

Conclusions

Colour code

Relevant.

More Relevant

Most Relevant

Cultural heritage due diligence

645. VicRoads recognised that the Western Highway duplication project was likely to impact Aboriginal cultural heritage in early 2008, when it began preliminary planning activities associated with the project.

646. This led VicRoads to commission a desktop report into Aboriginal cultural heritage within the vicinity of the existing highway corridor. This report recognised the traditional Djab Wurrung connection to the region and cautioned that previously unrecorded cultural heritage sites were likely to be encountered within the area.

647. Protection of Aboriginal cultural heritage sites was subsequently identified as one of several key objectives for the project. In 2011, two further Aboriginal cultural heritage assessments were commissioned for the purposes of evaluating alignment options for the section of highway between Buangor and Ararat, the focus of the present-day dispute.

648. The first of these assessments focused on previously identified Aboriginal cultural heritage sites within the area. At the recommendation of the Registered Aboriginal Party for the area, Martang, the latter assessment also attempted to predict the occurrence of undiscovered cultural heritage sites within the potential alignment corridors. Information concerning the broader cultural sensitivities of the area was also solicited from Martang and mapped against the shortlisted alignment options.

649. Specialist reports were also commissioned into the potential presence of mortuary trees and Aboriginal earth mounds within the project area. The decision to undertake detailed enquiries concerning these sites was guided by expert advice, which emphasised their relative prevalence in the region and significance according to Aboriginal tradition.

650. The results of the cultural heritage assessments were considered and weighed against other project objectives. It is noted that information identified during the cultural heritage assessments influenced VicRoads to favour some alignment options and eliminate others.

651. The two alignment options nominated by VicRoads for inclusion in the project's Environment Effects Statement were the subject of a further cultural heritage impact assessment, conducted in early 2012. This assessment concluded that, while both alignment options could encounter previously unrecorded Aboriginal cultural heritage sites, this risk could be managed by undertaking

targeted archaeological excavations and through preparation of a cultural heritage management plan for the project. VicRoads subsequently followed this advice.

652. The investigation established that VicRoads did not receive reports of possible birthing trees within the project area until early 2017, after the highway alignment had been determined by the Minister for Planning. Project consultation

653. Some parties submitted to the Ombudsman that late identification of the possible birthing trees was attributable to a failure to consult more broadly with Djab Wurrung traditional custodians during the project planning phase.

654. While often challenging to coordinate, early, broad and culturally inclusive public consultation invariably assists public authorities to understand different perspectives about planned initiatives and major infrastructure projects. Conclusions 132 www.ombudsman.vic.gov.au 655. VicRoads' consultation with local residents and affected landholders was thorough and responsive. Feedback from community information sessions and stakeholder meetings led to the identification and assessment of additional alignment options and the reconfiguration of alignment evaluation criteria.

656. Consultation with Aboriginal communities was more limited, and tended to rely upon discussions between VicRoads, Aboriginal Victoria and the Registered Aboriginal Parties for the area.

657. VicRoads did not develop a cultural heritage consultation plan for the project. The preparation of such a plan was recommended by VicRoads' Cultural Heritage Guidelines, although the Department of Transport observed that these guidelines may not have been kept fully up to date with developments in Victoria's Aboriginal cultural heritage framework.

658. While there appear to have been no registered native title claimants or traditional owner groups for the area during the relevant period, preparation of a cultural heritage consultation plan could still have assisted VicRoads to identify and consult with other Aboriginal parties with connections to and knowledge of the area.

659. This was particularly important considering the degree to which Djab Wurrung ancestors were displaced from their traditional lands. It is also possible that such efforts would have led to earlier engagement with representatives of Eastern Maar.

660. In response to the Ombudsman's draft report, the Aboriginal Heritage Council addressed this issue: [the] suggestion that broad Aboriginal focused consultation could be undertaken without interfering with the primacy of RAs is erroneous [and would] unreasonably interfere with RAs' rights to exercise their statutory function as the primary source on Cultural Heritage matters relating to their Registration Area.

