Federal Court of Australia

Onus v Minister for the Environment [2020] FCA 1807

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| File number: | VID 599 of 2020 |
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| Judgment of: | **GRIFFITHS J** |
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| Date of judgment: | 17 December 2020 |
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| Catchwords: | **ADMINISTRATIVE LAW** – application for judicial review challenging the lawfulness of the Minister’s decision dated 6 August 2020 not to make declarations under ss 10 and 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (***Act***) in relation to the effect on an area and certain trees claimed to be of particular significance for Aboriginals relating to the construction and alignment of a section of the Western Highway between Ararat and Buangor in Victoria – six grounds of judicial review raised – challenge to the lawfulness of the Minister’s decision in relation to the application for a declaration under s 10 of the *Act* dismissed – Minister’s decision in respect of the application for a declaration under s 12 of the *Act* found to be invalid in law and set aside – whether the Minister’s decision regarding ss 10 and 12 was severable – Minister directed to refer the s 12 application for reconsideration and determination according to law by another Minister with responsibility for administering the *Act* |
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| Legislation: | *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), ss 3, 4, 7, 9, 10, 12, 13, 16, 22, 23, 26  *Acts Interpretation Act 1901* (Cth), s 19(1)  *Administrative Decisio*ns *(Judicial Review) Act 1977* (Cth), ss 5(2)(b), 5(2)(g), 5(3)(a), 5(3)(b), 16(1)(d)  *Judiciary Act 1903* (Cth), s 39B  *Migration Act 1958* (Cth), s 501CA(4)(b)(ii)  *Aboriginal Heritage Act 2006* (Vic) |
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| Cases cited: | *Ali v Minister for Home Affairs* [2020] FCAFC 109; 380 ALR 393  *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; 78 CLR 353  *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352  *Chapman v Luminis Pty Ltd (No 4)* [2001] FCA 1106; 123 FCR 62  *Clark v Minister for the Environment* [2019] FCA 2027; 274 FCR 99  *Clark v Minister for the Environment (No 2)* [2019] FCA 2028  *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203; 160 ALD 123  *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; 263 CLR 1  *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 264 CLR 123  *Ibrahim v Minister for Home Affairs* [2019] FCAFC 89; 270 FCR 12  *Thorpe v Head, Transport for Victoria* [2020] VSC 804  *Tickner v Bropho* (1993) 40 FCR 183  *Tickner v Chapman* [1995] FCAFC 1726; 57 FCR 451  *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421  *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 78 ALJR 992  *Minister for Immigration v Li* [2013] HCA 18; 249 CLR 332  *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; 69 CLR 407  *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; 257 CLR 21 |
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| Date of last submissions: | 15 December 2020 |
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| Date of hearing: | 7-8 December 2020 |
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| Solicitor for the Respondent: | Clayton Utz |

ORDERS

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|  | | VID 599 of 2020 |
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| BETWEEN: | LORRAINE SANDRA ONUS  First Applicant  MARJORIE THORPE  Second Applicant | |
| AND: | MINISTER FOR THE ENVIRONMENT  Respondent | |

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| order made by: | GRIFFITHS J |
| DATE OF ORDER: | 17 DECEMBER 2020 |

THE COURT ORDERS THAT:

1. The decision of the respondent dated 6 August 2020 not to make a declaration under 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 application dated 17 June 2018, insofar as it relates to s 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), be remitted to the Minister with a direction that she refer the application for reconsideration and determination according to law by another Minister with responsibility for administering the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).
3. The respondent pay the applicants’ costs of the application, as agreed or taxed.

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

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GRIFFITHS J:

## Introduction

1. By an amended originating application for judicial review, the applicants challenge the lawfulness of the Minister’s decision dated 6 August 2020 not to make declarations under ss 10 and 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the ***Act***).
2. The Minister’s refusal decision related to applications by nine traditional owners of the Djab Wurrung Country (which included the two applicants in the present proceeding), for declarations to be made for:
3. the protection and preservation of a significant Aboriginal area from injury or desecration (s 10); and
4. the protection and preservation of specified significant Aboriginal objects, being six trees with cultural significance, from injury or desecration (s 12).
5. The applicants’ primary concerns relate to the effect of the construction and alignment of a section of the Western Highway between Ararat and Buangor in Victoria on the area and certain trees, which are said to have particular significance for Aboriginals.
6. The judicial review challenge relies on the Court’s jurisdiction under both the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (***ADJR Act***) and s 39B of the ***Judiciary Act*** *1903* (Cth).
7. For the following reasons, I consider that the Minister’s decision in respect of the application for a declaration under s 12 of the *Act* is invalid in law and should be set aside. I dismiss the applicants’ challenge to the lawfulness of the Minister’s decision in relation to the application for a declaration under s 10 of the *Act*.

## Summary of procedural history

1. It is desirable to outline the lengthy procedural history leading up to the current proceeding, noting that this is not the first occasion this matter has come before the Court. Indeed, this is the fourth such occasion (three of which relate to the Ministerial decisions refusing to make declarations under ss 10 and 12, while the other involved an unsuccessful challenge to the Minister’s decision not to grant a s 9 declaration). There has also been related litigation in other Courts, including a recent decision dated 3 December 2020 in the Supreme Court of Victoria by Forbes J, in which the Court granted an interlocutory injunction in relation to the area which is the same as the area in the present proceeding (see ***Thorpe*** *v Head, Transport for Victoria* [2020] VSC 804).
2. By a letter dated 17 June 2018, the then Minister for the Environment and Energy (the Hon Josh Frydenberg MP) was asked to make declarations under ss 9, 10 and 12 of the *Act* to protect the same significant Aboriginal area and six trees as are the subject of the present proceeding. Attached to the application was a report by Dr Heather Builth entitled “Desktop Report on Culturally Modified Trees along Planned Road Works of Southern Deviation Route of Option 1 for the Western Highway between Ararat and Beaufort, Victoria” (**2017 Builth Report**). Additional information in support of the urgent application was provided on 5 July 2018. This included confirmation that the s 10 application sought protection over an area described as the “Maximum Construction Footprint” of the planned roadworks as shown in maps and by GPS coordinates which were attached to that correspondence (the **Specified Area**) and that the s 12 application sought protection of particular objects, being the following six trees, including a 100m protection buffer:

a. E1 (Yellow Box Scarred Tree) [GDA94 Coordinates: (688430E 5864681N)];

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

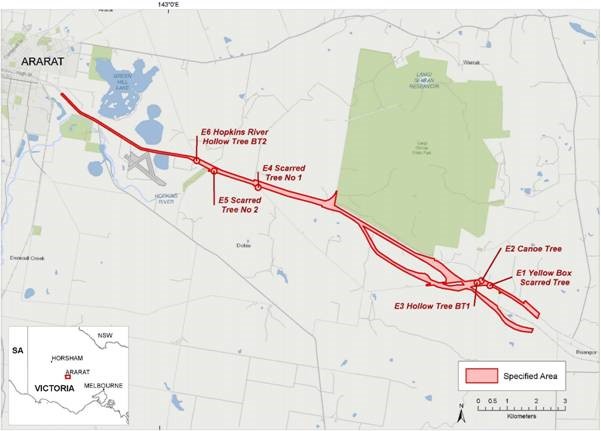
c. E3 (Hollow Tree BT1) [GDA94 Coordinates: (687991 E 5864773N)];

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, which was before the Minister, identifies the Specified Area by pink shading within a red boundary line. Notably, the map does not show the highway alignment at all, although it may be assumed that the alignment is somewhere in the Specified Area. The scale of the map is such that the map fails to identify with any precision the physical proximity of each of the six trees to the assumed highway alignment. As will shortly emerge, the Minister did not have before her any map which precisely identified the proposed highway alignment as at the date of her decision:



1. On 18 July 2018, Minister Frydenberg appointed Ms Susan Phillips as a reporter pursuant to s 10(1)(c) of the *Act* (the **Reporter**). Ms Phillips’ report, which was completed on 7 September 2018, was received by the Minister on 13 September 2018 (**Phillips Report**). It, together with the 17 June 2018 application and the 5 July 2018 email which provided additional information, was among the voluminous material which was before the current Minister for the Environment (the Hon Sussan Ley MP) when she made the decision which is the subject of the current proceeding. It might also be noted that the material before the Minister included a second report dated August 2018 by Dr Builth (**2018 Builth Report**). Another document before the Minister was a report dated December 2018 by On Country Heritage and Consulting (**On Country Report**).
2. On 12 September 2018, the then Minister for the Environment (the Hon Melissa Price MP) refused to make the emergency declaration sought under s 9 of the *Act* as she was not satisfied that the specified area was under serious and immediate threat of injury or desecration.
3. Subsequently, on 19 December 2018, Minister Price refused to make the declarations sought under ss 10 and 12 of the *Act*. That decision was quashed by consent by the Court’s orders dated 12 April 2019 in VID 168 of 2019. The matter was remitted to the Minister for redetermination according to law.
4. On 16 July 2019, Minister Ley (who had succeeded Minister Price as Minister) purported to make a decision again refusing to make the ss 10 and 12 declarations. That decision was quashed on 6 December 2019 following proceedings before Robertson J in which it was held that the Minister’s decision was invalid (see ***Clark*** *v Minister for the Environment* [2019] FCA 2027; 274 FCR 99). The Minister was directed once again to redetermine the matter according to law. In separate reasons for judgment delivered on the same day, Robertson J dismissed a separate application for an interlocutory injunction by the same applicants (*Clark v Minister for the Environment (No 2)* [2019] FCA 2028).
5. After the matter was remitted for reconsideration for the second time, the Minister sought and was provided with additional material by both the applicants and Major Road Projects Victoria (**MRPV**, which I will use to describe both that body and its predecessor body, the Major Roads Projects Authority), which had overall responsibility for the Western Highway project. The Minister was also provided with material from the Eastern Maar Aboriginal Corporation (**EMAC**), which body had a statutory role under the Victorian Aboriginal heritage protection framework, to which MRP was bound.
6. It will be necessary to expand upon this summary of background matters in due course.
7. On 6 August 2020, the Minister made the decision which is the subject of the present proceeding. On the same day the Minister provided a detailed statement of reasons for her decision. This is the third Ministerial decision rejecting the 17 June 2018 application for declarations under ss 10 and 12 of the *Act*.

## The Minister’s statement of reasons summarised

1. The statement of reasons totals 35 pages, together with multiple attachments. The attachments are voluminous and total approximately 5,250 pages (not all of which were put in evidence in the present proceeding). To avoid adding unduly to the length of these reasons for judgment, I will defer summarising the relevant attachments until addressing each of the six grounds of judicial review.
2. For current purposes, it is sufficient to set out section 6 of the Minister’s statement of reasons, which identifies the reasons for her ultimate findings and decision in respect of both ss 10 and 12 of the *Act* (it will be necessary later to address other relevant parts of the Minister’s statement of reasons with specific reference to the six individual grounds of judicial review):

6. **Reasons for decision**

6.1 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.

6.2 I was not satisfied that Tree E1 is a significant Aboriginal object. In reaching my conclusion, I placed significant weight on my finding that Aboriginal opinion is divided on the question of whether Tree E1 is of cultural significance. I also placed weight on my finding that the reports commissioned in relation to the Six Trees are inconclusive with respect to the significance of Tree E1, and did not provide detail about the uses or beliefs centred on Tree E1 (in contrast to the other trees subject to the Application).

6.3 I was satisfied that Trees E2, E3, E4, E5 and E6 are significant Aboriginal objects. However, I was not satisfied that those trees are under threat of injury or desecration. In reaching this conclusion, I accepted that MRPV has made a commitment to avoid Trees E2, E3, E4, E5 and E6 as part of the Western Highway upgrade and has developed the Framework for identifying and monitoring trees. Although it is unlikely to be legally binding, I accepted that MRPV can reasonably be expected to honour this commitment. I was further satisfied that the commitment of MRPV and the Framework provide adequate protection against possible use or treatment of the trees in a manner inconsistent with Aboriginal tradition, over and above protection against physical removal or destruction of the trees. For these reasons, I was satisfied that the procedures described above mean that the trees are not likely to be used or treated in a manner inconsistent with Aboriginal tradition within the meaning of section 3(1) of the ATSIHP Act and, accordingly, they are not under threat of injury or desecration as defined.

