

*Peter Holland*  
64 Chaucer St St Kilda 3182  
0411 470 651  
[hollandp@me.com](mailto:hollandp@me.com)

Open Letter to the Minister for Energy, Environment and Climate Change  
The Hon Lily D'Ambrosio, [lily.d'ambrosio@parliament.vic.gov.au](mailto:lily.d'ambrosio@parliament.vic.gov.au)  
The Hon Martin Foley, [martin.foley@parliament.vic.gov.au](mailto:martin.foley@parliament.vic.gov.au)

June 2016

Dear Minister D'Ambrosio

### **Summary**

The Port Phillip Council has recommended that Live Nation be awarded the long-term lease of the Palais. Although this is supposed to be secret, we know this from impeccable sources within the music industry. As the Minister for Environment, you will now decide whether to approve this decision.

The Port Phillip Council's processes have been a major concern and the impact of its decision on the Australian music industry and the Port Phillip community could be a disaster.

I am writing as a member of *ilovemypalais* and *unChain Port Phillip*, two community groups that have had long involvement with the Palais.

I am sure that you, as the Minister, and your Department would always carefully consider the Council's recommendation. But I submit that the Palais requires a level of review greater than normal. In particular:

1. The Minister should receive submissions from the music industry and give them a significant weighting. The Port Phillip Council has refused to do this. This means that the Council's recommendation is not based on the best available evidence.
2. The Minister should also invite the current operator, Palais Theatre Management, to make a submission.
3. The Minister should also consider whether the selection criteria in the Request for Proposals and the weightings were appropriate. The Minister should also consider whether the evaluation panel had the required expertise, especially in the way the music industry operates.
4. The Minister should then undertake her own independent assessment of the submissions from the three short-listed candidates, Live Nation, Playbill and Palais Theatre Management.

You, as Minister, may ultimately conclude that the current operator, Neil Croker, or the Sydney firm, Playbill, is a better long-term operator of the Palais theatre. On the other hand you may agree with the Council that Live Nation is the preferred candidate. So be it. You may conclude that the process is so flawed that the Council should be asked to start it again. A vigorous and independent review by the Minister is an important assurance that we are getting the best possible long-term operator of the Palais.

In making your determination, I submit that you should consider the following 7 matters:

1. The Minister should give the music industry an opportunity to raise concerns about Live Nation, an American conglomerate, monopolising the Palais.
2. Were the selection criteria weighted to favour bids that promised most money to the Council and were other non-financial criteria not given appropriate weight?
3. Were the elected Councillors effectively excluded from decision-making?
4. Was the Council's Evaluation Panel unbalanced and failed to include members with real expertise in the operation of the music industry?
5. Should the Council have excluded the successful current operator, Palais Theatre Management (Neil Croker)?
6. Was the 'non-complying' bid for the long-term lease by the current operator properly assessed by the Panel and the Council?
7. An interim extension of the current operator is possible.

**1. The Minister should give the music industry an opportunity to raise concerns about Live Nation, an American conglomerate, monopolizing the Palais.**

Promoter Michael Chugg and others in the music industry have explained that awarding the lease to Live Nation will effectively close off the venue to many Australian and international acts. Promoters will be wary of booking artists at a venue run by a competing promoter.

Live Nation is a vertically integrated conglomerate. The live music industry is comprised of five key parties: artists, promoters, venue operators, ticketing services and advertisers/sponsors. Live Nation is active in all of these areas, unlike the other two short-listed candidates, Playbill and Palais Theatre Management. They are venue operators, not rival promoters. This raises serious monopoly issues for the Council's recommendation of Live Nation.

Would the Palais realistically be available to competing promoters to book if Live Nation were the venue operator? Does Live Nation intend to have the Palais exclusively as a music venue for their own promotions and their own team of tied artists? Even if the theatre were available in theory for competing promoters, would they be deterred by concerns that Live Nation could use its inside knowledge to 'poach' performers or compete with them? Furthermore, would Live Nation be able to use its control over venues and ticketing agencies to gouge monopoly prices?

The decision on the Palais should be evidence-based. It may be asserted that measures can be put in place so that other promoters will continue to book the Palais. The best evidence rule would ensure there is input from rival promoters. This is the standard ACCC method of dealing with such monopolization issues. In February 2016 ilovemyplais wrote to the CEO and Councillors asking Council to invite other promoters to give their input on how the various monopoly issues could be resolved. We provided a list of 16 promoters and their contact details (see attached). However Council officers refused to seek this input from the music industry. Council officers blinded themselves to important evidence. Nor were the elected Councillors consulted about whether they would have found such information useful in making their final decision.

