

INQUIRY INTO WINDSOR BRIDGE REPLACEMENT PROJECT

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**Submission
to the
NSW Legislative Council**

**re
Inquiry into the Windsor Bridge replacement
project**

(revised version)
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from
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EXECUTIVE SUMMARY

- (A) This submission is informed by the author's involvement in the judicial challenge by Community Action for Windsor Bridge Inc to the ministerial approval of the Windsor Bridge replacement project. I was the barrister who designed and guided that judicial challenge conducted in 2014.
- (B) Condition B1 of the Approval given by the Minister is ineffective in ameliorating the environmental impacts on the heritage significance of Thompson Square. Only invoking one of the many other alternative options can proper respect be accorded to the importance of Thompson Square both as a heritage item and as a community space.
- (C) The committee should urgently recommend to Parliament and the Minister responsible for the RMS to direct the RMS to stop acting on the Approval until the Inquiry is complete.
- (D) The problems in the process whereby Parliament, the government of the day, the Minister responsible both at the time of the Approval and now, and the RMS at direction of the Minister responsible for that authority, came to approve and now are seeking to carry out the Windsor Bridge replacement project on the RMS's preferred option ought to be exposed by this Inquiry as part of its term of reference to enquire and report on the "project assessment process".
- (E) The process and reasons why the RMS has so firmly pressed its preferred option to the point where there appears to be a bias and consequent irrationality in championing its preferred option ought be investigated and exposed by this Inquiry as part of its term of reference to enquire and report on the "project assessment process".

Background

1. I was one of the barristers who agreed to assist the citizens action group Community Action for Windsor Bridge Inc (CAWB) on a pro bono basis to challenge the decision of the then Minister for Planning to approve a State significant infrastructure (“SSI”) project known as the Windsor Bridge replacement project (“the Project”). The Minister approved the Project on 20 December 2013 (“the Approval”).
2. The proceedings were heard in the NSW Land & Environment Court (NSWLEC) by Brereton AJ in October 2014, with judgment being delivered on 27 October 2015: *Community Action for Windsor Bridge Inc v NSW Roads and Maritime Services & anor* [2015] NSWLEC 167 (*CAWB v Minister*).
3. The committee will be well aware of the background to this matter factually, the historical significance of Thomson Square, and I would anticipate would readily accept from its own enquiries and from other submissions which will no doubt address question:
 - that Thomson Square has both substantial heritage significance and is the heart of Windsor township
 - that the Project will have devastating irreversible impact upon Thomson Square.
4. Through my involvement in *CAWB v Minister* I became increasingly concerned about the manner in which the RMS conducted not just the proceedings, but more importantly the assessment process which led to the recommendation of the preferred option to the Minister. Judicial review proceedings can raise only very limited grounds for challenge to the decision of the Minister, and particularly cannot be a challenge on the “merits” of the decision.
5. The “merits” refers to the exercise of the planning discretion by a consent authority to assess the pros and cons of a proposed development in the relevant legislative and planning law context to then decide whether a project proceeds. The Committee will receive substantial assistance by way of submission from the Heritage Council of NSW, CAWB and other interested parties including concerned members of the public about the substantial reasons why the Project was unmeritorious in the extreme. The lack of merit for approval is particularly obvious in the context of alternative albeit perhaps more costly alternatives to simply expanding the road through Thomson Square and constructing a disharmonious modern concrete bridge.
6. This Submission addresses the following elements of the terms of reference:
 - b)i. options presented to the community
 - b)v. the project assessment process.

