FEDERAL COURT OF AUSTRALIA

Clark v Minister for the Environment [2019] FCA 2027

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| File number: | VID 885 of 2019 |
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| Judge: | **ROBERTSON J** |
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| Date of judgment: | 6 December 2019 |
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| Catchwords: | **ABORIGINAL HERITAGE** – application under *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to Commonwealth Minister for declarations seeking the preservation or protection of a specified area from injury or desecration and for the preservation or protection of specified objects from injury or desecration – refusal of applications – application under *Administrative Decisions (Judicial Review) Act 1977* (Cth) for judicial review of the Commonwealth Minister’s decision – whether error of law – whether no evidence or other material to justify the making of the decision – whether the making of the decision was an improper exercise of the power – whether decision *Wednesbury* unreasonable – whether failure to consult with the appropriate Minister of the State of Victoria – whether breach of the rules of natural justice  **ADMINISTRATIVE LAW** – aboriginal heritage – applications under *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to Commonwealth Minister for declarations seeking the preservation or protection of a specified area from injury or desecration and for the preservation or protection of specified objects from injury or desecration – refusal of applications – application under *Administrative Decisions (Judicial Review) Act 1977* (Cth) for judicial review of the Commonwealth Minister’s decision – whether error of law – whether no evidence or other material to justify the making of the decision – whether the making of the decision was an improper exercise of the power – whether decision *Wednesbury* unreasonable – whether failure to consult with the appropriate Minister of the State of Victoria – whether breach of the rules of natural justice |
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| Legislation: | *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 3, 10, 12, 13  *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5  *Aboriginal Heritage Act 2006* (Vic) |
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| Cases cited: | *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1984] FCA 1074; 49 FCR 576  *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; 256 CLR 326  *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152  *Tickner v Bropho* (1993) 40 FCR 183  *Tickner v Chapman* (1995) 57 FCR 451 |
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| Dates of hearing: | 19 and 22 November 2019 |
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| Registry: | Victoria |
|  |  |
| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Category: | Catchwords |
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| Number of paragraphs: | 205 |
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| Solicitor for the Applicants: | Michael I Kennedy & Associates |
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| Counsel for the Respondent: | Mr CJ Horan QC with Dr L Hilly |
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| Solicitor for the Respondent: | Maddocks |

ORDERS

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|  | | VID 885 of 2019 |
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| BETWEEN: | JIDAH CLARK  First Applicant  MERIKI ONUS  Second Applicant  LORRAINE SANDRA ONUS (and another named in the Schedule)  Third Applicant | |
| AND: | THE MINISTER FOR THE ENVIRONMENT  Respondent | |

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| JUDGE: | ROBERTSON J |
| DATE OF ORDER: | 6 DECEMBER 2019 |

THE COURT ORDERS THAT:

1. The decision of the respondent made on 16 July 2019 not to make declarations under s 10 and s 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is set aside from the date it was made.
2. The applicants’ application dated 17 June 2018 be referred to the respondent for further consideration according to law.
3. The respondent pay the applicants’ costs of the application, excluding the costs of the applicants’ interlocutory application dated 8 November 2019, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ROBERTSON J:

## Introduction

1. On 16 July 2019 the Commonwealth **Minister** for the Environment decided not to make declarations under s 10 and under s 12 of the *Aboriginal and Torres Strait Islander* ***Heritage Protection Act*** *1984* (Cth). **Application** had been made to the Minister by Jidah Clark, Tracey Bamblett Onus, Meriki Onus, Lorraine Sandra Onus, Tameen Onus-Williams, Eileen Austin, Geoff Clark, Monica McDonald and Marjorie Thorpe, who identified themselves as Djab Wurrung traditional owners, seeking protection of a **Specified Area** of Djab Wurrung Country near Ararat, in Victoria, and **six trees** located in the Specified Area. The threat of injury or desecration was attributed to an upgrade of the Western Highway proposed by the Roads Corporation of Victoria (**VicRoads**), particularly what is known as “Section 2B”.
2. The six trees were identified by the Minister as follows:

a. E1 (Yellow Box Scarred Tree) [GDA94 Coordinates: (688430E

5864681N)];

b. E2 (Canoe Tree) [GDA94 Coordinates: (688126E 5864844N)];

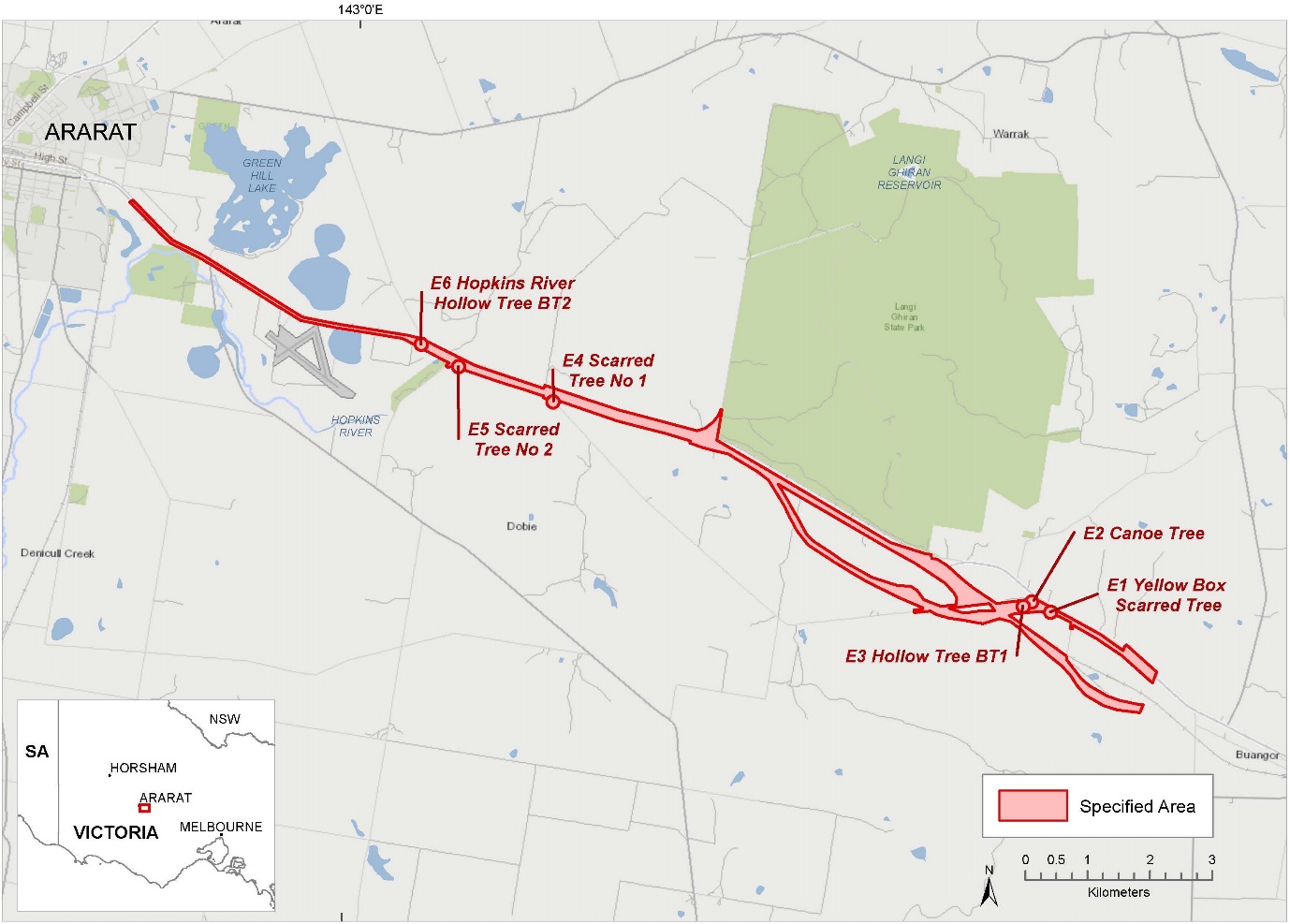
c. E3 (Hollow Tree BT1) [GDA94 Coordinates: (687991 E 5864773N)];

d. E4 (Scarred Tree No 1) [GDA94 Coordinates: (680435E 5868058N)];

e. E5 (Scarred Tree No 2) [GDA94 Coordinates: (678917E 5868624N)]; and

f. E6 (Hopkins River Hollow Tree BT2) [GDA94 Coordinates: (678320E 5868983N)].

1. The following map illustrates the location of the six trees and the Specified Area of Djab Wurrung country:



1. The applicants seek an order quashing the decision and remitting the matter to the Minister for reconsideration in accordance with law.
2. The applicants also seek consequential relief against the State of Victoria (the **State**). The State resists being joined as a party to these proceedings because it resists the relief claimed against it. That aspect of the matter is dealt with in a separate judgment also delivered today: *Clark v Minister for the Environment (No 2)* [2019] FCA 2028.
3. On 18 July 2018, the then Minister (the Hon Josh Frydenberg MP) nominated Ms Susan Phillips, barrister, as the **Reporter** for the purposes of the Application under s 10 of the *Heritage Protection Act*. On 7 September 2018, the Reporter submitted her report to the Minister.
4. On 12 September 2018, the then Minister (the Hon Melissa Price MP) decided not to make an emergency declaration under s 9 of the *Heritage Protection Act*.
5. On 19 December 2018, the then Minister decided not to make declarations under ss 10 and 12 of the *Heritage Protection Act* in relation to the Specified Area and the six trees. The applicants sought judicial review of that decision, which was set aside by consent orders made by Mortimer J on 12 April 2019, the matter being remitted to the Minister for reconsideration according to law.
6. The planned works in Section 2B of the Western Highway between Ballarat and Stawell (**WHDP**) comprise a section between Buangor and Ararat approximately 12.5km long.
7. Before July 2018, VicRoads was responsible for delivery of the WHDP. On 13 June 2018, to take effect on 1 July 2018, the Major Road Projects Authority (**MRPA**) was established as an administrative office in relation to the Victorian Department of Economic Development, Jobs, Transport and Resources. On 1 January 2019, the MRPA was abolished and its responsibilities transferred to Major Road Projects Victoria (**MRPV**), an Administrative Office in relation to the Department of Transport. The MRPA had the responsibility for delivering the WHDP and that responsibility was later transferred to MRPV.

## The relevant statutory provisions

1. The statutory provisions of the *Heritage Protection Act* are as follows:

**10 Other declarations in relation to areas**

(1) Where the Minister:

(a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration;

(b) is satisfied:

(i) that the area is a significant Aboriginal area; and

(ii) that it is under threat of injury or desecration;

(c) has received a report under subsection (4) in relation to the area from a person nominated by him or her and has considered the report and any representations attached to the report; and

(d) has considered such other matters as he or she thinks relevant; he or she may, by legislative instrument, make a declaration in relation to the area.

(2) Subject to this Part, a declaration under subsection (1) has effect for such period as is specified in the declaration.

(3) Before a person submits a report to the Minister for the purposes of paragraph (1)(c), he or she shall:

(a) publish, in the *Gazette*, and in a local newspaper, if any, circulating in any region concerned, a notice:

(i) stating the purpose of the application made under subsection (1) and the matters required to be dealt with in the report;

(ii) inviting interested persons to furnish representations in connection with the report by a specified date, being not less than 14 days after the date of publication of the notice in the *Gazette*; and

(iii) specifying an address to which such representations may be furnished; and

(b) give due consideration to any representations so furnished and, when submitting the report, attach them to the report.

(4) For the purposes of paragraph (1)(c), a report in relation to an area shall deal with the following matters:

(a) the particular significance of the area to Aboriginals;

(b) the nature and extent of the threat of injury to, or desecration of, the area;

(c) the extent of the area that should be protected;

(d) the prohibitions and restrictions to be made with respect to the area;

(e) the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal or Aboriginals referred to in paragraph (1)(a);

(f) the duration of any declaration;

(g) the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law;

(h) such other matters (if any) as are prescribed.

…

**12 Declarations in relation to objects**

(1) Where the Minister:

(a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified object or class of objects from injury or desecration;

(b) is satisfied:

(i) that the object is a significant Aboriginal object or the class of objects is a class of significant Aboriginal objects; and

(ii) that the object or the whole or part of the class of objects, as the case may be, is under threat of injury or desecration;

(c) has considered any effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal or Aboriginals referred to in paragraph (1)(a); and

(d) has considered such other matters as he or she thinks relevant;

he or she may, by legislative instrument, make a declaration in relation to the object or the whole or that part of the class of objects, as the case may be.

(2) Subject to this Part, a declaration under subsection (1) has effect for such period as is specified in the declaration.

(3) A declaration under subsection (1) in relation to an object or objects shall:

(a) describe the object or objects with sufficient particulars to enable the object or objects to be identified; and

(b) contain provisions for and in relation to the protection and preservation of the object or objects from injury or desecration.

(3A) A declaration under subsection (1) cannot prevent the export of an object if there is a certificate in force under section 12 of the *Protection of Movable Cultural Heritage Act 1986* authorising its export.

(4) A declaration under subsection (1) in relation to Aboriginal remains may include provisions ordering the delivery of the remains to:

(a) the Minister; or

(b) an Aboriginal or Aboriginals entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition.

1. The following provisions in s 3 are also important:

(1) In this Act, unless the contrary intention appears:

***Aboriginal tradition*** means the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

…

***significant Aboriginal object*** means an object (including Aboriginal remains) of particular significance to Aboriginals in accordance with Aboriginal tradition.

(2) For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:

(a) in the case of an area:

(i) it is used or treated in a manner inconsistent with Aboriginal tradition;

(ii) by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or

(iii) passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or

(b) in the case of an object—it is used or treated in a manner inconsistent with Aboriginal tradition;

and references in this Act to injury or desecration shall be construed accordingly.

(3) For the purposes of this Act, an area or object shall be taken to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated.

1. The applicants also relied on the following provision in relation to the claimed failure to consult:

**13 Making of declarations**

(1) In this section:

***declaration*** means a declaration under this Division.

(2) The Minister shall not make a declaration in relation to an area, object or objects located in a State or the Northern Territory unless he or she has consulted with the appropriate Minister of that State or Territory as to whether there is, under a law of that State or Territory, effective protection of the area, object or objects from the threat of injury or desecration.

(3) The Minister may, at any time after receiving an application for a declaration, whether or not he or she has made a declaration pursuant to the application, request such persons as he or she considers appropriate to consult with him or her, or with a person nominated by him or her, with a view to resolving, to the satisfaction of the applicant or applicants and the Minister, any matter to which the application relates.

(4) Any failure to comply with subsection (2) does not invalidate the making of a declaration.

(5) Where the Minister is satisfied that the law of a State or of any Territory makes effective provision for the protection of an area, object or objects to which a declaration applies, he or she shall revoke the declaration to the extent that it relates to the area, object or objects.

(6) Nothing in this section limits the power of the Minister to revoke or vary a declaration at any time.

## The Minister’s reasons

1. The Minister provided **reasons** for her decision, dated 16 July 2019.
2. As to Tree E1, the Minister concluded, at [5.25]:

In circumstances where there are differing views from Aboriginal groups that may speak for Country as to the significance of Tree E1 and where commissioned experts have not provided detail about the uses or beliefs centred around the tree (in contrast to the other trees subject to the Application), I am not satisfied that Tree E1 is a significant Aboriginal object for the purposes of the ATSIHP Act [*Heritage Protection Act*].

1. As to Trees E2, E3, E4, E5 and E6, the Minister said, at [5.26]:

After considering the available evidence, I am satisfied that there is a cultural connection that renders five of the Six Trees (namely Trees E2, E3, E4, E5 and E6) particularly significant, with a degree of antiquity, involving Aboriginal traditions, observances, customs and beliefs that are passed down from generation to generation through spirituality, culture and traditional interaction.

1. At [5.30], the Minister said:

As I am not satisfied that Tree E1 is a significant Aboriginal object, I have considered whether the remaining Six Trees, being Trees E2, E3, E4, E5 and E6, are under threat of injury or desecration.

