

DEPARTMENT OF THE ENVIRONMENT AND ENERGY

MS19-000478

To: Minister for the Environment (For Decision)

**ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1984
(CTH) – SECTIONS 10 AND 12 APPLICATIONS – DJAB WURRUNG**

Timing: 20 July 2019 – Major Roads Project Victoria (MRPV) has undertaken not to commence works prior to 24 July 2019

Recommendations:

1. That you agree, after considering the material in **Attachments A-S**, that you are satisfied that the five trees referred to as E2, E3, E4, E5 and E6 in the Application are significant Aboriginal objects for the purposes of subsection 12(1)(b)(i) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the ATSIHP Act).
Agreed / Not agreed
2. That you agree, after considering the material in **Attachments A-S**, that you are not satisfied that the tree referred to as E1 in the Application is a significant Aboriginal object for the purposes of subsection 12(1)(b)(i) of the ATSIHP Act.
Agreed / Not agreed
3. That you agree, after considering the material in **Attachments A-S**, that you are not satisfied that the trees: E2, E3, E4, E5 and E6 are under threat of injury or desecration for the purposes of subsection 12(1)(b)(ii) of the ATSIHP Act.
Agreed / Not agreed
4. That you agree, after considering the material in **Attachments A-S**, that you are satisfied that the Specified Area is a significant Aboriginal area for the purposes of subsection 10(1)(b)(i) of the ATSIHP Act, except to the extent of the vicinity of Tree E1 eastwards.
Agreed / Not agreed
5. That you agree, after considering the material in **Attachments A-S**, that you are not satisfied that the extent of the Specified Area that is a significant Aboriginal Area is under threat of injury or desecration for the purposes of subsection 10(1)(b)(ii) of the ATSIHP Act.
Agreed / Not agreed
6. If you agree with the above recommendations that you consider and sign the Statement of Reasons at **Attachment T** if it reflects your reasoning, which includes reasons as to why even if you had been satisfied that the statutory preconditions under sections 10 and 12 had been met, you would not have been minded to make declarations under sections 10 or 12 of the ATSIHP Act, otherwise make any modifications you consider necessary to ensure the statement reflects the reasons for your decision.

Signed / amendments requested

7. That you sign the letters to the representatives of the Applicant and MRPV informing them of your decision (**Attachment U**).

Minister:



Signed / Please discuss

Date:

Comments:

16 July 2019.

Clearing Officer: Sent 9 / 7 / 2019	David Williams	Assistant Secretary, Heritage Branch	Ph: 02 6274 2015 Mob: s22
Contact Officer:	s22	Acting Director, Indigenous Heritage Section	Ph: s22 Mob: s22

Key points:

1. On 18 June 2018, the then Minister for the Environment and Energy, the Hon Josh Frydenberg MP, received an application (the Application) from the Djab Wurrung Traditional Owners (the Applicants) dated 17 June 2018, seeking declarations under sections 9, 10 and 12 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the ATSIHP Act) in relation to an area known as Djab Wurrung Country (the Specified Area) near Ararat in Victoria. A copy of the application is at **Attachment A**.
2. On 5 July 2018, one of the Applicants confirmed that the section 12 application seeks protection of the following six trees: E1 (Yellow Box Scarred Tree), E2 (Canoe Tree), E3 (Hollow Tree BT1), E4 (Scarred Tree No 1), E5 (Scarred Tree No 2) and E6 (Hopkins River Hollow Tree BT2), collectively referred to as the Six Trees (**Attachment B**).
3. The Application sought protection under the ATSIHP Act of the Specified Area (under section 10) and the Six Trees (under section 12) from injury or desecration. The Application states that the Specified Area and the Six Trees would be injured or desecrated by a proposed upgrade to the Western Highway. A copy of the map showing the Specified Area and the location of the Six Trees is at **Attachment C**.
4. The Specified Area and Six Trees are located within the boundaries of the geographic area for which the Registered Aboriginal Party Martang Pty Ltd (Martang) is responsible under the *Aboriginal Heritage Act 2006* (VIC) (AH Act). Moreover, the Specified Area is within the boundaries of the registered Native Title determination application VC2012/001 made on behalf of the Djab Wurrung people by the Eastern Maar Aboriginal Corporation on 13 December 2012.
5. The Application states that the entire area defined in the map at **Attachment C** is of 'particular significance to Aboriginals in accordance with Aboriginal tradition'.
6. Major Roads Projects Victoria (MRPV) has given a number of undertakings in relation to timing of the proposed Western Highway upgrade. Most recently it has given an undertaking not to commence works prior to 24 July 2019 (**Attachment D**).

