

Management report to Council

Agenda item 6.10

East West Link Project – Compensation Issues

Council

Presenter: Kim Wood, Chief Legal Counsel

25 November 2014

Purpose and background

1. At the Council meeting on 28 October 2014, the Council resolved to request management seek legal advice from internal legal counsel initially on the likelihood of a successful claim through court proceedings initiated by the City of Melbourne against the Victorian Government for appropriate compensation for the impact of the East West Link project (Project) on infrastructure within the municipality.
2. Council further resolved that requests for legal advice should:
 - 2.1. Take into consideration the Memorandum of Understanding between the Linking Melbourne Authority and the City of Melbourne covering the cost of relocation of affected sporting grounds but focus on other areas of impact on the municipality particularly in light of the Minister for Planning's rejection of key components of the Comprehensive Impact Statement.
 - 2.2. Address the financial implications for Council of the project not proceeding, as a result of a change of government following the State election, and the avenues available for compensation for any financial shortcomings associated with the need to remedy impacted community infrastructure.
 - 2.3. Be presented at the Council meeting on 25 November 2014.

Key issues

3. The legislative framework for seeking compensation in respect of Council infrastructure affected by the Project and other relevant legal matters are contained in the legal attachment to this report.

Recommendation from management

4. That Council note this report.

Attachments:

1. Supporting Attachment

Supporting Attachment

Legal

1. As a general legal principle, there can be no legal claim until such time as loss is sustained and can be demonstrated. Loss is damage, detriment, or suffering flowing from the act or omission of another.
2. Under the Memorandum of Understanding (MOU) between the Council and the Linking Melbourne Authority (LMA) Council has been paid substantial funds, already, or to be, expended over time on alternate sporting facilities in anticipation of the loss of sporting facilities on Crown Land at and adjacent to the Ross Straw Field required for the Project. Details of funds paid and funds invoiced were provided in a Management report to Council on 28 October 2014.
3. Certain of these works have been completed. Some are scheduled to take place in subsequent years.
4. There is no provision for compensation for abandonment of the Project in the terms and conditions of the MOU. Nor is there any requirement for repayment to the LMA of funds already expended if the Project does not proceed. Presumably if the Project was abandoned the remainder of the funds yet to be paid under the MOU would not be paid to Council and the question of the funds paid but not expended would be a matter of negotiation between the parties to the MOU.
5. Section 145 of the *Major Transport Projects Facilitation Act 2009* (MTPF Act) provides for compensation for Council owned land (including infrastructure fixtures on the land) in the event that it is acquired for the Project; compensation provisions for reserved Crown land in which Council is Committee of Management prior to the Order (under the control of a Council) are contained in section 146. The MTPF Act provides for compensation if Council has sustained a pecuniary loss or incurred an expense as a *direct and reasonable consequence* of the Order.
6. *The Land Acquisition and Compensation Act 1986* (LAC Act) applies to a determination of the amount of compensation in accordance with principles set out in this Act.
7. The LAC Act provides for resolution of disputes in relation to interests in land which courts must adhere to in determining a claim. What the parameters are in terms of what may constitute '*direct and reasonable*' pecuniary loss and expenses would need to be the subject of negotiation and if not resolved, through court action.
8. In relation to the Minister's decision (in the Order made under the MTPF Act) to *not* follow certain recommendations of the Assessment Committee as detailed in the Comprehensive Impact Statement, little of consequence alters the MTPF Act's compensation process, unless it can be showed through the Yarra/Moreland/Moonee Valley City Councils' court actions that the Minister's approval failed to properly consider the Committee's recommendations and therefore the Minister's approval was invalid. The consequences of such court findings, specifically in relation to this Council claiming compensation, would depend on the reasons for the court's decision on the invalidity of the Minister's approval and what loss Council can prove.
9. In the event of unanticipated losses that may have flowed or are now anticipated to flow from the Order made under the MTPF Act these losses need to be a direct and reasonable consequence of the Order.
10. Under the MTPF Act a formal claim needs to be made within two years of the making of the Order being 30 July 2014. This two year time frame will present difficulties when certain losses and expenses are very likely to be incurred beyond this statutory time frame.
11. Under section 120A of the MTPF Act in relation to Council land owned now declared part of the Project boundary the LMA may also be liable to pay compensation under the provisions of the *Planning and Environment Act 1987*.
12. In the event that the Project is abandoned as a result of a change of government, compensation available to Council would depend on any remedial legislation being enacted in order to effect abandonment of the Project. Further, at this stage, as a result of the MOU funds provided to Council, Council's anticipated loss cannot be identified or quantified.

13. If the Project does not proceed following a change of government and Council had expended funds on relocating facilities and other expenses to effect the requirements of the Project, it is unlikely that such costs and expenses would be recoverable unless there is enacting legislation passed specifically dealing with and allowing compensation for such expenditure.
14. Notwithstanding the above and separate from Council's statutory compensation rights, if Council suffered damage/incurred costs as a result of the Project or the Project is abandoned, there may be other legal remedies available to it depending on the specific situation which led to the loss or damage being incurred. The existence of any such potential rights cannot be ascertained until such loss or damage occurs and until the circumstances leading to any such loss are identified.

Finance

15. Financial implications are dealt with in the legal section contained in Attachment 1.

Conflict of interest

16. No member of Council staff, or other person engaged under a contract, involved in advising on or preparing this report has declared a direct or indirect interest in relation to the matter of the report.

Stakeholder consultation

17. Not applicable. The report is for information only.

Relation to Council policy

18. Not applicable. The report is for information only.

Environmental sustainability

19. Not applicable. The report is for information only