1. The Minister continued:

5.31 The Applicants have described the nature and the extent of the threat of injury to the objects as severe injury and desecration of the trees caused by activities relating to the planned upgrade to the Western Highway. The threat as outlined in the Application was that ‘VicRoads intends to physically destroy and remove these ancient trees.’

5.32 However, MRPV [Major Road Projects Victoria] and EMAC [Eastern Maar Aboriginal Corporation] have since come to an agreement regarding how MRPV will undertake the Western Highway upgrade. MRPV will avoid Trees E2, E3, E4, E5 and E6 as part of the upgrade and has developed a draft framework for identifying and monitoring trees (**Framework**).

5.33 I note that the Applicants’ views that the trees are still under threat because:

a. MRPV’s arborist’s recommendations as set out in their Arborist’s report may not accord with Australian Standard AS4790-2009 *Protection of trees on development sites*; and

b. there can be no legally binding agreement between MRPV and EMAC.

5.34 I note that that the Framework provides that the ‘extent of the exclusion zone will be determined with the Ecologist/Arborist and in consultation with EMAC’. While the Framework is not as prescriptive as AS4790-2009 (as described by the Applicants), the two standards are compatible and I therefore do not consider them to be inconsistent.

5.35 While I agree with the Applicants that the agreement between MRPV and EMAC is not likely to be legally binding, I note that both MRPV and EMAC have publicly referred to MRPV’s commitment. I consider that given the public standing of MRPV and the scrutiny that has been attracted to the potential impact of the proposed Western Highway upgrade on Djab Wurrung country, MRPV can be expected to act in good faith in giving effect to its commitment (albeit not necessarily legally binding) to not remove the trees.

5.36 The Applicants have also raised concerns about how the agreement was reached. I consider this matter to be secondary to the existence of the agreement.

5.37 I am therefore not satisfied that the trees that I have found to be significant Aboriginal objects (E2, E3, E4, E5 and E6) are under threat of injury or desecration.

1. The Minister then made findings on whether the Specified Area is a significant Aboriginal area. At [5.38], the Minister set out the definitions of “significant Aboriginal area” and “Aboriginal tradition” from the *Heritage Protection Act* and said that based on these definitions, to be satisfied that the Specified Area was a “significant Aboriginal area” for the purposes of s 10(1)(b)(i), she must be satisfied that the Specified Area is of particular significance to Aboriginals in accordance with a relevant body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals.
2. The Minister’s statement of reasons then set out the conclusion of the Reporter that “it is clear that the trees … are situated in a landscape in which Djab Wurrung people maintain certain traditions. The existence of those traditions has been identified in work done with local Aboriginal people since and before the current controversy. The Applicants follow those traditions which have been handed down to the present generation by their forebears”.
3. The Minister then said:

5.42 To determine whether the Specified Area is a significant Aboriginal area, I considered and evaluated the evidence and material listed at paragraph 4.1 of this statement of reasons to gain an appreciation of the claimed significance of the Specified Area and the relevant Aboriginal tradition.

5.43 In particular, I considered:

a. the basis upon which the Specified Area was claimed by the Applicants to be an area of particular significance to Aboriginals in accordance with Aboriginal tradition, especially regarding the cultural significance of the trees to women and the broader cultural landscape of the greater area; and

b. the evaluation of the Application and representations by Ms Phillips in the Section 10 Report.

5.44 I note the Reporter’s view that Djab Wurrung Country is a significant Aboriginal area for the purposes of section 10(1)(b)(i) of the ATSIHP Act due to the local Aboriginals having a close, spiritual association with the Specified Area. Further, I noted broad agreement from persons who have made representations that Djab Wurrung Country is of particular significance. Djab Wurrung Country also has a close relationship with:

a. the songlines and stories that reach from Langi Ghiran, the Djab Wurrung people’s black cockatoo dreaming site.

b. the Hopkins River, which is connected to the Djab Wurrung people’s eel dreaming.

c. the trees within the Djab Wurrung Country area that embody key stories specific to Djab Wurrung traditions.

5.45 I note that in the additional information provided on 5 July 2019 by the Applicants, they sought protection under section 10 for the ‘Maximum Construction Footprint’. While I accept that there is a broader cultural landscape which encompasses the Specified Area, I note that the Application and representations made to the Reporter focused heavily on the cultural significance of the Specified Area as deriving from the Six Trees.

5.46 I note that the Reporter found in her conclusions about the significance of the Specified Area:

*It is clear that the trees, many culturally modified by their ancestors, are situation in a landscape in which Djab Wurrung people maintain certain traditions. The existence of those traditions has been identified in work done with local Aboriginal people since before the current controversy. The Applicants follow those traditions which have been handed down to the present generation by their forebears. The Applicants feel obliged by those traditions to seek protection of the trees which form an integral part of those traditions and enduring creation stories.*

*The particular traditions identified by the Applicants, (as elaborated by Jidah Clark and corroborated by investigation of the areas by Dr Builth, On Country Heritage and Consulting and the Langi Ghiran State Park Management Plan) include the belief in the trees as personifying their ancestors being Ancient Trees, Ancestor Trees, or Guardian Trees … These spiritual beliefs, which are connected to other stories in the landscape and the cultural modification of some of the trees in the specified area, demonstrate the particular significance of both trees and area under Djab Wurrung traditions.*

1. The Minister then continued:

5.47 While under the ATSIHP Act significant Aboriginal objects and significant Aboriginal areas are distinct considerations, in the context of the Application the significance of the Specified Area derives cultural significance from the trees (i.e. objects) situated in that area and interconnectedness of those trees to other stories.

5.48 Noting that I am not satisfied that Tree E1 is a significant Aboriginal object, after considering the available evidence, I am satisfied that there is a cultural connection that renders the Specified Area particularly significant, with a degree of antiquity, involving Aboriginal traditions, observances, customs and beliefs that are passed down from generation to generation through dreaming stories, songlines, spirituality, culture and traditional interaction with the cultural landscape comprised by, and within, the Specified Area, (except to the extent of the vicinity of Tree E1 eastwards).

5.49 Therefore, I am satisfied that the Specified Area is a significant Aboriginal area for the purposes of section 10(1)(b)(i) of the ATSIHP Act, except to the extent of the vicinity of Tree E1 eastwards.

1. The Minister then turned to whether she was satisfied that the Specified Area was under threat of injury or desecration. The Minister said:

5.50 Under section 10(1)(b)(ii) of the ATSIHP Act, in order to make a declaration, I must be satisfied that the Specified Area is under threat of injury or desecration.

5.51 I note the Applicants’ view that even if the trees were not considered under threat, the surrounding area will be destroyed by the works and therefore the Specified Area is under threat of injury.

5.52 However, as set out above, I have found that the significance of the Specified Area derives from the culturally significant trees contained in the area. In circumstances where the trees will not be removed, I am not satisfied that the Specified Area is under threat of injury or desecration.

1. The Minister said at [5.53] that notwithstanding that she was not satisfied that the preconditions to make a declaration were not met under ss 10 and 12, she had considered the other matters set out in those sections. The Minister said:

5.55 In reaching my decision I considered the following matters:

a. the extent to which the area is protected under State legislation;

b. the effects on proprietary and pecuniary interests of third parties; and

c. social and economic benefits, particularly relating to community safety.

1. In relation to the first of these matters, the Minister concluded:

5.65 I am satisfied that the measures under the Aboriginal Heritage Act, in particular the CHMP [the Cultural Heritage Management Plan], and the Victorian Government’s commitment to continue working with EMAC provides effective protection of the Six Trees and Specified Area.

1. In relation to the second of these matters, the Minister concluded:

5.68 After considering all the material before me, I am satisfied that, based on the information received from the Victorian Government, the building of an alternate route (the Northern Route) will have a significant economic cost impact.

1. In relation to the third of these matters, the Minister concluded:

5.74 Having considered the information before me, I find that there are likely to be community road safety benefits in the construction of the Western Highway upgrade. I find that there is likely to be safer road conditions associated with the duplication works.

1. Under the heading “Reasons for decision”, the Minister said as follows:

6.1 To make a declaration under section 10 of the ATSIHP Act in relation to the Specified Area, I must be satisfied that the Specified Area is a significant Aboriginal area and is under threat of injury or desecration. While I have found the Specified Area is a significant Aboriginal area (except to the extent of the vicinity of Tree E1 eastwards), I am not satisfied that it is under threat of injury or desecration. Consequently, I am not empowered to make a declaration under section 10 of the ATSIHP Act.

6.2 To make a declaration under section 12 of the ATSIHP Act in relation to the Six Trees, I must be satisfied that the Six Trees are significant Aboriginal objects and are under threat of injury or desecration. I am not satisfied that one of the trees (E1) is a significant Aboriginal object. I am satisfied that the remaining five of the Six Trees are significant Aboriginal objects. However, I am not satisfied that the five trees (E2, E3, E4, E5 and E6) that are significant Aboriginal objects are under threat of injury or desecration as MRPV has agreed not to remove them as part of the construction work for the upgrade and will be monitored under the Framework. Consequently, I am not empowered to make a declaration under section 12 of the ATSIHP Act in relation to the five trees that I have found to be significant Aboriginal objects.

6.3 Notwithstanding that I am not satisfied that the preconditions to make a declaration under section 10 and section 12 of the ATSIHP Act have been met, I note that if I had been so satisfied I would not have made declarations under section 10 and 12 of the ATSIHP Act for the following reasons.

6.4 In making a decision under section 10 or section 12 of the ATSIHP Act, in addition to considering the purpose of the ATSIHP Act set out in section 4, and the matters set out in section 10 and 12, I may only make a declaration after I have considered such other matters as I think are relevant. The ATSIHP Act does not expressly specify or limit the considerations that may be included those other matters. These matters can include a wide range of policy and public interest considerations.

6.5 I note that while the purpose of the ATSIHP Act is to preserve and protect from injury or desecration areas and objects in Australia that are of particular significance for Aboriginals in accordance with Aboriginal traditions, the ATSIHP Act provides a discretion.

6.6 I consider it relevant that the consultation between MRPV and EMAC that has occurred following the making of the Application has led to the protection of five trees which I consider to be significant Aboriginal objects under the ATSIHP Act. The protection now provided to these trees furthers the purpose of the ATSIHP Act.

6.7 In exercising the discretion in sections 10 and 12 of the ATSIHP Act, I am required to weigh up the competing views expressed and evidence provided to me for consideration. In this respect, I have given greater weight to the positive impact on community safety that the Western Highway upgrade will provide, given that it is extensively used, with the upgrade potentially saving lives. This would have a positive impact on a broad section of the community.

6.8 While I have also taken into account the proprietary and pecuniary interests of third parties presented, I have placed less weight on this.

Based on the material presented to me and for reasons set out above, I found that, for the purposes of the ATSIHP Act:

a. I have received an application for the purposes of section 10(1)(a) and section 12(1)(a) of the ATSIHP Act;

b. I am satisfied that the five trees: E2, E3, E4, E5 and E6 are significant Aboriginal objects for the purposes of section 12(1)(b)(i) of the ATSIHP Act;

c. I am not satisfied that Tree E1 is a significant Aboriginal object for the purposes of section 12(1)(b)(i) of the ATSIHP Act;

d. I am not satisfied that there is a threat of injury or desecration to the five trees: E2, E3, E4, E5 and E6 for the purposes of section 12(1)(b)(ii) of the ATSIHP Act;

e. I am satisfied that part of the Specified Area is a significant Aboriginal area for the purposes of section 10(1)(b)(i) of the ATSIHP Act;

f. I am not satisfied that there is a threat of injury or desecration to the Specified Area that is a significant Aboriginal area for the purposes of section 10(1)(b)(ii) of the ATSIHP Act; and

g. in consideration of other matters that are relevant prior to making a decision for the purposes of section 10(1)(d) of the ATSIHP Act I have found that, based on the evidence available there are likely to be community road safety benefits in the construction of the Western Highway upgrade. I find that that there is likely to be safer road conditions associated with the duplication works.

6.9 In light of these findings, and for the reasons above, I decided not to make declarations under section 10 and section 12 of the ATSIHP Act.

## The grounds of the application for judicial review

1. The grounds of the application under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (***ADJR Act***) in the applicants’ “Substituted further amended originating application” were as follows, the strikethrough showing the grounds which were not pressed. (It is also to be noted that the application referred to the Minister as the “First Respondent”, although at the time that application was filed there was only one respondent.)

**ADJR Act section 5(1)(a), (b), (f), (h) or (j)**

*The area*

A. The First Respondent failed to make the Decision in accordance with the Act in that she failed to have proper regard to:

a) the definition of Aboriginal tradition in s 3(1) of the Act;

b) the circumstances in which an area would be taken to be injured or desecrated for the purposes of the Act, as set out in s 3(2) of the Act;

c) the circumstances in which an area would be taken to be under threat of injury or desecration for the purposes of the Act, as set out in s 3(3) of the Act;

with the consequence that the First Respondent asked herself the wrong question in considering her state of satisfaction as prescribed by s 10(1)(b)(ii) of the Act.

B. Having correctly determined that the Specified Area was a significant Aboriginal area for the purposes of s 10(1)(b)(i) of the Act (save in respect of the area east of Tree E1), the First Respondent was required by the definition of Aboriginal tradition in s 3(1) and ss 3(2)(i) and 3(3) of the Act to consider whether on the material before her she was satisfied that the Specified Area was, or was likely to be, used or treated in a manner inconsistent with Aboriginal tradition, but she failed to approach the Decision on that basis.

C. Having correctly determined that the Specified Area was a significant Aboriginal area for the purposes of s 10(1)(b)(i) of the Act (save in respect of the area east of Tree E1), the First Respondent was required by the definition of Aboriginal tradition in s 3(1) and ss 3(2)(ii) and 3(3) of the Act to consider whether on the material before her she was satisfied that by reason of anything done or proposed to be done in, on or near the Specified Area, it was likely the use or significance of the Specified Area in accordance with Aboriginal tradition would be adversely affected, but she failed to approach the Decision on that basis.

D. Having correctly determined that the Specified Area was a significant Aboriginal area for the purposes of s 10(1)(b)(i) of the Act (save in respect of the area east of Tree E1), the First Respondent was required by the definition of Aboriginal tradition in s 3(1) and ss 3(2)(iii) and 3(3) of the Act to consider whether on the material before her it was likely that passage through or over, or entry upon, the Specified Area by any person would occur in a manner inconsistent with Aboriginal tradition, but she failed to approach the Decision on that basis.

E. In making the Decision, the First Respondent misconstrued the Act and unlawfully approached the question of whether she was satisfied as to the matters prescribed by s 10(1)(b)(ii) solely by reference to whether the Trees were to be injured, destroyed or otherwise physically damaged.

F. In so far as the Decision was that the area was a significant Aboriginal area *save for the area east of Tree E1*:

a) a breach of the rules of natural justice or procedural fairness occurred in connection with the making of the Decision in that the Applicants were not put on notice of that possibility and given an opportunity to comment;

b) there was no evidence or other material to justify it (and no reasons were given to justify it).

~~G. Procedures that were required by law to be observed in connection with the making of the Decision were not observed.~~

**~~Particulars~~**

~~Section 10(1)(c) of the Act required the respondent to consider the report received under section 10(4) of the Act.~~

~~The respondent did not consider the report; the respondent was not provided with the Executive Summary and introductory maps forming part of the report (being pages 110 – 134 of the material previously before former Minister Price, one page of which comprised “Map 2” annexed to this amended originating application).~~

*The objects*

H. The First Respondent failed to make the Decision in accordance with the Act in that she failed to have proper regard to:

a) the definition of Aboriginal tradition in s 3(1) of the Act;

b) the circumstances in which an object would be taken to be injured or desecrated for the purposes of the Act as set out in s 3(2) of the Act;

c) the circumstances in which an object would be taken to be under threat of injury or desecration for the purposes of the Act as set out in s 3(3) of the Act;

with the consequence that the First Respondent asked herself the wrong question in considering her state of satisfaction as prescribed by s 12(1)(b)(ii) of the Act.