(1) CAWB v The Minister

7. The grounds of challenge which can be lawfully brought before the court in judicial review proceedings are limited to established grounds for challenging administrative decisions. There is no right for any person, whether a member of the public, a statutory body such as the Heritage Council of NSW, local council or otherwise, to bring an appeal to the NSWLEC to have a review of the merits of the decision in the case of any SSI.
8. I was motivated and able to assist in preparation and presentation of the judicial review proceedings for a number of reasons. Firstly, when I met on the site of the Project with the members of CAWB I came to appreciate that this was not a rabble of community stirrers, but a group of careful and thoughtful citizens genuinely concerned about the destruction of Thompson Square. My pre-litigation site inspection provided me with substantial objective evidence that there had been a miscarriage of the development assessment. It is immediately obvious to any person with professional experience in the development assessment process to readily understand from such a site inspection that one of the alternative routes through or by-passing Windsor was the more appropriate planning and environmental outcome, and that the 'preferred option' was in heinously disregard for an item of state heritage significance. Consequently, I agreed to carry out a legal assessment of whether a challenge could be made to such an irrational decision.
9. When I looked into the matter further I was astonished to find that there were a number of entirely achievable alternative options available to the Roads & Maritime Services (RMS), all of which preserved the integrity of Thomson Square. I found it difficult to understand how any Minister could possibly contemplate that the RMS's preferred option could be accepted as being either reasonable or appropriate by a properly briefed Minister. The Minister's decision was so wacky on the merits that initially I had a strong sense that the Project could be challenged on the judicial review basis that the decision of the Minister was so manifestly unreasonable and irrational that the exercise of the discretion reposed in the Minister had miscarried and been exercised unlawfully (so-called *Wednesbury* unreasonableness).
10. The problem with challenges on the *Wednesbury* unreasonable basis is that the court has great difficulty in distinguishing a manifestly unreasonable and irrational decision from one which is extremely unmeritorious. Judges presented with cases based upon *Wednesbury* unreasonableness invariably talk about a challenge "on the merits" being disguised or attempted to be passed off as a "manifestly unreasonable" challenge. So one proceeds with great caution and endeavours to find other properly available legal grounds to have such a poor decision set aside on other judicial review grounds.
11. After careful analysis the grounds for judicial challenge were carefully refined to those which had good prospects for success. Mr Neil Williams SC is the pre-eminent

Senior Council at the NSW Bar practising in the area of judicial challenge and administrative law generally. He also agreed to provide his time to CAWB on a pro bono basis.

12. In those circumstances the grounds of challenge which we ultimately brought were carefully considered. The grounds which were run are informative of the problems which beset the Minister's approval. The grounds of challenge as recorded by his Honour Brereton AJ were¹:

"The applicant was obliged to acknowledge that it could not in those judicial review proceedings challenge the Approval on its merits, but contends that the Minister did not give a valid approval under s 115ZB, essentially on three bases.

The first is that the Minister did not decide, but deferred for later resolution in accordance with the terms of conditions B1 to B8, what modifications were to be made to the Project, so that the ultimate form and appearance of the Project was not discernible from the Approval, with the result that the purported approval lacked sufficient finality and certainty to be an "approval" within s 115ZB.

The second is that the Minister failed properly to take into account as a relevant consideration the impact of the Project on cultural heritage.

The third is that the Approval, particularly by the imposition of condition B1 (and/or conditions B1 to B8), was manifestly unreasonable."

13. I encourage the Committee to carefully consider the terms of Conditions B1 to B8. These were conditions put forward by the RMS and accepted by the Minister which were supposed to protect the heritage significance of Thompson Square. But the fundamental problem with the Project was that the new bridge proposed and the elevated widened road through Thompson Square by themselves desecrated the heritage significance of Thompson Square. Further, even if Thomson Square was not heritage listed the very nature of the works proposed were destructive of the green space which was the heart of Windsor. Conditions B1 to B8 did nothing to ameliorate that fundamental problem with the RMS's preferred option.
14. There was particular emphasis in the proceedings on condition B1. Condition B1 is in the following terms:

CULTURAL HERITAGE

B1. The Applicant shall submit a Strategic Conservation Management Plan (CMP) to the Director-General for the project area on the southern side of the Hawkesbury River as shown in Appendix 2 Strategic Conservation Management Plan study area.

¹ CAWB v Minister at [6]

Liability limited by a scheme approved under Professional Standards Legislation

The CMP shall be prepared by appropriately qualified and/or experienced heritage consultants. ...

The Applicant shall not carry out any pre-construction or construction activities on the southern side of the Hawkesbury River for the SSI before the CMP has been approved by the Director-General. The CMP is to provide for the heritage conservation of the Thompson Square Conservation Area. The CMP shall be prepared in consultation with the heritage Branch, OEH and in accordance with the relevant guidelines of the NSW Heritage Council and include, but not be limited to:

- (a) identification of the heritage value of the Thompson Square Conservation Area, including statements of significance for the Thompson Square Conservation Area and any individual listings within the conservation area of any local, state or national heritage items;
- (b) the development of heritage design principles for the project to retain the heritage significance of the Thompson Square Conservation Area and any individual listed item within the conservation area or in proximity to the site, with the exception of Item 3 (the Thompson Square lower parkland area) and Item 20 (Windsor Bridge) in Table 1 of Appendix 1;
- (c) specific mitigation measures for the Thompson Square Conservation Area and individually listed items to minimise impact and to ensure that final measures selected are appropriate and the least intrusive option; and
- (d) changes to the detailed design of the SSI to mitigate heritage impacts.