6.4 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. I accepted that, on balance, the Specified Area is a significant Aboriginal area. I also accepted that the Specified Area is under threat of injury or desecration within the meaning of section 10(1)(b)(ii) of the ATSIHP Act. I also received a report under section 10(4) of the ATSIHP Act (Section 10 Report), and I considered that report and the representations attached to that report. I was therefore satisfied that the preconditions for making a declaration under section 10 were met.

6.5 I also considered ‘other matters’ that I consider to be relevant under section 10(1)(d), including:

a. the effects on pecuniary interests of third parties;

b. considerations relating to health and safety; and

c. the extent to which the area is protected under State legislation.

6.6 Overall, I considered that considerations in favour of making a declaration under section 10 to protect and preserve the Specified Area from injury or desecration were outweighed by the considerations against the making of such a declaration. I acknowledged that the Specified Area for which protection is sought retains cultural value and connection to Country for the Applicants and the Djab Wurrung people. Having regard to the materials before me, I acknowledged that the Specified Area is of particular significance to Aboriginal people and I accepted that there is a threat of injury or desecration to the Specified Area.

6.7 Nevertheless, these findings did not remove the need to weigh up competing considerations before making any decision pursuant to section 10. The need for this balancing exercise is inherent in the fact that section 10 of the ATSIHP Act does not compel me to make a declaration in circumstances where I found that the Specified Area is a significant Aboriginal area and is under threat of desecration or injury, and instead allowed me to consider ‘other relevant matters’ before deciding whether to make a declaration.

6.8 With respect to the interests of third parties, I accepted that a declaration under section 10 of the ATSIHP Act would have a detrimental impact upon the pecuniary interests of the Victorian Government because of the significant ongoing financial costs resulting from the delay in commencement of construction, the termination of the relevant contract and the additional cost that would be incurred in pursuing an alternative route. I considered that this matter weighed substantially against making a declaration under section 10.

6.9 I also found that the making of a declaration would have had some impact on the pecuniary interests of commercial communities who are likely to benefit from the improved transport efficiency the Project is expected to deliver. However, in the absence of any modelling as to the predicted extent of these benefits, I accorded low weight to the pecuniary interests of the community.

6.10 With respect to health and safety considerations, I found that there are likely to be community road safety benefits in the construction of the Western Highway upgrade. In this regard, I accepted that the Project would have a positive impact on a broad section of the community. I consider that this matter weighs substantially against making a declaration under section 10, which would at the very least substantially defer or delay such community road safety benefits.

6.11 With respect to the extent to which the area is protected under State legislation, I was satisfied that any area of Victoria which is of cultural heritage is protected from harm by the Aboriginal Heritage Act if it satisfies the definition of an Aboriginal place. I accorded significant weight to the fact that a CHMP under the Aboriginal Heritage Act was approved on 18 October 2013 by Martang as the relevant RAP and that it is an offence for a sponsor of an approved CHMP to knowingly, recklessly or negligently fail to comply with the conditions of the CHMP. I also placed some weight on the specific measures contained in the CHMP for the management of Aboriginal cultural heritage likely to be affected by the activity relating to the Project. I also accepted that MRPV has made a commitment in good faith to avoid five of the Six Trees (Trees E2, E3, E4, E5, E6).

6.12 Accordingly, although I acknowledged the views of the Applicants on the CHMP and the role of Martang, I was satisfied that the Victorian Aboriginal heritage protection regime provides some degree of protection for the Specified Area. However, given that I accepted that the Specified Area is nevertheless under threat of injury or desecration, I considered that the extent to which this matter weighed against making a declaration under section 10 is slight.

6.13 For these reasons discussed in paragraphs 6.5 to 6.12, I concluded that there was sufficient evidence to allow me reasonably to form the view that the impact on the pecuniary interests of third parties, the health and safety considerations supporting the Western Highway upgrade, and the extent to which the area is protected under State legislation outweighed the loss of Aboriginal heritage value in the Specified Area.

6.14 Based on the material presented to me and for reasons set out above, I found that:

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

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

c. on balance, I was satisfied that the Trees E2, E3, E4, E5 and E6 are significant Aboriginal objects for the purposes of section 12(1)(b)(i) of the ATSIHP Act;

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

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

f. I was satisfied that there is a threat of injury or desecration to the Specified Area for the purposes of section 10(1)(b)(ii) of the ATSIHP Act;

g. I received a report under section 10(4) of the ATSIHP Act in relation to the Specified Area (the Section 10 Report) and considered the report and all representations attached to the report;

h. after considering other matters that I considered to be relevant for the purposes of section 10(1)(d) of the ATSIHP Act, and carefully considering information and submissions to the contrary, I found that the following matters weighed against the exercise of my discretion to make a declaration under section 10:

(i) a declaration would have had a detrimental impact upon the pecuniary interests of the Victorian Government;

(ii) a declaration is likely to have had a negative impact, to some extent, on the pecuniary interests of the commercial communities who stand to benefit from the improved transport efficiency the Project is expected to deliver;

(iii) a declaration would have had a detrimental impact on the significant community road safety benefits which are expected to arise from the construction of the Western Highway upgrade;

(iv) the measures under the Aboriginal Heritage Act, the CHMP, and the commitment of MRPV, provide some degree of protection for the Specified Area and some mitigation of the impact of the Project on Aboriginal heritage across the Specified Area; and

i. I found that, on balance, the matters that weighed against making a declaration under section 10 outweighed those matters which weighed in favour of making such a declaration.

6.15 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 applicants’ six judicial review grounds

1. By the amended originating application filed on 8 October 2020, the applicants raised the following six grounds of judicial review (without alteration save for deleting underlining):

The Applicants rely on the following grounds of review in lieu of the grounds set out in the originating application filed on 4 September 2020.

1. The Respondent failed to comply with a procedural condition for the decision, namely the obligation in s 10(1)(c) to of the Act to commission and receive a report in relation to the area from a person nominated by her.

Particulars

(a) The previous Minister appointed a Reporter under s 10(1)(c) of the Act on 18 July 2018. The report was completed and provided to the Minister on 7 September 2018.

(b) The Respondent discounted the report provided to the previous Minister because the Reporter’s observations about the injury and desecration of the trees and the area containing the trees were no longer relevant in light of the draft “Framework” proposed by Major Road Projects Victoria (’**MRPV**’) in April or May 2019.

(c) Insofar as the 2019 draft Framework altered the proposed works that had been assessed in the 7 September 2018 report that report did not deal with the matters prescribed by s 10(4) of the Act relevant to the consideration of the applications by the Respondent on 6 August 2020.

(d) The receipt and consideration by the Respondent of a report that complies with s 10(4) of the Act is a condition enlivening the power ins 10(1) of the Act.

2. The Respondent’s decision was affected by an unreasonable failure to exercise or consider exercising the power to obtain an up-to-date report pursuant to s 10(4) of the Act.

Particulars

(a) Particulars (a) and (b) of ground 1 are repeated.

(b) Given the Respondent’s view that the draft “Framework” proposed by MRPV in April or May 2019 materially changed the nature of the works that had been assessed by the Reporter in her 7 September 2018 report, it was unreasonable for the Respondent not to obtain an updated report that addressed the works relevant to the assessment of the Respondent’s decision on 6 August 2020.

3. The Respondent based her decision on the existence of a fact that did not exist, namely that MRPV had given an undertaking that would have the effect that trees E2 – E6 would not be “used or treated in a manner inconsistent with Aboriginal tradition due to works related to the Western Highway upgrade.”

Particulars

(a) The draft Framework before the Respondent was no more than a proposal and could not in itself result in the protection of trees E2-E6 from injury or desecration.

(b) The draft Framework suggested according lesser protection to trees E2-E6 than was required by the relevant Australian standard, compliance with which was a contractual requirement where trees were required to be protected.

(c) In any case, the non-removal of a tree pursuant to the draft Framework does not equate to using or treating the area and the trees in a manner not inconsistent with Aboriginal tradition.

4. The Respondent failed to take into account relevant considerations, in that she failed to give proper consideration to certain submissions that were made to the Reporter and included in the report or were made in response to the notice published in the Gazette, or alternatively, the Respondent made an error of law in wrongly treating certain submissions as “irrelevant considerations”.

Particulars

(a) Section 10(1)(c) of the Act requires the Minister to consider a report under s 10(4) and any representations contained in the report.

(b) Section 10(3)(b) of the Act requires the Minister to give due consideration to any representations furnished in response to a notice published in the Gazette under s 10(3).

(c) The Respondent failed to give adequate consideration to representations that raised biodiversity or conservation issues, asserting that such issues were “irrelevant considerations”.

(d) Further and alternatively, the Respondent made an error of law by treating biodiversity and conservation issues as irrelevant considerations for the purposes of her decisions under ss 10 and 12 of the Act.

5. The Respondent based her decision on the existence of a fact that did not exist, or alternatively, the Respondent’s decision was affected by jurisdictional error because it was based on reasoning that was irrational, in that the Respondent’s finding that it was reasonable to expect that an alternative route would have similar impacts on Aboriginal cultural heritage was not rationally open on the basis of the information before the Respondent considered as a whole.

Particulars

(a) The letter of the Major Road Projects Authority (‘**MRPA**’, the predecessor to MRPV) dated 7 November 2018, on which the Respondent relied, noted that the proposed northern alignment generally followed the route of the existing highway and that the new carriageway in the proposed northern alignment generally followed an existing powerline easement along the south side of the existing highway.

(b) The Respondent erred in stating that there was no evidence before her that the Applicants’ proposed alternative northern route was free of Aboriginal cultural heritage issues.

(c) The Respondent failed to consider the evidence before her, both in the report of the Reporter provided under s 10 and in the report prepared by Dr Heather Builth dated August 2018, that the route proposed by the Applicants had already been cleared of significant trees and “requires no protection for Aboriginal significance under the ATSIHP Act.”

(d) It was not rationally open to the Minister to conclude that the Applicants’ alternative route could be expected to have similar impacts on Aboriginal cultural heritage to the approved route.

6. The Respondent took into account irrelevant considerations, or alternatively, the Respondent’s decision was affected by jurisdictional error because it was based on reasoning that was irrational, in that the Respondent’s conclusion that making the declaration(s) sought by the Applicants would cause significant detrimental impact on the pecuniary interests of the Victorian government was based on the cost estimates of an “alternate northern alignment” that was not possible to construct by the time of the Respondent’s decision on 6 August 2020 and which in any case had not been proposed by the Applicants or anyone else and was not indicative of the cost of making the declaration(s) sought.

Particulars

(a) The Respondent compared the costs of the MRPV approved option (‘**Option 1**’) with an alternative option described in the Respondent’s Reasons as the “alternate northern alignment”, being the option that had previously been assessed by MRPA in the 2012 Environmental Effects Statement as Option 2, for “indicative comparison” despite the Respondent’s acknowledgement that the “alternate northern alignment” (‘**Option 2**’) was not the same as the Applicants’ proposed “Northern Option”.

(b) By the time of the Respondent’s decision on 6 August 2020, it was no longer possible to construct Option 2, due to a section of the project having been constructed along Option 1 past the point where the Option 1 and Option 2 routes diverged, which was completed in or around April 2016.

(c) It was clear, and the Respondent acknowledged, that the result of the Respondent granting either or both of the declarations sought would not be to construct the project in accordance with Option 2, but to construct it along an alternative route.