661. The Department of Transport, responding to the Ombudsman's draft report on behalf of VicRoads, similarly emphasised: The relevant statutory frameworks and [Aboriginal Heritage Council] guidance provides that the Registered Aboriginal Party [...] is the relevant Traditional Owner group with which to consult on cultural heritage matters, and VicRoads, MRPA and MRPV have acted consistently with the requirements of this statutory framework and VAHC guidance in the planning and delivery of the Project.

662. It is acknowledged that the Aboriginal Heritage Act prioritises consultation between project proponents and Registered Aboriginal Parties. The Act clearly identifies Registered Aboriginal Parties as the 'primary source of advice and knowledge' on matters relating to Aboriginal cultural heritage within their designated area, although the investigation noted that the Act does not prohibit a proponent from consulting more broadly with Aboriginal peoples.

663. Ultimately, it may be for Parliament to consider whether the processes under the Aboriginal Heritage Act should be made more permissive of consultation with individuals and bodies who have not been accorded Registered Aboriginal Party status; noting, at the same time, the need to respect the principles of Aboriginal selfdetermination underpinning this legislation.

664. In this regard, the investigation noted that Aboriginal Victoria – the office responsible for administering the Aboriginal Heritage Act – observed that the Ombudsman's draft report: point[ed] to some areas of Victoria's cultural heritage management and protection system which AV could explore for both policy and legislative improvement. conclusions 133 Selection of the highway alignment

665. Owing to the location of Langi Ghiran State Park, alignment options for the relevant section of highway were effectively limited to those which followed the existing highway alignment, either in full or in part, and those which deviated through farmland to the south.

666. It is noted that, largely owing to this constraint, none of the alignment options shortlisted by VicRoads would have entirely avoided the areas later identified for protection by some Djab Wurrung traditional custodians.

667. Following the alignment evaluation process, VicRoads resolved to present two alignment options for further consideration in the project's Environment Effects Statement, finalised in August 2012. VicRoads determined to endorse one of these options, Option 2, as its preferred alignment for the duplicated highway.

668. The investigation noted that this decision contradicted internal advice presented to VicRoads' executive team. While the Environment Effects Statement provided a detailed description of the alignment evaluation process, it did not include sufficient information to identify why this alignment was favoured by VicRoads. Further, VicRoads does not appear to have kept sufficient internal records concerning this decision.

669. Again, it is noted that neither option presented in the Environment Effects Statement would have entirely avoided the areas surrounding the nominated birthing trees – both options followed the same route between Ararat and Langi Ghiran State Park, where one such tree is located, and both diverged south of the existing highway between Langi Ghiran and Buangor, intersecting to different degrees the area surrounding the other tree.

670. VicRoads has publicly apologised for errors in the environmental data included in the Environment Effects Statement, although some community members maintain that the issues with this document are broader than have been acknowledged. These matters were largely outside of the terms of reference for the investigation and were not explored in detail by the Ombudsman.

671. The two alignment options presented in the Environment Effects Statement were subsequently evaluated by the Inquiry and Advisory Committee established by the Minister for Planning. In early 2013, this authority determined to recommend VicRoads' alternative alignment, Option 1, at the expense of VicRoads' preferred alignment, owing to its perceived environmental benefits. This was consistent with advice from the then-Department of Sustainability and Environment and was not unreasonable in the circumstances.

672. The Inquiry and Advisory Committee concluded that there would be a 'low impact' to Aboriginal cultural heritage associated with the project. This conclusion was consistent with the cultural heritage impact assessment included in the Environment Effects Statement and was also not unreasonable in the circumstances.

673. The Inquiry and Advisory Committee process appears to have provided a reasonable opportunity for members of the community to be heard about the project's impacts. 134
www.ombudsman.vic.gov.au Cultural heritage investigations

674. Aboriginal cultural heritage sites within the approved alignment corridor were investigated during preparation of the project's cultural heritage management plan. This involved three levels of cultural heritage assessment, including 66 days of field surveys and excavation activities undertaken in cooperation with Martang between January 2012 and August 2013.

675. The assessments undertaken for the cultural heritage management plan identified a number of new cultural heritage sites within and surrounding the project area. This included several culturally modified trees located near Buangor that were subsequently managed in accordance with measures agreed with Martang.

