

Our Ref: DB:222384

14 March 2012

Mr Alan Bright
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Attention: Mark Brown

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Dear Sir

Australian Catholic University objection by Strathfield Council

We act for Council in relation to the above matter.

Council has reviewed the Part 3A Concept Plan application (**the Concept Plan application**) submitted by Australian Catholic University (**ACU**) to the Department of Planning and Infrastructure (**the Department**) and wishes strongly to object to it on a number of grounds pursuant to s 75H(4) of the *Environmental Planning and Assessment Act 1979* (**EPA Act**). We have instructed eminent urban design, architectural, heritage and traffic engineering consultants to undertake a critical appraisal of the environmental impacts of the proposal. Their assessments of the Concept Plan application are annexed and referred to within the body of this submission.

1. **Executive Summary**

- 1.1 The key issues addressed in this submission, and in the expert evidence which supports it, are that the development proposed in the ACU Concept Plan application will result in:

Brisbane
Canberra
Melbourne
Norwest
Sydney

- (a) Unsustainable increase in student numbers;
 - (b) Intolerable impact on traffic and parking;
 - (c) A fundamental and undesirable change to the relevant locality and character of the Strathfield local government area;
 - (d) Unacceptable impacts to the heritage values of the existing buildings and surrounds; and
 - (e) A significant and detrimental impact on residents in the area bordering the site and in the Strathfield area generally.
- 1.2 Council calls on the Minister to exercise his power under cl 268R of the *Environmental Planning and Assessment Regulation 2000* (**the EPA Regulation**) to direct that a public hearing be held by the Planning Assessment Commission (**PAC**) so that the views of Council and concerned residents may be properly heard and be taken into account.
- 1.3 Council is aware that a public meeting will automatically be called on the basis that there have already been 317 submissions received (considerably more than the 25 which triggers a public meeting). Council encourages this process, however, Council would urge the Minister to take the further step of calling a public hearing so that the views of Council and the community can be properly ventilated and taken into account.
- 1.4 Council concludes that the application to expand ACU should be refused on the basis of expert reports. That evidence demonstrates that the reports and documentation accompanying the Concept Plan application are erroneous and misleading and should not be relied upon to make a decision in relation to the ACU site.
- 1.5 It is Council's submission that were the application approved, it would represent such a measure of irrationality as to amount to a decision that no reasonable decision maker would make with the same material before them.
- 2. History and Chronology of the ACU campus in Strathfield**
- 2.1 Early history
- (a) The ACU campus has a long history in the Strathfield area. It has been observed that the main administrative block was built in approximately 1885 and was owned by a Mr John Hinchcliffe until his death in 1895.¹ It was occupied by his family and then purchased by the Christian Brothers for the purpose of a training college in

¹ See judgment of Talbot J in *Australian Catholic University v Strathfield Council*, Unreported judgment, 16 December 1994, Land and Environment Court of NSW, at 1.

December 1908. It was not until 16 September 1984 that the College lodged its first relevant application with Council, to gain consent for the purpose of a transportable classroom. It was at that time traffic concerns were first raised as an issue in response to this application and Council undertook a traffic assessment.

- (b) The application was determined and Council granted consent for the development, subject to a number of conditions. Those conditions were framed to specifically control hours of operation between 9:00am and 9:30pm Monday to Thursdays and 9:00am to 1:00pm on Fridays. Furthermore, 200 off-street parking spaces were required to be provided on the site. At the time, there were approximately 300 students, 25 staff and 30 students in residence on the site. Following the determination, the college lodged an appeal to expand the approval with the Land and Environment Court and after a process of conciliation the provision of 187 off-street parking spaces was agreed to be provided.
- (c) In the early 1990s the Catholic training college became Australian Catholic University. At that time, Council consistently corresponded with ACU to ensure that compliance with the conditions regarding student numbers and offsite parking was intended. These concerns were driven by the increase in complaints received by Council from local residents in regard to environmental impacts arising from the Campus. ACU responded that there were no future plans for expansion and that traffic and student numbers would remain the same.