(d) The “indicative” comparison relied upon by the Respondent could not rationally support the conclusion that making the declaration(s) sought would have significant detrimental impact on the pecuniary interests of the Victorian government.

## The applicants’ submissions summarised

1. The applicants’ submissions, both in chief and in reply, on each of the six grounds of judicial review may be summarised as follows.

### (i) Ground 1: Failure to commission and receive a report under s 10(1)(c) of the Act relating to the application

1. The applicants complain that although the Phillips Report was before the Minister when she made her decision, she effectively put it to one side as no longer being relevant to the matters she had to determine. This was because she treated the draft Framework as fundamentally altering the nature of the threat to the significant area as reviewed by the Reporter. The applicants pointed to [5.56] of the Minister’s statement of reasons:

I consider the Reporter’s statement that “based on the description of the activity to occur in the Specified Area as set out in Part 1 of the CHMP, it appears that the area and objects, the subject of the Application, will be completely altered and the trees destroyed”. However, this observation was made prior to MRPV’s commitment in its letter of 29 May 2019 to avoid five of the Six Trees in the manner set out above.

1. The letter dated 29 May 2019 described and attached the draft Framework which is referred to by the Minister in her statement of reasons as “the Framework”.
2. The applicants contended that if the Minister was correct to approach the Framework as having fundamentally altered the nature of the threat or injury post the Phillips Report, that Report did not deal with the matters required by s 10(4). In other words, given this fundamental change, those parts of the Report which addressed, as at September 2018, the nature of the threat of injury or desecration and the prohibitions and restrictions to be made could not have dealt with those matters as they applied to things as they stood on 6 August 2020. The applicants contended that, on the Minister’s own assessment, those parts of the Phillips Report dealing with the impact of the planned road works on the significant Aboriginal area (in which Ms Phillips had concluded that “the area and objects the subject of the Application will be completely altered”) were no longer relevant in light of MRPV’s stated commitment to avoid five of the six trees. The applicants added that to the extent that other matters in the Phillips Report (such as the extent of the area that should be protected or the prohibitions or restrictions to be made with respect to the area) flowed from Ms Phillips’ conclusions about the Specified Area being completely altered, the Minister did not have before her as at 6 August 2020 a report that relevantly addressed those matters.
3. The applicants contended that, in light of MRPV’s commitment which caused the road route to be changed post the Phillips Report, the Minister had to assess the threat of injury or desecration to the Specified Area caused by the new route.
4. The applicants contended that the requirements of s 10(4) were essential preconditions to the Minister’s power to determine the application.

### (ii) Ground 2: Unreasonable failure to exercise the power to obtain an up-to-date report

1. Ground 2 was in the alternative to ground 1. The applicants contended that even if the Phillips Report constituted a report for the purposes of s 10(4), the Minister should have obtained an additional report or, at least, an update to the Phillips Report, which addressed the matters which the Minister viewed as having been made redundant by MRPV’s commitment in the letter dated 29 May 2019. The applicants contended that the purpose of a s 10(4) report is to provide the Minister with an independent objective analysis of the issues specified in that provision, including the submissions received by the reporter, so as to inform the Minister’s decision. They contended that the Minister’s power under s 10(1)(c) to obtain a report was a power which had to be exercised reasonably in the legal sense, citing *Minister for Immigration v Li* [2013] HCA 18; 249 CLR 332 at [63] per Hayne, Kiefel and Bell JJ.
2. In support of this contention, the applicants emphasised the importance of the fact that, under the statutory scheme, the s 10(4) report “is the principal means of informing the Minister about the issues she is required to consider in making the decision”. Thus it was critical that the s 10(4) report be current and address the matters which the Minister was required to consider. The applicants contended that the Minister’s failure to exercise the power to obtain an updated or additional report was unreasonable “in the manner of s 5(2)(g) of the ADJR Act”.

### (iii) Ground 3: Error in the treatment of the MRPV draft Framework

1. The applicants challenged the Minister’s assessment of the commitment given by MRPV, which commitment was at the heart of the Minister’s conclusion that five of the six trees were not at risk of injury or desecration. They contended that the Minister’s reasoning on this issue was flawed because:
2. the commitment was set out in a document entitled “**draft** Framework”, which was no more than a proposal (emphasis added);
3. the suggested level of protection under the draft Framework was less than that required by the relevant Australian standard, which was the minimum standard for protection of trees imposed by MRPV on its own contractors; and/or
4. the Minister treated the mere non-removal of a tree as entirely removing the threat of injury or desecration.
5. The applicants contended that if the draft Framework was binding and effective to prevent destruction of the relevant five trees, the Minister then had to consider whether the treatment of the trees under that Framework, together with construction of the highway along the proposed route, amounted to treatment of the trees that was inconsistent with Aboriginal tradition having regard to the terms of s 3(2)(b) of the *Act* (which provided that an object is taken to be injured or desecrated if it is treated in a manner inconsistent with Aboriginal tradition). They contended that because the significance of the trees to the Djab Wurrung people extended to their ability to interact with the trees and the surrounding landscape, mere non-destruction of the trees did not address that additional aspect of their significance to Aboriginal tradition. Because the Minister had not engaged with the extent to which those traditions would be impeded by construction of the highway through the area if the trees were not physically removed or harmed, the applicants contended that the Minister had effectively repeated the error identified by Robertson J in *Clark* at [146] ff.
6. The applicants submitted that this claimed error by the Minister provided the basis for Forbes J’s recent decision in *Thorpe* to grant an interim injunction restraining the roadworks notwithstanding MRPV’s commitment. In particular, they pointed to what her Honour said at [77]-[78] (emphasis added):

77 The difficulty that is presented by the defendants’ undertaking is the same difficulty identified by Robertson J in his review of the Minister’s reasons. **It would result in restraint that is limited to protection of a number of individual trees without due regard for the broader elements of how those trees hold cultural significance within their landscape.** Would relocating a living tree, whether it be a distance of metres or kilometres, to preserve the tree if it were possible to do so, preserve some or all of its social or other significance in accordance with Aboriginal tradition? **Put another way, if the tree is preserved but the landscape surrounding it altered by substantial roadworks, how is the impact on the significance of the tree being managed in accordance with the Act?**

78 **Without understanding the significance of each tree in all the ways embodied in the definition of cultural heritage significance, there is a danger that such an approach may be unnecessarily broad or unduly restrictive in application. This approach is not the same exercise as creating a buffer to protect the health of the tree as a living organism to ensure its root system and canopy is protected from compaction or other disturbance. That buffer is necessary to protect the tree itself rather than necessarily protecting the cultural heritage associated with it**.

1. The applicants contended that, contrary to the Minister’s statement in [5.61] that the applicants had failed clearly to describe how the “functions and attributes of the trees are under threat of injury or desecration apart from their physical removal or harm”, there was such material before the Minister. This material related to the cultural significance of the trees, which extended beyond their mere existence and emphasised their connection with the landscape. The applicants added that the Minister should have addressed this material. They identified the material as including the On Country Report and the 2018 Builth Report.
2. The applicants described the Minister’s error as involving the Minister basing her decision on a fact that did not exist (namely that the draft Framework effectively ensured the protection of the five trees) within the meaning of s 5(3)(b) of the *ADJR Act*. Alternatively, the error was described as a misunderstanding or misapplication of the Minister’s statutory task.

### (iv) Ground 4: Failure to take into account relevant considerations, namely submissions

1. Having regard to the terms of ss 10(1)(c) and 10(3)(b) of the *Act*, the applicants contended that the reference in the former provision to “any representations attached to the report” is to representations received by the Reporter following the publication of a notice in the Gazette inviting submissions from interested persons which must be given due consideration, as required by the latter provision.
2. The applicants focussed on the Minister’s statement in [5.28] of the statement of reasons where she said that many of the representations “additionally raised irrelevant considerations, such as biodiversity conservation issues”. Relying upon the Full Court’s decision in ***Tickner*** *v Chapman* [1995] FCAFC 1726; 57 FCR 451, the applicants contended that the Minister was obliged to consider **all** the representations (referring in particular to what Kiefel J said in *Tickner* at 495). The applicants also relied upon the statement in *Tickner* concerning the meaning of the obligation to “consider”, as recently approved in *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352 at [36]-[46].
3. The applicants contended that the Minister could not simply dismiss representations regarding biodiversity and conservation issues where there was an express statutory obligation to consider **all** the representations. This required the Minister to reflect upon them and then decide what weight to give them. The applicants contended that the representations regarding biodiversity and conservations issues were not irrelevant considerations, contrary to the Minister’s view.

### (v) Ground 5: Erroneous finding that an alternative route would have similar Aboriginal heritage protection issues

1. This ground relates to an alternative route for the highway proposed by the applicants, commonly referred to as the “Northern Option”. The Northern Option generally followed the existing carriageway of the Western Highway and an existing powerline easement adjacent to it.
2. In the 2018 Builth Report, Dr Builth regarded the powerline corridor on the northern side of the highway as “a largely cleared and previously disturbed area” which was “highly suitable for development as a road because [Dr Builth] found no culturally modified trees or related artefacts”.
3. The Phillips Report noted at [128] that Dr Builth considered that VicRoads should investigate this option “as it requires no protection for Aboriginal significance” under the *Act*.
4. The applicants referred to [5.114] of the Minister’s statement of reasons in which she said (emphasis added):

… I considered it possible that there could be other additional obstacles to the Applicants’ proposed ‘Northern Option’, such as Aboriginal heritage areas or objects, which had not yet been considered. **There was no evidence before me that the Applicants’ proposed ‘Northern Option’ is free of such issues**.

1. The applicants complained that the Minister’s statement that there was no evidence before her that the Northern Option “is free of such issues” was “plainly false”. That was because both the Phillips Report and the 2018 Builth Report contained evidence to that effect.
2. The applicants contended that because the Minister based her decision in part on a fact that did not exist (namely the absence of any evidence that the proposed Northern Option would not raise Aboriginal heritage protection issues), this amounted to a reviewable error under s 5(3)(a) of the *ADJR Act*. Alternatively, they contended that the Minister’s decision was affected by jurisdictional error because it was based on irrational reasoning (citing *inter alia Minister for Immigration and Citizenship v* ***SZMDS*** [2010] HCA 16; 240 CLR 611 at [135] per Crennan and Bell JJ).

### (vi) Ground 6: Error in the treatment of cost estimates

1. The applicants described this error as involving the Minister’s assessment of costs which had been prepared for an entirely different route (namely Option 2) in considering the pecuniary interests of the Victorian Government if a declaration were made and assuming that the effect of making such a declaration would be to require an alternative route to construct the section of duplicated highway. The applicants contended that the Minister’s reliance on costings provided by MRPV in its letter dated 7 November 2018 involved the Minister taking into irrelevant considerations contrary to s 5(2)(b) of the *ADJR Act*.
2. The applicant’s contentions on this issue had the following elements.
3. In its letter dated 7 November 2018, MRPV provided to the Minister costings drawn from an environmental effects statement prepared earlier in the process, comparing what was then labelled Option 1 (being the route that was ultimately approved) and Option 2 (being a route that was not available post April 2016). Neither option resembled the applicants’ proposed Northern Option. The Minister noted that the cost comparisons had been “provided for indicative comparison.”
4. Despite the Minister’s caveat that the references in the MRPV letter to the “northern alignment” (that is, the previous Option 2) was not and did not claim to be the same as the applicants’ proposed Northern Option, the Minister at [5.109] invoked the MRPV cost estimates of Option 2, then on the basis of that material, concluded that “I was satisfied that the alternative northern alignment would cost significantly more than the cost of the approved alignment.”
5. The Minister rejected an engineer’s analysis of the likely costs of the Northern Option (including that it may be cheaper than the approved option because it was shorter and less challenging in engineering terms) that had been provided by the applicants, because the Minister “prefer[red] the economic statistics and design information provided by MRPV” in the environmental effects statement that had compared Option 1 and Option 2 in 2012.
6. By the time of the Minister’s decision on 6 August 2020, it was no longer possible to build Option 2 because a section of the project beyond the point where the proposed Options 1 and 2 diverged had already been constructed by around April 2016. Accordingly, there was no possibility that granting the declarations sought by the applicants could result in the construction of the road along the Option 2 route.
7. In circumstances where, as the Minister herself acknowledged, Option 2 (referred to in the MRPV letter as the “alternate northern alignment”) was not the same as the Northern Option proposed by the applicants, and where it was not even possible for Option 2 to be pursued instead of the approved route if the declarations were made, the costings relating to Option 2 were irrelevant to the Minister’s consideration of the declarations under the Act.
8. Alternatively, the applicants contended that the Minister’s finding regarding the costs of making the declarations was irrational and amounted to jurisdictional error.