676. The investigation noted that, while reasonably thorough in themselves, information concerning the desktop and standard assessments could have been made more accessible in the project's Environment Effects Statement.

677. VicRoads consulted with Martang throughout the cultural heritage management plan process. This consultation did not lead to the identification of the possible birthing trees or the more significant cultural values that were subsequently attributed to the area.

678. This should not be interpreted as criticism of the advice provided by Martang. Evidently, there are differing views within the Djab Wurrung community concerning the degree to which the project will impact cultural values associated with the area.

679. Several individuals who approached the investigation said they believed the field inspections undertaken for the cultural heritage management plan did not involve participation of female Djab Wurrung traditional custodians and therefore may have failed to consider cultural values relating to women's business.

680. The investigation noted that several female representatives of Martang participated in the field work undertaken for the complex assessment of the project area. Further, senior female representatives of Martang also participated in the cultural values workshop undertaken for the purposes of the alignment evaluation process.

681. In any case, the investigation considered that VicRoads was required to rely upon Martang's judgement as to which of its representatives were best suited to participate in the inspections. It is noted that senior female representatives of Martang were involved in later inspections of the nominated birthing trees coordinated by Aboriginal Victoria and did not endorse the values attributed to these sites by other parties.

682. It is acknowledged that some traditional custodians have claimed that Martang was not sufficiently representative of Djab Wurrung people. These parties have suggested that it was inappropriate for VicRoads to have relied upon the advice provided by Martang when considering the cultural heritage impacts of the project.

683. During the relevant period, Martang was recognised by the Aboriginal Heritage Council as the primary source of cultural heritage advice and the body representing Djab Wurrung people for the area. The Aboriginal Heritage Act required VicRoads to consult with Martang before and during preparation of the cultural heritage management plan.

684. Presently, entities seeking registration as a Registered Aboriginal Party do not need to satisfy that they are the only, or even the most, representative body for traditional custodians of the relevant area; although this may still be a matter that the Aboriginal Heritage Council takes into account when considering an application. conclusions 135 685. Yet the degree to which a Registered Aboriginal Party represents traditional custodians is very important because, once registered, such bodies have sole responsibility for evaluating projects that may impact Aboriginal cultural heritage within their designated area.

686. Martang's limited ownership structure was recognised by the Aboriginal Heritage Council when it determined to approve Martang's application for registration as a Registered Aboriginal Party in September 2007. Despite this, the Aboriginal Heritage Council identified reasons why it was satisfied that Martang met the criteria for registration under the Aboriginal Heritage Act and was accordingly capable of speaking for Djab Wurrung cultural heritage.

687. The actions of the Aboriginal Heritage Council were not a subject of the investigation and it is not suggested that the Council's decision to approve Martang's application for registration was wrong.

688. Under the Aboriginal Heritage Act, VicRoads was required to prepare a cultural heritage management plan in relation to the project. While this document was finalised prior to selection of the approved highway alignment in October 2013, it is unlikely to have meaningfully influenced the decision.

689. The cultural heritage management plan documented the Aboriginal cultural heritage sites identified during the investigations conducted with Martang and proposed measures intended to reduce the risks to Aboriginal cultural heritage associated with the project.

690. Martang indicated that it was satisfied that the cultural heritage management plan suitably minimised harm to Aboriginal cultural heritage when it determined to approve this document in October 2013.

691. This was in accordance with the criteria identified in the Aboriginal Heritage Act, which, while prioritising principles of harm avoidance, require only that a cultural heritage management plan minimise harm to Aboriginal cultural heritage associated with an activity. It is acknowledged that to some traditional custodians, any harm to Country and cultural heritage will be unacceptable.

692. Although its actions were not a subject of the investigation, records reviewed by the Ombudsman indicate that Martang approached its responsibilities concerning the project diligently and in accordance with the requirements established under the Aboriginal Heritage Act. Credit trading agreement

THIS IS TOTAL BULLSHIT.

693. The investigation did not substantiate allegations that VicRoads unduly influenced Martang to approve the cultural heritage management plan.

