

**Investigation into the planning and delivery of the  
Western Highway duplication project**

**July 2020**

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**The Victorian Ombudsman pays respect to First Nations custodians of Country throughout Victoria. This respect is extended to their Elders past, present and emerging. We acknowledge their sovereignty was never ceded.**

# Letter to the Legislative Council and the Legislative Assembly

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To

**The Honourable the President of the Legislative Council**

and

**The Honourable the Speaker of the Legislative Assembly**

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973* (Vic), I present to Parliament  
*Investigation into the planning and delivery of the Western Highway duplication project.*



Deborah Glass OBE

**Ombudsman**

30 July 2020

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## Warning to Aboriginal and Torres Strait Islander readers

Aboriginal and Torres Strait Islander readers are warned that early sections of this report contain names and images of deceased persons.

Additionally, passages of the report set out information from historical sources that may be considered confronting or offensive to Aboriginal people. In the interests of truth-telling about the negative effects of colonisation for Aboriginal and Torres Strait Islander peoples, information from these sources has not been sanitised, and is presented 'as is'.

# Foreword

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*'It connects all our mob, through that one dreaming and one songline. [...] [The highway duplication works] will take out part of our dreaming.'*

- Oral submission to the investigation

The ancient trees soar overhead, twisted and gnarled; the surrounding grasslands shimmer in the hot afternoon breeze. On this sultry December day I can see the blue hills of Langi Ghiran State Park on the horizon. Djab Wurrung Country is beautiful; but its traditional custodians are fighting for more than its beauty.

Parts of Djab Wurrung Country have been occupied by Aboriginal people for more than 12,500 years. But from the late 1830s, Europeans began a decades-long process of invasion and dispossession, culminating in the 'near-ethnocide' of the Djab Wurrung by the end of the 1870s. Few continue to maintain a presence on their traditional lands.

This process of dispossession also saw the creation of a road between Buangor and the gold-diggings in Ararat, through the foothills of Mount Langi Ghiran, that would one day become the Western Highway, the major route between Melbourne and Adelaide. The duplication of a stretch of that highway remains unfinished as a result of both protest action and litigation.

"Songlines, Not Highways" reads one of the signs at the Djab Wurrung Heritage Protection Embassy by the side of the Western Highway, just outside Ararat. Given the region's history of ethnic murder and dispossession, it is hard not to sympathise.

In this investigation I sought to find answers to the key concerns raised about the project: fundamentally, that VicRoads and its successors designing the project failed to consult the traditional custodians of the land; did not properly investigate the Aboriginal cultural heritage of the area; and ignored options that would have provided better cultural and environmental outcomes.

This report shows the answers are complicated. The impact of the project on Aboriginal cultural heritage was recognised as a key issue when planning began in 2008. Consultation did take place, on numerous occasions, with the Registered Aboriginal Parties for the area, though some people have disputed that those consulted were properly representative of the Djab Wurrung peoples.

While consultation with local residents and landholders was extensive, consultation with Aboriginal communities was limited to the officially recognised body. This complied with legislation, and underlines the statutory importance rightly given to Registered Aboriginal Parties. But given the history of dispossession of the Djab Wurrung, was this good enough?

The two large old trees by the Embassy were not in fact identified until 2017 and claimed to be 'birthing trees', after the highway alignment had been determined. While there is no doubt of their age and beauty, traditional custodians continue to express different views as to their status.

In any event, once they were identified, the project sponsors undertook further consultation. Eastern Maar Aboriginal Corporation, now representing registered native title claimants for the area, commissioned a further independent cultural heritage assessment. Modifications were made to the route to keep 16 of the 22 trees identified as culturally significant, including the two 'birthing trees'. For many reasons, including cultural and environmental considerations, other route options were not considered to provide a better outcome.



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In light of these and other commitments, Eastern Maar has now indicated it is satisfied that Aboriginal cultural heritage impacted by the project will be adequately protected. This outcome also enjoys the support of the Victorian Aboriginal Heritage Council. But it is not supported by many others.

It is not for the Ombudsman to determine the best route for the highway and as I told members of the Embassy when I met them last December, even though I have the powers of a Royal Commission, I cannot make an order to stop the road. Knowing that, they still wanted me to investigate. 'If you have powers, you should use them', one of them told me.

So I have done so, having considered not only their views but the wider public interest in this long-running and contentious saga.

I can now observe that the motivations and actions of all the parties, no matter on which side of the fence they sit, appear to have been carried out in good faith, and resulted in significant compromise. This is a major achievement for those who mobilised to speak up for Country, inconceivable when the original road was built in the nineteenth century.

It is inevitable that it will not satisfy those for whom every tree and contour on Country must be preserved, and I acknowledge it is not only the trees, but all the surrounding landscape that carries the weight of Aboriginal history. We cannot turn the clock back to undo the damage of the past, nor can we entirely avoid the damage of the present. But we can minimise the damage – and we can work together to better understand and celebrate that the land always was, always will be, Aboriginal land.