2.2 Development consent for Albert Road campus

- (a) On 15 March 1993, Council approved the use of the nearby Albert Road site as an extension to ACU subject to several conditions. These included:
 - (i) 50 further parking spaces, making a total of 240 spaces;
 - (ii) Classes permitted between 9:00am – 9:30pm Mondays to Thursdays and 9:00am to 1:00pm Fridays;
 - (iii) Hours of operation for library 8:30am – 9:00pm Mondays to Fridays and 8:30am to 1:00pm Saturdays;
 - (iv) Evening classes shall occur no later than 40mins after the cessation of daytime classes;
 - (v) Maximum permitted student numbers attending shall not exceed 320 during daytime and 247 during night time; and

- (vi) Maximum permitted staff (teachers and admin) shall not exceed 78 during daytime and 21 during night time.

2.3 Further application made for expansion of use

- (a) On 28 June 1994, ACU sought approval from Council to expand and increase its capacity for student numbers to 400 and for staff to 40. It also sought consent for weekend use on the campus and for the addition of a new three storey building. This specifically included a new lecture theatre, teaching spaces and staff office space associated with existing campus buildings at the Mt St Mary Campus, which is on Barker Rd, Strathfield. That development application was refused by Council.
- (b) ACU appealed to the Land and Environment Court and judgment was handed down on 16 December 1994 by Talbot J, granting the appeal, subject to a number of conditions which primarily involved traffic and parking matters (**the 1994 consent**). Relevantly, those conditions were (emphasis added):
 - (i) Condition 10 – maintenance of existing 240 off-street parking spaces on ACU site;
 - (ii) Condition 11 – provision of an additional 65 off-street parking spaces on ACU site;
 - (iii) Condition 12 – all employees to utilise off-street parking on ACU site;
 - (iv) Condition 15 – all staff parking to be clearly designated;
 - (v) Condition 24 – construction of Barker Road entrance approximately 100m to the west of the intersection of Barker Road and South Street;
 - (vi) Condition 25 – construction of a new internal driveway;
 - (vii) Condition 30 – limitation to class (operating hours) as follows:
 - (A) Monday to Friday 8:00am to 9:00pm
 - (B) Library – hours above as well as 8:00am to 5:00pm Saturday.
 - (viii) Condition 31 – No more than 30 minute lapse period between end of daytime class and commencement of night time class;
 - (ix) **Condition 32 – enrolments at any one time shall not exceed 1,100 by day and 700 by night – notwithstanding this, at no one time shall the university permit in excess of 510 students to be present on the site**

during the day (being 8:00am to 5:00pm – Monday to Friday) and 247
during the night time (being 5:00pm to 9:00pm Monday to Friday);

- (x) No more than 190 staff; and
- (xi) Parking be made available to students and staff at a reasonable cost.
- (c) A further development application was determined by Council on 15 October 2002. It was in relation to an expansion of the campus and change of use of the Albert Rd campus (also known as the **Edward Clancy campus**). That development application was approved, subject to a number of conditions which included:
 - (i) Condition 24 – staff only parking plan of management to be finalised;
 - (ii) Hours of operation between 8:00am – 9:00pm Monday to Friday; and
 - (iii) Maximum student numbers at any one time is 240.
- (d) Two further DAs related to additions to the existing Albert Rd campus were submitted in 2011 which did not impact or increase student numbers or parking but which reinforced the existing consents.

2.4 Concerns raised in relation to student numbers and traffic congestion

- (a) On or about April 2006, Council formally wrote to ACU requesting information regarding the number of students on campus. The request was made following complaints in relation to illegal parking in the area. On 15 May 2006 ACU's Executive Director of University Services responded advising that nationally ACU has 13,000 enrolments across 6 campuses, 2 of which are located in Sydney being North Sydney and Strathfield. The Executive Director explained with words to the effect that student attendance at any one campus was dependent on subject choice and as a result students and staff may move between the North Sydney and Strathfield campus.
- (b) In this regard, no specific response to the maximum numbers for the Strathfield Campus was provided, however, it was advised that a notice was distributed to all students and staff requesting cooperation to minimise noise disturbance and park in accordance with relevant regulations.
- (c) A trial period which increased the number of students on campus was run by ACU. Council did not authorise the trial period. ACU wrote to Council advising of surveys of student numbers during the trial period. These surveys indicated up to a maximum of 896 students in one instance between 3:00pm and 4:00pm. The numbers were otherwise generally between 500 to 700.