694. Despite this, VicRoads' decision to negotiate a Credit Trading Agreement relating to the project with Martang during the period when Martang was required to evaluate the cultural heritage management plan was ill-advised and arguably created a conflict of interest.

More Bullshit Not having a go at their CEO Victoria Marles but she was the Legal Services Commissioner who resigned in 2009 because of a damning report by the Ombudsman in 2009 on the Victorian legal services commissioner which has never been released to the public.

695. Trust for Nature was not informed of Martang's role in evaluating the cultural heritage management plan and deserves no criticism for its involvement in the arrangement.

More Bullshit

696. There is no evidence that the Credit Trading Agreement was actually intended to influence Martang or that it had any impact on Martang's decision to approve the cultural heritage management plan.

697. Other payments from the Victorian Government to Martang during the relevant period did not create an incentive for Martang to approve the cultural heritage management plan.

136 www.ombudsman.vic.gov.au Response to cultural heritage concerns

698. VicRoads was first informed of reports of possible birthing trees within the project area in early 2017.

699. VicRoads subsequently facilitated Aboriginal Victoria's inspection of the nominated trees. Those inspections involved senior female Djab Wurrung representatives of Martang and Eastern Maar. At

the time, the former body had been recognised by the Aboriginal Heritage Council as the primary source of cultural heritage advice for the area and the latter body represented Aboriginal peoples with a registered native title claim concerning the region.

700. Aboriginal Victoria later wrote to VicRoads to report that these inspections had not substantiated the claims made about the area. Aboriginal Victoria informed VicRoads that it was authorised to proceed with the project in accordance with the cultural heritage management plan approved by Martang. That advice was reiterated after a further inspection of the area by representatives of Eastern Maar.

701. Under the Aboriginal Heritage Act, VicRoads was not responsible for assessing the preliminary reports concerning the possible birthing trees. It was reasonable in the circumstances for VicRoads to have relied upon the advice of Aboriginal Victoria regarding this issue.

702. In June 2018, after works associated with the project were effectively halted by efforts to protect the site, VicRoads resolved to undertake further consultation with Djab Wurrung opponents to the project, as well as representatives of Martang and Eastern Maar.

703. Following these discussions, VicRoads undertook to support a further, independent cultural heritage assessment of the area impacted by the project. After responsibility for the project was transferred to MRPA, this agency also began work to redesign the proposed highway to avoid the nominated birthing trees.

704. The announcement of a subsequent agreement with Eastern Maar was later criticised by the Aboriginal Heritage Council for its perceived disrespect to Martang's role under the Aboriginal Heritage Act, underscoring the complexity of the situation.

705. The independent On Country assessment commissioned by Eastern Maar identified a number of previously unrecorded trees that were said to be culturally significant to Djab Wurrung people. Several of these trees were previously inspected during the investigations conducted for the project's cultural heritage management plan.

706. While the On Country assessment did not speak in definitive terms regarding the issue, it discussed the significance attributed to the nominated birthing trees by some Djab Wurrung traditional custodians and identified archaeological signs suggestive of their traditional use by Aboriginal people.

707. The On Country assessment recommended that the areas surrounding the nominated birthing trees be avoided by wholesale redesign of the proposed highway alignment. It also expressed qualified criticism of the earlier cultural heritage assessments undertaken in relation to the project for their perceived focus on archaeological sites, rather than intangible values, associated with past Aboriginal use of the area. conclusions 137 708. The latter observation is reminiscent of the advice provided to VicRoads by one local Aboriginal body in the years prior to the duplication project: To the Ballarat Aboriginal Community, a locality or place has more importance than the artefacts on or in it because they have a spiritual connection with the land itself. The natural context of a place then, often extends beyond the boundaries of an archaeological site.⁴¹ 709. In some ways, this criticism also echoed observations made by VicRoads' internal review into environmental errors

associated with the project, which recognised the need for future environmental assessments to consider the 'important local values' often imbued into large old trees.

710. Considered in light of the many complexities encountered by the Western Highway project, these remarks reinforce the need for major planning decisions to be informed by broad, culturally inclusive consultation.