I. Having correctly determined that Trees E2 to E6 were significant Aboriginal objects for the purposes of s 12(1)(b)(i) of the Act, the First Respondent was required by the definition of Aboriginal tradition in s 3(1) and ss 3(2) and 3(3) of the Act to consider whether on the material before her she was satisfied that Trees E2 to E6 were, or were likely to be, used or treated in a manner inconsistent with Aboriginal tradition, but failed to approach the Decision on that basis.

J. In making the Decision, the First Respondent misconstrued the Act and unlawfully approached the question of whether she was satisfied as to the matters required by s 12(1)(i)(b) solely by reference to whether Trees E2 to E6 were liable to be injured, destroyed or otherwise physically damaged, without having regard to whether Trees E2 to E6 were, or were likely to be, used or treated in a manner inconsistent with Aboriginal tradition.

*The consultation process*

K. In making the Decision, the First Respondent failed to comply with the scheme of the Act and the obligations imposed upon her by section 13(2) of the Act, in that the First Respondent:

a) failed to consult with the appropriate Victorian Minister (being the Victorian Minister with responsibility for Aboriginal affairs) as to whether there was, under a law of Victoria, effective protection of the Specified Area or Trees from the threat of injury or desecration;

b) purported to consult with:

i. the Victorian Minister for Roads and Road Safety and Ports; and

ii. the MRPV;

as to whether there was, under a law of Victoria, effective protection of the Specified Area or Trees from the threat of injury or desecration.

**Particulars**

Letter from the First Respondent to the Hon Luke Donnellan MP dated 25 October 2018 (DW-1 p 1627);

Letter from the Hon Luke Donnellan MP to the First Respondent dated 30 October 2018 (DW-1 p 1629);

Letter from MRPV to Ms R Halliday Director of Indigenous Heritage, Department of Environment and Energy dated 7 November 2018 (DW-1 p 1631).

Letter from MRPV to Ms R Halliday Director of Indigenous Heritage Department of Environment and Energy dated 29 May 2019 (DW-1 p 2715).

*EMAC Compromise*

L. In making the Decision, the First Respondent failed to comply with the scheme of the Act and the obligations imposed upon her by the Act, in that the First Respondent:

a) failed to have regard to a relevant consideration under each of ss. 10 and 12 of the Act being whether making a declaration would advance the purpose of the Act and would benefit the Applicants, Aboriginal people more generally and the broader Australian community;

b) failed to take into account the detriment to the Applicants, Aboriginal people more generally and the broader Australian community of failing to make a declaration; and

c) made the Decision to facilitate the EMAC Compromise.

**Particulars**

The Applicants repeat the particulars set out under paragraph U below.

*Procedural fairness*

M. A breach of the rules of natural justice or procedural fairness occurred in that in making the Decision the First Respondent had before her a briefing from the Department that contained credible and relevant material adverse to the Applicants which material was not shown to the Applicants.

**ADJR Act section 5(1)(e)**

*The area*

N. The Decision constituted an improper exercise of power in that the First Respondent failed to take into account a relevant consideration, namely whether on the material before her she was satisfied that the Specified Area was, or was likely to be, injured or desecrated for the purposes of s 3(2) of the Act.

O. The Decision constituted an improper exercise of power in that the First Respondent failed to take into account a relevant consideration, namely a representation by the Applicants that, even if trees E2 to E6 would not be injured or desecrated by the Section 2B Upgrade (as contended by MRPV), the Specified Area was, or was likely to be, injured or desecrated for the purposes of s 3(2) of the Act.

**Particulars**

The representation was made in a letter dated 13 June 2019 from the Applicants’ solicitor to the Mr David Williams at pages 2823 and 2824 of DW-1 (paragraphs D(viii)(e) and D(viii)(f)).

P. The Decision constituted an improper exercise of power in that, having been satisfied that the Specified Area was a significant Aboriginal area for the purpose of s 10(1)(b)(i) (save in respect of the area east of Tree E1), the First Respondent’s failure to be satisfied that the Specified Area was, or was likely to be, under threat of injury or desecration based on the material before her was so unreasonable that no reasonable person could have so exercised the power.

~~Q. The Decision constituted an improper exercise of power in that the First Respondent failed to take into account a relevant consideration, namely the actual area in respect of which the Applicants sought a protection declaration.~~

**~~Particulars~~**

~~The area in respect of which the Applicants sought a protection declaration was described in the Application, as clarified by material provided to the Minister on 5 July 2018 including maps.~~

~~The respondent did not consider all of the material provided to the Minister on 5 July 2018; the respondent was not provided with the clarifying maps (being the maps at pages 55 – 69 of the material previously before former Minister Price).~~

*The objects – Trees E2 to E6*

R. The Decision constituted an improper exercise of power in that the respondent (sic) failed to take into account a relevant consideration, namely whether on the material before her she was satisfied that the Trees were, or were likely to be, injured or desecrated for the purposes of s 3(2) of the Act.

S. The Decision constituted an improper exercise of power in that, having been satisfied that Trees E2 to E6 were significant Aboriginal objects for the purpose of s 12(1)(b)(i) of the Act, the First Respondent’s failure to be satisfied that Trees E2 to E6 were, or were likely to be, under threat of injury or desecration based on the material before her was so unreasonable that no reasonable person could have so exercised the power.

*The objects – Tree E1*

T. In so far as the Decision was that the First Respondent was not satisfied that Tree E1 was a significant Aboriginal object, the Decision constituted an improper exercise of power in that the Reporter having been satisfied that Tree E1 was a significant Aboriginal object for the purpose of s 12(1)(b)(i) of the Act, the First Respondent’s failure to be satisfied that Tree E1 was a significant Aboriginal object based on the material before her was so unreasonable that no reasonable person could have so exercised the power.

**Particulars**

The Applicants rely on:

a) Dr Heather Builth’s reports of 2017, 2018 and 2019.

b) The On Country Report of 23 July 2018.

c) The fact the Reporter expressed the view that Tree E1 was a significant Aboriginal object.

d) The fact Minister Price determined that Tree E1 was a significant Aboriginal object.

e) The fact the respondent gave weight to the views of Martang and EMAC when Martang and EMAC did not represent the Applicants.

f) The fact the respondent relied on and gave weight to what was said to have been concluded during the Walk-through on 29 April 2019 as described in the letter from EMAC dated 29 May 2019 to MRPV to which reference is made at pp. 4-5 in the Applicants’ submission dated 13 June 2019 which is included in Attachment R (pages 2807-2844 DW1), when the Walk-through did not include the Applicants.

*Purpose inconsistent with Act*

U. In making the Decision, the First Respondent purported to exercise her powers under the Act for a purpose other than a purpose for which the powers were conferred, namely in order to facilitate the EMAC Compromise.

**Particulars**

The purpose alleged can be inferred from:

a) the fact that the First Respondent failed to find that Tree E1 was a significant Aboriginal object for the purposes of the Act, notwithstanding that the Reporter and former Minister Price had found to the contrary;

b) the fact that the First Respondent failed to find that the area east of Tree E1 was a significant Aboriginal Area when there was no proper basis for that conclusion and the conclusion was inconsistent with the First Respondent’s conclusion as to the balance of the Specified Area;

c) the fact that it was necessary for Tree E1 and the area east of tree E1 to be destroyed in order to give effect to the EMAC Compromise;

d) the fact that prior to making the Decision the First Respondent consulted with MRPV;

e) the fact that the respondent did not seek the views of, or otherwise consult with a Victorian Minister with responsibility for Aboriginal affairs prior to making the Decision;

f) the fact that the Decision gave effect to and facilitated the EMAC Compromise;

g) the matters alleged in grounds P and S;

h) the fact that the conclusions said to be unreasonable by reason of the matters alleged in grounds P and S can be rationally explained, and can only be rationally explained, on the basis that the First Respondent intended to give effect to the EMAC Compromise.

## The evidence

1. The applicants relied on two affidavits of Michael Kennedy, solicitor, sworn on 1 October 2019 and 30 October 2019.
2. The Minister relied on two affidavits affirmed by David Williams, Assistant Secretary in the Minister’s Department, dated 16 September 2019 and 4 October 2019.
3. There was no cross-examination. The purpose of the affidavits was to annex or exhibit documents.

## The submissions of the parties

#### Applicants’ submissions

1. The applicants made clear that they did not contend that there should not be a road but that there ought to be protection of the Aboriginal cultural heritage in the area and that that could be accommodated. Their submissions were as follows.
2. The applicants submitted that the principal error made by the Minister was her conclusion that she lacked jurisdiction to make protection declarations under the *Heritage Protection Act* because she was not satisfied that the Specified Area or the six trees were under threat of injury or desecration by the Section 2B upgrade. The applicants contended that in failing to be so satisfied the Minister:

(a) failed to have proper regard to the definition of Aboriginal tradition in s 3(1) of the *Heritage Protection Act*;

(b) failed to have proper regard to the circumstances in which an area or object will be taken to be injured or desecrated for the purposes of the *Heritage Protection Act*, as set out in s 3(2) of that Act; and

(c) failed to have proper regard to the circumstances in which an area or object will be taken to be under threat of injury or desecration for the purposes of the *Heritage Protection Act*, as set out in s 3(3) of that Act.

1. The applicants submitted that it was evident from her reasons that the Minister misunderstood her statutory obligation. This caused her to identify the wrong issue, and to ask herself the wrong question, the applicants submitted.
2. The concepts in issue in *Northern Territory v Griffiths* [2019] HCA 7; 364 ALR 208 and in the definition of Aboriginal tradition identified in s 3 of the *Heritage Protection Act* were essentially the same, the applicants submitted.
3. The applicants submitted that the s 10 application was always about the significance of the area, and the cultural landscape including the tree landscape along the Western Highway. They submitted that it was never put, and indeed there was much material to the contrary, that the only reason that the area was significant was because the six trees were significant, such that if the six trees remained standing there could be no desecration of the area. The area was significant beyond the significance of the six trees, the applicants submitted, and the issue was about cultural heritage more widely than simply thesix trees.
4. The Minister made several errors in connection with the decision, the applicants submitted. Most related to her claimed failure properly to construe the *Heritage Protection Act*. In particular, the applicants submitted, she failed properly to construe or appreciate the definition of Aboriginal tradition; she also failed to have regard to the requirements of ss 3(2) and 3(3), with the consequence that she asked herself the wrong questions, and thereby erred in purporting to assess whether she had reached the state of satisfaction required by ss 10(1)(b) and 12(1)(b) of the *Heritage Protection Act*.
5. The applicants submitted that the *Heritage Protection Act* was directed at the preservation and protection of significant areas and objects. Section 3(2) defined broadly and expansively what would constitute injury or desecration for the purposes of the *Heritage Protection Act*, and the concept of threat was also broadly defined in s 3(3), the applicants submitted.
6. The applicants submitted that the *Heritage Protection Act* did not permit the Minister, in assessing the significance of an area, to adjust the significance because of the way the Application was put. The *Heritage Protection Act* had provisions which prescribed the way the Minister identified and approached the question of what is Aboriginal cultural heritage, the applicants submitted. The Minister’s finding about the way the trees were significant did not reflect the material before her about what Aboriginal tradition is and the Minister misunderstood the application of the test, they submitted. The notion that the significance of the area derived from the trees was not reconcilable with the finding at [5.48] of the reasons that there was a cultural connection that rendered the Specified Area particularly significant, with a degree of antiquity, related to the dreaming stories, the songlines, the spirituality and traditional interaction with the cultural landscape comprised by, and within, the Specified Area. The applicants submitted that this disconnect meant that the Minister erred, when considering the question of injury or desecration, in reasoning that because the six trees were not going to be destroyed it followed that the Specified Area was not under threat. The Minister had not applied the test in s 3(2)(a) which applied in the case of an area, the applicants submitted.
7. The applicants also submitted that the Minister took an eccentric approach to reaching the states of satisfaction required by ss 10(1)(b) and 12(1)(b); she looked first at the 12(1)(b) issue. There was nothing in the legislation that suggested that was the correct approach. In fact, that approach led to serious error, the applicants submitted.
8. In approaching the s 12(1)(b) issue, the Minister determined that she was not satisfied that any of Trees E2 to E6 were under threat of injury or desecration for the purpose of the *Heritage Protection Act*. The basis for this conclusion was her acceptance of a representation from MRPV that it would “avoid” Trees E2 to E6.
9. That approach asked the wrong question, the applicants submitted. The question for the Minister was not whether these six trees would be “avoided”; that is, whether they would be clear-felled or otherwise destroyed by the Section 2B upgrade. The correct question was that posed by ss 3(2) and 3(3), namely, whether it was “likely” that Trees E2 to E6 would be “used or treated in a manner inconsistent with Aboriginal tradition” as a consequence of the Section 2B upgrade.
10. The question posed to herself by the Minister was fundamentally different to the question required to be asked by the *Heritage Protection Act*, the applicants submitted. The Minister approached the question of her satisfaction under s 12(1)(b)(ii) on the basis that she could be satisfied there was no relevant threat of injury or desecration if there was no physical destruction of or injury to Trees E2 to E6. The *Heritage Protection Act* called for a much broader inquiry about whether the threatened conduct would be likely to lead to use or treatment that was inconsistent with Aboriginal tradition, the applicants submitted, and the Minister’s approach constituted error of a fundamental sort.
11. The applicants submitted that the error by the Minister in relation to the discharge of her obligations under s 10(2)(b), regarding the threat to the Specified Area, was even more acute. Sections 10(2)(b)(ii), 3(2) and 3(3) required the Minister to ask herself three questions, they submitted:

(a) ***first,*** whether it was likely that as a consequence of the Section 2B Upgrade the Specified Area would be used or treated in a manner inconsistent with Aboriginal tradition (s 3(2)(a)(i));

(b) ***secondly***, whether it was likely that anything done in, on or near the Specified Area as a consequence of the Section 2B Upgrade would adversely affect the use or significance of the Specified Area in accordance with Aboriginal tradition (s 3(2)(a)(ii)); and

(c) ***thirdly***, whether it was likely, as a consequence of the Section 2B Upgrade, that passage through or over, or entry upon, the Specified Area by any person would occur in a manner inconsistent with Aboriginal tradition (s 3(2)(a)(iii)).