In our submission, the 1994 consent and the 2002 consent remains as the operable consent in relation to student numbers on the amalgamated ACU site.

2.5 Council is of the opinion that this long history of problems associated with expansion, including traffic congestion, reduced amenity and the apprehended unauthorised student numbers demonstrates lack of regard for conditions imposed on ACU in relation to its previous development consents. Council is concerned that were approval to be granted to the Concept Plan in its present form, not only would this inflame the present circumstances, it would add a further burden to the Strathfield community.

2.6 The concluded view of Council's traffic and urban design consultants is that that the impact on the local community should this application be approved would be "intolerable."

3. Nature of Part 3A Application

3.1 ACU Concept Plan

(a) The current Part 3A application describes the development as "a concept plan approval for a master plan for ACU". The application was submitted on 10 December 2010, prior to the repeal of Part 3A. The savings and transitional provisions of the current EPA Act which deal with Part 3A repeal apply to the application and characterise it as a "transitional project". The Concept Plan has been on exhibition since January 2012. The time period for exhibition was extended so that submissions may be received up to and including 14 March 2012. The application proposes:

- (i) Hours of Operation between 7:00am – 10:00pm weekdays with teaching generally scheduled between 8:00am – 8:00pm with the library open until 9:30pm weekdays. On weekends, the campus including the library will operate between 8:00am – 5:00pm;
- (ii) Student numbers proposed at 4,800 by 2016 with an upper limit of 2,400 students on the campus at any one time.
- (iii) Staff proposed up to a maximum of 260 by 2016.
- (iv) Provision of an additional 328 off-street parking spaces on the site primarily in the form of basement or underground car parks.
- (v) The total off-street parking provided on the site will be 644 and provide 504 spaces for students and 130 spaces for staff. This represents one space per 4.7 students (based on 2,400 students attending the site at any one time) and one space per two staff.

- (b) The above description demonstrates the level of intensification of the current ACU site.

4. Council's contentions

4.1 Student numbers and repeated alleged breaches of consent

- (a) It is clear from the history of the ACU campus outlined previously, that the student numbers have been an issue in the Strathfield community for some time. The 1994 consent requires that the number of students enrolled at ACU is not to exceed 1100 by day and 700 by night. The number of students in attendance on site is not to exceed 510 between the hours of 8.00am and 5.00pm Monday to Friday and 247 between 5.00pm and 9:00pm Monday to Friday. As discussed, these numbers were reached after a period of negotiation between Council and ACU. That process ought to be respected.
- (b) The above is to be considered together with the which applies only to the main campus, the number of students permitted on the Albert Rd campus. This is capped at 240 at any one time with a limit of 38 off-street parking spaces.
- (c) Council is concerned that despite the conditions of consent and existing consents which apply to the site, ACU has allegedly repeatedly breached the terms of its consent by having unauthorised student numbers on campus. Council contends that previous conduct is relevant in the determination of a development application: see *Jonah Pty Ltd v Pittwater Council* [2006] NSWLEC 99. In *Jonah v Pittwater Council* where Preston CJ commented at [38] that:

...past conduct (regardless of whether it is unlawful) may have given rise to unacceptable impacts, such as unacceptable acoustic impacts on adjoining properties. The experience of impacts of past use could be relevant in evaluating, first, the likely impacts of a prospective use for which consent is sought of the same or similar character, extent, intensity and other features as the past use, secondly, the acceptability of the likely impacts and thirdly, if likely impacts are considered to be unacceptable, the appropriate measures that ought to be adopted to mitigate the likely impacts to an acceptable level. Past use would, therefore, be of relevance but it is for proper planning reasons, not because the past use happened to be unlawful.

Clearly there have been problematic impacts, from a planning perspective, as a result of past use of the site and related to previous intensification of the site. Council strongly urges the Minister to consider the impacts on the Strathfield community if this development of the site were allowed to occur. Council believes that the likely impacts are unacceptable and that there is nothing which can be done to mitigate the likely impacts to an acceptable level, except to refuse the application.