## The Minister’s submissions summarised

### (i) Ground 1: Failure to commission and receive a report under s 10(1)(c) of the Act relating to the application

1. The Minister submitted that she did not “discount” the Phillips Report; rather she observed that it had been overtaken by MRPV’s more recent commitment. She further submitted that, as a matter of statutory construction, a report which satisfied the relevant statutory requirements did not cease to be a report for the purposes of s 10(1)(c) even if events subsequently changed. In support of that submission the Minister relied upon the following matters:
2. although a s 10 report has the purpose of assisting the Minister in making a decision, the Minister is free to depart from it;
3. the Minister is able to consider not only such a report, but other matters that he or she considers relevant (see s 10(1)(d));
4. the legislative regime envisages that the Minister may consult with such persons as he or she considers appropriate with a view to resolving the matter to which the application relates (s 13(3)), which further supports the particular role played by a s 10 report; and
5. it would be unrealistic not to expect details of a project to evolve over time and it is unlikely that the Parliament intended that the Minister would have to go back to a s 10 reporter.

### (ii) Ground 2: Unreasonable failure to exercise the power to obtain an up-to-date report

1. As to the applicants’ claim that the Minister had failed unreasonably in a legal sense to exercise the power to obtain an updated report, the Minister submitted that the claim should be rejected for the following reasons:
2. Without denying the importance of a s 10(4) report, there is nothing in the legislative scheme to indicate that it needed to be updated to encompass new information or changes in the nature of any threat.
3. The Minister is entitled to inform himself or herself on relevant matters other than those set out in a s 10 report and it is for the Minister to decide what weight should be given to the reporter’s view.
4. It would be time consuming to seek a further report, particularly taking into account any procedural fairness obligations under s 10(3).
5. The change to the nature of the threat in this case was of a kind that can be expected in a significant and complex project.
6. That relevant changes mitigated the threat to the Specified Area and did not introduce any new element of threat which the Reporter had not addressed.

### (iii) Ground 3: Error in the treatment of the MRPV draft Framework

1. The Minister acknowledged that the effect of *Clark* was that she was required under s 12 to ask herself whether the trees were, or were likely to be, used or treated in a manner inconsistent with Aboriginal tradition, even if the trees were not destroyed. She added that this was the way in which she approached the matter in conducting the redetermination, referring to [5.52] of her statement of reasons. She emphasised her finding at [5.62] of her statement of reasons that she could not identify any Aboriginal tradition in relation to the use or treatment of Trees E2 to E6 with which the Western Highway upgrade was likely to be inconsistent, whether by reason of their physical proximity or otherwise. The Minister submitted that she did not treat MRPV’s commitment as fully answering the statutory test of injury or desecration as she went on to consider whether there was evidence of any Aboriginal tradition that would be affected by the works if the trees were retained.
2. In addition, the Minister submitted that the relevant Australian standard did not bind her. Rather, it was a matter for her assessment whether the Framework would in fact result in the trees being spared from harm.
3. As to the applicants’ claim that the draft Framework was merely a proposal and not a binding commitment, the Minister said that she was justified in understanding that MRPV had committed to protecting the five trees by realigning the highway.

### (iv) Ground 4: Failure to take into account relevant considerations, namely submissions

1. The Minister submitted that she was not obliged to consider representations regarding biodiversity and conservation issues because, having regard to the subject matter, scope and purpose of the legislation, those representations were not mandatory considerations. The Minister emphasised that those representations “raised matters unrelated to Aboriginal heritage”.

### (v) Ground 5: Erroneous finding that an alternative route would have similar Aboriginal heritage protection issues

1. The Minister emphasised the following three points with respect to her reasoning about possible Aboriginal heritage issues affecting the Northern Option:
2. her conclusion with respect to that matter was a “peripheral comment” and was one of a matrix of factors supporting her ultimate conclusion;
3. that conclusion was no more than the identification of a possibility and did not constitute reliance on any particular “fact”; and
4. thus there was no “fact” to attract a complaint of no evidence.
5. The Minister added that her conclusion was consistent with Dr Builth’s report, which noted that the Northern Option route had not yet been part of a heritage survey under the *Aboriginal Heritage Act 2006* (Vic).

### (vi) Ground 6: Error in the treatment of cost estimates

1. The Minister submitted that she did not make any findings about the costs of construction of an alternative route which would be required if such a declaration was made. Rather, she said that she referred to the indicative costings of the Northern Option because that alternative had been considered by MRPV (see [5.108] of the statement of reasons). She emphasised that she did not state that it was still an option.
2. As to her comments at [5.110] of the statement of reasons, the Minister submitted that they were simply responsive to an apparent misapprehension by the applicants’ expert (Mr Vocale) that MRPV had compared the costs of the approved alignment and the Northern Option.
3. While acknowledging that one of the matters relied upon by the Minister in deciding not to make the declarations was because they would have a significant impact on the pecuniary interests of the Victorian government, the Minister submitted that that finding was based not on the costings of alternative routes, but on wasted planning and assessment costs and termination costs.

## Consideration and determination

## (a) The relevant legislative provisions

1. The purposes of the *Act* are set out in s 4. They are stated to be “the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition”.
2. Division 1 of Pt II empowers the Minister to make declarations. Section 9 provides for the Minister to make, by legislative instrument, an emergency declaration in relation to an area where the Minister has received an application by or on behalf of Aboriginals seeking preservation or protection of the area from injury and desecration. Another condition of the power to make an emergency declaration is that the Minister must be satisfied that the area is a significant Aboriginal area and that it is under serious and immediate threat of injury or desecration.
3. Section 10 empowers the Minister to make other kinds of declarations in relation to an **area**. It provides 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.

1. The Minister is empowered under s 12 of the *Act* to make declarations in relation to **objects** (as opposed to areas). It provides as follows:

**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. It may be noted that a significant difference between the making of a declaration under s 10 as opposed to s 12 is that, in relation to the former provision (which is concerned with areas) but not the latter provision (which is concerned with objects), the Minister must receive and consider a report from a person nominated by the Minister.
2. Mention should also be made of s 13. It not only requires the Minister to consult with appropriate Ministers of a State or Territory before making a declaration (s 13(2)), specific provision is also made in s 13(3) for the Minister to conduct consultations with any person with a view to resolving to the satisfaction of an applicant and the Minister any matter to which the application relates. Accordingly, the *Act* contemplates that an application may be resolved without the necessity for the Minister to make a declaration.
3. Some key statutory concepts and terms are defined in s 3 of the *Act*. “[S]ignificant Aboriginal object” is defined in s 3(1) as “an object (including Aboriginal remains) of particular significance to Aboriginals in accordance with Aboriginal tradition”.
4. “[S]ignificant Aboriginal area” is relevantly defined in s 3(1) as “an area of land in Australia… of particular significance to Aboriginals in accordance with Aboriginal tradition”.
5. Under s 3(2), an area or object is taken to be injured or desecrated if:
6. in the case of an area;
   1. it is used or treated in a manner inconsistent with Aboriginal tradition;
   2. 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
   3. passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or
7. in the case of an object, it is used or treated in a manner inconsistent with Aboriginal tradition.
8. Sub-section 3(2) provides another significant difference between a significant Aboriginal area and a significant Aboriginal object. The circumstances in which an area is taken to be injured or desecrated are wider than is the case with an object. In both cases, however, an area or object is taken to be injured or desecrated if it is used or treated in a manner inconsistent with Aboriginal tradition.
9. The effect of s 3(3) is to deem an area or object to be under threat of injury or desecration if it is, or is likely to be, injured or desecrated.
10. As is evident from the provisions described above, the concept of “Aboriginal tradition” is a central concept in the statutory regime. “Aboriginal tradition” is defined in s 3(1) as “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”.
11. As Robertson J observed in *Clark* at [147] that defined expression has both “breadth” and “subtlety”. The defined expression is also complex and requires a proper understanding of Aboriginal traditions, observances, customs or beliefs. The Minister’s previous understanding and application of the concept was found by Robertson J in *Clark* to be legally flawed. One of the key issues in the present proceeding is whether, in reconsidering and redetermining the application, the Minister has adopted and applied a legally correct understanding and application of key statutory concepts, particularly “Aboriginal tradition” and “injury and desecration”.
12. Where the Minister refuses to make a declaration under Div 1 of Pt II, he or she is required by s 16 to take reasonable steps to notify the applicant or applicants of the decision.
13. The *Act* provides for consultation by the Minister with the appropriate Minister of the relevant State (as noted above) and for revocation of a declaration where the Minister is satisfied that the law of a State makes effective provision for the protection of the area, object or objects (see ss 13(2) and (5), together with s 7). This is important. As von Doussa J observed in *Chapman v Luminis (No 4)* [2001] FCA 1106; 123 FCR 62 at [256], the *Act* is “a protective mechanism of last resort where State or Territory legislation is ineffective or inadequate to protect the heritage areas or objects. This intention finds expression in particular in ss 7 and 13 …” (see also *Bropho* at 211 per French J, referred to at [71] below).
14. A declaration relating to a significant Aboriginal area or object has the force of law and contravention of the terms of such a declaration is an indictable offence carrying substantial penalties (see ss 22 and 23 respectively). The Court has a broad power under s 26 to grant, on the Minister’s application, an injunction restraining conduct that constitutes or would constitute a contravention of a declaration made under Pt II (which includes ss 10 and 12) and to restrain related conduct.

## (b) The purposes of the Act

1. It is desirable to say something more about the purposes and history of the *Act*, drawing heavily on French J’s informative reasons for judgment in *Tickner v* ***Bropho***(1993) 40 FCR 183 at 211 ff. First, the *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. It was envisaged 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 need for Commonwealth legislation on this subject matter was tied to the perceived inadequacy or non-enforcement of State laws, as acknowledged by the then Minister for Aboriginal Affairs in the Second Reading Speech to the *Aboriginal and Torres Strait Islander Heritage (Interim Protection) Bill 1984* (Cth) when introducing that Bill (which was the genesis of the current *Act*):

Time and again the Commonwealth has been powerless to take legal action where State or Territory laws were inadequate, not enforced or non-existent, despite its clear constitutional responsibility.

1. Secondly, the beneficial nature of the legislation was expressly acknowledged in the conclusion to that Second Reading Speech when it was described as (emphasis added):

…beneficial legislation, as other legislation remedying social disadvantage has been. Aboriginals and Islanders will be secure in the knowledge that areas and objects of particular significance to them can be preserved and protected. Where the remains of ancestors were stolen from graves and shamefully abused, this Bill will allow those remains to be returned to them. ... But the benefit will not be confined to those local Aboriginals and Islanders whose areas and objects received the direct protection of the law. In a wider and very real sense, the benefit will be felt by the whole community. **The preservation and protection of this ancient and significant culture from the destructive processes which have been operating at different rates across this country can only enrich the heritage of all Australians**.

1. Thirdly, when the legislation was amended in 1986 and its title changed to its current form, the policy underlying the legislation was described by the then Minister for Aboriginal Affairs in the Second Reading Speech as follows:

Where an Aboriginal community closely identifies with an area which has historical, cultural or spiritual significance, the Commonwealth Act provides a means of protecting that area from actions which may destroy, injure or desecrate it. The Act cannot and will not be used where a State or Territory government has given assurances, or taken action, to protect such an area.