Furthermore, it may be difficult to achieve the best development for the St Kilda Triangle if the Minister approves the lease of the Palais to Live Nation. In its 2014 election campaign, the State Government pledged \$22 million music package including a Rock 'n Roll Hall of Fame. A model would be the Rock and Roll Hall of Fame in Cleveland, designed by I M Pei, a Pritzker Prize winner. This is responsible for creating more than 950 jobs with an economic impact of more than \$100 million each year. The St Kilda Triangle would be the perfect venue for a Rock 'n Roll Hall of Fame. However competing promoters may be reluctant to support a Hall of Fame at the St Kilda Triangle if Live Nation is granted the lease of the Palais. The Minister may want to discuss this issue with the music industry.

It is appropriate, therefore, for the Minister now to invite submissions from the music industry on the Council's recommendation. The Minister should give such submissions significant weight. The fundamental issue is what is the best long-term future for the Palais?

## **2. Were the selection criteria weighted to favour bids that promised most money to the Council and were other non-financial criteria not given appropriate weight?**

ilovemy Palais feared that the selection criteria and weightings in the Request or Proposals (RFP) were designed to favour bids that offered to contribute most money to the Council. There was no formal opportunity for interested people to comment on the criteria and weightings. Nevertheless, in April 2015 and May 2016 ilovemy Palais made submissions about the criteria the City of Port Phillip should consider (see attached). I fear that Council officers and the Evaluation Panel have ignored these submissions even though they were based on Council's own policies.

Council's policies can be found (*inter alia*) in the Municipal Strategic Statement, the St Kilda Foreshore Area Policy, the St Kilda Foreshore UDF and St Kilda Triangle 2012. When applied to the Palais, these Council policies would include considerations about residential amenity, heritage, 'St Kilda-ness', community service, the impact on the St Kilda Triangle and the monopolization issue. The call for Expressions of Interest was a public document and was clearly deficient in not specifically raising these considerations. I fear that the RFP had the same deficiencies. This raises questions such as these:

Did the RFP put sufficient emphasis on protecting residential amenity? For example are Live Nation's reputed plans to remove the seats in order to significantly increase

the capacity of the theatre acceptable? This would have a significant adverse impact on residential amenity.

Did the RFP put sufficient emphasis on heritage? For example is it acceptable for Live Nation to continue its standard practice of selling the naming rights to their theatres – the Coca Cola Palais anyone?

Did the RFP put sufficient emphasis on community service? Will Live Nation be allowed to maximise profits and not to provide for local community needs as the current operator has been doing in the past?

There has been no opportunity for the elected Councillors or the public to ensure that the RFP is not biased towards bids that promise to maximize the financial return to Council. It is appropriate, therefore, for the Minister to rigorously examine the selection criteria in order to determine whether the non-financial considerations have been properly taken into account.

### **3. Were the elected Councillors were effectively excluded from decision-making?**

The council's secretive process has improperly limited the involvement of the elected Councillors. The Victorian Auditor General has a guide to public sector contracts entitled 'Public Sector Procurement: Turning Principles into Practice'. It says that

*'for large and complex tenders managed by public entities, a high degree of board oversight of the tender would be expected. Typically, the board would make key decisions about the tender process, or review and sign-off on key decisions made by management. Board members should be given sufficient time to assess board documents.'*

This has not happened with the Palais tender. Councillors were not included in the deliberations about the make-up of the Panel, the contents of the RFP or the weightings to be given. Nor were they consulted on the elimination of one of the short-listed contenders (discussed below). Furthermore, Councillors were only given a few hours to consider the recommendation of the Evaluation Panel.

This means that there has not been the 'high degree' of oversight that the Auditor General would expect. The elected Councillors have been treated as 'rubber-stamps' by Council officers. It is therefore appropriate for the Minister vigorously to scrutinize the Council recommendation to ensure that the broad community interest has been taken into account. This is the role that the elected Councillors should have played, but have not.

### **4. Was the Evaluation Panel unbalanced and did it fail to include members with real expertise in the operation of the music industry?**

I am concerned that the unbalanced recommendation by the Evaluation Panel, in part, reflects an unbalanced composition of the Panel. As discussed above, a major issue for the Panel to consider was whether it is appropriate to allow the Palais to be exclusively controlled by a rival promoter. If the Panel did not include representatives with genuine and extensive experience in the music industry, these issues may not have been properly examined.

In particular the Panel may have accepted 'behavioural' undertakings that work in theory but not in practice (e.g. 'Chinese walls', confidentiality clauses, clauses regarding the rights of rival promoters etc). It is relevant to note that the ACCC is very reluctant to accept behavioural undertakings in dealing with similar monopoly issues within its ambit. It would be necessary for some of the Panel members to have extensive experience in how the music industry actually operates in order for the Panel to know whether 'behavioural' provisions are likely to successfully deal with monopolisation concerns.