- (d) Residents recently conducted an informal survey of the numbers of students entering and leaving ACU. That survey observed the net volume of people on campus, which is the total number of people arriving minus any leaving within the same timeframe. The number of people arriving at both campuses between 7 and 10am in total was 1579. This suggests a prima facie case for breach of ACU's consents.
- (e) In light of the above, and in relation to the negative community response, Council is concerned that the increase in student numbers and the intensification of use that is proposed in the application will have further serious impact on traffic congestion and on the amenity of the area at large. For this reason, the application should be refused. We refer to the evidence of Mr Craig McLaren, one of Australia's preeminent practicing traffic engineers, in his **attached** report (**the McLaren Report – Annexure A**). Mr McLaren states simply that in his opinion the impacts from traffic on the local amenity will be "intolerable."

4.2 Bulk and scale of the proposed development

- (a) Council, on the advice of experts including Visiting Professor Nigel Dickson of Dickson Rothschild architects, finds that the proposed development by virtue of its scale and bulk is fundamentally inconsistent with the existing neighbourhood character (**the Dickson Report - Annexure B**). Prof. Dickson is of the opinion that based on a study of the proposed structures extracted from the "Australian Catholic University Concept Plan Environmental Assessment" prepared by Hassell (**EA**) the development will fundamentally change the context of the area and is inconsistent with the urban design character of the existing campus and surrounds.
- (b) Further, the Dickson Report indicates that the EA contains serious errors is misleading. It has failed to show the context of the proposed buildings accurately. Errors and misrepresentations as to student numbers and the bulk and scale of the proposed development are found throughout the document. The effect is that the reality of the proposal and the description in the EA is markedly different. For example, most houses close to the campus are single storey. The proposed buildings, particularly the library, will be significantly taller by comparison and out of character with its surrounds.
- (c) The Dickson Report also identifies the principle that the physical expansion of the campus by virtue of increasing the bulk and scale of buildings within it is not the limit of consideration. The activities conducted within the boundaries of the campus and proposed buildings must be taken into account as well. This has the effect that the increase in student numbers and the activities associated with such an intense use as to an educational establishment will contribute to the impact of the development and is tied to the increase in bulk and scale of the buildings. Council is concerned

that the development will be fundamentally change the character of this part of the Strathfield area. For this reason it should be refused.

4.3 The evidence of heritage impact of the proposed development

- (a) Council has received advice from David Logan of Goddon Mackay Logan, specialists in heritage impact (**the Logan Report - Annexure C**). That advice has provided grounds for Council to contend that the impact on heritage by development of the site will be substantive enough to be detrimental to the heritage values. The Logan Report urges further consideration and redesign of the proposed building envelope.
- (b) Precinct 1 is located on the site of an existing carpark in the southwestern corner of the main campus. The Logan Report notes (at 2):
 - (i) the proposed envelope would have potential adverse impacts upon this significant view corridor and upon the visual setting of Mount Royal, the Edmund Rice Building and the Barron Chapel due to its small setback from the existing tree-lined avenue and its four storey scale at this end;
 - (i) the heights of the existing three storey scale buildings establish an appropriate reference point for the heights of future buildings in the more sensitive central area of the Main Campus. The proposed four storey scale at the western end of the western 'leg' of Precinct 1 would create a dominant new scale of development within this sensitive area; and
 - (ii) the proposed footprint of the future Library building in this Precinct comes quite close to two highly significant Araucaria trees (Bunya Pines) located near the gateway on the eastern boundary of the site. These trees once formed part of the early landscaping in front of the Victorian villa Ardross, and the Heritage Impact Statement recommends that they be retained in situ. The northern corner of the footprint is in very close proximity to at least one of these trees.
- (c) The Logan Report then goes on to recommend that:
 - (i) the building footprint should be further set back by at least another three metres from the former alignment of Albert Road to minimise its visual impact (encroachment) upon the view corridor. An increased building envelope setback on the northwestern side would better respect the original alignment of Albert Road and the existing setbacks of residences along the southern side of this Road;

- (ii) a reduction in the height of the building envelope (by one storey) at the northwestern corner of Precinct 1 would achieve a better scale relationship with the adjacent historic buildings; and
 - (i) the footprint should be modified to increase the distance (separation) between the future building and the canopies of the Bunya Pine trees and also the nearby gateway.
- (d) Council is concerned that the current Concept Plan application does not adequately take into account the heritage impact outlined above.