Deborah Glass

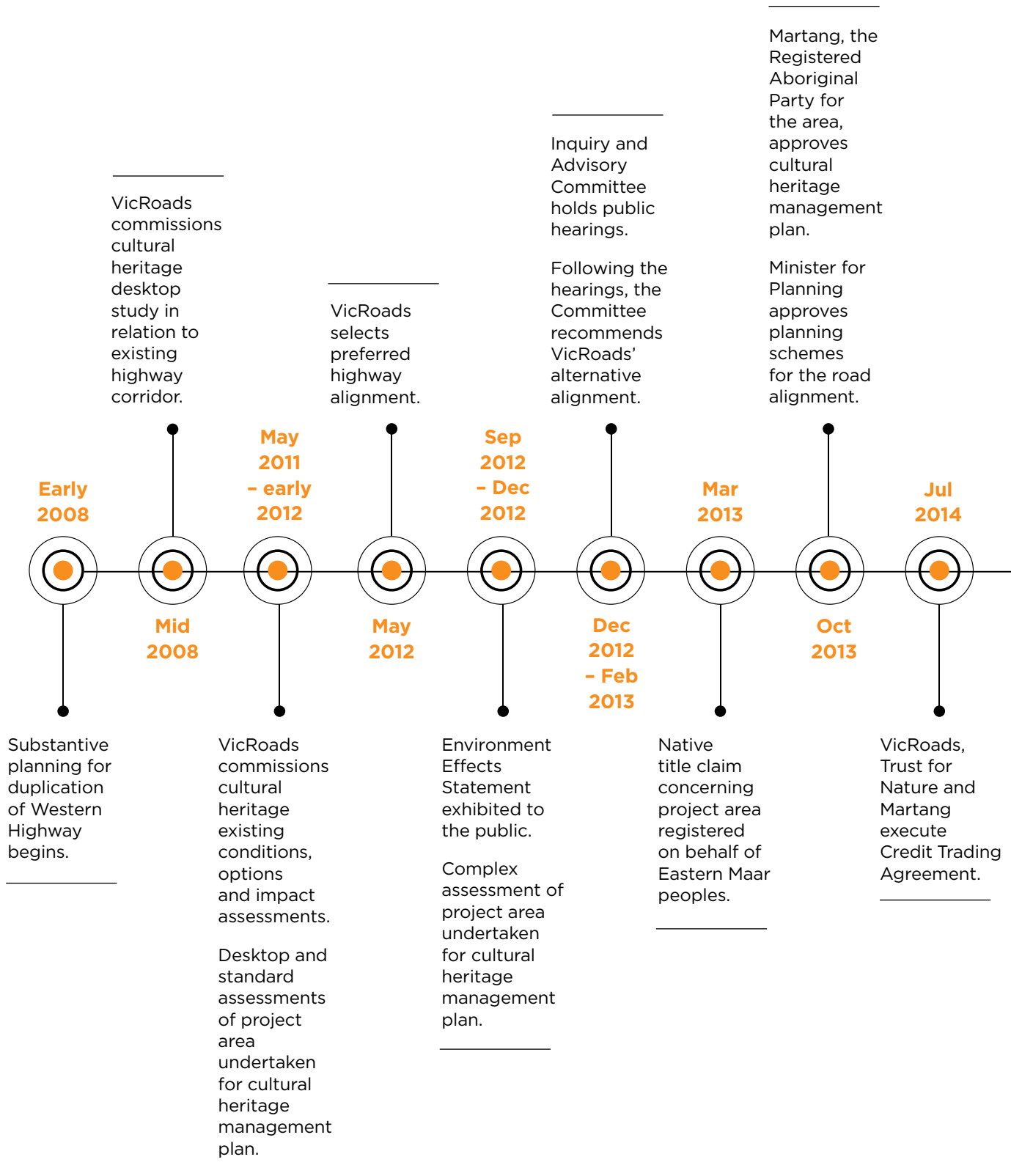
**Ombudsman**

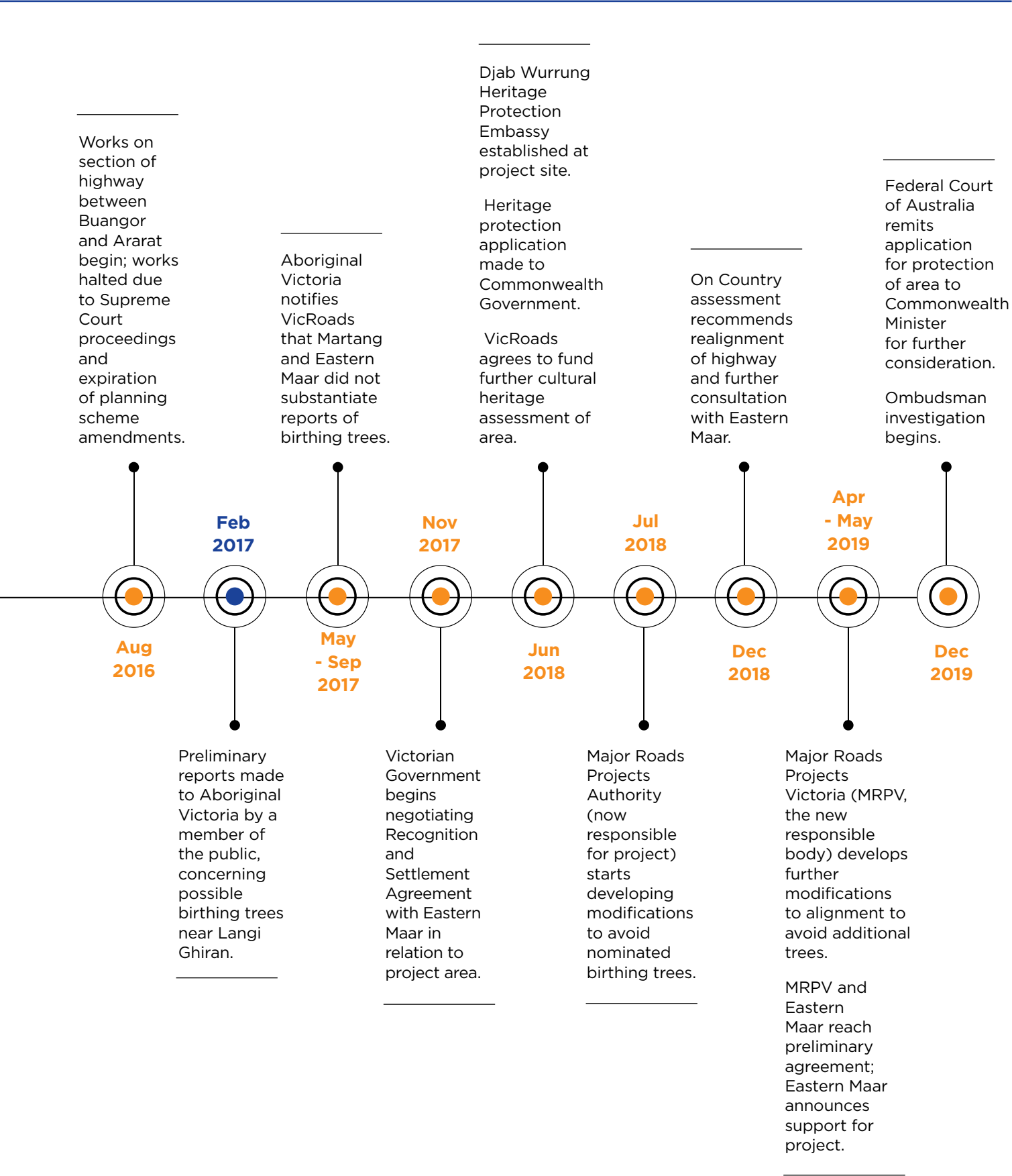
# Glossary

<b>Aboriginal Heritage Act</b>	<i>Aboriginal Heritage Act 2006</i> (Vic) – legislation providing for the protection of Aboriginal cultural heritage in Victoria.
<b>Aboriginal Heritage Council</b>	Statutory body made up of traditional custodians appointed by the Minister for Aboriginal Affairs under the Aboriginal Heritage Act.
<b>Aboriginal Victoria</b>	Office within the Department of Premier and Cabinet responsible for administering the Aboriginal Heritage Act and receiving reports about suspected Aboriginal cultural heritage places and objects.
<b>Birthing tree</b>	A highly culturally significant tree traditionally used by Aboriginal women when giving birth.
<b>Charter of Rights Act</b>	<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic) – legislation providing for the promotion and protection of human rights in Victoria. Commonly referred to as ‘the Charter’.
<b>Complex assessment</b>	Third level of cultural heritage assessment under the <i>Aboriginal Heritage Regulations 2018</i> (Vic) – involves disturbance or excavation of all or part of an activity area. May also involve the collection and review of oral history relating to the area.
<b>Conservation covenant</b>	Agreement between a landowner and Trust for Nature under the <i>Victorian Conservation Trust Act 1972</i> (Vic) binding the landowner to protect and manage land in perpetuity.