…

The Act, in effect, provides a means whereby Aboriginal and Torres Strait Islanders can use the Commonwealth to review decisions by State and Territory governments. It gives the Commonwealth authority to bring affected parties together to conciliate, mediate and negotiate in order to remove a threat of injury to a significant Aboriginal area or object. Declarations are needed only where such mediation fails to resolve the problem of a threat. The Act has been used in this way during the past two years.

1. Fourthly, it is important to note that under both ss 10 and 12, the Minister has an ultimate discretion whether or not to make a declaration even if he or she is satisfied that a significant Aboriginal area or object is under threat of injury or desecration, as is reflected in the use of the word “may” in the concluding part of both ss 10(1) and 12(1).
2. Fifthly, as French J observed in *Bropho* at 223-224, the *Act* (emphasis added):

… **was enacted for the benefit of the whole community to preserve what remains of a beautiful and intricate culture and mythology**. Its protection is a matter of public interest. There will, however, be occasions on which that objective will conflict with other public interests. The public interest in the provision of safe, convenient and economic utilities may in some cases only be advanced at the expense of areas of significance to Aboriginals. The question whether a declaration should be made which would adversely affect the public or private interests is a matter within the discretion of the Minister who is required to evaluate the competing considerations and make a decision accordingly. It follows that the statutory purpose does not extend to unqualified protection for areas of significance to Aboriginals. The Act provides a mechanism by which such protection can be made available. **Over and above that it accords a high value to such protection for heritage areas threatened with injury or desecration. That high statutory value is a factor required to be given substantial weight in the exercise of ministerial discretion under s 10**.

Those same observations apply to the exercise of ministerial discretion under s 12.

1. Finally, in *Bropho* at 191 Black CJ described the *Act* as being “clear in its purposes, broad in its application and powerful in the provision it makes for the achievement of its purposes”.

## (c) The applicants’ six judicial review grounds

1. It is convenient to now address each of the six judicial review grounds.

### (i) Ground 1: Failure to commission and receive a report under s 10(1)(c) of the Act relating to the application

1. This ground is only relevant to that part of the Minister’s decision in which she refused to make a declaration under s 10 in respect of the Specified Area. As noted, there is no requirement under s 12 of the *Act* for the Minister to obtain and consider a report in making a decision concerning a significant Aboriginal object.
2. For the following reasons, I reject the applicants’ claim that the Minister failed to commission and receive a report under s 10(1)(c) having regard to the particular circumstances here. The gravamen of the applicants’ complaint is that while the Phillips Report may have been a report for the purposes of s 10(1)(c) at the time it was provided to the Minister, this changed when the Minister received MRPV’s commitment in its letter dated 29 May 2019 to avoid five of the six trees. The applicants say that this fundamental change meant that the Phillips Report was no longer relevant. I did not understand the applicants to claim that the Phillips Report was not a valid report for the purposes of s 10 at the time it was provided to the Minister. Rather, their complaint is that it ceased to be a valid report because of the fundamental change provided by MRPV’s commitment, which change necessarily affected many of the matters specified in s 10(4) which had to be dealt with in a report.
3. I accept the Minister’s submission that the applicants’ position is inconsistent with various aspects of the statutory context. That context includes that procedural fairness requirements are likely to operate to provide the Minister with relevant material even where there is a fundamental change to the conduct which provides the threat of injury or desecration, as occurred here post the Phillips Report with the commitment given by MRPV. The applicants made no complaint of procedural unfairness. It is evident from the Minister’s statement of reasons that the applicants and other interested parties were given multiple opportunities to respond to various developments which post-dated the Phillips Report and they availed themselves of those opportunities.
4. Another aspect of the statutory context is the power conferred upon the Minister by s 13(3) which enables him or her to consult with various persons with a view to resolving an application without having to make a declaration. Again, it is evident that the Minister availed herself of this avenue here, *albeit* without success. The simple point is not that such consultation failed, but rather that the *Act* recognises various ways by which the Minister can obtain information relevant to the Minister’s decision-making task from various sources and need not obtain a further s 10(4) report in the events that occurred here.
5. It is also notable that the legislation is silent on the question whether the Minister has the power to direct a reporter to provide an updated report. Perhaps more significantly, the relevant provisions in s 10 are expressed in terms which indicate that the matters which have to be dealt with in a report are matters as they stand at the time the report is submitted to the Minister (see in particular s 10(4)).
6. Finally, I do not accept the applicants’ submission that their position is supported by what Lockhart J said in *Bropho* at 209. His Honour referred there to the possibility of a reporter being required by the Minister to prepare “a further report”. But that was said in the context of a hypothetical situation where the Minister was faced with two separate applications by different Aboriginal people or groups. Nothing said by his Honour was directed to the circumstances in the present proceeding where there was only one application, one s 10(4) report and a significant subsequent development.

### (ii) Ground 2: Unreasonable failure to exercise the power to obtain an up-to-date report

1. This ground is also rejected for the following reasons. First, putting to one side any difference between the concept of “unreasonableness” under the *ADJR Act* and under the *Judiciary Act*, the Minister’s failure not to obtain an up-to-date s 10(4) report was not unreasonable. Assuming, without deciding, that the Minister had such a power, it was not unreasonable for the Minister not to exercise that power having regard to the matters relied upon above in rejecting ground 1.
2. Secondly, there is nothing in the statutory scheme which indicates that the Minister is required to obtain a further s 10(4) report whenever there is a significant change in the conduct which is being assessed against the relevant statutory provisions. Perhaps that is unsurprising given the time and resources involved in producing such a report. Moreover, as has been emphasised, other aspects of the statutory scheme provide the Minister with the power to obtain up-to-date and relevant information from a variety of sources. Those powers would need to be exercised reasonably.

### (iii) Ground 3: Error in the treatment of the MRPV draft Framework

1. As this ground focuses upon the Minister’s state of satisfaction under s 12(1)(b)(ii) of the *Act*, it is desirable to say something about the legal character of that state of satisfaction and the extent to which it is amenable to judicial review.

#### **A. Judicial review of the Minister’s state of satisfaction under s 12(1)(b)(ii) of the Act**

1. It is notable that the Minister’s power to make a declaration under s 12 is subject to various preconditions, namely:
2. receipt of an application from specified persons;
3. that the Minister must be satisfied not only that the object sought to be preserved or protected is a significant Aboriginal object but also that the object is under threat of injury or desecration;
4. that the Minister must consider the effects of making a declaration on the proprietary or pecuniary interests of third parties; and
5. that the Minister must consider such other matters as he or she thinks relevant.
6. The pre-condition in paragraph (b) is of a different nature to those in the other paragraphs. That is because the pre-condition turns on whether or not the Minister has attained a particular state of satisfaction in relation to the two matters identified therein. The other pre-conditions are objective and do not turn upon the Minister’s state of satisfaction, with the possible exception of paragraph (d).
7. The pre-condition in paragraph (b) is properly regarded in law as a subjective jurisdictional fact in the sense in which that concept was described, for example, by the Full Court in ***Ali*** *v Minister for Home Affairs* [2020] FCAFC 109; 380 ALR 393 at [41] with reference to the Minister’s state of satisfaction under s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth).
8. In *Ali*, the Full Court described the scope of judicial review of a subjective jurisdictional fact with reference to cases such as *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; 78 CLR 353 per Dixon J; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 78 ALJR 992 at [38] per Gummow and Hayne JJ; *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203; 160 ALD 123 at [53]-[54] per Robertson J and *SZMDS*. Other relevant cases include *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; 69 CLR 407; *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; 257 CLR 21 at [33] per Gageler and Keane JJ; *Graham v Minister for Immigration and Border Protection* [2017] HCA 33; 263 CLR 1at [57] per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ and *Ibrahim v Minister for Home Affairs* [2019] FCAFC 89; 270 FCR 12 at [51]-[56] per White, Perry and Charlesworth JJ. Those authorities stand for the proposition that a state of satisfaction (which is a jurisdictional fact) must be attained reasonably and on a correct understanding of the law. Mr Kennett SC (who together with Ms Wright appeared for the Minister) acknowledged that this was a correct statement of legal principle.
9. Accordingly, an assessment of ground 3 of the applicants’ challenge here raises the question as to whether the Minister’s conclusion that she was not satisfied that five of the six trees were under threat of injury or desecration was a state of satisfaction which was attained reasonably and with a correct understanding of the law.
10. For the reasons that follow, I consider that the Minister’s state of satisfaction was attained unreasonably and/or without a correct understanding of the law.
11. Before explaining why that is so, it is desirable to say something more about both the background to the matter and relevant parts of the Minister’s statement of reasons.

#### **B. The Minister’s statement of reasons and some background matters**

1. As noted above, the application for the making of the declarations is dated 17 June 2018. Relevantly, the application stated (emphasis added):

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 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 [sic] 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.**

…

1. It is significant that the claimed cultural significance of the trees was not confined to their connection to the Specified Area (being the “Maximum Construction Footprint”), but extended beyond that to include songlines and stories reaching from Langi Ghiran (the Djab Wurrung people’s black cockatoo dreaming site) which is outside the Specified Area, as well as the Hopkins River (connected to Djab Wurrung people’s eel dreaming) which is outside the Specified Area).
2. It is also to be noted from the application that the claimed cultural significance of the trees focused not only upon the physical use of those trees by Aboriginals over hundreds of years but also on their spiritual quality because they were viewed as embodying Aboriginal ancestors. These claims are vivid examples of the complex and nuanced nature of Aboriginal tradition.
3. I have set out at [17] above the particular paragraphs from the Minister’s statement of reasons dated 6 August 2020 which summarise her reasons and ultimate findings in declining to make a declaration under either ss 10 or 12 of the *Act*. The Minister’s summary of her findings and reasons in respect of her decision not to make a declaration under s 12 in respect of Trees E2 to E6 are contained in [6.3].
4. It is now appropriate to refer to other parts of the Minister’s statement of reasons which explain why she declined to make a s 12 declaration in respect of those trees (which the Minister found to be “significant Aboriginal objects”, but not at threat of injury or desecration). They are principally contained in [5.52] to [5.63] of the statement of reasons (and noting that the applicants do not challenge the findings concerning tree E1):

5.52 As I found that Trees E2, E3, E4, E5 and E6 are significant Aboriginal objects, I considered whether those trees are under threat of injury or desecration.   
I considered and evaluated the evidence and material listed in Annexure C of this statement of reasons. In so doing, I was mindful that it was necessary to consider not only the threat of destruction and/or removal of the trees, but also to have regard to other aspects of the statutory concept of ‘injury or desecration’, including use or treatment in a manner inconsistent with Aboriginal tradition.

5.53 I considered the Applicants' view, as set out in the Application, that the road works proposed by MRPV will ‘physically destroy and remove these ancient trees that are particularly culturally significant to women’ (referring in particular to Trees E3 and E6). The Applicants identified the threat of injury or desecration to the trees caused by activities relating to the proposed Western Highway upgrade. The submissions made on behalf of the Applicants maintain that protection of the trees from injury or desecration is not limited to whether or not the trees are destroyed or removed. Accordingly, I also considered both whether the proposed works are likely to result in physical damage to the trees, and whether the proposed works are likely to result in the use or treatment of the trees in a manner inconsistent with Aboriginal tradition.

5.54 I note that MRPV and EMAC reached an agreement regarding how MRPV will undertake the Western Highway upgrade. Under that agreement, MRPV will avoid Trees E2, E3, E4, E5 and E6, and has developed a draft framework (Framework) for identifying and monitoring trees. The Framework is set out in Attachment B to the letter from MRPV to the Department on 29 May 2019 – 'Draft Framework for Identifying and Managing Trees of Interest, 17 April 2019'. As noted above, notwithstanding Mr Kennedy's submissions, I was not satisfied that there was anything improper in the agreement reached between EMAC and MRPV.

