupported by the evidence contained in the Technical Reports – or even inconsistent with it. A particular example of this is the treatment of safety benefits associated with the Project:

(i) Both Chapters 2 and 7 of the CIS assert that the Project would improve traffic safety.[21] In particular, Chapter 7 suggests that this is based on the Zenith modelling, stating that '[an] analysis of crash data sourced from the strategic model shows a small decrease in casualty road crashes' between the base case and with Project scenario;[22]

(ii) In fact, the evidence – as set out in the Traffic Impact Assessment ("TIA") – does not support this assertion:

(A) The increase in vehicle kilometres travelled (VKT) associated with the Project means there is a 'higher chance' of casualty crashes occurring;[23]

(B) This increased risk is potentially offset by a reduction in crashes on local and arterial roads;[24] and

[21] Chapter 2, page 11; Chapter 7, page 41.
[22] Chapter 7, page 41.
[23] Traffic Impact Assessment, p. 78.
[24] Id.

(C) The Project itself does not significantly affect the modelled crashed rate produced by the Zenith model, as the Zenith model calculates the crash rate on a network wide basis.[25]

(iii) Given this approach, the Committee should not take any claimed benefits at face value, but should be very careful to ensure that there is a proper basis for each and every claim made.

31. In fact, looked at as a whole, the supposed benefits of the Project can be broken down into three types:

(a) First, there are benefits which, even if they exist and regardless of their worthiness, could never possibly, singularly or cumulatively, justify the impacts which the Project will inflict. These include benefits like enhancing the state of archaeological knowledge under Royal Park[26] or upgrading cycle paths;[27]

(b) Secondly, there are the temporary benefits. These include all of the amenity benefits associated with the Project as well as some of the key connectivity benefits, such as increased 'resilience' in the traffic network. There are three points which can be made about these benefits:

(i) First, they are clearly of lesser value than permanent benefits. In fact, their value really depends on what else is happening whilst they are in existence. For example, the 'resilience'

[25] Id.
[26] Chapter 9, page 12.
[27] Chapter 2, page 15.

benefits provided by the Project are of limited value if no additional river crossings are provided during the Project's lifetime, as incidents on the Westgate Bridge would still have the power to substantially disrupt the traffic network;

(ii) Second, the 'lifespan' of these benefits will be affected by any errors (or omissions) in the modelling. Insofar as the model underestimates traffic, it overestimates the temporary benefits provided by the Project. Here, there is good reason to believe that the model does underestimate future traffic levels, as it does not include:

(A) The full range of induced traffic responses, including changes in land use patterns (and, hence, traffic) caused by the Project itself;[28] or

(B) The impact of works necessary to implement the Project, which are expected to add somewhere in the region of 9% to modelled traffic levels.[29]

(iii) Third, with regard to the benefits to Alexandra Parade in particular,

(A) The CIS claims Alexandra Parade will gain various benefits from a reduction in traffic along its length;

(B) The LMA has clearly indicated, through its cross-examination of Mr McGauran and Mr Moore, that it

[28] Document 30, *Traffic Conclave Report*, Item 2.6(b)
[29] Doc 61, *Zenith Model Sensitivity Tests*

actively opposes any permanent reduction in traffic levels along Alexandra Parade;

(C) If that's so , as night follows day, traffic levels will return to the same levels as existed before the Project; and

(D) In reality, this means that any benefits to Alexandra Parade are illusory (as are the alleged flow on benefits in for north south bound vehicles and public transport patrons). Any benefit will provide only a brief respite between years of construction impacts and a return to, at best, the status quo and potentially something worse.

(c) Thirdly, there are the connectivity – including travel time – benefits of the Project. Again, these are unsupported – or poorly supported – by evidence:

(i) In relation to traffic benefits generally:

(A) Mr Veitch's evidence was that attempting to address peak congestion through the provision of additional road capacity was, in his words, 'futile' – that any traffic reduction provided by the Project during peak periods would inevitably be temporary. This evidence should be accepted;

(B) Instead, he and other LMA witnesses sought to emphasise the supposed off peak benefits of the Project, which it was claimed constitute a majority of trips;

(C) The difficulty with this contention is that there is no evidence in the CIS that:

(1) Congestion during the off peak period is a significant problem, let alone a problem requiring an $8billion solution; or

(2) The Project will produce any travel time savings during the off peak period.

(D) Mr Pelosi also sought to argue that the Project would also provide benefits for inner urban redevelopment, such as the Arden Macaulay precinct. This position:

(1) Is not supported by the Traffic Impact Assessment; and

(2) Cannot plausibly be supported by the strategic modelling, as that modelling:

a) Focussed on network wide impacts from the Project and is unsuitable for modelling local impacts; and

b) Did not take into account the impacts of public transport projects such as Melbourne Metro, which will have direct impacts on demand for travel to and from Arden Macaulay and other urban renewal areas.

(E) It is clear from the TIA that information regarding the off peak impacts of the Project could have been provided. It

was not. In the circumstances, it is appropriate to infer that this is because the information, had it been provided, would not have assisted the LMA.

(ii) Similarly, the material in support of social connectivity benefits is unpersuasive:

(A) Like Mr Veitch, Ms Nesbitt sought to emphasise to the off peak benefits of the Project for social trips;

(B) Again though, no material was provided to support her claims. As she accepted, any assessment of her claim would have required detailed information about non-work travel patterns which neither she nor the CIS provided;

(C) Ms Nesbitt also asserted, without qualification, that the Project would provide connectivity benefits to eastern, western outer suburbs;

(D) As an unqualified proposition, this is demonstrably false, as Ms Nesbitt had to concede. The data in the TIA shows that the Project will do nothing to improve the position of the western suburbs and may, in fact, make things worse for those suburbs, which are already relatively disadvantaged; and

(E) In fact, it was Ms Nesbitt's evidence that, in preparing her witness statement, she had only 'read the summary' of the TIA and had not reviewed the data in any detail. As a result, very little weight can be given her to

evidence, except insofar as that evidence demonstrates a blatant attempt on the part of the LMA to introduce evidence of benefit (however underwhelming it might be) to patch the obvious deficiencies in the analysis undertaken in the CIS.