Section 9

7. On 12 September 2018, the then Minister for the Environment, the Hon Melissa Price MP, decided not to make an emergency declaration protecting the Specified Area under section 9 of the ATSIHP Act (**MS18-001128**).
8. Minister Price was not satisfied that the Specified Area was under serious and immediate threat of injury or desecration. This was due to there being no evidence that works had commenced or were likely to commence immediately. The Main Road Projects Authority (MPRA) – a predecessor of MRPV – provided a letter on 14 August 2018, confirming that: *'no works will occur by [MRPA] in the area the subject of the Application until the resolution of the Application...'* (**Attachment E**).

Section 10

9. Under subsection 10(1)(c) of the ATSIHP Act, the Minister is required to appoint a person to prepare a report for consideration in making a decision on this matter. A copy of the ATSIHP Act is at **Attachment F**.
10. On 18 July 2018, Minister Frydenberg appointed Ms Susan Phillips to prepare a report under subsection 10(4) of the ATSIHP Act in relation to the Specified Area (**MS18-000896**).
11. On 25 July 2018, pursuant to section 10 of the ATSIHP Act, a notice was published in the Commonwealth Gazette on behalf of the reporter, Ms Phillips, inviting interested persons to furnish representations regarding the purpose of the Application and the content of a resulting report. A copy of this notice is at **Attachment G**.
12. On 13 September 2018, Ms Phillips provided the Department with a copy of her report under section 10 of the ATSIHP Act (the Section 10 Report). A copy of this report is at **Attachment H**.

Section 13

13. On 25 October 2018, as per subsection 13(2) of the ATSIHP Act, Minister Price sent correspondence to consult with the Victorian Minister for Roads and Road Safety, the Hon Luke Donnellan MP, requesting that the Victorian Government provide advice regarding the Application (**Attachment I**).
14. Copies of this letter were also sent to the Victorian Minister for Energy, Environment and Climate Change, the Hon Lily D'Ambrosio MP and the Victorian Minister for Planning, the Hon Richard Wynne MP.
15. Replies to Minister Price's 25 October 2018 request were received from Minister Donnellan (**Attachment J**) and the MRPV (**Attachment K**) regarding the additional information requested and background information that was deemed relevant.
16. The submissions provided consideration of the issues regarding the threat to the trees. Minister Donnellan affirmed that the Victorian Government had commenced further consultation with traditional owner groups at the time, and that he had directed the MRPV to explore alternate design options within the current alignment that might preserve the trees.

17. As of 1 January 2019, MRPV was established. MRPV is part of the Major Transport Infrastructure Authority established as an Administrative Office of the Department of Transport in the State of Victoria. MRPV effectively replaced MRPA in relation to the application.

First decisions under sections 10 and 12

18. On 19 December 2018, Minister Price decided not to make declarations under sections 10 and 12 of the ATSIHP Act in relation to the Application (**MS19-001332**).
19. This decision was subject to a judicial review challenge in the Federal Court by the Applicants (*Clark & Ors v Minister for the Environment*).
20. On 12 April 2019, by consent, Justice Mortimer set aside the decision of the Minister of 19 December 2018 not to make declarations under sections 10 and 12 of the ATSIHP Act and remitted the Application for those decisions to the Minister for determination according to law.
21. The basis for judgement on which her Honour made those orders was that the Minister conceded that her decision was affected by an error of law; namely, that the Minister did not afford the Applicants procedural fairness in making that decision insofar as the Minister took into account credible, relevant and significant information without putting particulars of it to the Applicants and inviting them to comment.
22. The information that the Minister took into account, particulars of which were not put to the Applicants, was primarily information obtained under the consultation process with the State Government under section 13 of the ATSIHP Act. Minister Price had sought further information on the costs and impacts of both alignments referred to in the submissions of the Section 10 Report (**Attachments I-M**).

Procedural fairness process

23. Since the judgement of 12 April 2019, the Department has undertaken a further procedural fairness process in order for you to make a fresh decision in relation to the Application according to law.
24. The Department wrote to the Applicants on 17 April 2019 inviting them to make submissions in relation to the material provided by the State Government, namely, the information that will inform the Minister's assessment of the economic, social and pecuniary impacts of a declaration, including information received by Ms Phillips during the section 10 process and by Minister Price during the section 13 process. The Department's letter is at **Attachment N** and the Applicant's responses dated 20, 21 and 22 May 2019 are at **Attachment O**.
25. Subsequently to the above process, MRPV notified the Department on 23 May 2019 that it had reached agreement with Eastern Maar Aboriginal Corporation regarding how MRPV will undertake the proposed Western Highway upgrade. On 29 May 2019, MRPV wrote to the Department to provide an update on its consultation with Eastern Maar Aboriginal Corporation, which included a letter of support from Eastern Maar Aboriginal Corporation to MRPV (**Attachment P**). The Attachment to the letter of support indicated that five trees subject to the Application (Trees E2, E3, E4, E5 and E6) were considered to be culturally significant by Eastern Maar Aboriginal

Corporation and Tree E1 was not. Additionally, the five culturally significant trees will now not be removed as part of the proposed upgrade.