5.55 I note that, through its agreement with EMAC and through the Framework, MRPV has made a commitment to avoid Trees E2, E3, E4, E5 and E6. The ways in which the trees will be ‘avoided’ is described in the Framework as being that the trees will be retained, with planned works and permanent structures being diverted away from them at a biologically meaningful distance to ensure their ongoing survival and health. The Framework relevantly provides as follows:

a. an exclusion zone will be established around each relevant tree. The extent of the exclusion zone will be determined with an Ecologist/Arborist and in consultation with EMAC;

b. the exclusion zone will be deemed to be a 'No-Go Zone' and managed as such by the construction contractor, with the erection of fencing around each with signage stating, 'No Unauthorised Access'. If access is required, an Ecologist/Arborist will be engaged to assess the potential impact and this will also be discussed with EMAC;

c. all persons working on site will be inducted by the construction contractor and this induction will cover the restrictions to access outlined above; and

d. where one of the trees may be affected by the proposed works, the Ecologist/Arborist will be requested to make an assessment of the impact. Following this, a joint inspection between EMAC, MRPV, the Ecologist/Arborist and the contractor shall be carried out prior to the commencement of any work which may affect the tree.

5.56 I considered the Reporter's statement that ‘based on the description of the activity to occur in the Specified Area as set out in Part 1 of the CHMP, it appears that the area and objects, the subject of the Application, will be completely altered and the trees destroyed’. However, this observation was made prior to MRPV’s commitment in its letter of 29 May 2019 to avoid five of the Six Trees in the manner set out above.

5.57 I also carefully considered the Applicants' views that, notwithstanding the commitment from MRPV, 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 AS4970-2009 Protection of trees on development sites*; and

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

5.58 I also carefully considered the Applicants’ submission that ‘damage to the root zone by compaction during construction or road operation or vibration will inevitably result in the death of a tree’.

5.59 I acknowledge that *AS4970-2009* is a standard appropriate to the situation and although it is more detailed than the Framework, I was not aware of any incompatibility between the two documents. I consider that the expertise and experience of a trained arborist in its application is likely to be the key element in ensuring the long-term health of the retained trees. I also noted that MRPV has proposed remedial measures to retain and preserve the health of some of the trees, including work undertaken under technical (arborist) and cultural (EMAC) supervision. I do not accept, subject to implementation of the Framework, that the construction and operation of the highway will inevitably result in the death of the trees and I note that in addition to any proactive protective measures, an arborist’s report accompanying the Framework identifies Tree E2 as dead and fallen, and Trees E3, E4 and E6 being outside of construction zones. I accept that the agreement between MRPV and EMAC is not likely to be legally binding. However, given the public standing of MRPV and the media scrutiny concerning the potential impact of the proposed Western Highway upgrade on Djab Wurrung country, I find that MRPV can reasonably be expected to act in good faith in giving effect to its commitment not to remove the trees, notwithstanding that this commitment might not necessarily be legally enforceable. I note that both MRPV and EMAC publicly referred to MRPV's commitment.

5.60 Having considered all of the material before me, I find that in light of the commitments from MRPV and the procedures described above, Trees E2, E3, E4, E5 and E6 are not likely to be physically injured or desecrated by deliberate removal or indirect harm resulting from the roadworks or the ongoing use of the highway by general traffic.

5.61 Further, I was not satisfied that Trees E2, E3, E4, E5 and E6 are likely to be used or treated in a manner inconsistent with Aboriginal tradition more broadly. The Applicants described a cultural connection that renders 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 tradition. However, they did not clearly describe any ways in which those functions and attributes of the trees are under threat of injury or desecration apart from their physical removal or harm, as discussed above.

5.62 On the material before me, I find that there is no Aboriginal tradition in relation to the use or treatment of Trees E2, E3, E4, E5 and E6 with which the Western Highway upgrade works are, or are likely to be, inconsistent, whether by reason of their physical proximity or otherwise.

5.63 For the reasons given above, while I was satisfied that Trees E2, E3, E4, E5 and E6 are significant Aboriginal objects, I was not satisfied on the material before me that these trees are, or are likely to be, used or treated in a manner inconsistent with Aboriginal tradition due to works related to the Western Highway upgrade. I was therefore not satisfied that Trees E2, E3, E4, E5 and E6 are under threat of injury or desecration for the purposes of section 12 of the ATSIHP Act. I reached my conclusions having regard to the definition of ‘Aboriginal tradition’ in section 3 of the ATSIHP Act.

1. It is relevant to note the following significant features of the Minister’s reasons regarding the s 12 application:
2. the Minister found that the relevant five trees were significant Aboriginal objects for the purposes of the *Act*;
3. having regard to all the material before her, however, and particularly in light of the MRPV’s commitment and the Framework, she found that the trees were not likely to be **physically** injured or desecrated by deliberate removal or indirect harm resulting from the roadworks **or** the ongoing use of the highway by general traffic (see at [5.60]);
4. the Minister then purported to address the issue (as identified by Robertson J in *Clark*) as to whether she was satisfied that the five trees were likely to be used or treated in a manner inconsistent with Aboriginal tradition more broadly (at [5.61]);
5. the Minister referred to the applicant’s description of “a cultural connection” which rendered the trees particularly significant and as involving Aboriginal traditions, observances, customs and beliefs that are passed down from generation to generation through spirituality, culture and tradition (at [5.61]); and
6. critically, however, the Minister concluded that because the applicants did not “clearly describe” any ways in which the functions and attributes of the trees were under threat or desecration apart from their physical removal or harm, there was no Aboriginal tradition in relation to the use or treatment of the five trees with which the roadworks were, or were likely to be, inconsistent, whether by reason of their physical proximity or otherwise (at [5.61]-[5.62]).
7. The Minister’s statement of reasons is structured in a way such that separate findings and reasons were provided by her in respect of her decision not to make a declaration under s 10 in respect of the Specified Area. Those findings and reasons are set out in her statement of reasons at [5.68] to [5.142] and in the relevant parts of section 6. For present purposes, and with particular reference to judicial review grounds 2 and 3, it is sufficient to set out [5.79] and [5.92]-[5.93]:

5.79 To a large extent, the information provided by the Applicants is directed to the significance of the Specified Area in connection with the Six Trees. Nevertheless, the material before me includes evidence that the significance of the trees is connected with the significance of the Specified Area (as part of Djab Wurrung country more generally) in accordance with Aboriginal tradition. On a consideration of all of the material, I accept that there is a cultural connection that renders the Specified Area of particular significance to the Djab Wurrung people, 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. I was satisfied that those Aboriginal traditions relate to the songlines and stories that reach from Langi Ghiran (the Djab Wurrung people’s black cockatoo dreaming site), the Hopkins River (which is connected to the Djab Wurrung people’s eel dreaming) and the trees within Djab Wurrung country that embody key stories specific to Djab Wurrung traditions.

…

5.92 In the light of the above, I accept that:

a. culturally significant physical features of the landscape within the Specified Area that had been identified, which include the Hopkins River, as well as a number of large old trees, are likely to be removed, altered, isolated or threatened by future proximity to a major highway; and

b. ongoing significantly altered access, spatial arrangement and noise impacts within the Specified Area may adversely affect the ability of traditional owners, including the Applicants, to enjoy, care for or otherwise interact with culturally significant intangible features of the landscape.

5.93 For these reasons, notwithstanding my findings that Tree E1 is not a significant Aboriginal object and that Trees E2, E3, E4, E5 and E6 are not under threat of injury or desecration, I was satisfied that the Specified Area is under threat of injury or desecration within the meaning of section 10(1)(b)(ii) of the ATSIHP Act.

1. It is notable that the Minister’s consideration of the significance of physical features of the landscape is confined to the landscape within the Specified Area itself, and not to the area beyond the “Maximum Construction Footprint”.
2. Ultimately, the Minister declined to make a s 10 declaration in relation to the Specified Area because of the weight she gave to countervailing considerations as identified in [6.14(h)] of her statement of reasons (see [17] above).

#### **C. Robertson J’s reasons in Clark**

1. As noted, the applicants contended that the Minister’s failure to engage with the extent to which Aboriginal tradition would be impeded by the construction or alignment of the highway through the area if the trees were not physically removed or harmed involved a repetition of the error identified by Robertson J in *Clark*. His Honour held there that the Minister had fallen into legal error by adopting an oversimplified view of the statutory definitions and concepts of Aboriginal tradition and injury or desecration in that she treated the statutory questions in relation to those definitions and concepts as sufficiently answered by the fact that five of the six trees would not be destroyed.
2. The core of Robertson J’s reasoning is reflected in *Clark* at [146]-[151]:

146. 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.

147. 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.

148. 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.

149. 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.

150. 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.

151. 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.

1. The difficulties non-Indigenous people may have in appreciating and understanding the subtleties and nuances of Aboriginal tradition and culture is well reflected in the following extracts from a s 10(4) report by the Hon J H Wootten AC QC in *Junction Waterhole Report to the Minister* (1992) at p 68-69 (emphasis added and noting also that these extracts were included in the Phillips Report):

Our perceptions of values which we categorise as spiritual, religious, sacred, traditional, and political are shaped by our own culture and do not necessarily fit with categories or concerns in Aboriginal Culture… The Western notion of knowledge as objective and scientifically based does not square with the Aboriginal notion of knowledge, which in the fields with which we are concerned, derives from authoritative statement by a person, who, in terms of traditional authority, was qualified to define the knowledge.

…

The issue should not be whether, judged by the norms and values of our secular culture or our religions, the sites are important, but whether they are important to Aboriginals in terms of the norms and values of their traditional culture and beliefs. **In other words the issue is not whether we can understand and share the Aboriginal beliefs but whether, knowing they are genuinely held, we can therefore respect them**.

1. The construction and application of the definition of “Aboriginal tradition” needs to take account of these subtleties and nuances so as to give effect to the *Act’s* clear purpose.

#### **D. Why the Minister committed reviewable errors**

1. I find that the Minister acted unreasonably and/or on an incorrect understanding of the law in concluding that the five trees were not at risk of injury or desecration. The errors may be summarised as follows:
2. contrary to the Minister’s view, there was material before her which clearly described how the five trees were under threat of injury or desecration with reference to “Aboriginal tradition” as defined in the *Act*;
3. in attaining the state of satisfaction required under s 12(1)(b)(ii), the Minister did not have before her any material or map which precisely identified the physical proximity of the highway alignment to the five trees; and
4. the Minister failed to appreciate that the cultural significance of the five trees was not confined to their connection with the Specified Area, but extended to the area beyond the Specified Area.
5. I will now explain why I consider that the Minister committed these individual errors.

#### **(1) Aboriginal tradition**

1. It is well to bear in mind the central significance of the concepts of “injury or desecration” in the *Act*. Their significance is underlined by the fact that, as stated in s 4, the purposes of the *Act* are the “preservation and protection from injury or desecration” of areas and objects which are of particular significance to Aboriginals in accordance with Aboriginal tradition.
2. The expression “preservation or protection… from injury or desecration” also appears in ss 10(1)(a) and 12(1)(a).
3. Moreover, as noted above, an area or object is taken to be injured or desecrated in the particular circumstances described in s 3(2). One of those circumstances, in the case of both an area and an object, is that the area or object “is used or treated in a manner inconsistent with Aboriginal tradition”.
4. “Aboriginal tradition” is defined in s 3(1) in broad terms as “the body of traditions, observance, 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”. As previously noted, that defined expression is one of both breadth and subtlety. There can be no doubt that it extends to include Aboriginal cultural or spiritual beliefs.
5. There should also be no doubt that the expression “injury or desecration” includes but goes beyond actions which physically injure or harm an Aboriginal area or object. This is implicit in the ordinary meaning of those terms. The *Macquarie Dictionary*, Fifth Edition, defines “injure” as follows
6. to do or cause harm of any kind to; damage; hurt; impair…
7. to do wrong or injustice to.
8. The definition it provides of “desecrate” is as follows:

to divest of sacred or hallowed character or office; divert from a sacred to a profane purpose; treat with sacrilege; profane.