(iii) The evidence for wider economic benefits is also questionable:

(A) Although the LMA has suggested the economic benefits are beyond the scope of this hearing, this has not prevented it from seeking to adduce evidence of some of those benefits when it suits the LMA in order to bolster its case – whether in the form of tendering the SGS report, or inviting its witnesses to emphasise benefits of the project for which there is no quantitative evidence;

(B) Ms Stoettrup, having previously emphasised that her Business Impact Assessment was not an economic impact assessment,[30] claimed that the Project would produce a variety of wider economic benefits, in addition to the ordinary benefits associated with a transport project;

(C) This assertion was undermined by Ms Stoettrup's concessions that:

(1) Not every transport project will produce agglomeration benefits; and

[30] Business Impact Assessment, p 1.

(2) She had not been asked to, and was unable to, assess whether the Project would produce any agglomeration benefits.

(D) Ultimately, Ms Stoettrup's evidence is best summarised by her comment that it was appropriate to include benefits in evidence if you 'believe' they exist - what might be described as the 'Father Christmas' method of quantitative research;

(E) In addition, the assertions of Ms Stoettrup must be balanced against the LMA's failure to:

(1) Call Mr Marcus Spiller, despite having previously stated it would do so. Mr Spiller is an established urban economist who has done significant work on agglomeration benefits and had participated in the East West Link Needs Assessment; or

(2) Produce an assessment of the anticipated agglomeration benefits, despite tabling a paper which provides a method for calculating those benefits.[31]

(F) The proper inference from these failings is, again, that a proper assessment of the agglomeration benefits of the Project would not have assisted the LMA's case.

[31] Document 53, SGS Economics, *Long-run economic and land use impacts of major infrastructure projects* (2012).

32. Indeed, the absence of extensive reliable evidence of benefits is borne out by the manner in which the LMA has variously approached the question of benefits. Among other highlights:

(a) Instructing its witnesses as early as November 2013 to "beef up the benefits"

(b) Calling Mr Pelosi to lend his credibility and experience to a project which he has barely examined so that he could say there are benefits; and

(c) Buying a copy of Glaeser's book and selectively quoting from it in order to found a narrative of separated families brought closer together by ……a freeway?

33. As a result, the LMA has been forced to forage for evidence beyond the four corners of the CIS. This has taken a number of forms:

(a) Unsubstantiated submissions by counsel for the LMA;

(b) Evidence which blatantly seeks to supplement the deficiencies in the content of the CIS unsubstantiated by any empirical evidence;

(c) Assertions which seek to claim as a positive benefit of the project things which are not; and

(d) Cross-examination of witnesses with to view to establishing what is said to be the "merit" of the project in very general terms.

34. It is appropriate to examine each of these matters in turn in the context of the evidence, if for no reason other than to illustrate how utterly unpersuasive and hollow is the LMA's case on benefits.

Unsubstantiated submissions by counsel for the LMA

35. It was asserted in opening by the LMA that *Investing in Transport* (2008), known as the Eddington Report, established the benefits of the East-West Link, although the only passage quoted in support of this assertion is a single paragraph in the Overview.

36. Fairly read, although the Eddington Report clearly supports a range of interventions aimed at facilitating east-west travel, including a road, the Project as presently designed is actually at odds with its recommendations:

    (a) A key inconsistency between the Eddington Report and the Project is the inclusion of the inner city access between Hoddle Street and CityLink, which the LMA insists is vital. The Eddington Report specifically rejected the provision of inner city access for that leg of the link for 'operational, functional and strategic' reasons, including:

        (A) The need to avoid adding to existing inner city congestion; and

        (B) The need to ensure the primacy of public transport for inner city journeys.[32]

        This reasoning was echoed by the candid observations of Mr McGauran in evidence – where is everybody going to park? How can it be that there is strategic justification for establishing connection to the street network for

[32] *Investing in Transport* (2008), pp. 218 – 219.

access to the city and the knowledge precinct when in those areas parking for vehicles is becoming (as a result of deliberate planning policy) more and more constrained.

(b) Another inconsistency is that the Eddington Report stated that the 'most urgent need' was for an additional alternative river crossing to take pressure off the West Gate Bridge.[33] The Project plainly does not include an additional river crossing and, in fact, will result in additional pressure on existing river crossings, as shown in the TIA;[34]

(c) Similarly, but more broadly, the Eddington Report emphasised the need for improved transport connectivity in the western suburbs as a way of addressing existing disadvantage there. The Project does not address that disadvantage and may make it worse by:

(i) Adding traffic to existing routes; and

(ii) 'Crowding out' additional transport infrastructure in the western suburbs.

37. In truth, the driving philosophy of this project is not a freeway to address the strategic imperatives discussed by Eddington. It is a project designed to convince the electorate that the Government is "doing something" about the traffic snarls that affect people in the outer east, whether or not what it is "doing":

(a) will actually solve their problem in the long run;

[33] Ibid, p. 218.
[34] Traffic Impact Assessment, Tables 22 and 23 (as they relate to Footscray Road) and Figure 18.

(b) is well thought through; or

(c) even if it is well thought through, is not sufficiently transparent to informed observers confidence that what the Government is trying to do is appropriate.