#### **5. Should the Council should have excluded the successful current operator, Palais Theatre Management (Neil Croker)?**

Council released the names of 3 short-listed candidates. They were Palais Theatre Management (the current operator headed by Neil Croker), Live Nation and Playbill, a Sydney firm. Council announced in January 2016 that that Neil Croker had been eliminated. This was a surprise as he has done an excellent job over the past five years in improving the Palais.

The Evaluation Panel excluded the current operator without consulting the elected Councillors. It is the Councillors, acting collectively, who ultimately are responsible for the decision to recommend a candidate to the Minister. Surely therefore the elected Councillors should have been consulted on whether to eliminate one of the three candidates. This is especially relevant since the Palais and the Triangle constitute one of the key tasks for the CEO and the Council. The Palais lease is an important political issue, going to the heart of what sort of community we want to live in. It is not a run-of-the-mill tender that could, effectively, be delegated to an evaluation panel.

Councillors (and the Minister) may have wanted to compare the known track record and experience of the current operator against the theoretical promises of the two other candidates. Councillors (and the Minister) may have wanted to be satisfied that one or both of the other candidates was demonstrably superior to the existing operator. However Councillors (and the Minister) were denied this opportunity since the Panel eliminated Palais Theatre Management.

The Minister should take into account the fact that the neither she nor the Councillors have had the opportunity to consider the merits of the bids by the current operator.

#### **6. Was the 'non-complying' bid for the long-term lease by the current operator properly assessed by the Panel and the Council?**

I understand from music industry sources, that the current operator, Neil Croker, lodged two bids – one that complied with the RFP and a non-complying bid.

I fear that the Panel may not have assessed the non-complying bid. It was non-complying because it included a vision for the rest of the St Kilda Triangle. While the Council has separated the development of the Palais from the rest of the St Kilda Triangle, I suggest that the Council (and the Minister) should be able to consider the non-complying bid. This is in accord with the spirit of the St Kilda Triangle Act under which both the Council and the Minister are acting. The Act includes the Palais as a key component of the St Kilda Triangle.

#### **7. An interim extension of the current operator is possible.**

There must be no period where the Palais theatre is left vacant if the Minister asks Council to re-start the leasing process. However, this is not a problem as I understand that the bids from the existing operator, Palais Theatre Management (Neil Croker), include an offer to extend the current lease if that would enable the State government to make the best decision on the long-term lease of the Palais.

This outcome would be similar to the Greek Theatre precedent in Los Angeles. In 2014 The Los Angeles City Council voted to overturn a recommendation to allow Live Nation to take over the iconic Greek Theatre. Residents were concerned that Live Nation would significantly increase the capacity of the theatre and become a nuisance to the surrounding neighbourhood and the music industry was concerned about monopolization issues.

## **Conclusion**

The Palais is an iconic site not just for Port Phillip but also for the whole of the state. The Victorian taxpayers and the Port Phillip ratepayers have paid over \$20 million for emergency short-term repairs to the Palais. Surely this was not done simply to allow a foreign conglomerate effectively to monopolize the theatre.

I am sure that you, as the Minister, and your Department would always carefully consider Council's recommendation. But I submit that the Palais requires a level of review greater than normal. In particular:

1. The Minister should receive submissions from the music industry and give them a significant weighting. The Port Phillip Council has refused to do this. This means that the Council's recommendation is not based on the best available evidence.
2. The Minister should also invite the current operator, Palais Theatre Management, to make a submission. The evaluation panel excluded the current operator too early. This was a bizarre decision as the current operator knows the theatre better than anybody and is likely to have made the most 'realistic' bid. The current operator may be able to provide valuable information about the Palais to assist the Minister in making her decision.
3. The Minister should also consider whether the selection criteria in the Request for Proposals and the weightings were appropriate. Have non-financial considerations like heritage, residential amenity, community service, impact on the St Kilda Triangle and the monopolization issues been properly taken into account? The call for Expressions of Interest was a public document and was clearly deficient in this regard. I fear that the RFP had the same deficiencies. The Minister should also consider whether the evaluation panel had the required expertise, especially in the way the music industry operates.
4. The Minister should then undertake her own independent assessment of the submissions from the three short-listed candidates, Live Nation, Playbill and Palais Theatre Management.

You, as Minister, may ultimately conclude that the current operator, Neil Croker, or the Sydney firm, Playbill, is a better long-term operator of the Palais theatre. On the other hand you may agree with the Council that Live Nation is the preferred candidate. So be it. It is also possible you conclude that there are sufficient major

defects in the current process to ask the Council to re-do the whole lease process. This would then open up the lease to new bidders.

A vigorous and independent review by the Minister is an important assurance that we are getting the best possible long-term operator of the Palais.

I am happy to discuss this further

Yours Faithfully

Peter Holland  
0411 470 651  
May 2016