15. Whilst the legal challenge failed, the issues raised in *CAWB v Minister* highlight internal problems in the manner in which the Approval requires the project to proceed. There are two grounds of challenge in particular which demonstrate problems with the form of the Approval.
16. The first ground of challenge was that the Approval did not amount to a lawful approval of the SSI under s 115ZB EP&A Act because it lacked finality and certainty, by reason that the impugned conditions – in particular, condition B1 (read with condition A3) – mean that the Minister had not himself approved the development with or without modifications and conditions, but had left it to a subsequent process and other officials to determine potentially material modifications and the final location, appearance and form of the development.
17. The Committee when reviewing the Approval will see that the final outcome of the project is yet to evolve through the process of Condition B1. This is a most unsatisfactory way to proceed in respect of an item on the State heritage register.
18. The second ground of challenge was that the Minister did not duly exercise the jurisdiction given by s 115ZB by reason that in purporting to approve the Project the Minister did not properly take into account a mandatory relevant consideration, namely the adverse impact it would have on cultural heritage. This ground of challenge, also based upon the content of Condition B1, highlighted that the RMS's preferred option to bulldoze the road through Thompson Square presented the heritage impacts as a fait accompli with Condition B1 inserted as a salve to deal with

the impact upon heritage. In fact Condition B1 could not repair the intrinsic damage to be done to the heritage significance of Thompson Square. Rather, that heritage significance was effectively ignored by the preferred option pressed by the RMS upon the Minister.

19. On merits nothing in Condition B1 could ameliorate in any significant way the unacceptable impacts upon Thompson Square.
20. The RMS had developed and investigated ten options for the rehabilitation or replacement of the bridge – including
 - a bypass of Windsor,
 - other routes through Windsor that did not pass through Thompson Square,
 - refurbishing the existing bridge,
 - and “doing nothing”.
21. The RMS determined that its preferred option was the construction of a new 159m long, five span bridge across the Hawkesbury River, located 35m downstream (northeast) of the existing bridge, including the construction of new northern and southern approach roads, the realignment and modification of access roads, and the removal of the existing bridge. The existing bridge is itself a heritage item.
22. Whilst the decision of the then Minister has not been set aside by the NSWLEC in consequence of *CAWB v Minister*, the ongoing problems with the terms of the Approval ought be a matter of concern for the Committee.
23. Whilst there are many lessons which arise from the proceedings, the manner in which the RMS conducted the proceedings is relevant to the Inquiry. The focus in the proceedings was on conditions B1 to B8, but particularly B1 which ineffectively dealt with heritage impact. In the proceedings the Minister accepted that if the challenge to the terms of Condition B1 had been successful that the whole of the Approval could not stand and would be invalid. The Minister acknowledged that Condition B1 was so important as to heritage and the approval in general that it could not be simply severed and the Approval continue without that condition. That was the proper position for the Minister to take.
24. However, the RMS took the position that the condition was severable from the Approval. The RMS argued that the heritage conditions in Condition B1 to B8 were not fundamental to the Approval and if invalid could simply be severed and ignored. That position taken in the judicial challenge proceedings demonstrated that the RMS as an organisation was lacking sufficient objectivity in its determination to protect the Approval. The position the RMS took in the proceedings demonstrates that the RMS internal decision-making processes are in need of review.

25. The objective evidence of the manner in which the RMS conducted the litigation suggests that the RMS may not have conducted the project assessment process or the proceedings in the objective manner expected of such a public authority.

(2) The EIS

26. The process for assessment of State Significant Infrastructure (SSI) involves the Director General of the Department of planning providing environmental assessment guidelines. On 24 November 2011, the Director-General issued environmental assessment requirements under s 115Y *Environment Planning & Assessment Act 1979* (EP&A Act), identifying the requirements for the Environmental Impact Statement (EIS) for the Project. These included that the EIS address nine specific matters, referred to as "Key issues" one of which was heritage. The consideration of heritage was required to include specified evaluations in relation to impacts to State or locally significant heritage items. Other "key issues" included "Visual Amenity, Urban Design and Landscaping" and "Soils, Sediments and Water". Assessment requirements included landscape and urban design objectives for the reinstatement and rehabilitation of Thompson Square.
27. The EIS, which was completed in November 2012, assessed the Project and several alternatives – including a lower-level bridge, bridges at different locations, and the refurbishment of the existing bridge. It also assessed the various impacts, including the impact on State and local historic heritage and maritime heritage, Aboriginal heritage, visual amenity design and landscape of the area, and hydrology.
28. But the EIS was heavily biased towards the RMS's preferred option of simply expanding the road through Thompson Square including a new bridge and removal of the old bridge.
29. It is true that the EIS acknowledged the difficulties with heritage impacts on Thompson Square, and section 4.5 discusses the further development of urban design options for Thompson Square, but these were directed towards compatibility with the RMS's preferred option. The EIS was dressed up and said to be informed by the historical context and by urban design principles developed to guide design, including protecting and interpreting the heritage values of Thompson Square, maximising available open space in the Square, and improving the amenity of the Square and surrounding areas. But the EIS never addressed the intransigent problem that the heritage values of Thompson Square were fundamentally and directly impacted irredeemably by the preferred design.
30. The design of the preferred option claimed to incorporate measures to reduce visual impacts on Thompson Square, and the rehabilitation of the Square. The relocation of the approach road – which currently bisects the Square parkland – to the eastern side, thus creating a larger area of consolidated open space, was identified as a