38. This project is populist, not strategic – and not consistent with what Eddington recommended.

39. Reliance was also placed on *The Triumph of the City* by Professor Edward Glaeser as demonstrating the benefits of the Project. Any fair reading of that book shows that Professor Glaeser actually opposes the development of freeways as 'anti-urban':[35]

(a) Although Professor Glaeser acknowledges congestion as a problem for cities, he explicitly repudiates the construction of new roads as a solution. In a section headed 'More Roads, Less Traffic?', Professor Glaeser states:

> *For decades, we've tried to solve the problem of too many cars on too few lanes by building more roads, but each new highway or bridge then attracts more traffic.*[36]

(b) This outcome, he says, 'reflects the impossibility of sating demand for anything that's free.'[37] Contrary to the implication of Mr Morris and some of the LMA's witnesses, Professor Glaeser's view is that:

> *Building more roads almost never eliminates traffic delays, but congestion charging does.*[38]

[35] Edward Glaeser, *Triumph of the City* (2011)
[36] Ibid,
[37] Ibid.,

(c) Indeed, Professor Glaeser recently reaffirmed this view in an article in the New York Times, entitled 'How to Discourage Driving', where he argued that 'we should charge drivers for using the valuable space of city streets';[39]

(d) This is consistent with the Eddington Report's conclusion that the question is 'not if, but when' congestion charging will have to be introduced in Melbourne;[40]

40. Of particular concern is the attempt by the LMA to use 'cost' as a sort of trump card to dismiss consideration of alternative designs:

(a) The basic fact is that there is no meaningful evidence whatsoever of the cost of developing the Project, or individual parts of the project;

(b) Notwithstanding this, the CIS repeatedly asserts that various design options, including in particular the 'longer tunnel option', were rejected for cost reasons;[41]

(c) Similarly, during this hearing, Mr Morris has sought to imply that all options for additional tunnelling should be rejected on cost grounds, based purely on the fact that tunnelling is more expensive other road construction methods; and

(d) In both cases, it is simply asserted that these options are cost prohibitive with no apparent consideration given to the benefits with might be gained by doing so.

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[38] Ibid,
[39] Edward Glaeser, 'How to Discourage Driving', *New York Times* (14 October 2013) at < http://www.nytimes.com/roomfordebate/2011/06/28/car-clash-europe-vs-the-us/the-best-way-to-discourage-driving> accessed at 18 March 2014.
[40] *Investing in Transport*, p. 104.
[41] Executive Summary, pp. 10 – 13.

Deficiencies in the CIS

41. Evidence which blatantly seeks to supplement the deficiencies in the content of the CIS after the fact, which evidence is itself unsubstantiated by any empirical evidence, is hardly probative:

    (a) The LMA engaged a number of witnesses – in particular, Heather Nesbitt, Marianne Stoettrup and Peter Lovell – to provide substantial additional evidence, beyond that contained in the CIS, on the positive and negative impacts of the Project in these proceedings;

    (b) This evidence was commissioned during the CIS and, if it was genuinely thought to be relevant, ought to have been contained in it, so that people make submissions had an opportunity to properly consider it. To hold back relevant material and only bring it forward at a moment that suits the LMA is the definition of trial by ambush and is self-evidently inappropriate in the context of this (and any sensible) decision-making framework ;

    (c) This is especially so in relation to Ms Nesbitt and Ms Stoettrup, as, on a strict reading, their evidence falls outside the scope of the public hearing matters. On that view, it is not open to the participants in the hearing to make submissions about that material, leaving it notionally unchallenged; and

    (d) That said, the gravity of this issue is mitigated by the fact that the material actually provided by Ms Nesbitt and Ms Stoettrup is of so little probative weight that it may be safely dismissed by the Committee.

Illusory benefits

42. Assertions which seek to claim as a positive benefit of the project things which are not smacks of grasping. To suggest that a benefit of the Project will be the fact that the road will be in a tunnel through Fitzroy, Carlton and Parkville – as though it could be realistically contemplated that an above ground road traversing the inner north of Melbourne could ever be taken seriously, is ridiculous. The tunnelling cannot be counted as a benefit. At best it is neutral. It is a fact of life for any proposed link.

Making a case in the Cross examination of opponents' witnesses

43. Cross-examination of witnesses with to view to establishing what is said to be the "merit" of the project in very general terms:

    (a) Senior Counsel for the LMA sought to adduce evidence of the merits of Part A and the full East- West link from Mr Keays:

        (i) It is true that Mr Keays conceded that Part A had 'some merit' in the sense that it produced some benefits. The strength of such a concession, however laboriously extracted, must be weighed against the qualifications which went with it. He also said that:

            (A) There was not enough information in the CIS to determine whether Part A really did have merit;

            (B) He had never seen a transport project without some level of benefit; and

(C) The key issue was whether the benefits outweighed the costs.

(ii) In relation to the other benefits that Senior Counsel for the LMA tried to coax from him, Mr Keay's evidence was that:

(A) The Project does 'little' to clear congestion;

(B) The travel time savings were 'actually quite small' for a project of this scale;

(C) Whilst, as a matter of theory, agglomeration and labour benefits might arise from a transport project, 'in the specifics, it sort of depends';

(D) Years of transport spending had failed to produce any obvious benefits in terms of densification;

(E) Any resilience benefit was 'very transitory'; and

(F) He had seen no evidence that the Project would improve travel time certainty.

(iii) Mr Henshall was also cross-examined about the economic merit of Part A:

(A) Mr Henshall was asked whether, 'in a general sense', Mr Henshall would 'expect' Part A to produce agglomeration benefits;

(B) Mr Henshall said that, in that sense, he would; and

(C) Without criticising Mr Henshall, this is not probative evidence of the Project's economic merit:

(1) Mr Henshall would likely be among the first to admit that his 'general expectation' is a poor basis for making an $8bn investment decision;

(2) In fact, this is consistent with his evidence in chief in which he was critical of the CIS and the Short Form Business Case for failing to provide adequate information to enable a proper cost-benefit analysis to be undertaken;

(iv) Ultimately, it can be accepted that, consistent with what Mr Keays and Mr Henshall said, the Project will produce some, mainly temporary, benefits. The fundamental problem remains that the LMA has not provided any way of quantifying the benefits and thus no sensible way to weigh them against the costs and/or impacts;

(v) Mr Higgs and others were also cross-examined with a view to establishing the importance of the Elliott Avenue interchange. In none of these exchanges did the witness expressly endorse the provision of an interchange at Elliott Avenue. Their evidence was instead that it is necessary, as it no doubt is, for the tunnel to connect to the surface network at some point, if it is going to do what the LMA wants it to do.