1. The applicants submitted that her reasons showed that the Minister did not ask herself these questions. Accordingly, the analysis performed by the Minister in purporting to reach the necessary state of satisfaction did not comply with the statutory requirement cast on her.
2. The Minister’s analysis appeared in [5.51]-[5.52] (see [23] above) of the reasons: she “noted” the view of the applicants to the Application that “even if the trees were not considered under threat, the surrounding area will be destroyed by the works and therefore the Specified Area is under threat of injury”. However, she dismissed that view summarily.
3. Several errors were apparent, the applicants submitted. First, and most fundamentally, the Minister failed to ask herself the questions prescribed by ss 3(2) and 3(3) and instead asked a different, much narrower, question. The question posed by the Minister was whether the six trees would be “removed”.
4. Second, the applicants submitted, the conclusion expressed in this passage, that the significance of the Specified Area “derives from” the culturally significant trees, reflected a misreading of “Aboriginal tradition” as defined in s 3(1) of the *Heritage Protection Act*. The Aboriginal heritage values called within the scope of the *Heritage Protection Act* by the definition of Aboriginal tradition must be understood as a “scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole”, the applicants submitted, citing *Griffiths*: see [36] above. That understanding of Aboriginal tradition was at odds with the model of Aboriginal tradition adopted by the Minister, the applicants submitted, which was one in which the significance of the area derived from, and solely from, the presence of the trees; and while the trees stood, no inconsistency with the traditional use of the Specified Area – not even the total destruction of the area and the construction of a multi-lane highway through the Specified Area – would be found to threaten the use of the Specified Area in accordance with Aboriginal tradition. The Minister’s approach was plainly at odds with the scheme of the *Heritage Protection Act*, the applicants submitted. They submitted it was wrong as a matter of law, for the reasons explained in *Tickner v Bropho* (1993) 40 FCR 183 and *Griffiths*.
5. Even if that were not so, the applicants submitted, there was no material available to the Minister that would support her analysis of the relevant Aboriginal tradition working in the way suggested. The Reporter concluded at [224]-[225] of her report that “the trees, many culturally modified by their ancestors, are situated in a landscape in which Djab Wurrung people maintain certain traditions … The particular traditions … include the belief in the trees as personifying their ancestors … These spiritual beliefs, which are connected to other stories in the landscape and the cultural modification of some of the trees in the specified area, demonstrate the particular significance of both trees and area under Djab Wurrung traditions.” Further, the Minister’s analysis of Aboriginal tradition was inconsistent with her own determination that there was “a cultural connection that rendered the Specified Area particularly significant, with a degree of antiquity, involving Aboriginal traditions, observances, customs and beliefs that are passed down from generation to generation through dreaming stories, song lines, spirituality, culture and traditional interaction with the cultural landscape”. That determination and the Aboriginal tradition it described was impossible to reconcile with the later conclusion that the Specified Area was not threatened by the Section 2B upgrade, the applicants submitted.
6. Finally, the Minister’s analysis failed, even in its own terms, the applicants submitted. The Minister found there was no threat of injury to the area because “the trees will not be removed”. In fact, the decision relied on an arrangement made between the Eastern Maar Aboriginal Corporation (**EMAC**) and MRPV that involved Tree E1 being destroyed.
7. The applicants submitted that MRPV set about reaching a compromise with EMAC (**EMAC Compromise**) that would permit the Section 2B upgrade to be constructed largely on the planned alignment, with adjustments that would avoid the need to destroy five of the six trees.
8. Notably, the applicants submitted, MRPV chose to negotiate with EMAC but not the applicants who had asserted that cultural heritage existed. The elements of the EMAC Compromise were also notable; it involved MRPV committing to “additional incentives” in return for EMAC supporting the existing alignment of the Section 2B upgrade. The incentives MRPV committed to were in part financial, the applicants submitted: “1% of procurement spend being obtained from Aboriginal owned businesses” and an “‘Aboriginal Employment Target’ of 2.5% for the Western Highway Duplication”.
9. Additionally, the applicants submitted, there was a commitment by MRPV to “undertaking a cultural values assessment for the additional projects planned for the Western Highway” that would include “both tangible and intangible Aboriginal heritage values” and “consultation with Traditional Owners”.
10. Lastly, the applicants submitted, MRPV agreed to install “interpretative signs to acknowledge the cultural significance of the land”. In summary, the applicants submitted, by offering financial advantages for some unidentified Aboriginal businesses and people, changes in the route alignment that would avoid destruction of five of the six trees and the other measures identified, MRPV procured EMAC to withdraw its opposition to the works to upgrade the Western Highway.
11. The EMAC Compromise was formally notified to the Minister’s Department on 29 May 2019. On the same day the Department sent a letter to the applicants, in which the Department foreshadowed the reasoning later adopted by the Minister in the decision; namely, the conclusions that Tree E1 was not significant, and that none of the other trees, nor the Specified Area, were threatened by the Section 2B upgrade. The timing and content of this letter obviously suggested co-ordinated action, the applicants submitted.
12. These events suggested several errors that impugned the lawfulness of the decision, the applicants submitted.
13. First, as part of the statutory machinery the *Heritage Protection Act* created in aid of the purposes of that Act, it contemplated communication between the Minister and the “appropriate” State Minister about whether State law provided effective protection to the relevant area or objects, the applicants submitted, referring to s 13(2). They submitted that it was to be inferred that the “appropriate” State Minister was the person with responsibility for administering the State law which might provide the relevant protection. That consultation did not take place, the applicants submitted. Instead, the Minister wrote to the Victorian Minister for Roads, with responsibility for the Western Highway upgrade, Minister Donnellan. Minister Donnellan invited the Minister to consult directly with the MRPA (the predecessor to MRPV). The applicants submitted that an obligation to consult with the appropriate State Minister was a duty that should be implied into s 13(3) as necessary or “proper” for the discharge of a statutory function set up by the *Heritage Protection Act*. The applicants submitted that what occurred undermined the scheme of that Act because the Minister conducted her consultation with the statutory entity responsible for development of the project said to threaten the Specified Area and the trees (namely, MRPV), and not with the Victorian Minister charged with protecting Aboriginal interests.
14. Second, the *Heritage Protection Act* was enacted with the express purpose of preserving and protecting from injury or desecration areas and objects in Australia that are of particular significance to Aboriginals in accordance with Aboriginal tradition. Informing its enactment was the idea that it would be used as a protective mechanism of last resort where State or Territory legislation was ineffective or inadequate to protect heritage areas or objects, the applicants submitted. The events described above undermined this protective purpose, they submitted. By consulting with MRPV, the developer, and not the Victorian Minister charged with protecting Aboriginal heritage, the Minster and her Department, implicitly or expressly, became participants in the EMAC Compromise, which had as its sole objective the advancement of the Section 2B upgrade along its existing alignment, the applicants submitted.
15. The EMAC Compromise was not directed at protecting the Specified Area or the trees, but was a bargain, struck on the basis of incentives offered by the developer to EMAC, expressly intended to allow the project to be built notwithstanding its impact on the Specified Area, the applicants submitted. They submitted that by its conduct, the Department set the Minister upon a course that failed to give effect to her statutory obligations: she failed to consider the Application in good faith by reference to the statutory criteria; she allowed the exercise of her statutory powers to be fettered and constrained by the need to bring her decision within the framework contemplated by the EMAC Compromise; and she failed to give proper and appropriate consideration to the material before her. In all the circumstances, the decision was properly characterised as the purported exercise of the powers under ss 10 and 12 of the *Heritage Protection Act* other than for the purposes for which they were conferred.
16. Finally, and most fundamentally, in adopting the analysis of the Department and the draft reasons provided to her, the Minster erred in concluding that she lacked jurisdiction to make declarations under ss 10 and 12 of the Act, the applicants submitted. At [6.1]-[6.2] of her reasons, the Minister determined that by reason of not being satisfied about the threat to the Specified Area or the six trees, she was not empowered to make the declarations sought by the Application. The applicants relied on their earlier submission that, in assessing her state of satisfaction about the alleged threat, the Minister failed to apply the statutory criteria in s 3(2). That occurred because the process miscarried at an earlier stage. Instead of applying the *Heritage Protection Act* in good faith, the Minister engaged in an artificial process and adopted contrived reasons, the applicants submitted, which were crafted by the Department to bring about a predetermined result. The applicants submitted that the Minister did not, as the *Heritage Protection Act* required, engage with the desirability of making declarations that would protect significant Aboriginal cultural heritage for the benefit of the applicants, the Djab Wurrung people and all Australians; instead, she adopted reasons calculated solely to reach a conclusion that would facilitate and give effect to the EMAC Compromise.
17. For these reasons, the applicants submitted, the Minister also failed to take into account whether on the material before her she was satisfied that the Specified Area was, or was likely to be, injured or desecrated for the purposes of s 3(2) of the *Heritage Protection Act*. She also failed to apply the criterion in s 3(2) in assessing the threat to the six trees (or at least Trees E2 to E6). The failure to have regard to this important issue was (inter alia) a failure to have regard to a relevant consideration.
18. In addition, the applicants submitted, the Minister failed to take into account a representation made by the applicants that expressly identified the errors in the Minister’s approach. In a letter dated 13 June 2019 to the Department, the applicants submitted, they had contended that:

(a) the suggestion that there was a ‘nexus between a significant aboriginal area and significant aboriginal Objects’ so that preservation of the Trees meant the Specified Area may not be under threat was wrong and unjustified; and

(b) even if it were correct that there was no threat to the Trees (which the applicants did not accept), because ‘the area surrounding [the] trees will be destroyed by the proposed works’ there was no basis for the Minister to find that the Specified Area was not under threat of injury and desecration.

The reasons showed that the Minister failed to consider these representations, the applicants submitted.

1. As to unreasonableness, the applicants submitted that the Court was required to consider the quality of the decision by reference to the statutory source of the power exercised in making the decision and, thus, assess whether the decision was lawful, having regard to the scope, purpose and objects of the statutory source of the power. In making that assessment the Court was concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It also considered whether the decision fell within a range of possible, acceptable outcomes which were defensible in respect of the facts and law. On either test, the decision by the Minister may be impugned, the applicants submitted.
2. For these reasons, the purposes and objects of the *Heritage Protection Act* were not given effect by the decision. Additionally, the determination that the significance of the Specified Area derived from, and implicitly solely from, the culturally significant trees totally lacked evidence to support it or any other justification, the applicants submitted. It was inconsistent with both the material before the Minister and her own conclusions about why the area was significant for the purposes of the *Heritage Protection Act*. Even if these errors were not expressly apparent in the reasons, the decision was not “within a range of possible, acceptable outcomes”. The conclusion that construction of a four-lane highway through an area of significant Aboriginal cultural heritage did not threaten to injure or desecrate that heritage, needed only be articulated for it to be seen to be indefensible. That was true based on an ordinary analysis of the concepts of injury, desecration and threat. When the extended definitions of those concepts in s 3 of the *Heritage Protection Act* were accounted for, the decision was revealed clearly to be legally unreasonable, the applicants submitted.
3. As to procedural fairness, the applicants submitted that between 12 April 2019 and 29 May 2019, the Department radically changed its approach to the consideration of the Application. The Department’s letter to the applicants dated 17 April 2019 had suggested that the Minister, like the former Minister, was contemplating refusing the Application based on the benefits that the Section 2B upgrade was said to achieve. The 29 May 2019 letter from the Department to the applicants alerted them to “new information” but did not put them on notice of the complete change in the Department’s approach to the Application. In the context, to understand the significance of “new information” required the applicants to have access to the Department’s analysis as provided to the Minister (**Departmental Analysis**), the applicants submitted. In the circumstances, the provision of this information was necessary to accord procedural fairness. Despite requests, the Departmental Analysis was not provided to the applicants.
4. As to the grounds relating to Tree E1 considered by itself, the applicants noted that the Minister was satisfied that the Specified Area was a significant Aboriginal area for the purposes of s 10(1)(b)(i) of the *Heritage Protection Act* “except to the extent of the vicinity of Tree E1 eastwards”.
5. The applicants submitted that the conclusion regarding the area “[in] the vicinity of Tree E1 eastwards” was unexplained, and that nowhere in her reasons did the Minister articulate a basis for “excising” this area. Nor did the reasons define, or depict on a map, the boundaries of the area “[in] the vicinity of Tree E1 eastwards”. The area was unknown and therefore uncertain, and one was left to speculate about where the area was, and for what reason the Minister excised it, the applicants submitted.
6. The applicants challenged this aspect of the decision on two bases. First, the applicants submitted that they were not given notice of the possibility that the Minister might treat the area “[in] the vicinity of Tree E1 eastwards” differently from the Specified Area as a whole, and thus were given no opportunity to comment. This was claimed to be a breach of the rules of natural justice.
7. Second, the applicants submitted that there was no evidence to support the conclusion that the area “[in] the vicinity of Tree E1 eastwards” was not significant. There was much evidence to support the conclusion that the Specified Area (as a whole) was “significant”. But the evidence did not address the area “[in] the vicinity of Tree E1 eastwards” separately from, or in any different way to, the Specified Area (as a whole). In terms of s 5(3) of the *ADJR Act*, the applicants submitted that:

(a) the Minister was required by law to reach a decision (namely, that she lacked jurisdiction to make a protection declaration under the *Heritage Protection Act*) only if a particular matter was established (namely, that she was not satisfied that the area “[in] the vicinity of Tree E1 eastwards” was significant), and, having determined that the Specified Area was significant, there was no evidence or other material (including facts of which she was entitled to take notice) from which she could reasonably be satisfied that the matter was established; and

(b) the Minister based the decision on the existence of a particular fact (namely, that the area “[in] the vicinity of Tree E1 eastwards” lacked the characteristics that she had found pertained to the remainder of the Specified Area), but that fact did not exist.

1. The applicants also contended that the Minister’s failure to be satisfied that Tree E1 was a significant Aboriginal object based on the material before her was so unreasonable that no reasonable person could have so exercised the power.
2. The applicants observed that the *Heritage Protection Act* (in s 3(1)) relevantly provided that significant Aboriginal object meant an object (including Aboriginal remains) of particular significance to Aboriginals in accordance with Aboriginal tradition. The question for the Minister therefore was whether she was satisfied that Tree E1 was an object “of particular significance to Aboriginals in accordance with Aboriginal tradition”.
3. The applicants noted that on the basis of the Builth 2017 and 2018 reports, the Sanders 2018 report and Ms Phillips’ report, the former Minister had been satisfied that Tree E1 was a significant Aboriginal object.
4. The Minister’s justification for coming to a contrary decision on Tree E1 spanned [5.17]-[5.25] of the reasons. The Minister started by referring to views expressed by Martang Aboriginal Corporation and, later, EMAC, that Tree E1 bears a “European scar”. The applicants submitted that the source of the views ascribed to Martang and EMAC was not clear from the reasons; neither made a representation to the Reporter (or to the Minister).
5. The Minister then noted the Reporter’s conclusion that all six trees were significant Aboriginal objects. But, the applicants submitted, the Minister effectively disregarded or downplayed the Reporter’s conclusion on Tree E1 by characterising her report as “focussed on Trees E3 and E6”.
6. The Minister went on to consider the expert material from Dr Builth and Natasha Sanders. In relation to Ms Sanders, the Minister noted that her report “included information on the cultural values of some of the Six Trees”. The applicants submitted that characterisation disregarded or downplayed Ms Sanders’ actual conclusion (namely, that the tree was “culturally modified”) and Ms Sanders’ overall conclusion, quoted in terms by the Reporter:

All of the old trees, both within the focus areas and the broader area, were identified as having cultural significance even if there were no clear or visible markings from modification. These old trees were often referred to throughout the consultation as Ancient Trees, Ancestor Trees, or Guardian Trees highlighting the relationship between the trees and the ancestors that live within them.

1. In relation to Dr Builth, the Minister referred to all three of her reports. The Minister summarised aspects of Dr Builth’s reports, the applicants submitted, but omitted to refer to the key evidence and conclusions in Dr Builth’s reports concerning Tree E1.
2. The applicants contended that the Minister reached her conclusion at [5.25] (see [15] above) by a process that:

(a) ignored the statutory definition of “significant Aboriginal object” (the Minister did not mention it, but instead appeared to approach the question by considering that the question for her was whether Tree E1 was as significant as Trees E3 and E6);

(b) presented and relied on a highly selective subset of the evidence before her, and disregarded or downplayed “unhelpful” evidence or conclusions that had been placed before her;

(c) gave equal weight to the beliefs of the applicants (supported both by the expert evidence they adduced from Dr Builth, and the “independent” expert evidence from Ms Sanders), and the unascribed hearsay views of Martang and EMAC (who did not represent the applicants);

(d) relied on and gave weight to what was said to have been concluded during the Walk-through on 29 April 2019, when the Walk-through did not include the applicants.

1. The process of reasoning followed by the Minister in respect of Tree E1 was the opposite of a process of justification, transparency and intelligibility, the applicants submitted. The decision was indefensible in light of the whole of the evidence before the Minister; it only had the appearance of defensibility when presented in the reasons in a way that ignored or downplayed “unhelpful” evidence or conclusions. In light of the whole of the evidence before the Minister, the applicants submitted that the Minister’s decision was so unreasonable that no reasonable person could have reached it.