711. It is noted that the methodologies used by the cultural heritage assessments undertaken by VicRoads did incorporate input from Martang about cultural values associated with the area. Modifications to the alignment

712. Following the On Country assessment, Eastern Maar wrote to the Victorian Government to request that it 'genuinely consider an alternative route' for the proposed highway.

713. In January 2019, responsibility for the project was transferred again to MRPV. Following further discussions with representatives of Eastern Maar and the Djab Wurrung Heritage Protection Embassy, this agency developed several localised modifications to the approved alignment. 41 Robert G Gunn, Western Highway Section, Dobie, Western Victoria: Archaeological Survey (Victorian Aboriginal Heritage Register, 2011) 12.

714. This modified alignment, which represents the current project design, is expected to avoid – in some cases only narrowly – 16 of the approximately 22 trees that have been identified as culturally significant by some Djab Wurrung traditional custodians. This includes the two nominated birthing trees, as well as other trees identified as having particular significance, such as the 'marker', 'directions' and 'grandmother' trees.

715. In light of these and other commitments made by MRPV, Eastern Maar has indicated it is satisfied that the project will adequately protect Aboriginal cultural heritage impacted by the project. This aligns with Martang's previous assessment of the project. It is noted that Eastern Maar is currently the Registered Aboriginal Party for the relevant area.

716. This outcome also enjoys the support of the Federation of Victorian Traditional Owner Corporations, Aboriginal Victoria and the Aboriginal Heritage Council.

717. It is not supported by representatives of the Djab Wurrung Heritage Protection Embassy who spoke with the Ombudsman or the Djab Wurrung traditional custodians seeking Commonwealth protection of the area. Alternatives to the approved alignment

718. Some individuals who approached the Ombudsman concerning the project suggested that it was possible to avoid the areas surrounding the nominated birthing trees by duplicating the highway along the existing alignment through the foothills of Langi Ghiran State Park.

719. Media articles and approaches to the Ombudsman have included claims that VicRoads, and later, MRPV, failed to meaningfully investigate this 'northern option'.

138 www.ombudsman.vic.gov.au 720. The northern option does not enjoy the unanimous support of the Djab Wurrung traditional custodians who hold concerns about the project. While this option is supported by the individuals seeking Commonwealth protection of the area, some representatives

of the Djab Wurrung Heritage Protection Embassy who spoke with the investigation said that it would still involve unacceptable impacts to cultural values associated with the area.

721. It is also noted that the northern option, like the approved alignment, would not wholly avoid the area surrounding the second nominated birthing tree, to the west of Langi Ghiran State Park.

722. Further, although private assessments have been conducted, parts of this option have not been assessed for the potential presence of Aboriginal cultural heritage sites under the Aboriginal Heritage Act.

723. Alignment options resembling the northern option were developed and evaluated by VicRoads during preliminary project planning and as part of the formal alignment evaluation process. Following sustained pressure from some community members, versions of the northern option were developed and considered again in 2011, 2012 and 2015.

724. Independent from VicRoads, a version of the northern option was also considered and rejected by the Inquiry and Advisory Committee established by the Minister for Planning.

725. The northern option was also later presented to and rejected by the Minister for Transport Infrastructure as a possible resolution to some of the cultural heritage concerns about the project.

726. VicRoads and MRPV have publicly and privately maintained that it is not possible to construct a suitable road using the alignment identified by proponents of the northern option without causing significant additional impacts to the environment.

727. The decision not to pursue development of the northern option appears to have been based on a combination of environmental, cultural heritage, financial and road configuration considerations. Importantly, records reviewed by the investigation confirmed that the option was not dismissed on cost considerations alone.

728. While some parties may disagree with VicRoads and MRPV's assessment of the northern option, the investigation was ultimately satisfied that these authorities had given fair and appropriate consideration to this possible design alternative.

729. It is noted that, as matters stand, MRPV is constrained to ensure that duplication of the highway occurs within the area identified in the public acquisition overlay included in the Ararat Planning Scheme. Observations

730. While VicRoads' initial project consultation did not appear to have reached all interested audiences, the investigation ultimately concluded that VicRoads, MRPA and MRPV had made legally sound and good faith efforts to consult with traditional custodians and arrive at a compromise solution to the cultural heritage concerns about the project, once raised.