<b>Credit trading agreement</b>	Commercial agreement under which a landowner sells native vegetation credits to a developer – a method to achieve native vegetation offset requirements under Victorian and Commonwealth planning approvals.
<b>Cultural heritage management plan</b>	Report prepared on behalf of a project proponent under the Aboriginal Heritage Act setting out the results of an assessment of the project’s potential impacts on Aboriginal cultural heritage. Identifies measures to be taken by the proponent to manage and protect Aboriginal cultural heritage.
<b>Desktop assessment</b>	First level of cultural heritage assessment under the <i>Aboriginal Heritage Regulations 2018</i> (Vic) – involves searching the Victorian Aboriginal Heritage Register and reviewing reports, published works and historical accounts relating to Aboriginal cultural heritage in the activity area. May also involve the collection and review of oral history relating to the area.
<b>Djab Wurrung</b>	Aboriginal people whose traditional lands include part of what is now known as Western Victoria, including the area between Buangor and Ararat.
<b>Eastern Maar</b>	Eastern Maar Aboriginal Corporation – body representing registered native title claimants for the area between Buangor and Ararat. The Registered Aboriginal Party for this area under the Aboriginal Heritage Act since February 2020.
<b>Environment Effects Act</b>	<i>Environment Effects Act 1978</i> (Vic) – legislation providing for the assessment of proposed projects that may have a significant effect on the environment in Victoria.