#### Minister’s submissions

1. The respondent Minister submitted that none of the grounds alleged in the application for review were established. The Minister made nine points by way of summary.
2. First, it was submitted, the Minister correctly had regard to and applied the relevant provisions of the *Heritage Protection Act*, including the statutory definition of “Aboriginal tradition” in s 3(1), the concept of “injury or desecration” in s 3(2), and the concept of “threat of injury or desecration” under s 3(3) of the Act.
3. Second, on the material before the Minister, it was submitted that it was open to her to find that five of the trees (Trees E2 to E6) located within the Specified Area were significant Aboriginal objects, and that one of the trees (Tree E1) was not a significant Aboriginal object. It was also open to the Minister to find that part of the Specified Area was a significant Aboriginal area and that, in the context of the Application, the cultural significance of that area was relevantly derived from the trees and their interconnectedness to other stories.
4. Third, on the material before the Minister, it was submitted that it was open to her to find that she was not satisfied that the significant Aboriginal objects (ie, Trees E2 to E6) or the relevant part of the Specified Area comprising the significant Aboriginal area were under threat of injury or desecration within the meaning of ss 10 or 12 of the *Heritage Protection Act*.
5. Fourth, it was submitted that the Minister properly had regard to factual developments in relation to the agreement reached between MRPV and the EMAC, which were relevant to her consideration of whether the trees and surrounding area were under threat of injury or desecration within the meaning of the *Heritage Protection Act*.
6. Fifth, it was submitted that there was no basis on which to infer that the Minister made the decision for reasons other than those set out in the written statement of reasons, and in particular the Minister did not act for an improper purpose of facilitating or giving effect to the agreement reached between MRPV and EMAC in order to carry out the planned upgrade works. Nor did the Minister (or the Department) engage in an “artificial” process in order to bring about a “pre-determined result”, she submitted: the applicants did not rely on any evidence in support of this assertion, and moreover had not properly pleaded any allegation of actual bias on the part of the Minister.
7. Sixth, it was submitted that there was proper consultation by the Minister with relevant Victorian Ministers (including the Minister for Roads and Road Safety). In circumstances where she did not make a declaration under the *Heritage Protection Act*, the Minister submitted she was not obliged by s 13(2) to consult with the appropriate Victorian Minister as to whether there was effective protection of the area or objects under the law of Victoria. Further or alternatively, any failure to consult with the appropriate Victorian Minister would not result in invalidity of the decision, it was submitted.
8. Seventh, it was submitted on behalf of the Minister that the applicants were given a reasonable opportunity to be heard on all issues relevant to the decision, and to comment on and respond to the substance of any adverse material. Procedural fairness did not entitle the applicants to be given a copy of the Departmental brief to the Minister which summarised and analysed the material relevant to the decision, the Minister submitted.
9. Eighth, the decision was within the bounds of legal reasonableness. The Minister’s reasons, she submitted, provided an intelligible basis on which she was not satisfied that significant Aboriginal objects or areas were under threat of injury or desecration, and why in any event she would not have exercised the discretion to make a declaration under ss 10 or 12 of the *Heritage Protection Act*.
10. Ninth, in any event, it was submitted that even if the applicants could establish that there was legal error affecting the Minister’s findings that she was not satisfied that the significant Aboriginal objects or the significant Aboriginal area were under threat of injury or desecration for the purposes of ss 10(1)(b)(ii) and 12(1)(b)(ii) of the *Heritage Protection Act*, any such error was not material to the Minister’s decision to refuse to make declarations under ss 10 and 12 of the Act. In circumstances where the Minister would not have exercised her discretion to make declarations even if she had been satisfied that the preconditions under ss 10 and 12 had been met, the applicants had not been deprived of any possibility of a different outcome on their Application, the Minister submitted.
11. In relation to Grounds A, B, C, D, E, H, I, J, P, N, O and R, the Minister submitted these grounds of review essentially alleged that she fundamentally misunderstood her statutory obligations under ss 10 and 12 of the *Heritage Protection Act*. The error was said to have arisen because the Minister took an unduly narrow interpretation of what comprised “Aboriginal tradition” and what amounted to a “threat of injury or desecration” within the meaning the *Heritage Protection Act*. This complaint, the Minister submitted, was largely based on a contention that the Minister’s assessment focused “solely” upon the removal of the trees, rather than considering the broader impacts of the road works on the Specified Area. The Minister submitted this complaint was unfounded. It was submitted that it was evident from the Minister’s reasons that she properly understood the statutory task under ss 10 and 12 of the *Heritage Protection Act*. The Minister referred to the terms of the relevant provisions of the *Heritage Protection Act*, including the statutory definitions in ss 3(1), (2) and (3), and addressed the evidence in those terms. It was the task for the Minister to evaluate the evidence and material before her, including making qualitative judgements about this material.
12. The Minister submitted that, on the material before her, it was open to her to find that the significant Aboriginal objects (being Trees E2 to E6) were not under threat of injury or destruction, and it was open on the evidence to find that Tree E1 was not a significant Aboriginal object within the meaning of the *Heritage Protection Act*.
13. Similarly, the Minister submitted, it was open on the material before her to find that the significance of the Specified Area was relevantlyconnected to the traditional significance of Trees E2 to E6, and that the part of the Specified Area that comprised the significant Aboriginal area was not under threat of injury or destruction from the planned works.
14. It was accepted that the area in which the trees were located was significant under Aboriginal tradition and that the trees were connected with the broader cultural landscape. However, it was submitted, the Application did not specifically claim that, as a discrete matter separate from the significance of the trees under Aboriginal tradition, the construction of the proposed highway upgrade would itself amount to the use or treatment of the area in a manner inconsistent with any identified Aboriginal tradition or would adversely affect the use or significance of the area in accordance with any identified Aboriginal tradition. Nor was the Minister obliged to accept any such claim, she submitted.
15. The Minister submitted that her reasons made it clear that she understood her statutory obligations and the legislative framework in which her decision was to be made. Her approach was far from “eccentric”; rather, it was entirely orthodox, she submitted.
16. The Minister submitted that the approach she adopted, and the structure of her reasons, responded to the emphasis that was placed by the applicants in both the Application and in their submissions on protection against “threats of injury and desecration of sacred trees alongside the Western Highway”. The principal focus of the Application was on the trees, it was submitted, and this was reflected in the structure of the Minister’s reasons. The Minister referred to *Tickner v Chapman* (1995) 57 FCR 451 at 458-60 per Black CJ, at 481-2 per Burchett J and at 489-90 per Kiefel J as standing for the proposition that an application for a declaration should clearly identify not only the area in respect of which protection is sought, but also what activities constitute the threatened injury and how the threatened activities constitute injury or desecration to the area, by reference to Aboriginal tradition.
17. The “broader inquiry” about whether the planned works would be likely to lead to use or treatment that was inconsistent with Aboriginal tradition was precisely the question that was addressed by the Minister, it was submitted. The Minister submitted that the applicants’ complaint did not seek to identify anything in the material before her which would substantiate a contention that the planned works might amount to a use or treatment of the trees in a manner inconsistent with Aboriginal tradition in this “broader” sense, notwithstanding that the trees themselves and their immediate surrounds were protected and preserved.
18. The Minister noted that the applicants submitted that she failed to take into account representations made by them on 13 June 2019 suggesting there was a nexus between the Specified Area and the trees (so that the Specified Area may still be under threat even if the trees were not). It was submitted that the Minister did not fail to take into account any representations made by the applicants in relation to the distinction between the significance of the Specified Area and the significance of the six trees. The Minister expressly acknowledged the applicants’ view that, “even if the trees were not considered under threat, the surrounding area will be destroyed by the works and therefore the Specified Area is under threat of injury”, but was not satisfied that this would pose a threat of injury or destruction to the Specified Area given she had found that the significance of the area derived from the trees.
19. As to the application for a declaration under s 10 in relation to the Specified Area, the Minister noted that the applicants submitted that her error was “even more acute”, in that they alleged that she failed to address the questions raised by s 3(2)(a) of the *Heritage Protection Act* and treated the significance of the Specified Area as being derived from the culturally significant trees. These submissions should be rejected, the Minister submitted. The connection or link between the significance of the trees and the surrounding area was clearly raised by the Application and by the material before the Minister, including the s 10 report and accompanying representations. It was not in dispute that the Djab Wurrung people as traditional owners had a cultural connection to the area, in respect of which they maintained Aboriginal traditions. Nevertheless, the Minister submitted, the specific question raised by the Application was whether and how the planned works involved a threat of injury or desecration to a significant Aboriginal area, for example by using or treating the area in a manner inconsistent with Aboriginal tradition or so as to adversely affect the use or significance of the area in accordance with Aboriginal tradition. In this respect, the material before the Minister focused on the significance of the trees under Aboriginal tradition, and the need to protect the trees as part of the cultural landscape.
20. The Minister submitted that, contrary to the applicants’ submissions, she did not adopt a “model” of Aboriginal tradition under which “not even the total destruction of the area” would be found to threaten the use or treatment of the area in accordance with Aboriginal tradition. This argument did not engage with either the Minister’s reasons or the material that was before the Minister in relation to the Application. Nor was it “impossible to reconcile” the Minister’s ultimate findings with her acceptance that there was a cultural connection that rendered the relevant part of the Specified Area particularly significant under Aboriginal tradition. It was self-evident, the Minister submitted, that this finding that the Specified Area was a significant Aboriginal area did not dictate a conclusion that any acts taking place in the area (including the planned works) must necessarily involve a threat of injury or desecration within the meaning of the *Heritage Protection Act*.
21. Accordingly, it was submitted, it was open to the Minister to find, without legal error, that the significance of the Specified Area relevantly derived from the culturally significant trees contained in the area and their interconnectedness to other “stories”. In such circumstances, the Minister submitted, the positive evidence that Trees E2 to E6 would not be removed or destroyed, but rather would be avoided in accordance with a framework developed by MRPV and EMAC involving an exclusion zone to be determined by an Ecologist/Arborist in consultation with EMAC, supported the Minister’s finding that she was not satisfied that the Specified Area was under threat of injury or destruction for the purposes of s 12 of the *Heritage Protection Act*.
22. In the light of the finding that Tree E1 was not a significant Aboriginal object, it was submitted that it was also open to the Minister to find that the area in the vicinity of Tree E1 eastwards was not a significant Aboriginal area within the meaning of the Act. This finding was not irrational or unreasonable in the legal sense, the Minister submitted. In any event, it was submitted, given that the Minister was not satisfied that those parts of the Specified Area that were found to be a significant Aboriginal area were under threat of injury or desecration as a result of the proposed works, it was difficult to see how that conclusion would not also apply to the rest of the Specified Area. Accordingly, the Minister submitted that the exclusion of the area in the vicinity of Tree E1 eastwards was not in any way material to the Minister’s decision not to make a declaration under s 12 of the *Heritage Protection Act*.
23. The applicants complained that the material before the Minister included the Departmental Analysis that was not shown to them, resulting in a denial of procedural fairness. However, the Minister submitted, contrary to the applicants’ submissions, the Departmental Analysis was not a document that attracted the obligations of procedural fairness: the applicants were given an opportunity to be heard on all relevant issues and to respond to all material that might have been adverse to their interests. The Minister was not required to give the applicants an opportunity to comment on or respond to the Departmental Analysis, which summarised and analysed the material before the Minister. The applicants did not complain of a failure to provide them with an opportunity to review and comment on the material that formed the basis of the Departmental Analysis. Such an opportunity was clearly provided, the Minister submitted, referring to correspondence on 17 April 2019 from the Minister’s Department to the applicants and on 29 May 2019 from the Minister’s Department to the applicants, to which the applicants responded.
24. It could not be said, the Minister submitted, that there was anything in the decision arising from the Departmental Analysis that was not obvious to the applicants on the material that was available to them. To the extent that the Departmental Analysis contained analysis or opinions, they were the subjective views and thought processes of Departmental officials which did not attract any obligation of procedural fairness. This included matters pertaining to the “new information” contained in the 29 May 2019 letter, the Minister submitted, upon which the applicants had an opportunity to comment.
25. The material underlying the Departmental Analysis, and issues arising from it, were clearly in issue, the Minister submitted. Any conclusions drawn from that material were both open and not surprising. Accordingly, she was not obliged to disclose the Departmental Analysis to the applicants before making her decision.
26. The same principles applied to render untenable the applicants’ complaint that they were not given “notice of the possibility” that the Minister might treat the area in the vicinity of Tree E1 eastward differently from the Specified Area as a whole, it was submitted. The Minister submitted that the reason the area in the vicinity of Tree E1 eastwards was distinguished was that the Specified Area was more or less west to east and Tree E1 was the easternmost tree, the area westwards of Tree E1 being in the vicinity of Tree E2.
27. In response to the applicants’ contention that by taking into account the agreement between EMAC and MRPV the Minister was acting for an improper purpose, the Minister submitted, first, that there was a broad discretion in the matters that she may take into account when considering the exercise of her discretion, being “such other matters as [she] thinks relevant”: s 10(1)(d). In circumstances where the Application focused explicitly upon the threat of injury or desecration to the six trees by the implementation of the proposed road works, the Minister submitted that any agreement by which the proponent of those works agreed to avoid destroying or damaging those trees and their surrounds was clearly relevant.
28. Second, it was submitted, there was no material before the Court from which an inference could be drawn that the Minister was acting for an improper purpose. The Minister noted that the applicants pointed to the date on which MRPV formally notified the Department of the agreement, being 29 May 2019, and placed emphasis on the fact that this was the same day that the Department wrote to the applicants foreshadowing reasoning that was later adopted by the Minister in her decision. However, the Minister submitted, any inference of collusion and ulterior purpose failed to note that the Minister’s letter to the applicants on 29 May 2019 was forthcoming with information that her Department had been notified of the agreement between MRPV and EMAC six days earlier, on 23 May 2019 and, further, that the fact of the agreement had been publicly announced in a press release on MRPV’s website on 13 May 2019. There was nothing conspiratorial about the timing of the correspondence.
29. Third, the Minister submitted, this ground of review amounted in substance to an allegation of actual bias which had not been distinctly pleaded or particularised. Accordingly, the Minister submitted, it could not be entertained by the Court in the current proceeding.
30. In relation to the claimed failure to consult with the appropriate State Minister, Ground K, it was submitted on behalf of the Minister that there were several reasons why this ground should be rejected. First, the Minister submitted that the *obligation* to consult under s 13(2) of the Act with the “appropriate Minister” only arose as a precondition to *the making of* a declaration, referring to *Tickner v Bropho* at 194-5 per Black CJ, 208-9 per Lockhart J and 233-4 per French J. It was submitted that the obligation did not arise here, where the Minister *did not* make a declaration under the *Heritage Protection Act*. The Minister submitted that her declaratory powers were only intended to operate “as a measure of last resort” where the State failed to provide effective protection, or until a State provided effective protection. The purpose of s 13(2) was to accommodate this relationship, the Minister submitted, and to ensure that appropriate intergovernmental consultations were taken before a declaration was made on a matter that would affect matters that might otherwise be the subject of State governance.
31. Second, the Minister submitted, s 13(4) of the *Heritage Protection Act* provided that a failure to comply with s 13(2) did not invalidate the making of a declaration. There was no scope to imply any obligation to consult the “appropriate Minister” prior to making a decision *not to make* a declaration, the Minister submitted, let alone an obligation that was an essential precondition to the validity of any such decision. The Minister submitted that the implication on which the applicants relied was directly inconsistent with both the language of s 13, including the contrast between the language used in ss 13(2) and (3) respectively and the express terms of subs (4), and with the place of s 13 in the statutory scheme.
32. Third, the Minister submitted, while it may be acknowledged that in many cases the appropriate Minister may be the State Minister responsible for Aboriginal affairs, such a requirement was not prescribed by the *Heritage Protection Act*. The identity of the “appropriate Minister” for the purpose of s 13(2) was not defined. In any event, it was submitted, it was clear that the Minister took into account the views of the relevant Victorian Ministers, and that all relevant Victorian Ministers were included in the consultation process undertaken by the Minister before she arrived at her decision, including the Minister for Aboriginal Affairs, referring to the letter from the Victorian Roads Minister dated 30 December 2018 being copied to the Minister for Aboriginal Affairs.
33. Fourth, the Minister submitted, the applicants’ contention that she failed to comply with the scheme of the *Heritage Protection Act* by consulting with the Minister for Roads and MRPV could not succeed in light of the broad power afforded to the Minister under s 13(3) to “request such person as he or she considers appropriate to consult with him or her … with a view to resolving … any matter to which the Application relates.” Further, s 10(1)(d) of the *Heritage Protection Act* permitted the Minister to consider “other such matters as he or she thinks relevant”, which the Minister submitted clearly authorised her to have regard to the representations made by the Victorian Roads Minister and MRPV.
34. The Minister submitted that any error was immaterial. Her decision not to make a declaration under ss 10 or 12 was based not only on her lack of satisfaction that the area or objects found to be significant were under threat of injury or desecration. It was also based, she submitted, upon her consideration of competing considerations relevant to the exercise of her discretion under the *Heritage Protection Act*. Even if the Minister was satisfied that the area or object was significant and was, or was likely to be under threat of injury or desecration, it remained within her discretionary power to refuse to make the declaration sought: *Tickner v Bropho* at 193 per Black CJ.
35. The Minister submitted that she considered the following other matters, as she was required to pursuant to s 10(1)(d), in making her decision:

* the extent to which the area was protected under State legislation;
* the effects on proprietary and pecuniary interests of third parties; and
* social and economic benefits, particularly relating to community safety.