Summary

44. None of this is a substitute for hard evidence, established using the conventional methodologies usually required of a project of this nature.

45. In truth the LMA is desperate to establish an evidentiary basis for the asserted benefits because without one it seems to finally appreciate that the task of this Committee is almost impossible.

46. Indeed, without concrete evidence not only of the generic types of benefit, but also the quantum of that benefit, the assessment of the applicable law criteria cannot be properly undertaken.

The Negative Impacts

47. The potential negative impacts of any future project fall broadly into the following categories:

    (a) Visual impact of any future design to the extent that it sits out of the ground;

    (b) Extent of demolition and or disturbance of heritage fabric to facilitate the construction of a road;

    (c) The destruction and alteration of important parkland; and

    (d) Social impacts of the proposal insofar as ordinary people are affected by either the acquisition of the land, the noise and other amenity impacts which flow from the construction and operation of the project for people living in the vicinity.

48. The identification and assessment of the potential impacts in this case is impeded by the fact that the LMA has chosen to proceed with a

Reference Project, rather than a real project, which in urban design terms means that:

(a) It is impossible to properly assess the impact of the "project" other than to conclude that the visual impact of the project cannot be appropriately addressed or managed until a real project is on the table;

(b) The only conditions which can be imposed are generic statements of intent directed to the aspiration of achieving excellent design;

(c) Unlike the desalination plant, this Committee is not assisted by any empirical values which are driven by a contextual response; and

(d) Unlike the other projects mentioned in opening (eg Eastlink and Peninsula Link) the context of the inner urban areas is completely different and considerably more sensitive. As the CIS and UDF suggest, what is proposed is the retrofitting of substantial freeway infrastructure into a 19th century built environment and parkland. The problem here is that it has been assumed that "retrofitting" means "plonking" a little piece of the Craigieburn bypass into Collingwood and Fitzroy.

49. The LMA has also chosen to:

(a) Not provide the complete outputs of the Zenith modelling, which would enable a more thorough analysis of the network impacts of Project, including on the western suburbs.

(b) Limit its own assessment of the traffic impacts of the project by combination of the following factors:

(i) Performing only limited, non-cumulative sensitivity testing of the Zenith modelling:

(A) The purpose of sensitivity testing is to address the uncertainties associated with a proposition;

(B) Where, as here, there are multiple areas of uncertainty, it may not be sufficient to simply test the uncertainty around each factor individually;

(C) Rather, it will be appropriate to test for the cumulative uncertainty of multiple areas of uncertainty, e.g. the combined effect of high population growth coupled with the inclusion of the necessary works;

(D) The LMA's failure to do this kind of cumulative testing gives an air of false precision to its modelling results, even in circumstances where Mr Veitch has effectively admitted a 15% margin of error for the Zenith model.

(ii) Providing micro-simulation of only a small number of selected intersections and doing so in a way that was generally agreed at the Conclave to be inadequate;

(iii) Arbitrarily distinguishing the Project and the additional road works that are a necessary consequence of the Project and only assessing the traffic impact of the Project:

(A) The Project Act defines 'impacts' from a project as including 'indirect' impacts. As a matter of law, 'indirect impacts' includes impacts caused by the actions of third

parties, provided they can be reasonably anticipated.[42] This would necessarily include any works – such as the widening of the Eastern Freeway by VicRoads– required to give effect to the Project. It is not open to the LMA to simply ignore these impacts;

(B) The impact of this arbitrary distinction is demonstrated by Mr Veitch's own sensitivity testing, which shows a 9% increase in modelled traffic levels if 'necessary / complementary' works are taken into account;

(C) It is self-evident that if the CIS is consistently underestimating traffic levels by close to 10%, then this will impact – negatively – on the ultimate benefits delivered by the Project; and

(D) In fact, because this 9% figure includes complementary public transport projects which might reduce travel demand, it is possible that it actually underestimates the impact of the necessary works on traffic flows along the Project.

(c) Completely ignore the established methodology for undertaking assessment of the demolition of heritage fabric in that it:

(i) Did not conduct an assessment of the loss of heritage fabric against the local planning policy framework; and

[42] See, e.g., *Minister for the Environment and Heritage v Queensland Conservation Council Inc*. (2004) 139 FCR 24

(ii) Adopted as the tool for undertaking the assessment a method which:

(A) Inherently undervalues the significance of local heritage fabric;

(B) Ignores the extent of actual demolition, which on any view would never otherwise be contemplated; and

(C) Produce results that, according to the expert who assisted in the preparation of the tool, can lead to obvious anomalies.

(d) Blinker its assessment of noise impacts by selectively adopting noise criteria which suit it, and ignoring what is unquestionably best practice planning for the management of road noise:

(i) The New South Wales government – through the Road Traffic Authority and the Department of Environment and Climate Change has two relevant sets of guidelines for dealing with road noise. These are:

(A) The *Environmental Criteria for Road Traffic Noise*, published in 1999 ("Criteria"); and

(B) The *NSW Road Noise Policy*, published in 2011.[43]

[43] Although the 2011 Policy supersedes the 1999 Criteria in many regards, the 2011 Policy explicitly refers to the 1999 Criteria in relation to the issue of sleep disturbance, as well as 2008 protocol for assessing sleep disturbance from traffic: Department of Environment and Climate Change, NSW Road Noise Policy (2011), p. 35.

(ii) In fact, the Criteria have been referred to many times by Marshall Day in the context of sleep disturbance for a range of night time activities;

(iii) Curiously, the Criteria were never raised by Mr Fearnside or anyone at MDA since their original involvement in the project, despite identifying other interstate noise controls as relevant. Indeed, it appears that all of the consultants in this case have simply proceeded upon the basis that the Vicroads policy is the only thing worth considering notwithstanding that the Vicroads policy:

(A) Has no known research foundation;

(B) Has no night time criteria;

(C) Does not acknowledge the possibility of sleep disturbance as a factor; and

(D) Is explicitly premised on not spending too much money.