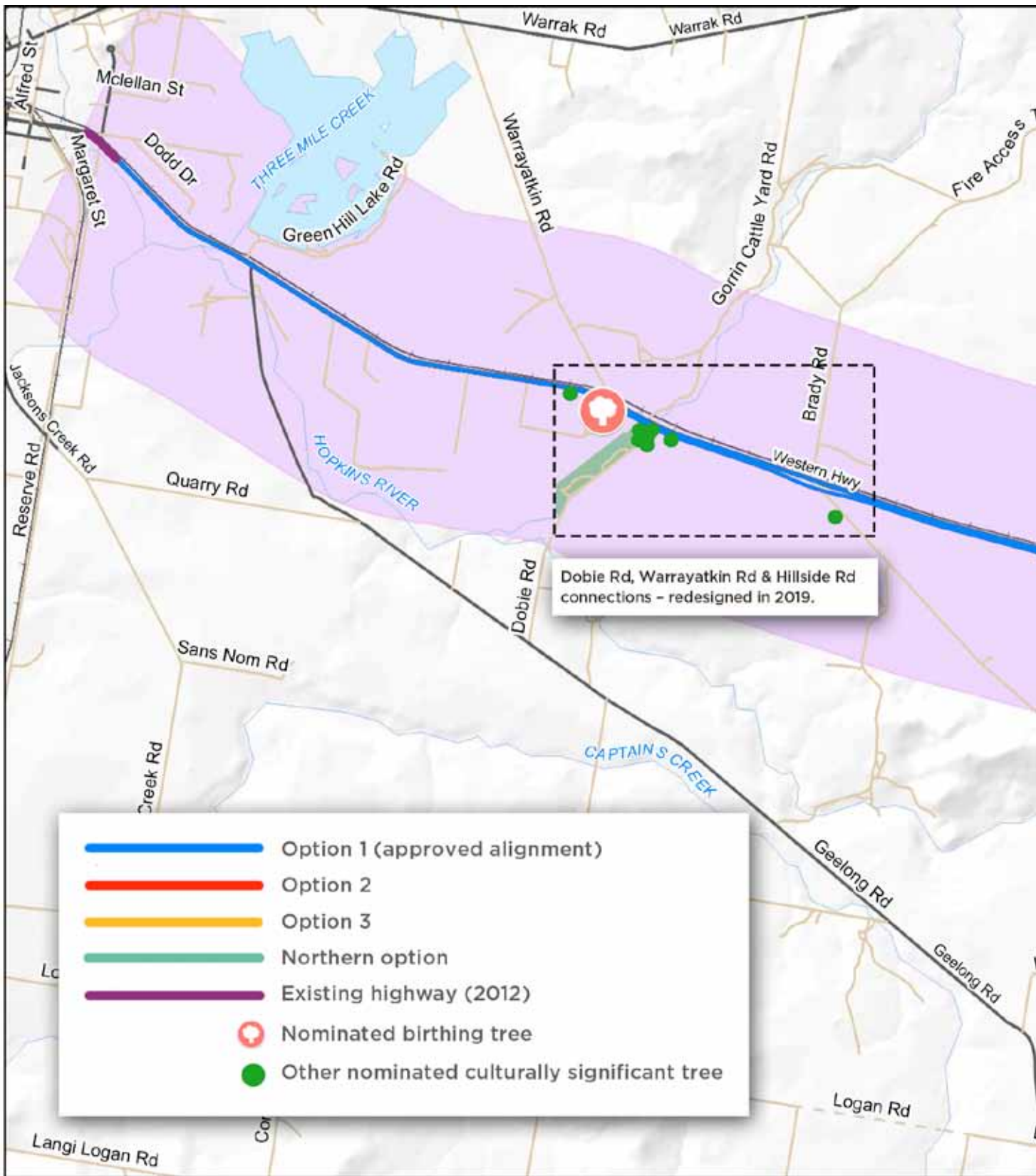
<b>Environment effects statement</b>	Statement prepared in accordance with the Environment Effects Act setting out the potential significant environmental effects of a project and proposed measures to avoid, minimise or manage those effects.
<b>Inquiry and Advisory Committee</b>	Combined inquiry and advisory committee established by the Minister for Planning to consider and provide advice concerning Section 2 of the Western Highway duplication project in November and December 2012.
<b>Martang</b>	The Registered Aboriginal Party for the area between Buangor and Ararat under the Aboriginal Heritage Act during the period between September 2007 and August 2019.
<b>Mortuary tree</b>	A particularly significant hollow tree where the remains of Aboriginal people were ritually interred.
<b>MRPA</b>	Major Road Projects Authority – now defunct administrative office of the Victorian Government responsible for the Western Highway duplication project between 1 July and 31 December 2018.
<b>MRPV</b>	Major Road Projects Victoria – office within the Major Transport Infrastructure Authority of Victoria responsible for the Western Highway duplication project since 1 January 2019.
<b>On Country assessment</b>	Cultural heritage assessment commissioned by Eastern Maar in approximately July 2018.
<b>Registered Aboriginal Party</b>	Aboriginal representative body registered under the Aboriginal Heritage Act to act as the primary source of advice and knowledge to the Victorian Government on matters relating to Aboriginal cultural heritage in a designated area.
<b>Scarred tree</b>	A tree that has been culturally modified by Aboriginal people through the removal of bark or wood.
<b>Standard assessment</b>	Second level of cultural heritage assessment under the <i>Aboriginal Heritage Regulations 2018</i> (Vic) – involves a ground survey of all or part of the activity area, including the examination of mature indigenous trees in the area. May also involve the collection and review of oral history relating to the area and sub-surface excavations within the area.
<b>Trust for Nature</b>	Trust for Nature (Victoria) – authority established under the <i>Victorian Conservation Trust Act 1972</i> (Vic) for public conservation purposes.
<b>VicRoads</b>	Trading name of the Roads Corporation – authority responsible for the Western Highway duplication project from commencement until 30 June 2018.
<b>Victorian Aboriginal Heritage Register</b>	The central repository for traditional custodians to store information about their cultural heritage under the Aboriginal Heritage Act.
<b>Western Highway duplication project</b>	Victorian Government project to duplicate the Western Highway between Ballarat and Stawell commenced in early 2008.
<b>Western Highway duplication project – Section 2</b>	For planning and delivery purposes, the section of the Western Highway between Beaufort and Ararat. Section 2B relates to the area between Buangor and Ararat.