26. The latest correspondence from MRPV was put to the Applicants for comment on 29 May 2019 (**Attachment Q**) and the Applicants provided submissions in response dated 30 May 2019, 10 June 2019, 13 June 2019 (provided on 18 June 2019), 17 June 2019, 19 June 2019 and 4 July 2019 (**Attachment R**).
27. You are required to consider the above material in making these fresh decisions under sections 10 and 12 of the ATSIHP Act.

Considerations under sections 10 and 12

28. The Department considers that the following documents may be highly relevant to you in reaching your decision:
 - a. The Section 10 Report (**Attachment H**).
 - b. Letters from MRPV dated 11 June 2019 and 21 June 2019 providing commitments not to undertake works in the Specified Area pending the Minister's decision (**Attachment D**).
 - c. Letter from the Victorian Minister for Roads, the Hon Luke Donnellan MP, dated 30 October 2018, responding to a request from you under section 13 of the ATSIHP Act, concerning additional information regarding the costs — economic, social and heritage, of the proposed highway route and alternatives (**Attachment J**).
 - d. Letter from MRPA, dated 7 November 2018, providing additional background information and MRPA's response to the additional information that was requested (**Attachment K**).
 - e. MRPA Submission Attachment – Western Highway Cultural Heritage Management Plan Complex Assessment (CHMP 12327) (**Attachment L**).
 - f. MRPA Submission Attachment – Western Highway Duplication: costs, social, economic and cultural heritage impacts summary (**Attachment M**).
 - g. Letter from the Department to the Applicants dated 17 April 2019, including material from MRPA's letter dated 7 November 2019 (**Attachment N**).
 - h. Applicants' submissions in relation to the MRPA letter dated 7 November 2018 and other material before me dated 17, 21 and 22 May 2019 (**Attachment O**).
 - i. Letter from MRPV to the Department dated 29 May 2019, including a letter of support from Eastern Maar Aboriginal Corporation (**Attachment P**).
 - j. Letter from the Department to the Applicants dated 29 May 2019 regarding the further information from MRPV dated 29 May 2019 (**Attachment Q**).
 - k. Applicants' submissions in relation to the further information provided by MRPV dated 30 May 2019, 10 June 2019, 13 June 2019 (provided on 18 June 2019) 17 June 2019, 19 June 2019 and 4 July 2019, including a Supplementary Trees Report from Dr Heather Bulth dated 13 June 2019 (**Attachment R**).
29. While there is no statutory timeframe for your decision on this matter, it would be prudent to make the decision as soon as possible. MRPV have given undertakings that it will not commence work before 24 July 2019 (**Attachment D**) and it would be preferable for you to have made a decision before then if possible.

30. The proposed Western Highway upgrade has received all the necessary approvals for construction under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The Department's Analysis (**Attachment S**) further details this.
31. The ATSIHP Act pre-dates the *Native Title Act 1993* (Cth) and therefore does not consider native title. The ATSIHP Act also operates independent to the EPBC Act. Any processes that relate to the same area under these acts are able to be considered on their own merits and in parallel if required.

Further critical consideration

32. The Department has analysed the requirements of sections 10 and 12 with respect to the Application. A copy of this analysis is at **Attachment S**. This includes a summary of the Section 10 Report and a summary of the representations received, including the response to the letter sent by Minister Price on 25 October 2018 under section 13 of the ATSIHP Act.
33. In summation, the Department is satisfied that five of the Six Trees: E2, E3, E4, E5 and E6, are 'significant Aboriginal objects' for the purposes of subsection 12(b)(i) of the ATSIHP Act.
34. Further, the Department is satisfied that the Specified Area is a 'significant Aboriginal area' for the purposes of subsection 10(b)(i) of the ATSIHP Act, except to the extent of the vicinity of Tree E1 eastward.
35. However, the Department is not satisfied that there is a direct threat of injury or desecration to the 'significant Aboriginal objects' (Trees E2, E3, E4, E5 and E6) for the purposes of subsection 12(b)(ii) of the ATSIHP Act. This is because MRPV has committed not to remove the trees (see **Attachment P**).
36. The Department is also not satisfied that there is a direct threat of injury or desecration to the 'significant Aboriginal area' for the purposes of subsection 10(b)(ii) of the ATSIHP Act. This is due to the cultural significance of the Specified Area deriving from the trees in the Specified Area, which will not be removed.
37. Overall, the Department considers that the preconditions for making declarations under sections 10 and 12 in relation to the Application (that is, your satisfaction about significance and threat) have not been met. However, the Department recommends that you set out in the statement of reasons why even if you had been satisfied that the preconditions had been met, because of social and economic benefits, particularly relating to community safety, you would not be minded to make the declarations.