1. The Minister submitted that, drawing upon the submissions before her, she noted that the MRPA had claimed that the financial costs of the Western Highway upgrade was “$97.2 million, plus up to an additional $260,000 per week until construction commences or the contract is terminated” and that the cost of an alternative route (being the Northern Route) “was estimated to range from $123 million to $139 million.” In her reasons, the Minister considered material put forward by the applicants in support of their claim that a further “Northern Route” was shorter and therefore self-evidently cheaper. After considering this material, the Minister concluded that she was “satisfied that, based on the information received from the Victorian Government, the building of an alternate route (the Northern Route) will have a significant economic cost impact.”
2. The Minister submitted that she also considered the “community road safety benefits”. She submitted that this included: submissions from representatives of ten surrounding shire councils citing the need for the upgrade on the current approved route; and information through the MRPA about the crash and fatality rate on the section of the Western Highway marked for upgrade, including that “in the last 10 years, 43 people have been involved in casualty crashes along the 12.5 km section to be upgraded as part of the Project, with 10 being serious injury crashes.”
3. The Minister submitted that the applicants were given an opportunity to comment on the material put before the Minister relating to these other matters. The competing submissions were considered by the Minister, she submitted, but she ultimately gave greater weight to the other relevant matters such as community road safety benefits and (to a lesser extent) economic costs.
4. The Minister submitted that the applicants had not taken issue with those findings as they related to matters considered under s 10(1)(d). She submitted that the applicants had not demonstrated that, even if any of the errors alleged in the grounds of review were established, she might have exercised the discretion to make a declaration under ss 10 or 12 of the *Heritage Protection Act*. Accordingly, even if the Minister’s approach to her task under ss 10(1)(b) or 12(1)(b) of the *Heritage Protection Act* was affected by legal error, the Minister submitted that it had not been shown that this could realistically have resulted in a different decision. The matters considered under ss 10(1)(d) and 12(1)(d) provided an alternative basis upon which the Minister declined to make a declaration, it was submitted. Relief would only be granted to an applicant seeking judicial review where he or she can establish that the error was material. Similarly, as the power to grant relief under s 16 of the ADJR Act was discretionary, the relief sought should be refused on the basis that no material error has been established, the Minister submitted.

#### Applicants’ reply submissions

1. In their written reply, dated 11 November 2019, the applicants submitted that the *Heritage Protection Act* required the Minister to consider whether the Section 2B upgrade would injure or desecrate the Specified Area by assessing it against the criteria in s 3(2). Neither the Minister’s submissions nor her reasons explained how she was able to find that the Section 2B upgrade did not constitute a threat when assessed against these criteria.
2. The applicants noted the Minister’s contentions that the applicants were obliged to identify the apprehended injury or desecration against which they sought protection and that the Application did not “specifically claim” the construction of a highway would give rise to injury or desecration of the area. Implicitly, the applicants submitted, the Minister contended that it was permissible for her to apply the 3(2) criteria only to the threat that the trees would be removed, and that she did so. There were several answers to this, the applicants submitted.
3. First, this was not a fair reading of the Application, the applicants submitted. They submitted that on no reasonable view of the Application and the material before the Minister did the significance placed on the trees operate to the exclusion of the significance of the area in its own right. The applicants submitted that their 15 July 2018 clarification sought protection of the “maximum construction footprint”, and the accompanying map depicted a 12.5km stretch of the proposed Section 2B upgrade. That map showed that the “construction footprint” included many kilometres of “area” not proximate to any of the trees. The Application sought protection for “significant sites” and trees that sat in an “extremely significant area … connected to song lines and stories”. The Reporter concluded that the Application and representations made to her described the way the “Specified Area and identified trees play an important and significant role in the traditions, observances, customs and beliefs of Djab Wurrung people”; and that based on “the description of the activity to occur in the specified area … it appears that the area and objects the subject of the Application will be completely altered and the trees destroyed.”
4. Second, the applicants submitted that the submission now advanced by the Minister was not reflected in her reasons. The Minister construed the Application as covering the threat posed by the highway upgrade to the area, the applicants submitted, and did not consider that the significance of the area derived solely from the fact that it contained the six trees.
5. Third, the applicants submitted that the Minister was not permitted to “read down” the requirements of s 3(2). The Minister was required to consider the s 10 report and the representations attached to it and assess the issues raised by ss 10(l)(b) and 12(1)(b) of the *Heritage Protection Act* (as informed by s 3(2)). The applicants submitted that these plainly raised the effect of the Section 2B upgrade generally; representations talked about the desirability of different alignments. It was impermissible for the Minister to treat the Specified Area and trees as threatened only if conduct that would otherwise fall within the s 3(2) criteria was also “specifically” complained of in the Application.
6. Fourth, the applicants submitted that even if this approach were permissible, if the Minister intended to read down the Application and the scope of the *Heritage Protection Act* in the way now asserted, she had an obligation to notify the applicants of this, as it was far from obvious.
7. In answer to the Minister’s contention that she referred to relevant sections of the *Heritage Protection Act* including ss 3(1)-(3) and the assertion that she “addressed the evidence in those terms”, the applicants submitted that the Minister did not point to any part of the reasons, or any other evidence, to support this assertion. Paragraphs [5.50]-[5.52] and [5.27]-[5.37] of the reasons, which dealt with whether there was a threat, did not evidence the s 3(2) criteria being addressed, the applicants submitted, and in fact showed that other reasoning was applied. The absence of a reference to the s 3(2) criteria raised an inference that the criteria were not considered as material.
8. The applicants submitted that the Minister’s repeated references in her written submissions to findings being “open” to her also missed the point. The Minister’s task was to answer the questions identified in the applicants’ primary submissions. Whether findings in relation to the wrong question were open on the material before the Minister did not address this issue, the applicants submitted. They submitted that Aboriginal tradition, as found by the Minister to exist, could not be reconciled with the position taken by the Minister in relation to whether it was threatened.
9. In relation to the “EMAC Compromise”, the applicants’ contention was that the material showed that the decision was made to give effect to the EMAC Compromise. They submitted that the totality of the evidence showed that the decision was made to facilitate the negotiation that had been concluded by MRPV with EMAC and that the decision could be impeached on that basis.
10. As to procedural fairness, the applicants submitted that the Departmental Analysis included a contention that the significance of the Specified Area derived from the culturally significant trees and where those would not be removed the Specified Area was not threatened by the proposed construction. This contention was not obvious, the applicants submitted, was adverse to the interests of the applicants and had not been previously notified to them. It was critical to the decision, they submitted, and procedural fairness required that it be disclosed.
11. As to the submission by the Minister that the errors did not provide a basis for the relief claimed because they were not material, the applicants responded as follows.
12. First, the applicants submitted that materiality issues in relation to *ADJR Act* review were resolved by the question: is the error complained of so insignificant that it could not have materially affected the decision? Relief would only be refused, they submitted, if the error complained of could not materially have affected the decision, and the Court could not be so satisfied in this case.
13. Second, no issue of materiality arose, the applicants submitted. The Minister characterised the decision as having been supported by two paths of reasoning. The applicants submitted that this was incorrect. They submitted that the decision was a consequence of the finding that the Minister lacked jurisdiction to make protection declarations. The Application required “a determination by the Minister of the question whether the area is one of significance and if so, whether it is under any and if so, what kind of threat”, the applicants submitted, which required her to ask herself the questions raised by s 3(2). No lawful decision to refuse the Application could be made without considering those questions, it was submitted, because that conduct conditioned the exercise of the power to refuse to make the declaration. The applicants submitted that it was unlawful for the Minister to conduct a balancing exercise without having first lawfully answered the questions in ss 10(1)(b) and 12(1)(b).
14. Third, the applicants submitted, materiality was satisfied against any test. The Minister was said to have erred by failing to apply the relevant test, finding no threat to the Specified Area or the trees; by failing to consult the State Minister; and by reasoning in a way calculated to facilitate the EMAC Compromise. Additionally, the applicants submitted that the Minister failed to take into account relevant material, and failed to give notice of her narrow reading of the Application adverse to the interests of the applicants. Each of these issues affected the balancing exercise, the applicants submitted, and there was no distinct, unimpeached basis for the decision. Because of the balancing exercise, the applicants submitted, the errors complained of were yoked to, and affected, the separate basis on which the Minister contended the decision could be sustained.
15. No question of materiality arose on the question of whether the decision was affected by error, as the error was not “so insignificant” it could be ignored, the applicants submitted. They submitted that the contention that relief should be refused in exercise of the discretion under s 16 was not supported by principle.

## Consideration

1. The heading of the 17 June 2018 Application to the Commonwealth Minister was:

**Victorian Government Western Highway project - Application for an emergency declaration for protection of significant Aboriginal areas and objects to prevent threats of injury and desecration of sacred trees alongside the Western Highway near Buangor, Victoria on Djab Wurrung Country**

1. The body of the Application stated that:

Starting from 18 June 2018 there are proposed road works planned which will lead to the desecration of significant sites and objects, in particular, highly culturally significant trees. The significant Aboriginal areas and objects on Djab Wurrung country close (sic) to the Victorian town of Buangor on the VicRoads planned upgrade to the Western Highway.

Attached to this application is a desktop report on the culturally modified trees along the planned road works (‘Report’).

Of particular significance are hollow trees ‘E3’ and ‘E6’ detailed in the report, with photos attached at the end of this letter. E6 has been used by our people for over 50 generations.

E3 & E6 are two highly culturally significant ancient hollow trees, which sit in a (sic) extremely significant area at the basin of the Hopkins river, and are connected to our songlines and stories that reach from Langi Ghiran, our black cockatoo dreaming site and also along the Hopkins river which is connected to our eel dreaming. VicRoads intends to physically destroy and remove these ancient trees that are particularly culturally significant to our women.

These trees have been used by our ancestors for hundreds of years, over 50 generations, and have had multiple uses over time. They are extremely rare examples and the last remnants of such trees, most similar trees in the area have already been destroyed over the course of history. We are fighting to maintain and preserve what we have left, as these trees have played an important role in the health of our country and the wellbeing of our people for countless generations. They are living beings that embody our stories throughout this significant landscape. These old trees are named ‘Delgug’ meaning ‘tall person’. These trees are our ancestors and we must protect them to the best of our ability. Destroying them is severely upsetting, and brings bad fortune.

…

Martang Pty Ltd (‘Martang’) who is a Registered Aboriginal Party under the *Aboriginal Heritage Act 2006* (Vic) has had dialogue with VicRoads and Aboriginal Victoria. We require the protection order to allow us time to have dialogue with Aboriginal Victoria, Martang, and VicRoads time to reverse the decision to approve the destruction of these trees. Martang does not represent all Djab Wurrung clans or people, but has a limited membership. As detailed in the Report, Martang has not confirmed the cultural values of the trees in its dealings with VicRoads and Aboriginal Victoria. This is utterly wrong, and had sufficient consultation been undertaken the cultural values would have been confirmed.

It is therefore requested by Djab Wurrung traditional owners that a protection declaration be made in order to preserve and protect the ancient and culturally significant trees, and allow a dialogue to occur with the Victorian Government on the cultural heritage value of the trees.

…

1. By email on 5 July 2018 to an officer of the Department, the applicants wrote:

Thank you for the call this morning and indicating that that (sic) our application for protection declarations by the Minister’s office has been accepted.

I confirm that for protection under s9, 10 & 12 of the Act your office requires the clarification of map boundaries sought to be protected and GPS coordinates.

A map ‘VicRoads\_Option1\_Boundary’ is **attached** that outlines a boundary area with GPS coordinates. We are also claiming protection of the ‘Maximum Construction Footprint’ in map sheets 8 to 14 (the pink boundary line), which is contained in the VicRoads Mapbook attached called ‘Alignment Options 1 2 Constraints Mapbook’.

We are requesting:

1. a s9 protection declaration for 30 days protection over the Maximum Construction Footprint.

2. a s10 protection declaration over the Maximum Construction Footprint, i.e., the VicRoads planned works area until the following is achieved:

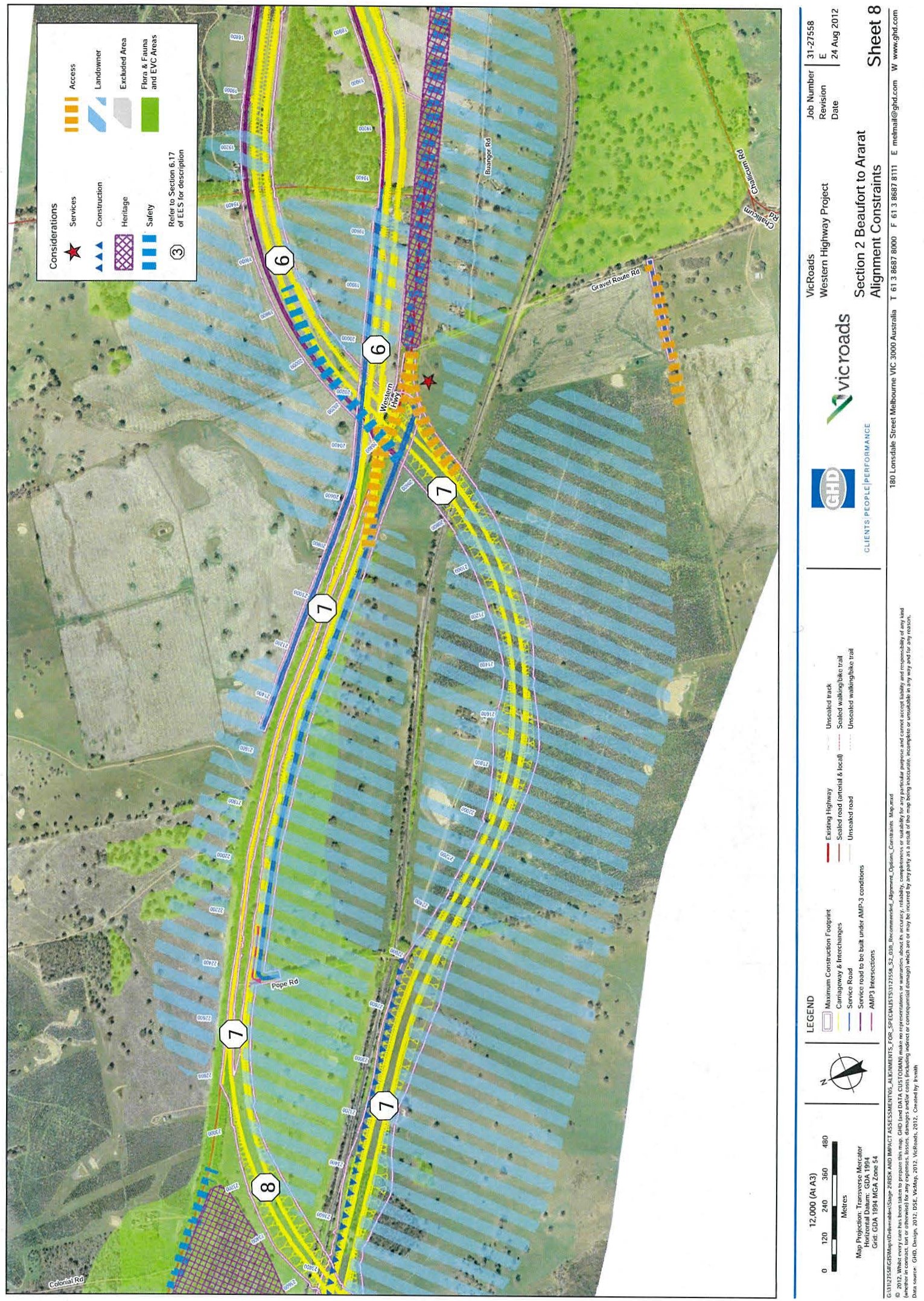
* relevant cultural heritage assessments within the boundary area are completed by the Djap (sic) Wurrung traditional owners, including but not limited to the trees listed below. In particular we require archaeological excavations of trees E3 and E6;
* relevant sites/landscapes/objects are registered under either the *Aboriginal Heritage Act 2006* (Vic) or the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); and
* contingency plans for the registered sites are agreed upon and implemented by traditional owners and VicRoads.