1. The Minister’s statement at [5.61] of her statement of reasons (see [98] above) that the applicants had not clearly described any ways in which the function and attributes of the five trees were under threat of injury or desecration, apart from their physical removal or harm is contrary to the evidence. As the applicants pointed out, contrary to the Minister’s finding, the material before her did contain sufficient relevant material. For example, the On Country Report emphasised the “intangible values” which the trees represented. Under the heading “Cultural landscapes and Storylines”, the On Country Report stated:

Traditional Owners do not perceive the notion of discrete archaeological or heritage ‘sites’ being separate from the ‘cultural landscape’ that they inhabit. This conceptual framework is borne out of relationships between people, cultural practice, natural resources, and kinship networks. Interwoven through this conceptual framework are the storylines, the songlines, and law lines, the intangible values that bind and govern an understanding of landscape and peoples place with in it. During the on-site consultation, the places and cultural heritage that was identified, was rarely spoken about as individual ‘sites’ or ‘places’. Each place was viewed and spoken of as part of a broader, holistic landscape that included both the tangible and intangible.

On a localised scale, this was evident in the relationship between the Hollow Trees and nearby Red Gums that while not all displayed evidence of cultural modification, were linked by the way Aboriginal people used them and the landscape. Area 1 for example, was always discussed by the Traditional Owners as a cultural landscape, as an Aboriginal place where their ancestors would have camped, taken refuge inside the hollow of trees, or used them to give birth in, hunted kangaroo on the plains, and made canoes from the nearby trees to use in the swamp that once existed here. One element of this place doesn’t exist without the other, it’s all connected.

1. A marginal note to those passages in the On Country Report described “Cultural landscape” as “a conceptual framework borne out of a relationship between people, cultural practice, natural resources, and kinship networks”. Under the heading “Idea of ‘place’” the marginal note further explained that this concept should be “viewed as part of a broader landscape that includes both tangible and intangible values”.
2. The 2018 Builth Report contained material to similar effect. Reference was made to how the Djab Wurrung were “sustained by their spiritual relationship with their landscape, that which created them and the features within their country, and which therefore provides physical sustenance by its spiritual origins and its continuing existence. These features appear in the landscape both as spiritual and physical manifestations”.
3. Later in the 2018 Builth Report, Dr Builth stated (noting that “CMT” is an abbreviation of “culturally modified hollow tree”):

The Women’s Camp was then visited, which is overseeing the protection of the E3, E2 and E1 trees, plus others in the vicinity. It soon became clear that this whole area, which is part of the Option 1 corridor, is a cultural precinct in that the former landscape with its separate features consisting of both CMTs, hallowed trees, artefacts – all around what was a previous swamp and adjacent to woodland, could not be subdivided by a highway and still retain its significant natural and cultural integrity.

1. In her concluding remarks and recommendation, Dr Builth stated (with specific reference to trees E3 and E6) (emphasis added):

In this report I present the case for the existence and protection of a cultural landscape by documenting physical evidence and by sharing and understanding gained from Djab Wurrung elders and other Indigenous supporters, **that speak for the trees, the hills, the land, the waters, including oral history of the relationships between life and landscape and historic connections across their country. What has been communicated to me is that there is a very deep connection to the trees and that this country has persisted despite an enforced separation of people from their ancestor’s heritage and their preordained inheritance.**

…

Archaeological evidence identified during the field surveys, which are described in the Map attached as Annex 2, confirmed to my satisfaction that the CMTs stand in a significant aboriginal cultural precinct.

1. The 17 June 2018 application itself also contained relevant material relating to Aboriginal tradition and the cultural significance of the trees, particularly trees E3 and E6. Indeed, that material was referred to and summarised by the Minister in the early part of her statement of reasons at [5.24] and [5.25]. The Minister relied upon that and other material in concluding that trees E2-E6 were significant Aboriginal objects for the purposes of s 12(1)(b)(i). But inexplicably she appears to have overlooked that material in concluding at [5.61] that the applicants had failed clearly to describe ways in which the functions and attributes of the relevant trees were under threat of injury or desecration apart from their physical removal or harm for the purposes of s 12(1)(b)(ii).
2. The Minister’s finding at [5.60] that the five trees were “not likely to be physically injured or desecrated by deliberate removal or **indirect harm** resulting from the roadworks or the ongoing use of the highway by general traffic” (emphasis added) is not an answer to this part of the applicants’ case. The focus of the Minister in reaching that finding was on the trees being **physically** injured, as is supported by her finding in the subsequent paragraph at [5.61] that the applicants “did not clearly describe ways in which the functions and attributes of the relevant trees were under threat of injury or desecration apart from their physical removal or harm, as described above”. That finding in turn fed into the Minister’s conclusion at [5.62] there was no Aboriginal tradition in relation to the use or treatment of the five trees with which the roadworks were, or were likely to be, inconsistent, whether by reason of their physical proximity or otherwise. The Minister’s analysis fails to grapple with the complex and nuanced cultural and spiritual heritage associated with the trees and the effect on that heritage by the alignment of the highway in proximity to them.
3. The material described above at [115] to [120] was plainly relevant to the Minister’s assessment of the threat of injury or desecration to the trees when the treatment of those trees by the roadworks and highway alignment were viewed through the prism of Aboriginal tradition. Her failure to address that material suggests that the Minister continued to misunderstand the important statutory concepts of “injury or desecration”, “used or treated” and “Aboriginal tradition”. I consider that she also acted unreasonably in not addressing this material in coming to her conclusion that the trees were not at risk of injury or desecration.
4. As the Court pointed out during the hearing, it may not be an easy task for non-Indigenous people to appreciate the complexity and subtleties of “Aboriginal tradition” as defined in the *Act*. A broad analogy which highlights the significance of the metaphysical character of cultural heritage is the importance attached by many Australians to the battlegrounds at Gallipoli. It is well to recall the public outcry in Australia in 2005 when Turkish authorities announced that they would widen parts of the coastal road at Anzac Cove and build two carparks there.
5. It is also important not to lose sight of the fact that the purpose of the *Act* is not merely to preserve and protect significant Aboriginal areas and objects so as to enrich Aboriginal heritage – the purpose goes much further and seeks to enrich the heritage of **all** Australians.

#### **(2) Physical proximity of highway alignment to the five trees**

1. Having regard to the terms of the application as it related to s 12, for the Minister to be able to conduct a valid assessment of the threat of injury or desecration of the five trees by the roadworks and highway alignment, she needed to know with some precision the physical proximity of those roadworks and highway alignment to the trees (which she found were significant Aboriginal objects). The need to know that physical proximity was essential not only to the Minister’s assessment of the risk of physical harm to the trees, but also to the risk of injury or desecration with reference to Aboriginal tradition relating to the trees.
2. When the Court raised this issue with the Minister’s senior counsel and asked to be shown the material before the Minister which identified the proximity of the trees to the roadworks and highway alignment, he pointed to the contents of [111] of the Department’s brief. The Minister was told by her Department:

The Department does not accept, subject to implementation of the Framework, that the construction and operation of the highway will inevitably result in the death of the trees. Of the five of the Six Trees to be retained, the Framework notes that:

* Tree E2 is already dead and fallen
* Tree E3 is 18 metres from the nearest workzone
* Tree E4 is approximately 100 metres outside the construction zone
* Tree E5 will be protected by an exclusion zone around the tree for at least 3 metres greater than the tree canopy to avoid disruption to the root systems
* Tree E6 is ‘outside of the roadworks area and will not be affected’.

1. There are two significant things to note about this passage. First, its exclusive focus is on whether the roadworks and operation of the highway “will inevitably result in the death of the trees”. The passage does not address the issue whether the roadworks and highway presented a threat of injury or desecration to the trees other than in respect of physical harm (which is the error identified by Robertson J in *Clark*).
2. Secondly, while it is true that the Department provided the Minister with some general information regarding the physical proximity of **some** of the trees to the “workzone”, “construction zone” and “roadworks area”, no information was provided by the Department to the Minister concerning the physical proximity of the highway alignment to the five trees.
3. As senior counsel for the Minister properly acknowledged, none of the other material before the Minister (including maps) precisely identified the physical proximity of the highway alignment to the five trees.
4. It is notable that in the absence of any such material, the Minister was nevertheless “satisfied that the commitment of MRPV and the Framework provide adequate protection against possible use or treatment of the trees in a manner inconsistent with Aboriginal tradition, over and above protection against physical removal or destruction of the trees” (at [6.3] of the statement of reasons).
5. I consider that this most significant omission from the material before the Minister of any document precisely identifying the physical proximity of the highway alignment to the five trees meant that her state of satisfaction that the trees were not at risk of injury or desecration was not reasonably attained and/or was reached on an incorrect understanding of the law.
6. One might rhetorically ask how any Minister, acting reasonably in the legal sense, could make a proper assessment of the extent of any threat of injury or desecration to the trees without knowing how close the highway alignment would be to them. That information is essential not only in assessing the risk of physical injury, but it is also essential in assessing the extent to which Aboriginal tradition relating to the trees was at risk of injury or desecration. It may well be that the degree of threat will be much less if the highway is located say 300 metres away from the trees but the position is likely to be very different if the distance is as small as say 20 or 30 metres. The fundamental problem is that the materials before the Minister did not provide her with this relevant information. The significance of the omission is highlighted with reference to the Gallipoli analogy referred to above.

#### **(3) Connection of five trees to an area beyond the Specified Area**

1. The materials provided by the applicants in support of their application, as referred to at [94] above, made plain that the cultural significance of the five trees (and, in particular, the hollow trees being E3 and E6) was based not only on their own significance as objects *per se*, but also because of their location. The applicants claimed that the cultural landscape with which the trees were connected included, but was not confined to, the Specified Area. For example, the application dated 17 June 2018 expressly referred to E3 and E6 sitting “in an 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”.
2. This claim was never directly addressed by the Minister in the part of her statement of reasons relating to s 12(1)(b)(ii). Instead, the Minister proceeded on the erroneous basis that the claim of the trees’ cultural significance was confined geographically by their location within the Specified Area. This is apparent from [5.56] (which appears in that part of the Minister’s statement of reasons relating to whether the trees are under threat of injury or desecration). It is true that the Minister referred to the stories and songlines extending beyond the Specified Area at [5.79] of her reasons (see at [100] above). That reference is an insufficient answer to this aspect of the applicant’s case relating to s 12. That is because [5.79] relates only to the Minister’s consideration of the s 10 application and not to the s 12 application. Similarly, the Minister’s reference in [5.26] to locations outside the Specified Area does not answer the applicants’ complaint. That paragraph, which forms part of the Minister’s statement of reasons relating to s 12(1)(b)(i), refers to only two of the five relevant trees (E3 and E6). In addition, the Minister does not apply those findings to her reasoning relating to s 12(1)(b)(ii). Nowhere in her statement of reasons concerning s 12(1)(b)(ii) does the Minister adequately address the relationship between the trees and the area **beyond** the Specified Area.
3. I consider that this significant omission from the Minister’s assessment indicates that the state of satisfaction she attained in respect of s 12(1)(b)(ii) was attained unreasonably and/or on an incorrect understanding of the law. The Minister was obliged to carry out her statutory task with reference to the application she received.