(iv) It is true that even the NSW guidelines are not mandatory and do permit departure in circumstances where it is not reasonable or feasible to achieve that result. Importantly, there is no factual basis upon which it can be said that what would be required by that policy is neither feasible nor reasonable in this case. The LMA doesn't need to because it has chosen to adopt self-serving noise criteria. If it were required to justify departure from the guidance given by the NSW guidelines, there is simply no evidence as to feasibility or reasonableness.

The Balancing Process

50. The LMA's case is that:

    (a) The reference project as advanced is appropriate subject only to very minor changes; and

    (b) Really any other project, regardless of how much it might depart from the reference project, is also appropriate provided that it falls within the very loosely expressed performance measures.

51. In other words, the LMA is saying that the impacts which can be identified from the generic reference project are acceptable – that they have been appropriately addressed and/or managed.

52. One thing is for certain, the impacts will be substantial.

53. In some instances the impacts are so severe that they would not ever be in the contemplation of ordinary planning decision making having regard to the content of the local planning policy.

54. The only possible way in which these substantial impacts could be justified is if it could be said that the project gave rise to such benefits to the broader community that these substantial negative impacts are outweighed by the positives.

55. As a matter of logic, the positives must be proportionate to the negatives. The benefits must themselves be substantial, necessary and commensurate in scale to the sacrifices required to facilitate the project.

56. If the benefits do not outweigh the negatives then the only course available is to consider alternatives.

57. The extent of change which might need to occur will depend upon the relationship between the negatives and the positives. In some cases, minor changes may be sufficient to appropriately address the impact. In other cases the level of negative impact might be so great that wholesale change is required.

58. Of course this process of finely tuning the project is made very difficult by the absence of an actual project. The Committee may have been assisted in this process had the CIS contained a detailed assessment of the various alternatives considered by the actual design team.

59. In this case the LMA has:

    (a) Overstated the benefits;

    (b) Understated the impacts; and

    (c) Actively obfuscated and obstructed every attempt of both the Committee and other parties to raise for consideration alternatives which may have the result of ameliorating some of the most catastrophic aspects of the "reference project".

60. The LMA has not been transparent in the way in which it has come to a resolution of obviously competing interests.

61. There has been no real attempt by the LMA to explain what alternative designs have been considered and why they have not been pursued, notwithstanding:

    (a) The Scoping Directions; and

    (b) This Committee's section 57(4) request.

62. Indeed, the LMA has set about to deliberately insulate from any scrutiny the process by which the reference project was design by choosing:

    (a) Not to call the actual designers; and

    (b) To rope in Mr Brock at very short notice to address road design alternatives posited by the Councils (and only then at the insistence of the Committee).

63. Importantly, every single alternative proposal posited by the Councils (and by the Committee) has one thing in common: they are all directed to attempting to ameliorate the otherwise significant impact on the urban environment of inner Melbourne that the reference project would cause.

64. Neither the Councils (nor this Committee) have had the months and months that the LMA has had to consider and weigh the various alternatives. Neither are the Councils (nor this Committee) privy to the various considerations which have led the LMA to the conclusion that various alternatives which might ameliorate the visual impact on inner Melbourne are not "feasible" or "viable" or "reasonable", and the grounds upon which such a conclusion has been reached by the LMA.

65. The LMA's approach to various alternatives mooted in this hearing to eliminate the need for a flyover is a good indication of the cavalier attitude of the road builders:

    (a) When Counsel Assisting inquired as to the possibility of an alternative approach to the intersection based upon the current configuration of the freeway on ramp what was the LMA's response?:

(i) The Committee ruled that it would not require Mr Brock to produce plans, leaving it to the discretion of LMA as to how it proposed to deal with the question;

(ii) LMA's case in evidence has now closed;

(iii) LMA has not voluntarily proffered any information as to whether such an alternative was considered, and if so, why it has been discounted. Here a distinction is to be drawn between post hoc justification, and proper consideration at an early stage. Here also a distinction needs to be drawn between submissions from the bar table and actual evidence. It is true that, in some instances in a hearing like this, submissions can be counted as evidence – but not when the substance of the evidence is disputed. To take counsel's word on a disputed fact over the objection of another party, even in a case like this, is a denial of procedural fairness.

(b) Yarra's suggestion that consideration should be given to alternative designs which could minimise the extent of acquisition, and the visual impact of the flyover, has been treated with similar contempt:

(i) Yarra first made the suggestion many months ago;

(ii) Evidently, it was not the intention of the LMA to even call a witness in relation to road design until this Committee required it to do so;

(iii) The LMA did not do the obvious thing. It did not decide to call as a witness one of the design team who has been with the project from the start;

(iv) Instead it called as an expert a witness whose bid to do the actual design work for the project the LMA had rejected!;

(v) This witness had in total 14 days to respond to the road design issues;

(vi) The witness' assessment of the option posed by Yarra was, cursory and incomplete; and

(vii) What is particularly galling is that the LMA has been critical both in comment and questioning of other witnesses, of the Council's failure to call any evidence supporting the introduction of a DDI intersection. Galling because:

(A) Most of the traffic engineering outfits in the country with any experience in road projects of this order of magnitude are either bound to an existing consortia, or otherwise refuse to be involved because they want to be contracted to do some of that work down the track;

(B) The LMA's publication of its traffic and modelling data was scant in the CIS, and getting access to it thereafter was like drawing teeth, such that material which should have been included in the CIS technical papers was being produced only after this hearing commenced; and

(C) The LMA clearly has always had all the resources at its disposal to prove conclusively one way or the other why a flyover is the only choice at Hoddle Street, but it has chosen not to do so.