731. On one view, this outcome – which will see the proposed highway avoid 16 trees of significance, including the two nominated birthing trees – represents a significant achievement for those who mobilised to speak up for Country. conclusions 139

732. Yet it is also clear that the terms of the preliminary agreement between MRPV and Eastern Maar have not satisfied all Djab Wurrung traditional custodians who have expressed concerns about

the project. These individuals have observed that the duplication works will inevitably harm a landscape that was once nurtured and revered by Djab Wurrung ancestors, and which continues to be of immense contemporary significance to many.

733. It is evident that these parties continue to distrust the motivations and actions of public authorities associated with the project. That distrust, and the resilience displayed by some Djab Wurrung traditional custodians in seeking to protect their traditional lands, is hardly surprising considering past and ongoing Aboriginal experiences of government. It is a reminder that the trust of Aboriginal communities must be earned, and never assumed.

734. It is also recognised that the concerns raised by Djab Wurrung opponents to the project – some of which relate to matters of legislation and policy – are much broader than could ever be addressed by the investigation.

735. Many of those concerns appeared to derive from tensions at the heart of Victoria's Aboriginal heritage protection framework. In this regard, the investigation observed that the processes under the Aboriginal Heritage Act, while intended to empower traditional custodians when speaking for Country, also have the potential to exclude some voices from the discussion.

736. In response to the Ombudsman's draft report, Aboriginal Victoria submitted: [Aboriginal Victoria] devotes considerable resources to assist Traditional Owners form sustainable representative organisations, and supports the Victorian Aboriginal Heritage Council in its policy to only appoint Registered Aboriginal Parties (RAPs) that are representative of the Traditional Owners of their areas. However, issues such as the representativeness of RAPs and the degree to which Aboriginal oral traditions are explored in cultural heritage management plan processes are areas for which AV could explore improvements.

737. It is clear that the concerns about the project also continue to resonate with the broader community, and may risk impacting some sectors of the public's confidence in the Victorian Government's commitment toward protecting Aboriginal cultural heritage and the delivery of other initiatives seeking to mend the relationships between the State and Aboriginal peoples.

738. It must be recognised that complaints relating to systemic issues often require systemic responses. In such cases, it may not be enough for public authorities to rely upon assurances as to the observance of proper processes to satisfy significant and far-reaching concerns about the way that government functions.

739. In this manner, it is recognised that the conclusions of the investigation are similarly unlikely to resolve remaining concerns about the impacts of the project. While no doubt likely to disappoint many of the individuals who approached the Ombudsman, the observations in this report do nothing to question the commitment and motivations of those who continue to speak for Djab Wurrung Country. 140 www.ombudsman.vic.gov.au Compliance with human rights

740. Section 19(2) of the Charter of Rights Act recognises that Aboriginal people hold distinct cultural rights. This section provides that among other things, Aboriginal people must not be denied the right, along with other members of their community: • to enjoy their identity and culture • to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

741. Decisions by the United Nations Human Rights Committee have recognised that the following matters may be relevant to whether the cultural rights of indigenous peoples have been denied by an administrative action: • the degree to which indigenous people were consulted in relation to, or participated in, the decision to undertake the action • the relative adverse impacts on traditional cultural practices and relationships associated with the action, including any measures adopted by the decision-maker to minimise those impacts.⁴²

742. The investigation did not conclude that the actions of VicRoads and MRPV were incompatible with section 19(2) of the Charter of Rights Act, while noting that MRPV and the other authorities responsible for the project must give proper consideration to the cultural rights of Aboriginal people when determining whether and how to move forward. ⁴² *Länsman v. Finland*, Human Rights Committee, UN Doc. CCPR/C/52/D/511/1992 (8 November 1994); *Mahuika v. New Zealand*, Human Rights Committee, UN Doc. CCPR/C/70/D/547/1993 (15 November 2000). Section 19(2) of the Charter of Rights is based on rights recognised in the International Covenant on Civil and Political Rights and the United Nations Declaration on the Rights of Indigenous Peoples.