3 a s12 protection declaration for a 100m protection buffer around the trees’ coordinates:

* Tree E1, ‘Yellow Box Scarred Tree’, GDA94 Coordinates: (688430E 5864681N)
* Tree E2, ‘Canoe Tree’, GDA94 Coordinates: (688126E 5864844N)
* Tree E3, ‘Hollow Tree BT1’, GDA94 Coordinates: (687991E 5864773N)
* Tree E4, ‘Scarred Tree No 1’, GDA94 Coordinates: (680435E 5868058N)
* Tree E5, ‘Scarred Tree No 2’, GDA94 Coordinates: (678917E 5868624N)
* Tree E6, ‘Hopkins River Hollow Tree BT2’ GDA94 Coordinates: (678320E 5868983N)

…

1. The “Maximum Construction Footprint” is represented in map sheets 8 to 14 (which depict different parts of the Section 2B upgrade) by a pink boundary line. By way of example, map sheet 8 is as follows:



1. If there were any doubt as to whether or not the claimed significance of the Specified Area (only or principally) derived cultural significance from the trees situated in that area, so that where five of the six trees would not be removed it was for that reason open to the Minister to be not satisfied that the Specified Area was under threat of injury or desecration, this was displaced by the letter dated 13 June 2019 from the applicants’ solicitors to the Acting First Assistant Secretary of the Department, which stated:

e. the following assertion “(and, *therefore*, the specified area may not be under threat, given the relationship between the significance of specified area and the significance of the trees referred to above)” is a statement by the Department which is unjustified as it suggests, wrongly, there is a nexus between a significant aboriginal area and significant aboriginal Objects; further, it is inconsistent with the ostensible purposes of the Act to preserve and protect from injury or desecration specified areas and specified objects that are of significance to Aboriginals in accordance with Aboriginal tradition;

f. the most important additional and obvious point to be made about the two statements referred to in sub-paragraphs (d) and (e) above is that even if the statement ‘that there is no threat to the 16 trees’ was correct, so that they are isolated islands, even protected by Tree Protection Zones in accordance with AS 4970-2009, the area surrounding such isolated trees will be destroyed by the proposed works, such that there is no basis for the Minister to find that the area which is the subject of the application is not a significant Aboriginal area that is under threat of injury and desecration.

(Emphasis in original.)

1. The Minister addressed this aspect of the 13 June 2019 letter in her reasons as follows. At [5.42], the Minister stated that in determining whether the Specified Area was a significant Aboriginal area she “considered and evaluated” the material listed at [4.1], which included the “Applicants’ submissions … dated … 13 June 2019”, “to gain an appreciation of the claimed significance of the Specified Area and the relevant Aboriginal tradition.” At [5.51] the Minister noted “the Applicants’ view that even if the trees were not considered under threat, the surrounding area will be destroyed by the works and therefore the Specified Area is under threat of injury”, but repeated her earlier finding that “the significance of the Specified Area derives from the culturally significant trees” and concluded that “[i]n circumstances where the trees will not be removed, I am not satisfied that the Specified Area is under threat of injury or desecration.” In my opinion, the difficulty with this approach is that the Minister has explained away the clarification of what was implicit in the Application by doing no more than restating her finding as to the nature of the application. That finding, as explained below, involved legal error.
2. The Application, both for protection of the Specified Area from injury or desecration and of the specified objects from injury or desecration, was required to be considered in the statutory context provided by the *Heritage Protection Act*.
3. I have set out at [12] above the terms of the *Heritage Protection Act* which state when an area or object shall be taken to be injured or desecrated and which define “Aboriginal tradition”.
4. One relevant question the Minister was required to ask herself in the case of the Specified Area was whether it was, or was likely to be, used or treated in a manner inconsistent with Aboriginal tradition, that expression being defined by the *Heritage Protection Act* to mean the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, including any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.
5. Similarly, the Minister was required to ask herself whether the use or significance of the Specified Area in accordance with Aboriginal tradition was, or was likely to be, adversely affected by reason of anything done in, on or near the Specified Area, and whether there was, or was likely to be, passage through or over, or entry upon, the Specified Area by any person occurring in a manner inconsistent with Aboriginal tradition as defined.
6. In the case of objects, the Minister was required to ask herself whether they were, or were likely to be, used or treated in a manner inconsistent with Aboriginal tradition as defined.
7. In essence, as shown particularly by [5.32] of the reasons (see [18] above), the Minister reasoned, first, that the five trees she had found to be significant Aboriginal objects were not under threat of injury or desecration because they were no longer proposed to be removed. As shown particularly by [5.47]-[5.52] of the reasons (see [22]-[23] above), the Minister reasoned, second, that the Specified Area was not under threat of injury or desecration because it derived cultural significance (only or principally) from those five trees (described variously as the “trees” or “culturally significant trees” situated or contained in the Specified Area) “and interconnectedness of those trees to other stories.”
8. In my opinion, the Minister’s reasons reveal a misunderstanding of the provisions of the *Heritage Protection Act*. The legal error on the part of the Minister was to oversimplify both the meaning of Aboriginal tradition, as defined, and the statutory concept of injury or desecration. That oversimplification was in treating statutory questions posed by those provisions, as outlined at [142]-[144] above, as sufficiently answered by the fact of non-destruction of five of the six trees.
9. The breadth, and the subtlety, of the defined expression “Aboriginal tradition” is explained by the Full Court, in particular by Lockhart J and by French J, in *Tickner v Bropho*. More immediately, it is demonstrated by the finding of the Minister at [5.48] as to cultural connection rendering the Specified Area particularly significant “with a degree of antiquity, involving Aboriginal traditions, observances, customs and beliefs that are passed down from generation to generation through dreaming stories, song lines, spirituality, culture and traditional interaction with the cultural landscape comprised by, and within, the Specified Area”. There is, however, a disconnect between that finding and the Minister’s reasoning, at [5.52], that the significance of the Specified Area derived (only or principally) from the culturally significant trees contained in the area such that in circumstances where the trees, or five of them, would not be removed, she was not satisfied that the Specified Area was under threat of injury or desecration. It was legally necessary for the Minister to undertake the task of considering the statutory questions outlined at [142]-[143] above in light of the traditions, observances, customs and beliefs she had found.
10. There is a similar disconnect between the Minister’s finding, at [5.26], of a “cultural connection” in relation to five of the six trees which rendered them “particularly significant, with a degree of antiquity, involving Aboriginal traditions, observances, customs and beliefs that are passed down from generation to generation through spirituality, culture and traditional interaction”, and her conclusion at [5.37], having found that those trees would not be destroyed, that she was not satisfied they were under threat of injury or desecration. Again, it was legally necessary for the Minister to undertake the task of considering the statutory question outlined at [144] above in light of the traditions, observances, customs and beliefs she had found.
11. The change of approach by MRPV so as to avoid five of the six trees did not, contrary to the reasoning of the Minister, necessarily mean that there would be no injury or desecration either of the Specified Area or of five of the six trees.
12. To say, as the Minister did at [5.45], that the Application “focussed heavily on the cultural significance of the Specified Area as deriving from the Six Trees” did not mean that Aboriginal tradition as defined had been understood and considered. Similarly, to reason at [5.47] that the “Specified Area derives cultural significance from the trees” did not mean that the Specified Area had no other connection with Aboriginal tradition as defined. In my opinion, this was to oversimplify the claimed nature of the connection or relationship between the applicants and the Specified Area, which included the objects, the trees, the subject of the Application.
13. While it was correct to say that the focus of the Application was on the then impending removal or cutting down of the six trees, that was a particular of the Application. The Application was not in terms limited to destruction of the six trees, and the applicants in their 5 July 2018 email clarified that they sought both: a 100 metre protection buffer around each of the six trees; and protection of the area within the “Maximum Construction Footprint” as depicted in various maps. Contrary to the tenor of the submissions of the Minister recorded at [95] above, the Application identified the threat of injury or desecration sought to be protected against as arising from “proposed road works”. I would not regard it as necessary to go further and to identify the claimed reason why the activities pose a threat, and I do not regard *Tickner v Chapman* as so requiring, but in any event the Application claimed that those works would “lead to the desecration of significant sites and objects, in particular, highly culturally significant trees”; understood in the context of the *Heritage Protection Act*, the reference to “desecration” cannot be seen as limited to destruction, and nor could the reference in particular to “highly culturally significant trees” limit the scope of the application in circumstances where it was, or soon after became, clear that a claim over the Specified Area was also being made. I regard the unduly narrow view which the Minister took of the Application to be a consequence of the error I have found, namely an oversimplification of the relevant statutory definitions and concepts.
14. This error had a number of consequences for the way the Minister came to her decision. It is reflected in the Minister’s approach of dealing with the question arising under s 12, in relation to objects, before considering the question arising under s 10 in relation to the Specified Area. It led the Minister to her conclusion that it was only or principally the six trees (or five of them) that gave the Specified Area its significance in Aboriginal tradition. It also led the Minister to conclude that if five of the six trees were not removed this meant that neither the trees nor the Specified Area would be injured or desecrated. Ultimately, it led to the Minister failing to complete her statutory task of considering the questions at [142]-[144] above by reference to the findings she had made at [5.26] and [5.48] concerning the cultural significance of five of the six trees and of the Specified Area.
15. I have used the phrase “only or principally” in describing the Minister’s reasoning, but I consider the better interpretation of that reasoning to be that the Minister considered that the significance of the Specified Area derived *only* from the six trees. This is because Minister’s reasons do not deal with the significance of what would be left over if the significance of the Specified Area derived *principally* from the six trees.
16. In summary, in my opinion, not only did the Minister misunderstand the Application in this way but she did so by misconstruing the breadth of the statutory concepts of injury or desecration in terms of inconsistency with, and adverse effects on, Aboriginal tradition as defined in the *Heritage Protection Act*.
17. My reasoning thus far deals with grounds A through E in relation to the Specified Area and with grounds H through J in relation to the objects, being Trees E2 to E6.
18. In my opinion, it is not the apposite characterisation of the legal error I have found to contend that the Minister failed to take into account a relevant consideration (Grounds N to O in relation to the Specified Area and Ground R in relation to Trees E2 to E6).
19. Ground P in relation to the Specified Area and Ground S in relation to Trees E2 to E6, which raised *Wednesbury* unreasonableness, seem to me to go to the merits of the decision to the extent they go beyond what I have already said.
20. I now turn to consider the remaining grounds, considered as points discrete from what I have concluded thus far.

#### Procedural fairness

1. By Ground M, the applicants claimed that there was a breach of procedural fairness in that the Minister had before her a brief from her Department, the Departmental Analysis, which contained credible and relevant material, adverse to the applicants, which was not shown to them.
2. In my opinion, a fair reading of the letter dated 29 May 2019 from a senior officer of the Department and addressed to two of the present applicants shows that they were given an opportunity to be heard in relation to the issues.
3. The applicants were informed that on 23 May 2019, the Department was notified by MRPV that it had reached agreement with EMAC regarding how MRPV would undertake the Western Highway upgrade “in a way that protects culturally sensitive trees.” The applicants were told as follows:

… As set out in the MRPV Covering Letter and the Letter of Support, MRPV and EMAC have agreed that:

* MRPV will, as part of the Western Highway upgrade, avoid five of the six trees that are the subject of the Application; and
* the remaining tree the subject of the Application is not an Aboriginal scarred tree.

…

The new information set out above may lead to the Minister **not** being satisfied that E1 Yellow Box Scarred Tree is a ‘significant Aboriginal object’. You are invited to comment on the above information, including the possibility that the Minister may conclude that E1 Yellow Box Scarred Tree is not a significant Aboriginal object.

(Emphasis in original.)

1. The applicants were also told:

The Attachment to the Letter of Support states that the following trees the subject of the Application will be avoided by MRPV as part of the Western Highway duplication section 2B: E2 [Canoe Tree]; E3 [Hollow Tree BT1]; E4 [Scarred Tree No 1]; E5 [Scarred Tree No 2]; and E6 [Hopkins River Hollow Tree BT2].

You are invited to comment on the above information, including the possibility that the Minister may conclude that trees E2, E3, E4, E5 and E6 as identified in the Application are **not** under threat of injury or descretation (sic).

(Emphasis in original.)

1. The applicants were again told that information now before the Minister was to the effect that MRPV had agreed that it would now avoid five of the trees the subject of the Application and that the sixth tree the subject of the Application “is not an Aboriginal scarred tree (and may, therefore, not be a significant Aboriginal object).
2. The applicants were told as follows:

MRPV has committed to implementing the recommendations in the Arborist Report (Annexure A to Attachment B of the MRPV Covering Letter), which includes implementing exclusion zones, and EMAC has in the Letter of Support indicated that this commitment satisfies EMAC that ‘there is no threat to the 16 trees or the area that contains those trees’ (and, therefore, the specified area may not be under threat, given the relationship between the significance of the specified area and the significance of the trees referred to above); …

1. The letter continued as follows:

In the above circumstances, the Minister may find that the area sought to be protected by the Application is not a significant Aboriginal area that is under threat of injury or desecration. You are invited to comment on the above information, including the possibility that the Minister may reach this conclusion.

1. The letter concluded:

**Invitation to comment**

In light of the agreement now reached between MRPV and EMAC, and the fact that a number of Djab Wurrung Traditional Owners are also members of EMAC, the Department seeks confirmation from the Applicants as to whether they wish to pursue the Application under sections 10 and 12 of the ATSHIP (sic) Act or whether they now wish to withdraw the Application.

If the Applicants wish to pursue the Application, the Applicants are invited to respond to the matters raised in this letter. In particular, why the Minister should be satisfied that Tree E1 is a significant Aboriginal object, why Trees E2, E3, E4, E5 and E6 are under threat of injury or desecration and why the specified area is under threat of injury or desecration.

1. In my opinion, the applicants were sufficiently put on notice of the matters which the Minister might take into account. In particular, in my opinion, the applicants were put on notice that the Minister might find that the significance of the Specified Area derived only from the significance of five of the six trees and that avoiding five of the six trees would mean that neither the trees nor the area were under threat.
2. In this respect I apply what the Full Court said in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1984] FCA 1074; 49 FCR 576 at 591-2:

Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question. For a statutory exception to the latter proposition see the pre-decision conference process provided for in the *Trade Practices Act 1974*(Cth).

1. The letters in reply, dated 30 May 2019, 10 June 2019 and 13 June 2019, from the solicitors for the present applicants confirm that there was an opportunity to be heard.
2. For completeness, I find that the applicants were not denied procedural fairness by virtue of the circumstances that they asked for, but were not given, a copy of the Departmental Analysis. There was no undertaking that the applicants would be given a copy of that document. The applicants’ entitlement could be no more than to be given the opportunity to be heard in relation to the issues I have considered above. That conclusion also follows from the part of the reasons of the Full Court I have set out at [168] above from *Alphaone*.
3. I reject this ground.