# Timeline of key events



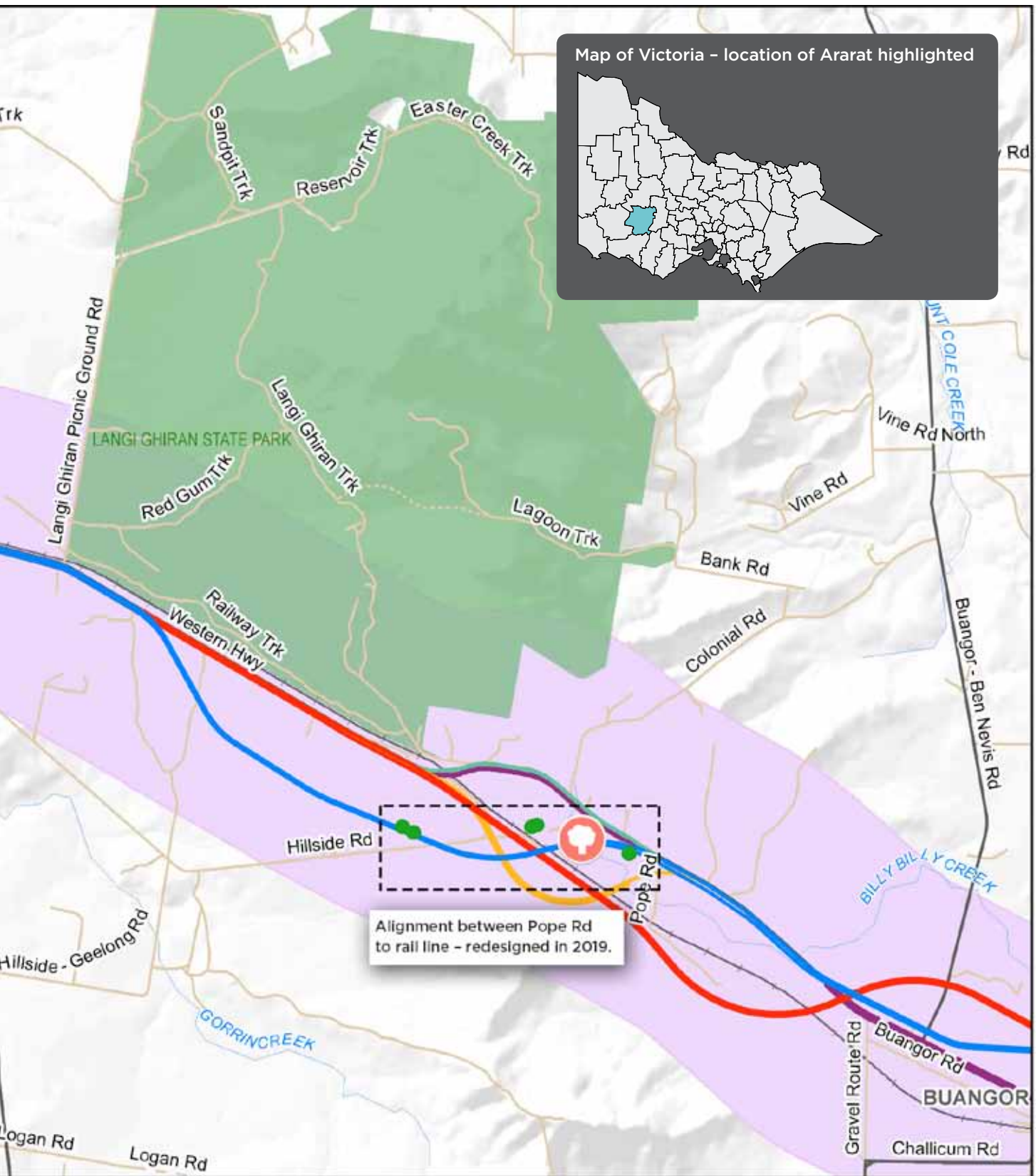


# Map



This map includes approximate locations only.





Other areas of cultural heritage sensitivity and registered Aboriginal places and objects are not marked.

# Executive summary

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## Why we investigated

1. In August 2019, the Ombudsman received a number of complaints about the planning and delivery of the Victorian Government's Western Highway duplication project. The complaints invariably raised concerns about the potential for the highway project to damage or destroy sites of Aboriginal cultural heritage significance, including a number of trees in the vicinity of Langi Ghiran State Park, to the east of Ararat, that were said to be sacred to Djab Wurrung traditional custodians.
2. This followed claims, first reported in the media in early 2017, that planning authorities had failed to recognise the cultural significance of two hollow trees in the path of the approved highway alignment, said to have been traditionally used by Djab Wurrung women when giving birth.
3. Those claims, and the efforts of some traditional custodians to halt construction associated with the project, have received considerable local and international media coverage, which highlighted concern about a lack of consultation by the Government with Djab Wurrung traditional custodians during the project planning phase.
4. In December 2019, the Ombudsman decided to conduct an 'own motion' investigation into the planning and delivery of the project.
5. Among other things, the investigation looked at:
  - how the alignment of the section of highway between Beaufort and Ararat was determined
  - the extent to which development of the project made allowances for the protection of Aboriginal cultural heritage
  - VicRoads' decision to negotiate and enter into a Credit Trading Agreement with a Registered Aboriginal Party involved in assessing the project's cultural heritage impacts
  - how authorities responded to the cultural heritage concerns about the project, once raised.
6. The investigation also considered whether the actions of the relevant authorities were compatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter of Rights Act').

## Djab Wurrung Country

7. The traditional lands of the Djab Wurrung people are part of an ancient volcanic landscape, interspersed with temporary and perennial lakes and swamps, intermittent streams and open plains. Archaeological surveys have demonstrated that parts of Djab Wurrung Country have been occupied by Aboriginal people for more than 12,500 years.
8. These surveys have emphasised the relative prevalence of Aboriginal cultural heritage sites in the vicinity of what is now Langi Ghiran State Park, attesting to the traditional Aboriginal connection to this area. The name 'Langi Ghiran' itself is generally understood to mean 'home of the black cockatoo' in the Djab Wurrung language.