Next steps

38. Under section 16 of the ATSIHP Act, if you decide not to make a declaration, you must take reasonable steps to notify the Applicant of your decision. The Department considers it prudent to also inform VicRoads and MRPV of your decision, should you agree not to make declarations.
39. A draft Statement of Reasons is provided at **Attachment T** for your consideration. The Department recommends that you sign the statement only if it accurately reflects your reasoning.

40. The Department has prepared letters in accordance with its recommendations for your signature (**Attachment U**).

Sensitivities and handling

41. The Section 10 Report includes culturally sensitive information. Material that has been asked to be treated as confidential has been marked in the report and should not be disclosed to anyone.
42. There are a number of factors that increase risk in this case. The Department has undertaken a number of actions to mitigate these, for example by extending timeframes for comment. Given that the Applicants have challenged the previous decision it is possible they will look for an opportunity to challenge this decision.
43. The Applicants state that they were not properly consulted in Victorian approval process for the proposed highway extension in relation to Aboriginal cultural heritage in the area.

Consultation: YES

44. As noted in this brief, the Department has consulted extensively with both the Applicant and the MRPV in relation to the Application and has also consulted with the Victorian Government as required under the ATSIHP Act.
45. The Indigenous Heritage Section has also consulted with the Department's General Counsel Branch on aspects of its briefing.

ATTACHMENTS

A	Application for section 9, section 10, and section 12 under the ATSIHP Act
B:	Clarification email regarding section 12, from Jidah Clark, dated 5 July 2018
C:	Map of the Specified Area — with trees marked
D:	Letters from MRPV dated 11 June 2019, 21 June 2019 and 8 July 2019 providing commitments not to undertake works in the Specified Area pending the Minister's decision
E:	Letter from MRPA dated 14 August 2018 providing interim commitments not to undertake works in the Specified Area pending the Minister's decision
F:	A copy of the ATSIHP Act
G:	A copy of the Government Gazette Notice published on behalf of the reporter, Ms Phillips on 24 July 2018
H.	A report dated 13 September 2018 under section 10 of the ATSIHP Act by Ms Phillips (the Section 10 Report) [note that only the main body of the report is provided electronically – attached documents are provided in hardcopy]
I.	Minister for the Environment request for Victorian Government advice, dated 25 October 2018
J:	Letter dated 30 October 2018, from the Minister for Roads and Road Safety, the Hon Luke Donnellan, MP, regarding section 13 of the ATSIHP Act (MS18-001328)
K:	Letter dated 7 November 2018, from Major Roads Project Authority, regarding additional information requested under the ATSIHP Act (MS18-001328).

L:	MRPA Submission Attachment - Western Highway Cultural Heritage Management Plan Complex Assessment (CHMP 12327)
M:	MRPA Submission Attachment - Western Highway Duplication: costs, social, economic and cultural heritage impacts summary
N:	Letter to Applicants dated 17 April 2019 inviting submissions in response to material from MRPA
O:	Applicant's submissions in relation to the MRPA letter dated 7 November 2018 and other material before Minister dated 17, 21 and 22 May 2019
P:	Letter from MRPV to the Department dated 29 May 2019, including a letter of support from EMAC
Q:	Letter from the Department to the Applicants dated 29 May 2019, seeking comments on the material provided by MRPV on 29 May 2019
R:	Applicant's submissions in relation to the further information provided by MRPV dated 30 May 2019, 10 June 2019, 13 June 2019 (provided on 18 June 2019), 17 June 2019, 19 June 2019 and 4 July 2019 including a Supplementary Trees Report from Dr Heather Builth dated 13 June 2019.
S:	Department analysis and summary — Section 10 and 12 applications — Djab Wurrung Country, Victoria
T:	Draft Statement of Reasons
U:	Draft Letters to Applicant and MRPV informing them of the decision under section 10 and section 12 of the ATSHIP Act