#### Consultation

1. By Ground K, the applicants alleged that there was a breach of the requirements of s 13(2) of the *Heritage Protection Act* in that the (Commonwealth) Minister failed to consult with the appropriate Victorian Minister (said to be the Victorian Minister with responsibility for Aboriginal affairs) and purported to consult with the Victorian Minister for Roads and Road Safety and MRPV.
2. I have set out at [13] above the terms of s 13 of the *Heritage Protection Act*. The short answer to the applicants’ contention is provided by s 13(4) which states that any failure to comply with s 13(2) “does not invalidate the making of a declaration.” A “declaration” is defined to mean a declaration “under this Division”, which Division includes ss 10 and s 12.
3. I also consider that the terms of s 13(2) leave it principally to the Minister to decide who the appropriate State or Territory Minister is in order to consult him or her as to whether there is, under a law of that State or Territory, effective protection of the relevant area or objects from the threat of injury or desecration. The applicants in the present case have not established that the Victorian Minister for Roads and Road Safety was not the appropriate State Minister for that purpose. I would not construe the provision to mean that the only State or Territory Minister that the Minister may consult is the State or Territory Minister for Aboriginal Affairs. In my view the consultation should be, as a matter of substance, with a State or Territory Minister who is in a position to say whether there is a State or Territory law which gives effective protection. The consultation is not required to be with a specific individual or the holder of a specific portfolio identified by its name.
4. The relevant correspondence is the letter from the then Minister to the Victorian Minister for Roads and Road Safety dated 25 October 2018; a letter from that Victorian Minister to the Minister dated 30 October 2018; a letter from the MRPA to the Minister’s Department dated 7 November 2018; and the letter from the MRPA to the Minister’s Department dated 29 May 2019.
5. In my opinion, the reply given by the Victorian Minister for Roads and Road Safety dated 30 October 2018 and copied to the Victorian Minister for Aboriginal Affairs evidenced a consultation within s 13(2) of the *Heritage Protection Act*. The Victorian Minister said in respect of the subject matter of s 13(2) of the *Heritage Protection Act*:

Overall, the project has been through exhaustive investigations since 2012, in accordance with the *Aboriginal Heritage Act 2006* (Vic) (**AH Act**) and as part of the preparation of an Environment Effects Statement (**EES**). A Cultural Heritage Management Plan (**CHMP**) has been approved by the relevant Registered Aboriginal Party to ensure that all culturally sensitive places and objects could be identified and protected or managed appropriately while the work takes place.

Furthermore, the AH Act has been in operation in Victoria for over 10 years and creates a comprehensive regime for the identification, assessment and protection of areas that are culturally sensitive. Given this, it is my view that you should be satisfied that the laws of Victoria make effective provision for the protection of the area to which this application applies.

Nonetheless, in light of more recent concerns raised by some members of the local Djab Wurrung community about the potential impact of the project on two trees, the State Government has commenced further consultation with traditional owner groups. I have also directed the MRPA to explore alternate design options within the current alignment that might preserve these trees.

1. The Minister’s letter dated 25 October 2018 also requested other information made relevant by s 10 of the *Heritage Protection Act*, particularly: the approximate cost and broader social and economic impacts of the proposed upgrade; the approximate cost and broader social and economic impact of alternative routes that could be taken; and whether the proposed alternative routes had any similar issues regarding items of indigenous cultural significance. It is this which in his letter dated 30 October 2018 the Victorian Minister was referring to as “the additional information requested” which he asked the MRPA to provide to the Minister’s Department.
2. In my opinion, although it is correct to say that the subsequent correspondence from the MRPA dealt not only with the additional information requested but also with the question of the effective provision for protection, this does not detract from the consultation constituted by the letters of 25 October 2018 and 30 October 2018.
3. It is unnecessary to decide the merits of the submission on behalf of the Minister that s 13(2) has no present application because the Minister did not “make a declaration” in relation to an area or objects located in the Victoria but rather decided not to make such a declaration. The argument to the contrary proceeds by analogy with the decision of the Full Court in *Tickner v Bropho*, which held that the Minister may not go straight to the exercise of his or her discretion under s 10(1) of the *Heritage Protection Act* without first determining whether he or she is satisfied that the area is a significant Aboriginal area and that it is under threat of injury or desecration. That was so even though the requirements to consider those matters in ss 10(1)(b)(i)-(ii) are, in form, conditions precedent to making a declaration and are not expressed as obligations. My tentative opinion is that the analogy with *Tickner v Bropho* is a sound one, and that s 13 requires, albeit with no invalidating consequence, consideration of the efficacy of State law in the protection of the relevant area or the relevant object or objects, whether or not the Minister ultimately decides to make or not make a declaration.
4. I reject this ground.

#### The discrete challenge to the Minister’s treatment of Tree E1

1. Ground F(a) is to the effect that the Minister’s exclusion of the area east of Tree E1 involved a breach of the rules of procedural fairness in that the applicants were not put on notice, and given an opportunity to comment, in relation to the possibility that the area east of Tree E1 would or might be excluded from the area found to be a significant Aboriginal area. I have already considered and rejected the applicants’ procedural fairness contention at [159]-[171] above, except in so far as it relates to the area east of Tree E1.
2. In my opinion, no separate procedural fairness ground arises because it is clear from the contents of the letter dated 29 May 2019, which I have set out extensively above at [161]-[166], that the applicants were put on notice that the Minister might decide their Application on the basis which she did, which was that the area derived its significance only or principally from five of the six trees, excluding Tree E1, and that if those trees were avoided then there would be no threat of injury or desecration to the Specified Area. This was sufficient to put the applicants on notice that the area east of Tree E1 might be found not to be significant because that tree itself might not be so found. Again, whether the decision may be able to be challenged on other grounds, or that the applicants disagree with the reasoning and conclusion, is not to the present point. The present point is one of fairness and procedure, and the *conclusion* of the Minister is not of significance: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 at [25]; *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; 256 CLR 326 at [55]-[60] per Gageler and Gordon JJ.
3. I reject this ground.
4. Ground F(b) was to the effect that there was no evidence or other material to justify the exclusion of the area east of Tree E1 and that no reasons were given to justify that exclusion. In my opinion it is doubtful whether this is a proper “no evidence” ground. The Minister had before her: a description by Martang Aboriginal Corporation, the Registered Aboriginal Party under the *Aboriginal Heritage Act 2006* (Vic), of the scar on Tree E1 “as European scar”; and EMAC’s conclusion that the scarring on Tree E1 was “European scar, not an Aboriginal scarred tree”, the other five trees subject to the Application having been considered to be culturally significant by EMAC. The Minister also took into account other conclusions by Ms Sanders and Dr Builth.
5. In these circumstances, insofar as the ground relates to the significance of Tree E1 considered of itself, to submit that there was “no evidence” constitutes an impermissible appeal to the merits. I reject this ground.
6. To the extent that it was put that there was “no evidence” in relation to the exclusion from the area found to be a significant Aboriginal area described by the words “except to the extent of the vicinity of Tree E1 eastwards”, as I have earlier indicated I regard this conclusion as flowing from the approach taken by the Minister to the question whether the Specified Area was, in her view, a significant Aboriginal area, that is, by regarding the significance of the Specified Area as deriving only or principally from the significance of (five of) the six trees. It follows that this also is not a “no evidence” ground. I reject this ground.
7. In relation to Ground T, another *Wednesbury* unreasonableness ground but in relation to Tree E1, as pleaded this constitutes no more than, at best, a disagreement with the Minister’s factual conclusion. In truth, since the relevant statutory provision, s 12(1)(b)(i) of the *Heritage Protection Act*, concerns the satisfaction or lack of satisfaction of the Minister that the object is a significant Aboriginal object, the ground involves a challenge to the Minister’s evaluation of the material before her. It is not to the point that the Reporter may have concluded that Tree E1 was a significant Aboriginal object: indeed, the Reporter had no specific statutory role under s 12. I reject this ground.
8. There is also an element, in the particulars relating to this ground, of improper purpose on the part of the Minister or that the Minister’s purpose was inconsistent with the *Heritage Protection Act*, which I next consider.

#### Purpose inconsistent with the Heritage Protection Act

1. In my opinion, Ground U has no separate substance. The applicants’ challenge was to the effect that the Minister’s decision was made for the purpose of facilitating the “EMAC Compromise”, and that this was a purpose extraneous to the *Heritage Protection Act*. The applicants have not established that the Minister had a purpose, or a substantial purpose, inconsistent with the *Heritage Protection Act*.
2. Although in her reasons, at [5.64], the Minister noted that “more recently MRPV has worked with EMAC in relation to dealing with the Six Trees within the footprint of the Western Highway upgrade”, the relevant issue being addressed by the Minister was whether she was satisfied that measures under the *Aboriginal Heritage Act 2006* (Vic) provided effective protection “of the Six Trees and Specified Area”: [5.65] of the Minister’s reasons. The Minister was satisfied that the Victorian Government’s commitment to continue working with EMAC provided, in part, that effective protection.
3. This issue was within the purposes of the *Heritage Protection Act*. I refer, by way of example, to s 13, in particular s 13(5) which provides that where the Minister is satisfied that the law of the State makes effective provision for the protection of an area or objects to which a declaration applies, he or she shall revoke the declaration.
4. It follows, in my opinion, that the applicants’ focus on the so-called “EMAC Compromise”, defined tendentiously in the applicants’ substituted further amended originating application asmeaning“a non-binding agreement or arrangement between EMAC and MRPV made without the knowledge or input of the Applicants seeking to deal with the cultural heritage issues raised by the Applicants in the Application”, was misconceived. On the Minister’s understanding of the *Heritage Protection Act* the arrangement between MRPV and EMAC furthered the objects of that Act.
5. It also follows that, on the Minister’s understanding of the *Heritage Protection Act*, she considered whether making a declaration would advance the purpose of that Act and thus did not fail to have regard to a relevant consideration as claimed in Ground L.
6. While in a sense it is true to say that the Minister “facilitated” the so-called “EMAC Compromise”, that was because the Minister was satisfied that that measure contributed to effective protection “of the Six Trees and Specified Area” and therefore to the purposes of the *Heritage Protection Act*.
7. In my opinion there was no purpose inconsistent with the *Heritage Protection Act* and no other judicially reviewable error flowing from the Minister’s consideration ofthe arrangement between MRPV and EMAC. I reject this ground.

#### Materiality

1. The Minister submitted that because she had also decided, as a matter of discretion, not to make a declaration in relation to the Specified Area under s 10(1) of the *Heritage Protection Act* and not to make a declaration in relation to the six trees under s 12(1) of the *Heritage Protection Act*, it followed that any legal error in relation to the earlier parts of her decision-making were immaterial in the sense that the applicants had not shown that the error *might* have made a difference to the outcome: *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; 256 CLR 326 at [43]-[44]. There, in the context of jurisdictional error, Kiefel, Bell and Keane JJ said:

An interview by the Second Reviewer *might* have made a difference to the outcome of the IMR process. This may be seen from what was involved in any assessment of the respondent’s application to be undertaken by the Second Reviewer. The acceptance or rejection of his case was likely to turn, not only upon apparent inconsistencies or uncertainties in his account, but also upon impressions formed about how he had responded to questions about his recollection of events in the recorded interview with the First Reviewer.

The benefit to a decision-maker of seeing a witness advance his or her case should not be exaggerated, but for the reasons already mentioned, it cannot be dismissed as illusory. The respondent could not have been in a worse position if the Second Reviewer had not been disposed, after seeing him responding to questions, to take a more favourable view of his credibility. But he may have been in a better position if the Second Reviewer had formed the impression that he was genuinely doing his best to give truthful evidence in difficult circumstances.

(Original emphasis. Footnotes omitted.)

1. In my opinion, approaching the matter as one of possibility rather than probability, the applicants have shown that there is a causal link between the error and the decision under review. This is not a case of denial of procedural fairness but of a more fundamental legal error in the Minister misunderstanding the scope of the protection of the *Heritage Protection Act*, and consequently the basis of the Application
2. I therefore see a parallel between the present case and the decision of the Full Court in *Tickner v Bropho*. In that case it was held that it was an error of law for the Minister to decide not to make a declaration under s 10(1) of the *Heritage Protection Act* without first considering the matters in ss 10(1)(b)(i)-(ii), being whether the area is a significant Aboriginal area and whether it is under threat of injury or desecration, and s 10(1)(c), being a report in relation to the area from a person nominated by him.
3. Black CJ said, at 193, that he could not accept that the legislation could have been intended to allow for the rejection of applications for protection without proper consideration being given to the significance of the area sought to be protected. His Honour held that the proper exercise of the discretion required that the Minister consider the matters to which s 10(1)(b) directed attention.
4. Lockhart J said, at 209:

There is no question that the Minister has a discretion whether or not to make a declaration under s 10; but it is a discretion which must be exercised after the matters specified in pars (b) and (c) have been considered. It is only then that the balancing process which the Act requires the Minister to engage in will be satisfied, balancing on the one hand the considerations of significance of the area to the Aboriginal people and the threat of injury or desecration of the area and on the other hand any other matters which may be considered relevant. There is no warrant against the Minister for failing to go through the statutory exercise which s 10 demands.

To conclude that the Minister can, in advance of considering and determining the matters referred to in pars (b) and (c) of s 10, decide that there are matters of such consequence to the nation that he may ignore the provisions of those paragraphs, is in my view contrary to the intendment of the Act and its evident purpose eloquently described in s 4.

1. French J said, at 233:

… Sections 10(3), 10(4) and 13 of the Act contemplate a consultative process involving persons who may be affected by a declaration and the relevant State or Territory Minister. They also contemplate a weighing of competing interests. The possibility may be accepted that a situation could arise in which there is a public or private interest of such weight that it would take priority over the public interest in the preservation of an area of significance to Aboriginals. That possibility does not support the proposition that the Minister could ever conclude, without investigation of the matters arising under s 10(1)(b), that no form of partial or conditional protection were possible. The balancing of interests which the Act contemplates allows for the possibility of compromise which involves recognition if not satisfaction of all relevant interests.

1. In that case there was a failure to comply with the preconditions for the exercise of the discretion. In the present case, although the preconditions to the exercise of the powers under ss 10(1) and 12(1) were addressed in fact, they were addressed in a way which meant that they were not addressed in law with the result in this case that the Minister did not complete her statutory task. I do not see how the statutory discretions could be validly exercised in circumstances where the Minister had a seriously flawed appreciation of the operation of the *Heritage Protection Act* and of the Application. The discretions are not discrete from or independent of the matters in respect of which the discretions may be exercised. It cannot be said that, if the balancing process to which Lockhart and French JJ referred had been carried out absent the error and on a proper understanding of the *Heritage Protection Act* and the Application, the applicants could not have succeeded.
2. Relatedly, I see the seriousness of the error, another aspect of materiality, as affecting the result of the causality question: it cannot be said that the Minister’s error was so insignificant that a proper understanding of the Application and of the provisions of the *Heritage Protection Act* could not have made a difference to the outcome of the exercise of the discretion under each of ss 10 and 12 and thus to the Minister’s ultimate decision not to make declarations.
3. It follows that I do not accept the submissions on behalf the Minister that any errors made in considering the matters in ss 10(1)(b) and 12(1)(b) were such that the applicants had not shown that those errors might have made a difference to the outcome, being the Minister’s refusal to make the declaration sought in respect of the area under s 10 and in respect of the objects under s 12. In short, the exercises of discretion in the present case were not independent of the error made by the Minister in considering the matters specified in ss 10(1)(b) and 12(1)(b).

## Conclusion and orders

1. For these reasons, the applicants’ application for judicial review succeeds and I shall order that the decision of the respondent Minister made on 16 July 2019 be set aside from the date it was made. Consequentially, the applicant’s Application dated 17 June 2018 is to be referred to the respondent Minister for further consideration. Leaving aside the costs of the applicants’ interlocutory application, the respondent is to pay the applicants’ costs of this application, as agreed or assessed.

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| I certify that the preceding two hundred and five (205) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson. |

Associate:

Dated: 6 December 2019

SCHEDULE OF PARTIES

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| --- | --- |
|  | VID 885 of 2019 |
| Applicants |  |
| Fourth Applicant: | MARJORIE THORPE |