#### **F. Are the errors material?**

1. I reject the Minister’s submission that none of these individual errors is material so as not to give rise to a jurisdictional error (or, alternatively, a reviewable error for the purpose of the *ADJR Act*). This was said to be because the Minister made clear in her statement of reasons that, even if she had been satisfied that the five trees were under threat of injury or desecration, she would have exercised her residual discretion not to make a declaration under s 12. This was said to follow from the weight she gave to matters such as the effect of a declaration on the pecuniary interests of third parties and considerations relating to health and safety in balancing countervailing considerations concerning the s 10 application (see [5.66] and [5.67]).
2. As Robertson J pointed out in *Clark* at [202] the Minister’s discretions are not discrete or separate from the matters to which the discretions may be exercised. The Minister has to have a correct appreciation of both the *Act* and the application which triggers her decision-making tasks under that *Act* if she is to carry out her statutory tasks according to law.
3. The requirement of materiality raises the question whether the Minister’s decision to decline to make a s 12 declaration might have been different if she had acted reasonably in attaining the state of satisfaction referred to in s 12(1)(b)(ii) of the *Act* and on a correct understanding of the law (see *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 264 CLR 123 and *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421). This question should be answered affirmatively. The Minister’s assessment of the extent of the threat of injury or desecration may have been different if she had acted reasonably and on a correct understanding of the law, with reference to each of the three individual errors. This may have then affected the balancing exercise when it came to the Minister addressing her residual discretion. As French J observed in *Bropho* at 224, the *Act* “accords a high value to such protection for heritage areas threatened with injury or desecration. That high statutory value is a factor required to be given **substantial weight** in the exercise of ministerial discretion under s 10” (emphasis added). As noted above, those same observations apply to the exercise of ministerial discretion under s 12. There is a distinct possibility that the Minister’s erroneous approach caused her to give less weight to protecting heritage values than otherwise might have been the case. Thus there is a distinct possibility that the outcome may have been different if the Minister’s errors had not occurred.

#### **G. Can the Minister’s decision regarding ss 10 and 12 be severed?**

1. The errors described above all relate to the Minister’s reasoning in respect of the s 12 application. The applicants contended that the Minister’s reasoning concerning ss 10 and 12 was not severable. In particular, the applicants contended that although the Minister’s reasoning concerning the s 12 application ended at [5.67] (apart from the ultimate conclusions), there were some parts of the Minister’s subsequent reasoning concerning the s 10 application which was affected by her findings and reasoning concerning the trees. In particular, the applicants pointed to [5.79] of the statement of reasons (which is set out at [100] above).
2. I reject the appellant’s contentions on non-severability. The Minister’s reference to the trees in [5.79] was in the context of her explaining why she accepted that the material before her included evidence that the significance of the trees was connected to the significance of the Specified Area. This is to be contrasted with her separate finding that the trees were **not** at threat of injury or desecration, which formed no part of her reasoning why the Specified Area **was** under threat of injury or desecration.
3. No part of the Minister’s reasoning concerning s 10 relied upon her legally erroneous approach to s 12(1)(b)(ii).
4. In my view, the Minister’s findings and reasoning regarding s 10 are severable from those relating to s 12. Relief should only be granted in respect of the Minister’s decision concerning the s 12 application.

#### **H. The first two particulars of ground 3**

1. The errors identified above are raised by the third particular to ground 3. In those circumstances, it is unnecessary to resolve the first two particulars other than to indicate that I would have rejected those parts of the applicants’ case, substantially for the reasons given by the Minister in her submissions, as summarised at [47] and [48] above.

### (iv) Ground 4: Failure to take into account relevant considerations, namely submissions

1. Strictly speaking, it is also unnecessary to resolve this separate ground of review having regard to the applicant’s success regarding ground 3. I can indicate, however, that I would reject this ground for the following reasons.
2. The Minister’s obligation to consider representations attached to a s 10(4) report is correctly understood as referring to representations which are relevant to the Minister’s particular statutory task whether or not to make a declaration as sought in an application. This does not require the Minister to consider representations which are irrelevant to that task. The ambit of the task is defined in the provisions of s 10 (noting that s 12 is differently expressed to s 10 and contains no equivalent provision to s 10(1)(c)). Sub-section 10(4) has particular significance. It specifies the matters which a report must address. Although that provision does not in its terms apply to representations, it is implicit that it does. That is because it may be inferred from s 10(3), that representations need to be “in connection with the report” (see s 10(3)(a)(ii)). In other words, the representations need to address the various matters specified in s 10(4).
3. In my opinion, the reporter is not obliged to consider representations which do not relate to any of those matters, nor is the Minister required to give consideration to them if he or she reasonably concludes that the representations are not relevant to the Minister’s statutory task.
4. This is the approach which the Minister took here, as is reflected in [5.28] of her statement of reasons, where she described representations on biodiversity conservation issues as irrelevant considerations. It was open for her to do so. Biodiversity conservation issues are not a matter specified in s 10(4) and it was a matter for the Minister to decide what other matters were relevant (assuming that they were not mandatory relevant considerations).

### (v) Ground 5: Erroneous finding that an alternative route would have similar Aboriginal heritage protection issues

1. Again, it is strictly unnecessary to resolve this ground. I can indicate, however, that I would have rejected it for the following reasons.
2. First, this ground is directed to the Minister’s conclusion at [5.114] of her statement of reasons (and the paragraphs leading up to it) as is evident from its terms:

In light of this material, I was not satisfied that the Applicants' proposed ‘Northern Option’ would be self-evidently less expensive than the approved alignment as it is likely that, even if it would be a shorter stretch of road, additional costs may need to be incurred in ensuring that it conformed to required design and road safety standards. In addition, I considered it possible that there could be other additional obstacles to the Applicants’ proposed ‘Northern Option’, such as Aboriginal heritage areas or objects, which had not yet been considered. There was no evidence before me that the Applicants’ proposed ‘Northern Option’ is free of such issues.

1. There are two essential elements to [5.114]. The first relates to the Minister’s statement that she was not satisfied that the Northern Option would be less expensive. The second, and additional element, concerns the Minister’s finding that it was possible that the Northern Option could involve additional obstacles, including Aboriginal heritage areas or objects which had not been considered to date. It was in this context that the Minister then stated that there was no evidence before her that the Northern Option was free of such Aboriginal heritage issues.
2. Secondly, I would have accepted the Minister’s submissions that the Minister’s concluding statement in [5.114] regarding “no evidence”:
3. was a peripheral comment;
4. did not involve a finding of fact, but rather identified a possibility; and
5. because the Minister’s statement that there was “no evidence” that the Northern Option is free of such issues, does not relate to any finding of fact which would attract a “no evidence” ground under either the *ADJR Act* or any comparable ground of review under the *Judiciary Act*.

### (vi) Ground 6: Error in the treatment of cost estimates

1. Again, it is unnecessary to determine this ground but I can indicate that if it had been necessary I would have rejected it for the following reasons.
2. First, the ground is directed to [5.109] of the Minister’s statement of reasons, which is as follows:

MRPA estimated that the cost of the alternate northern alignment would be $139 million (excluding sunk costs associated with the works undertaken up to November 2018, and the termination of the existing contract, totalling approximately $31 million). MRPA states that the alternate northern alignment would cost approximately $41.8 million more than the approved alignment would cost to deliver. On the basis of the material before me, I was satisfied that the alternative northern alignment would cost significantly more than the cost of the approved alignment. I also noted that MRPV in its submission to the Department of 7 November 2018 stated that it is reasonable to expect that any northern alignment would have similar impacts on Aboriginal heritage as the approved alignment.

1. The paragraph concerns the Minister’s consideration of cost estimates for an alternative northern alignment considered by MRPV, which was referred to as “Option 2”. The Minister compared the cost estimates of Option 2 with the approved alignment and concluded that Option 2 would cost significantly more.
2. Ground 6 is predicated on the proposition that the Minister took into account the costs of Option 2 notwithstanding that Option 2 was not possible as at the date of the Minister’s decision and, in any event, was different from the Northern Option. I consider that this premise is not available. The Minister did not make any findings about the costs of construction of an alternative route in the event that she made a declaration which required MRPV to pursue an alternative alignment. Nor did she say that Option 2 was still an option. She referred to the indicative costings of Option 2 because that Option had previously been considered by MRPV, as is evident from the Minister’s finding at [5.108].
3. Secondly, I consider that the Minister’s ultimate conclusion not to make a declaration under s 10 was based in part because of her findings regarding adverse pecuniary and proprietary effects on third parties, particularly the Victorian government. I accept the Minister’s submission that that finding was based not on the costings of alternative routes, but rather on wasted planning and assessment costs and termination costs.

## To whom should the s 12 application be remitted?

1. During the hearing, the Court raised with the parties the question whether the s 12 application should be remitted to another Minister for reconsideration and determination having regard to the fact that the Court has found that the Minister effectively repeated the same error she committed as found by Robertson J in *Clark*. The parties availed themselves of the opportunity to provide brief supplementary submissions on this issue.
2. In her supplementary submissions, the Minister confirmed that under current Administrative Arrangements Orders, the *Act* is administered by the Department of Agriculture, Water and the Environment (save for one presently irrelevant provision, which is administered by the Attorney-General’s Department). Three Ministers and two Assistant Ministers have been appointed to administer the Department. Accordingly, by force of s 19(1) of the *Acts Interpretation Act 1901* (Cth), each of those persons is capable of performing the function of “the Minister” under s 12 of the *Act*. Strangely, the Minister for Aboriginal Affairs is not one of the Ministers with responsibility for administering the *Act*, despite its subject matter.
3. The Minister contended that the Court was powerless to set aside a decision by an individual person who is reposed with a statutory power (such as a Minister) and direct that the matter be considered by another person authorised to exercise the power. It is unnecessary to resolve that issue because the Minister accepted that s 16(1)(d) of the *ADJR Act* empowers the Court to direct the original decision-maker, if he or she is a party to the proceeding, to refer the matter to somebody else who is authorised to exercise the relevant power, where the Court considers that it is “necessary to do justice between the parties”. I accept that submission.
4. The issue then arises whether such an order is necessary to do justice between the parties in the particular circumstances of this case.
5. Contrary to the Minister’s submission I consider that such an order should be made in the particular circumstances of this case because, if the matter is remitted to the Minister, a reasonable and informed observer might apprehend that the Minister might not bring an open mind in considering and determining the s 12 application. I am of that view for the following two reasons, which are peculiar to this case. First, if the matter were remitted to the Minister that would be the third time that she would be required to determine the s 12 application, in circumstances where her previous two purported attempts to determine that application have been set aside for jurisdictional error. Moreover, as I have explained, the jurisdictional error committed by the Minister in her third decision (which is the subject of challenge in the present proceeding) substantially repeats the jurisdictional error found by Robertson J. I consider that this matter would weigh heavily in the mind of the hypothetical lay observer in assessing whether the Minister might have a closed mind.
6. Secondly, and related to the first matter, it is significant that in her statement of reasons relating to the latest s 12 application, the Minister said that even if she had concluded that the trees were at threat of injury or desecration, she would have exercised her discretion not to grant a s 12 declaration because she considered that that threat was outweighed by the same considerations which she relied upon ultimately in rejecting the s 10 application. I consider that that matter would also weigh heavily in the mind of the hypothetical observer.
7. I should make it clear that I am not suggesting that there is any basis to find that the Minister is actually biased. Rather, the issue is one of apprehended bias, with particular reference to the perception of prejudgment in the unusual circumstances of this case. Nothing I have said should be taken as suggesting that in every case where the Court finds that a Minister has fallen into jurisdictional error and the Minister’s decision is set aside, the matter needs to be remitted to some other Minister. Rather, as I have emphasised, the present proceeding has unusual features which make such an order appropriate and necessary in order to do justice between the parties.

## Conclusion

1. For these reasons the Minister’s decision dated 6 August 2020 should be set aside insofar as it relates to her decision not to make a s 12 declaration. An order remitting the s 12 application will be made consistently with the discussion above. The parties were agreed that costs should follow the event.

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| I certify that the preceding one hundred and sixty-four (164) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Griffiths. |

Associate:

Dated: 17 December 2020