benefit of the preferred option. This claimed benefit was a nonsense in the context of the overall scheme of the preferred option.

31. The bias of the EIS in favour of the RMS's preferred option is laid bare in Chapter 11 (Project justification and conclusion) which included the following with my **emphasis added**:

While [the] Windsor bridge replacement project addresses the project objectives it would result in significant impacts on the heritage values of [Thompson Square] and its archaeological resources. These impacts have been minimised as much as possible through reducing the height of the bridge, selecting a bridge type that has a lower visual profile and including appropriate urban design features and landscaping, however, they cannot be ameliorated completely. **These impacts are unavoidable unless an alternative option was selected, however the alternative options would have other impacts and do not provide as high value for money as the project. ...**

32. There is no question that the other options would cost more because the most effective of them required land acquisition. But the EIS failed to present to the Minister a fair assessment of the environmental and social impacts of the RMS's preferred option. The particular bias was towards the option that cost the least measured in financial cost, without fairly considering and balancing the social and other environmental costs. The bias of the EIS was to seek to justify the least costly in dollar terms but downplay the most costly in environmental impact terms.

(3) The RMS

33. I note that the Committee's terms of reference include the "project assessment process". Having regard to the matters I have raised in respect of the RMS's conduct of litigation, and the RMS's presentation of the EIS to the Minister, the questions which I suggest the Committee should also address in the context of its inquiry and report into the project assessment process might include:

- Why was the RMS so heavy-handed in pressing for its "preferred option"?
- Did the manner in which the RMS present the options to the Minister fairly and objectively present the options or was there a bias in favour of its "preferred option"?
- If yes to that second question, ought there be further inquiry into the manner in which the RMS conducts its project assessment processes and defended those processes?

34. Following the adverse decision in *CAWB v Minister* I consulted with a number of Senior Counsel about the prospects for appeal to the NSW Court of Appeal. One of those SC's expressed the opinion to me: *there is nothing in the legislative scheme which prevents the Minister from being an environmental vandal.*

35. The embarrassment of that outcome does not fall upon only the shoulders of the then Minister and the RMS who promoted its “preferred option” so fervently. The NSW Parliament is quite right to have established this Inquiry into the Windsor Bridge replacement project. The RMS is an arm of government. Just how this unsatisfactory decision came to be made by the Minister and defended so strongly by the RMS ought be identified by the Committee.
36. In the meantime, the Committee or an individual member ought raise in Parliament at the earliest opportunity the need to have the Project put on hold. Just because the Project has been approved does not mean it cannot be stopped. It is the province of any consent holder, including the RMS to decide not to proceed with any development consent. Until such time as the question of whether Parliament or the Minister responsible for the RMS should direct the RMS not to proceed with the project as approved is decided the Project ought be put on hold.

(4) Heritage listing does not guarantee protection

37. The listing of Thompson Square on the state heritage register is rendered meaningless in the face of a determined authority like the RMS. The Heritage Council of NSW will no doubt make a submission to this committee. The objective reasons for this project ought be stopped will be highlighted by that appropriate authority.
38. Not only ought this project be stopped and re-evaluated for one of the alternative options, but a further matter needs to be considered by NSW Parliament. A listing of this kind on the state heritage register needs greater protection and be given more significance in the legislative scheme of development assessment. What is the point of being heritage listed as of state significance if this kind of environmental vandalism can be rubber stamped by the Minister responsible?
39. The Committee ought be considering recommending significant change to the legislative scheme so far as it applies to heritage, so that when something is placed upon the state heritage register that the significance of that registration cannot effectively be ignored by either the Minister as the consent authority or a local Council as a consent authority for any proposed development. That is especially the case in respect of Thompson Square where there are so many alternatives which are available.

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