66. It is not for Yarra to assume the task of designing the Hoddle Street interchange.

67. It is for the LMA to demonstrate that:

(a) The impacts of a flyover as shown in the reference project are acceptable such that it can be said that the visual impacts of such a proposal (should it be built) have been appropriately addressed; or

(b) Alternatives which would not have the same visual impact are simply not feasible.

68. This is where the rubber hits the road.

69. The evidence establishes that:

(a) the impact of the flyover is significant visually and socially;

(b) the traffic benefits are grossly disproportionate:

(i) the flyover will create a level of service which far exceeds anything which is necessary or appropriate; and

(ii) whatever benefits there might be from the project as a whole, they cannot be said to justify the massive intrusion of the flyover unless the flyover is the only viable/feasible/reasonable alternative.

(c) There is no evidence that the flyover is the only viable/feasible/ or reasonable alternative – why?

70. If the Committee finds that the visual and or social impact of the flyover is or even may be unacceptable and incapable of being addressed by the waffly performance measures contained in the UDF then it should make such a finding.

71. The Committee should give effect to such a finding by recommending the inclusion of conditions in the appropriate part of any approval that prohibit any project which might be approved under these controls from comprising such a flyover.

72. Assuming the legality of approaching this process on the basis of a reference project rather than a real project, it is apparent that such a finding and recommendation are clearly open and within the scope of the Terms.

73. Such a finding is certainly open on the available evidence. A finding to the effect that:

(a) The land acquisition required for the flyover is significant;

(b) The extent of demolition of heritage fabric is significant;

(c) The traffic benefits for traffic entering the freeway northbound to eastbound are unnecessarily and disproportionately high;

(d) All things being equal, the flyover would be an unacceptable outcome, unless it could be established that the flyover is the only way in which free access in this location could be feasibly/viably or reasonably provided;

(e) There is no evidence that the flyover is the only viable alternative; and

(f) Consequently, the significant impacts that would flow from the flyover have not been justified nor have they been appropriately addressed.

74. The Committee should not feel embarrassed about its inability to recommend an alternative. It has been robbed of that opportunity by the way in which the LMA has conducted its case.

75. In a case which will, on any view leave a lasting mark on the face of inner Melbourne the best, safest and most appropriate course for this Committee to adopt, is to make its decision based upon the evidence before it and leave it to others to wrangle later about what should be done.

76. In this case the evidence does not support the conclusion that the visual impact of the flyover (or really a flyover of any design) has been appropriately addressed or managed. Nor does the evidence support the contention that there is no other way of doing it – the Committee simply doesn't know.

77. Why would this Committee allow a legacy making project of this kind to proceed which permitted the inclusion of a flyover (of indeterminate design) in the absence evidence justifying such a course?

78. Yarra adopts the substance of the submissions made by Melbourne City Council. In particular, Yarra agrees that no clear case has been made for the development of Part B.

79. In relation to the Elliot Avenue interchange and the effect on Royal Park, looking at the impact of the reference project as designed, the only conclusion that can be drawn is that the impact of an interchange which involves interference in the middle of Royal Park at the scale proposed is clearly unacceptable.

80. Even if a road project like East West link should have an exit in this general location (a view obviously shared by LMA but which is not accepted by any of the Councils or Eddington) it doesn't necessarily follow that the reference project design appropriately addresses the impacts of such a project.

81. Again, there is no evidence before the Committee that the reference project design or location is the only feasible or alternative location or design.

82. The real problem in this case is that the LMA and government have been reluctant to transparently share with the community its vision for what it is hoping to achieve and why.

83. The purpose of the legislative framework established by the Project Act is not just to cut the red tape. It is also to ensure that opportunities for public consultation are maintained. The community cannot be properly consulted (nor can the Committee be properly informed) where key pieces of the puzzle, directly relevant to the applicable law criteria, the hearing matters and a proper and rigorous consideration of the issues is not on the table.

84. Such an approach is totally at odds with s 21 of the Transport Act , which specifically provides that the public should be given access to

reliable and relevant information regarding transport decision-making. The purpose of doing this is not simply to make sure people are aware of what is going to happen, but to enable them to participate in, and enhance the quality of, those decisions.[44]

85. The only thing in this case that is transparent about the LMA's approach is the underlying philosophy which has driven the formulation of the reference project – this is road project designed by road engineers with scant regard for anything else:

    (a) There has been characteristic over engineering of the road infrastructure proposed as evidenced by the:

        (i) Levels of service for the Flyover; and

        (ii) Levels of service for Elliot Avenue.

    (b) Heritage, urban design and the assessment of other impacts have been an afterthought, which has been tailored to justify the settled reference design.

Recommendations and Performance Measures

86. The Committee is charged with making recommendations. Further, clause 1(3)(b) of the Terms directs the Committee to consider performance requirements that might be applied to the Project. A number of issues arise.

[44] Department of Transport, *Towards an integrated and sustainable transport future* (2009), p. 47.

Relevance of the Contract Process

87. The LMA has made the extraordinary submission that because the performance measures are to constitute contractual obligations, this Committee should proceed on the basis that the outcomes described in the performance requirements will need to be tailored so that they can be achieved in the delivery of the Project. The gravamen of this submission is that the performance requirements should not get in the way of whatever contractual negotiations and obligations might arise in the future.

88. With great respect, this Committee has not been appointed to consider any contract for the delivery of the project, nor has it been constituted because it has any expertise in that field. The purpose of this Committee is to examine the project in the context of the applicable law criteria.

89. It follows that, in the assessment of the project, the Committee should proceed upon the basis that all of the tools which are ordinarily available to it to guide outcomes, set direction and to mitigate unreasonable impacts are also available to it here, including but not limited to the use of the magic words "to the satisfaction of the responsible authority".

90. Moreover, accepting the LMA's argument risks frustrating the operation of other legislation, such as a P&E Act and the Public Health and Wellbeing Act 2008 (Vic), by denying Councils access to information to required to discharge their duties under that legislation.

Urban design

91. The stated urban design principles are unarguable. Given the highly generic nature of those principles, and their lofty aspirational nature – how could anyone disagree with them?