4.4 Traffic and parking impacts

- (a) The ACU site has historically demonstrated its incapacity to properly deal with traffic impacts in terms of on street parking demand generated by students, academic staff and visitors to the site. The local road network has exceeded capacity and Mr McLaren is of the strong opinion that the site is no longer capable of properly managing the demands that will be generated if this application were to be approved.
- (b) Similar to the Dickson Report, the McLaren Report indicates that there are several discrepancies within the transport report submitted with ACU's application. That report is entitled the "Australian Catholic University (Strathfield Campus) Transport & Accessibility Study" and was completed by ARUP on 14 December 2011 (**the ARUP Study**). The McLaren Report outlines inconsistencies throughout the ARUP Study. For example (at 3):
 - (i) Section 1.2 ... 510 ACU + 240 EC = 750 students combined.
 - (ii) Section 3.8.2 ... "Currently Strathfield campus is allowed to hold a maximum of 2200 students at any one time."
 - (iii) Section 3.9 ... "In 2008 Semester 1, the peak student capacity reached 884 students attending lectures and tutorials where room capacity being 1585 at that time... Therefore in Strathfield campus the maximum utilisation of students is only 55-60% of its permissible capacity."
 - (iv) Figures 15 & 16 show student attendance levels well in excess of the 750 combined population limit.
 - (v) Table 3 in Section 4.5 shows an existing student number of 2200 at any one time increasing to 2400 students at any one time, thus an increase of 200 students stated as a 9% increase above the 'existing' 2200 limit.

- (c) These inconsistencies in relation to student numbers make an assessment of impact on the traffic and transport amenity of the area. The McLaren Report canvasses issues that also concern residents (see below at Part 4.5). These include the impact on safety, traffic overflow, on-street parking, residential amenity, student and staff transport modes (and how these issues fail to be addressed in the ARUP Study).
- (d) In the informal survey described earlier, residents also observed the impact on car parking that ACU attendees currently have. There were an estimated 675 probable university-related cars parked on street. A further 344 cars were parked on campus between 12 noon and 1pm. This adds to a total of 1019 cars on site, a significant impact on the traffic flow and available parking in the area.
- (e) Council is concerned by the erroneous reporting measures in the ARUP Study and submits that it would be unreasonable to base any decision on the Study as it is. The application ought to be refused on this basis alone.

4.5 Impact on residents

- (a) Council is aware of the objection submitted on behalf of the residents of Strathfield on 29 February 2012. Council adopts and supports the submission with one clarification. Council does not support the proposition that it was dilatory in the exercise of its regulatory and enforcement functions. We submit that, in relation to the trial period of additional student numbers, Council has never consented to the trial period. Further, Council reserved its position to take action if residents were adversely affected.
- (b) Broadly, residents are concerned with the issue highlighted in the Dickson Report: that the site on which ACU is located is suitable only for a smaller "village style" educational establishment. It is unable to accommodate the proposed expansion and its attendant impact on the surrounding area.
- (c) More specifically, concerns of the residents in the area centre around the issues discussed in the expert reports. The residents are concerned with:
 - (i) Traffic and parking: there is already a significant impact on the amenity of the residents in the area in terms of traffic. The noise, disturbance, pollution, litter and inability to move into and out of resident houses due to traffic congestion were raised as issues by many residents. Further, the forecast increase in student numbers in the concept plan will generate a demand for car parking that far exceeds the proposed increase in the on-campus parking areas. These traffic and parking issues are linked to concerns for safety of residents who are encountering difficulty picking up family members from Strathfield Station and from local schools.

- (ii) Bulk and scale of proposed buildings: residents have voiced objections to the proposed buildings, which have no buffer in relation to adjacent low residential buildings. This will impact the privacy of residents and alter the character of the area.
- (iii) Heritage: residents firmly oppose the application on the basis that it will detract from the heritage landscape in which the ACU campus is presently situated. Residents are of the view that such a change will materially alter the character of the area and transform it into a commercial precinct.
- (d) Council views these as very serious concerns. The residents of Strathfield will bear the burden of any expansion of the ACU campus, particularly in terms of traffic and safety impacts. The Minister ought to take this into account when making a decision and find, on the basis of the evidence annexed, that approval for the development is intolerable to the local community and so should be refused.