9. Traditional Aboriginal occupation of the area was largely interrupted when, from the late 1830s, Europeans began to force Djab Wurrung ancestors from their traditional lands. What followed was a decades-long process of invasion, dispossession and murder, culminating in the 'near-ethnocide' of the Djab Wurrung by the end of the 1870s. Today, many Djab Wurrung descendants live off Country, while others continue to maintain a presence on their traditional lands.



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10. This process of dispossession also saw the creation of a road between Buangor and the gold-diggings in Ararat, through the foothills of Mount Langi Ghiran, that would one day become the Western Highway.

### Reports of possible birthing trees

11. Substantive planning for duplication of the Western Highway between Ballarat and Stawell commenced in early 2008. In May 2013, the Minister for Planning endorsed an alignment for the section of duplicated highway between Beaufort and Ararat, including the area to the south of Langi Ghiran State Park.

12. In early 2017, before substantive construction of the relevant section of highway commenced, Aboriginal Victoria – the office responsible for administering Victoria’s Aboriginal cultural heritage legislation – notified VicRoads, the authority then responsible for the project, that it had received preliminary reports from a member of the public concerning a number of trees in the vicinity of Langi Ghiran State Park. This included two hollow trees that were said to have ‘all the hallmarks’ of highly culturally significant birthing trees used by Djab Wurrung ancestors when giving birth.

13. VicRoads subsequently facilitated inspections of the nominated trees by Aboriginal Victoria. Those inspections involved senior female Djab Wurrung representatives of Martang Pty Ltd (‘Martang’) and Eastern Maar Aboriginal Corporation (‘Eastern Maar’). At the time, the former was recognised by the Aboriginal Heritage Council – an independent statutory body made up of traditional custodians appointed by the Minister for Aboriginal Affairs – as the primary source of cultural heritage advice for the area, and the latter represented Aboriginal peoples with a registered native title claim over the region.

14. Aboriginal Victoria later wrote to VicRoads to report that these inspections had not substantiated the claims made about the area. On two occasions in May and November 2017, respectively, Aboriginal Victoria informed VicRoads that it was authorised to proceed with the project in accordance with a cultural heritage management plan previously approved by Martang.