92. The real problem is that the principles don't say anything definitive. In fact, two people reading the same principle could come to quite different conclusions about what is allowed.

93. This is illustrated by the ambiguous position of the Reference Project. On the one hand, it is said not to be a finished response to the UDF; on the other hand, the LMA's Section 57(4) Response identifies a number of elements of the Reference Project – including the Hoddle Street flyover – as contributing to the goals of the UDF;

94. That in itself is odd. It is clear from the evidence of Mr Wyatt that the urban design decision making framework was established only once the Reference Project was developed. While it is true that Mr Wyatt said that he doesn't think the Reference Project could be approved as is, he nonetheless considers that a design which proceeds upon the premise of *inter alia* elevated structures at Hoddle Street would be an appropriate response to that urban design framework

95. It follows that:

    (a) Anything is possible; and

    (b) A flyover is possible.

96. If the flyover does proceed there is very little that can be done to mitigate the impact. In reality, if the flyover proceeds no amount of landscaping or tricked up design will alter the significance of the impact.

97. Yarra City Council's position is that an elevated structure anything like that which is shown in the reference project is unacceptable. It says further that the impacts are significant and no evidence has been provided to establish that such a response is the only available solution to connect NB to EB traffic from Hoddle Street to the Eastern Freeway.

98. If the Committee agrees, what can it do about it?

99. The reliance of the LMA upon a reference rather than real project makes this task very difficult.

100. In theory it could do only one of three things:

(a) indicate a preference for an alternative design;

(b) require the further consideration alternatives under section 69 of the Act;

(c) make a recommendation that:

(i) any future project should not include design features which are capable of assessment in the context of the reference project and which the Committee concludes could not be appropriately addressed; and/or

(ii) set more definitive direction about the hierarchy of priorities to be applied in the approach to any design.

101. Yarra can understand the Committee's willingness to find solutions. That said, the Committee should not feel compelled to fix the problems inherent in the way in which this case has been dished up to it.

102. Why should this Committee shoulder that responsibility?

103. The Committee can be asked to do no more than assess the evidence which is said to support the project contained in the CIS. It shouldn't be for this Committee to fill the gaps in the evidence, or to try to make "ends meet".

104. On any objective view of the evidence before the Committee:

    (a) The Reference Project design for Hoddle Street is unacceptable; and

    (b) Other alternatives have not been excluded on any ground.

105. If the Committee takes the view that alternatives should be considered, it should invoke section 69 of the Act. This is a case which would also warrant a recommendation that a supplementary assessment should be made under section 69(2). Exceptional circumstances here arise, if for no other reason than that the LMA has simply not done what the scoping directions, the section 57(4) request and the Act require.

106. Alternatively it is open to this Committee to simply recommend that no flyover be included in any future design, or to set design principles which have that effect. This is the only way in which the performance framework could be adequately amended to address the impact based upon the evidence as it presently stands.

107. Similar reasoning can be applied to the Elliot Avenue interchange.

The Scope of the Committee's Assessment

108. The Committee's task under both the Project Act and the Terms is to conduct an assessment of the merits of the Project, having regard to:

    (a) All applicable law criteria; and

    (b) The transport system objectives and decision-making principles set out in the Transport Act. Of particular relevance is s 16, which expressly requires consideration of 'all the economic, social and environmental costs and benefits' of the Project, 'taking into account externalities and value for money'.

109. The LMA has prepared the CIS, and conducted its case, on the basis that it is open to the Planning Minister to radically confine the scope of the Committee's assessment and, in particular, to exclude economic impacts and questions of feasibility and cost from its consideration, and that the Minister has done so in this case. As a result, it has simply not provided any evidence on the economic impact or aspects of feasibility relevant to key parts of the Project.

110. Unfortunately, the LMA's position is wrong. It is a basic legal principle that a subordinate instrument, made under an Act, cannot be inconsistent with the Act under which it is made.

111. It follows that it was simply not open to the Minister, acting lawfully, to direct the Committee, through the Terms, not to consider a matter that it is obliged, under either the Project Act or the Transport Act, to consider.

112. That said, the Minister has not done anything of the sort, and the express words in the Terms bear that out:

(a) Section 73(1) of the Project Act sets out what the Committee must do; and

(b) There are only two relevant limitations upon the Committee's power:

(i) Inconsistency;[45] and

(ii) Section 73(4)(g) as qualified by (6).

113. Section 35 obliges the Minister to establish this Committee to assess the CIS, and empowers the Minister to provide terms of reference under which the Committee will assess the CIS. Section 35 does not empower the Minister to confine the operation of the Committee in such a way as would prevent the Committee from performing its own statutory obligations. Such a reading of the section 35 would be inconsistent with the purpose of the Act, and would in the result, permit the Minister to appoint a Committee on terms requiring it to recommend approval of a project.

114. In formulating terms of reference, section 36(1) of the Project Act permits the Minister to do two relevant things:

(a) Include directions as to the matters that the Committee is to consider;[46] and

(b) Include a direction confining the public hearing matters.[47]

115. Here, the Terms have done both.

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[45] Section 73(2), *Major Transport Project Facilitation Act 2009* (Vic).
[46] Section 36(1)(b), *Major Transport Project Facilitation Act 2009* (Vic).
[47] Section 36(1)(aa), *Major Transport Project Facilitation Act 2009* (Vic).

116. Under the heading "1. Task", the Terms establish their own scope. Whether all of the tasks which have been allocated to the Committee have been made expressly under 36(1)(b) or not, the scope of what the Committee has been asked to undertake is clear:

(a) One of the principal tasks of the Committee is to prepare a recommendation in accordance with section 73, which evaluates all applicable law criteria. It is to be noted that:

(i) There is nothing in the Terms which expressly or impliedly qualifies the nature or scope of this evaluation;

(ii) It is strongly arguable that any attempt by the Terms to limit the evaluation required under section 73(1) would be beyond power;

(iii) If it was both lawful and intended that the Committee should do other than evaluate all of the applicable law criteria, then the Terms might have been expected to say so (eg. Do not consider the economic impacts or questions of feasibility, or assume that certain specified areas a "out of bounds"). The Term do not expressly exclude matters from the evaluation of all applicable law criteria; and

(iv) Indeed, under the heading "Procedure", the Terms affirm and confirm that there is no such constraint upon the evaluation of the applicable law criteria: Clause 2(1)(e).