5. Avenues for objection

5.1 Objector appeal rights

- (a) The application is for a concept plan approval. An application for a concept plan was made under s 75M of the previous iteration of Part 3A and carries no right of merit appeal by objectors.
- (b) If the application is characterised as a project application any objector right of appeal under s 75L would cease to apply in the event of a PAC review. We are advised by Council that there has as yet been no PAC review, but that one is expected to take place in the future.

5.2 Council can attend and call for a public hearing

- (a) On 28 September 2011 the Minister delegated reviewing and determination, *inter alia*, functions in relation to specified Part 3A applications. The present application falls within one of those specified and so the PAC has delegated authority to determine the proposal. However, The Minister may request that a public hearing take place pursuant to cl 268R of the EPA Regulation as it was then in force at the date of repeal of Part 3A. Clause 268R:

268R Public hearings of Commission

(1) The Commission must conduct a public hearing in the following circumstances:

(a) if requested to do so by the Minister

...

- (b) If the PAC wishes to exclude any party from the public hearing it must provide strong public interest grounds for doing so, and Council can see no reason why any party should be so excluded: cl 268R(5) of the Regulation. Council strongly urges the Minister to request the PAC to conduct a public hearing pursuant to cl 268R(1)(a) of the Regulation so that the many thousands of residents affected by the proposal will have a forum to air their concerns. In view of the absence of appeal rights Council contends that it would be a denial of natural justice not to allow the community a real right to participate.
- (c) This application has the potential to affect thousands of local residents in Strathfield and by its history has already demonstrated that it is the most contentious application for land use in the recent history of this local government area. A public hearing will allow the community to properly ventilate its concern and at the very least allow its concern to be properly expressed.

5.3 *Wednesbury* unreasonableness as a ground of judicial review

- (a) The principle of *Wednesbury* unreasonableness has been established by the courts for some time since its initial form by Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 at 682H. The test has been encapsulated as a question of whether, based on the material before the decision-maker, the decision was so unreasonable that no reasonable decision-maker could have come to that decision: *Woolworths Ltd v Pallas Newco Pty Ltd* [2004] NSWCA 422;(2004) 61 NSWLR 707. Pain J at [152] in *Pittwater Council v Minister for Planning* [2011] NSWLEC 162 found that (citations omitted):

The decision must amount to “an abuse of power or be so devoid of plausible justification that no reasonable person could have taken that course”.

- (b) With this in mind, the Council submits that any decision to approve the Concept Plan (based on the current plans and supporting material) application falls within the bounds of manifest unreasonableness for the reasons listed above.
- (c) The Minister, if the project is approved, will have;
 - (i) failed to consider the impact on heritage, traffic, intensification of use in the form of student numbers;
 - (ii) the discordant nature of the proposed expansion in the setting of the Strathfield community; and
 - (iii) in so doing will have made a decision that is so unreasonable that no reasonable decision maker could have taken that course.

(d) In this regard, Council formally reserves its position.

6. The Concept Plan application has already attracted a great deal of criticism from the community, particularly on the ground of its inappropriate bulk and scale and the reduction in heritage values for the Strathfield area. This is a further reason that confirms the Concept Plan application and the project it refers to as unacceptable for approval.

7. Concluding remarks

- 7.1 Council strongly objects to the Concept Plan application for the expansion and intensification of use of the ACU campus. In light of the evidence **attached**, it would, in our submission, be a manifestly unreasonable decision to approve the project and would cause significant community outcry and disruption that is simply unacceptable.
- 7.2 We request that the Minister consider the above impacts, including reduction in heritage values, traffic intensification and the fundamentally unacceptable bulk and scale of the proposal, on the locality and amenity of the Strathfield area at large. The only proper determination open to the Minister based upon an objective assessment of the merits and legal principles governing same is to refuse the application.
- 7.3 Council formally requests that the Minister withdraw his Delegation to the PAC of 28 September 2011 pursuant to s 23D of the EPA Act and consider the matter himself. Alternatively, in the event that the Minister does not revoke the Delegation, Council formally requests that the Minister require a public hearing by the PAC pursuant to cl 286R of the EPA Regulation.
- 7.4 The proposal constitutes an offensive over development of the site of such proportion that in our opinion the principles of Wednesbury² unreasonableness apply. For this reason, approval to the application should not be granted.

Yours sincerely

HWL Ebsworth



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² See Part 5.3 of the submission where we discuss the principle in detail.