15. In June 2018, as tree-removal near Langi Ghiran State Park was scheduled to commence, several individuals, including some Djab Wurrung traditional custodians, began to occupy the project site, causing works to cease. Members of this group later established a camp – the ‘Djab Wurrung Heritage Protection Embassy’ – at several locations along the approved highway alignment.

16. Around the same time, several Djab Wurrung traditional custodians made an application to the Commonwealth Government seeking protection of the project area under Commonwealth Aboriginal heritage protection legislation.

17. In August 2018, and again in February 2019, Eastern Maar also wrote to the Victorian Government to express concerns about the project and requested that it investigate alternatives to the approved highway alignment.

18. Broader community interest in the Western Highway project increased dramatically after details of efforts to protect the site were first published in traditional and social media platforms. To date, more than 179,000 people have signed an online petition calling upon the Victorian Government to halt works associated with the project.

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19. Djab Wurrung people in opposition to the project who spoke with the Ombudsman said the natural features and contours of the area impacted by the approved highway alignment – including, but not limited to, the nominated birthing trees – were sacred according to Aboriginal tradition; and that the highway works would involve unacceptable impacts to cultural heritage in this area.

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***‘We’re holding on to the last of what’s left.’***

- Oral submission to investigation.

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20. These traditional owners also said they held concerns about the nature and thoroughness of the cultural heritage assessments conducted by VicRoads when the highway alignment was developed, as well as the extent of VicRoads’ consultation with traditional custodians during this period.

## Project planning

### Development of the alignment

21. VicRoads recognised the Western Highway duplication project was likely to impact Aboriginal cultural heritage in early 2008, when it began preliminary planning activities associated with the project.
22. This led VicRoads to commission a desktop report into Aboriginal cultural heritage within the vicinity of the existing highway corridor. This report recognised the traditional Djab Wurrung connection to the region, and cautioned that previously unrecorded cultural heritage sites were likely to be encountered within the area.

23. Protection of Aboriginal cultural heritage sites was subsequently identified as one of several key objectives for the project. In 2011, two further Aboriginal cultural heritage assessments were commissioned for the purposes of evaluating alignment options for the section of highway between Buangor and Ararat, the focus of the present-day dispute. Information concerning broader cultural sensitivities was also solicited from the Registered Aboriginal Party for the area, Martang, and mapped against shortlisted alignment options.
24. The results of these assessments were considered and weighed against other project objectives. Information identified during the assessments influenced VicRoads to favour some alignment options and eliminate others.
25. Owing to the location of Langi Ghiran State Park, alignment options for the relevant section of highway were effectively limited to those which followed the existing highway alignment, either in full or in part, and those which deviated through farmland to the south.
26. It is noted that largely owing to this constraint, none of the alignment options shortlisted by VicRoads would have entirely avoided the areas later identified for protection by some Djab Wurrung traditional custodians.
27. The two alignment options nominated by VicRoads for inclusion in the project’s Environment Effects Statement, prepared under the *Environment Effects Act 1978* (Vic), were the subject of a further cultural heritage impact assessment, conducted in early 2012. This assessment concluded that while both alignment options could encounter previously unrecorded Aboriginal cultural heritage sites, this risk could be managed by undertaking targeted archaeological excavations and through preparation of a cultural heritage management plan for the project. VicRoads subsequently followed this advice.

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28. Neither alignment option presented in the Environment Effects Statement would have entirely avoided the areas surrounding the nominated birthing trees – both options followed the same route between Ararat and Langi Ghiran State Park, where one such tree is located, and both diverged south of the existing highway between Langi Ghiran and Buangor, intersecting to different degrees the area surrounding the other tree.
  29. The investigation established that VicRoads did not receive reports concerning the possible birthing trees until early 2017, after the highway alignment had been determined by the Minister for Planning.
  30. The decision not to pursue development of an alternative alignment favoured by some, but not all, Djab Wurrung opponents to the project – often referred to as the ‘northern option’ – appeared to have been based on a combination of environmental, cultural heritage, financial and road configuration considerations, and did not seem unreasonable in the circumstances.

### Consultation with traditional custodians

31. While VicRoads’ consultation with local residents and affected landholders during the project’s design phase was thorough and responsive, its consultation with Aboriginal communities was more limited, and tended to rely upon discussions between VicRoads, Aboriginal Victoria and Djab Wurrung traditional custodians associated with Martang.
32. VicRoads did not develop a cultural heritage consultation plan for the project. The preparation of such a plan was recommended, but not required by VicRoads’ *Cultural Heritage Guidelines*, and could have assisted VicRoads to identify and consult with other Aboriginal parties with connections to and knowledge of the area.
33. Despite this, the investigation noted that the *Aboriginal Heritage Act 2006* (Vic) prioritised consultation between project proponents and Registered Aboriginal Parties – these bodies being the ‘primary source of advice and knowledge’ on matters relating to Aboriginal cultural heritage within their designated area.
34. It may be for Parliament to consider whether the processes under the Aboriginal Heritage Act should be made more permissive of consultation with individuals and bodies who have not been accorded Registered Aboriginal Party status; noting, at the same time, the need to respect the principles of Aboriginal self-determination underpinning this legislation.
35. In this case, it is not clear that broader consultation would have led to earlier identification of the possible birthing trees or the other cultural values subsequently attributed to the area.