(b) The Committee is also asked to consider all submissions. It is accepted that a submission must be "properly made", and to be properly made, such a submission must fall within the scope of the

terms of reference of the Committee: section 52(3)(e). It follows that any submission which is directed to the Committee's evaluation of all the applicable law criteria is a properly made submission.

117. The Committee is also required to conduct these public hearings in a way which is confined to certain specified matters ("the public hearing matters"). Importantly:

(a) The Terms do not confine the content of submissions themselves to the public hearing matters. A properly made submission is one which is within the scope of the Terms, whether or not it extends beyond any specified public hearing matter;

(b) The specified public hearing matters are not expressed to confine the Committee's overarching evaluation of all of the applicable law criteria – they are simply intended to confine the matters ventilated at this hearing; and

(c) Notwithstanding that the public hearing is expressed to be limited to certain matters, given the nature of those matters themselves it is inevitable that the proper evaluation matters necessarily involves the Committee and the parties in the examination of matters which are not expressly mentioned in the list of public hearing matters. The phrase "appropriately addressed" or "appropriately managed" necessarily imports considerations that are within scope of the Terms but not expressly mentioned (let alone excluded) by the public hearing matters.

118. In substance, the Committee has been tasked with two jobs:

(a) A complete evaluation of the project against all of the applicable law criteria; and

(b) The conduct of a public hearing concerning certain specified parameters/constraints.

119. The LMA has suggested that the Committee should hear all submissions rather than take an overly legalistic approach. That suggestion is less magnanimous than it sounds. In truth, the task of the Committee, even in the course of this public hearing confined to specified matters, necessarily involves a consideration of matters that the LMA doesn't really want talked about or considered in too much detail.

120. The LMA's suggestion that these submissions should be heard, but then later rejected by the Committee if they do not technically fall within the public hearing matters, should be treated by the Committee with great caution, both because it raises issues of fairness and legitimate expectations and because the public submissions and evidence raises serious questions as to the underlying feasibility of the project, and in particular:

(a) the absence of any economic justification for key aspects of the project which result in significant negative impacts on the surrounding area;

(b) the consideration of alternatives both within and outside the project area; and

(c) the conditions which might be imposed on the planning controls which, taking the reference project (and certain features of it which have been expressly adopted by the LMA as contributing to the

ultimate project), the ability of the Committee to include clauses in the planning framework to preclude visual and other impacts which would not be appropriate – whether arising in its evaluation of all applicable law criteria, or in the context of the confined public hearing matters.

Scope of Conditions

121. Section 73(3) permits the inclusion of conditions on any approval. This clearly encompasses the inclusion of clauses in a planning scheme amendment, or any incorporated document or reference documents which will guide approval.

Project boundary

122. The LMA suggests that clause 1(3)(b) of the Terms imposes a limitation upon the scope of this Committee to impose conditions requiring change, particularly in relation to suggested changes outside the boundary of the project area.

123. This limitation finds two forms of expression:

(a) It is expressed in writing at paragraphs [28] to [31] of the LMA's written submission; and

(b) Orally, in an attempt to distinguish between 'ancillary' and core elements of the Project by Senior Counsel for the LMA.

124. It is Yarra's position that the Committee is not limited to considering alternatives within the Project boundary, whether ancillary or otherwise. Clause 1(3)(b) provides no express limitation on the Committee's powers and the Committee's jurisdiction should not be read down in the

absence of express words. This is particularly true when the concept relied upon here – the Project Boundary – is not one found in the Project Act.

125. In any event, whatever the constraint, if it exists at all, it is no bar to a consideration of:

(a) Eliminating the Hoddle Street flyover;

(b) The reverse "Q" or "P" turn at Hoddle Street;

(c) Any of Mr McGauran's suggestions; or

(d) Any at grade design solution at Hoddle Street.

126. Nor does it exclude consideration of:

(a) Alternative designs of the Western Portal;

(b) The design, and indeed, existence of the Elliott Avenue interchange; or

(c) The option of building a longer tunnel.

127. All of these supposed limitations must be viewed in the context of section 73(3), which permits the Committee to identify alternatives which haven't been properly/adequately considered.

128. Nothing in the Terms expressly limit the power conferred on this Committee by section 73(3) – nor could it as a matter of law. Imagine if it could.

Conclusion

129. The LMA has approached its task with all the swagger of a proponent for major development works who thinks it has the backing of government –who thinks it's "in the bag".

130. Now, it may be true that the government does back this project. But the purpose of this process is to ensure that that's not the end of the matter. One of the problems a government can face is that, once it has publicly committed to something, it is difficult to change course in the face of new information. The existence of this Committee can act as a check on those kinds of pressures and provide the opportunity for a clear, evidence-based decision on the merits.

131. On the evidence available, the Committee should recommend that the relevant approvals not be granted. The simple fact is that the Committee has not been provided with sufficient detail about the Project and its impacts – including such basic matters as an intended design – to make a properly informed decision. The absence of that information is not an accident; it's a choice that has been made by the LMA in the way it has approached this process and it's not a choice which should be rewarded.

132. As the Productivity Commission has recently highlighted, 'delaying a major investment decision until more information becomes available can lead to a better decision'. The truth is, that's the best thing the Committee could do here.

133. In the absence of any evidence of urgency, there's nothing to prevent the LMA from simply going back to the drawing board and coming back

with a new proposal that properly addresses the impacts, including the economic impacts, that this Committee is required to consider as part of its task of ensuring that any major transport infrastructure that is to be developed in this State is the best it can be.

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