### Cultural heritage management plan

36. Under the Aboriginal Heritage Act, VicRoads was required to prepare a cultural heritage management plan through which impacts to Aboriginal cultural heritage associated with the project were to be identified and addressed.
37. Possible Aboriginal cultural heritage sites within the approved alignment corridor were investigated as part of this process. This involved three levels of cultural heritage assessment, including 66 days of field surveys and excavation activities undertaken in cooperation with Martang between January 2012 and August 2013.

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38. VicRoads consulted with Martang throughout the cultural heritage management plan process. This consultation did not lead to the identification of the possible birthing trees or the more significant cultural values that were subsequently attributed to the area. The investigation noted there appeared to be differing views within the Djab Wurrung community concerning the degree to which the project would impact cultural values associated with the area.
  39. Martang indicated it was satisfied that measures were in place to suitably minimise harm to Aboriginal cultural heritage when it determined to approve the project's cultural heritage management plan in October 2013. This was in accordance with the criteria identified in the Aboriginal Heritage Act, which, although prioritising principles of harm avoidance, required only that an activity be conducted in a way that minimised harm to Aboriginal cultural heritage.
  40. While some traditional custodians claimed that Martang was not sufficiently representative of Djab Wurrung people, the investigation noted that this body's limited ownership structure was recognised and addressed by the Aboriginal Heritage Council when it determined to approve Martang's application for registration as a Registered Aboriginal Party in September 2007.
  41. The investigation nevertheless saw the tensions at the heart of the Aboriginal Heritage Act and observed that, while processes under this legislation were intended to empower traditional custodians when speaking for Country, they also had the potential to exclude some voices from the discussion.

## Credit Trading Agreement

42. The investigation did not substantiate allegations that VicRoads unduly influenced Martang to approve the project's cultural heritage management plan.
43. Despite this, VicRoads' decision to negotiate a Credit Trading Agreement relating to the project with Martang during the period when Martang was required to evaluate the cultural heritage management plan was ill-advised and arguably created a conflict of interest.
44. The authority responsible for facilitating the Credit Trading Agreement, Trust for Nature, was not informed of Martang's role in evaluating the cultural heritage management plan and was not criticised by the investigation for its involvement in the arrangement.
45. There was no evidence before the investigation, however, that the Credit Trading Agreement was intended to influence Martang or that it had any impact on Martang's decision to approve the cultural heritage management plan.
46. Although its actions were not a subject of the investigation, records reviewed by the Ombudsman indicated that Martang approached its responsibilities concerning the project diligently, and in accordance with the requirements established under the Aboriginal Heritage Act.

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## Response to cultural heritage concerns

47. In June 2018, after works associated with the project were effectively halted by efforts to protect the site, VicRoads undertook to support a further, independent cultural heritage assessment of the area impacted by the project.
48. Following this assessment and further dialogue with Martang, Eastern Maar and representatives of the Djab Wurrung Heritage Protection Embassy, Major Road Projects Victoria ('MRPV') – the authority currently responsible for the project – developed several 'localised realignments' to the proposed highway. These are expected to avoid – in some cases only narrowly – 16 of approximately 22 trees identified as culturally significant by Djab Wurrung opponents to the project, including the two nominated birthing trees.
49. In light of these and other commitments made by MRPV, Eastern Maar – representing native title claimants for the area – has indicated it is satisfied that the project will adequately protect Aboriginal cultural heritage impacted by the project. This outcome also enjoys the support of the Federation of Victorian Traditional Owner Corporations and the Aboriginal Heritage Council.
50. It is not supported by representatives of the Djab Wurrung Heritage Protection Embassy who spoke with the Ombudsman or the Djab Wurrung traditional custodians seeking Commonwealth protection of the area.

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***'You can't separate the land from the tree, or the tree from the land. [...] It's still going to go through and take out a part of sacred Country.'***

– Oral submission to investigation.

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## Observations

51. While VicRoads' initial project consultation did not appear to have reached all relevant audiences, the investigation ultimately concluded that VicRoads and MRPV had made legally sound and good faith efforts to consult with traditional custodians and arrive at a compromise solution to the cultural heritage concerns about the project, once raised.
52. On one view, this outcome – which will see the proposed highway avoid 16 trees of significance, including the two nominated birthing trees – represents a significant achievement for those who mobilised to speak up for Country.
53. Yet it is also clear that the terms of the preliminary agreement between MRPV and Eastern Maar have not satisfied all Djab Wurrung traditional custodians who have expressed concerns about the project. These individuals have observed that the duplication works will inevitably harm a landscape that was once nurtured and revered by Djab Wurrung ancestors.
54. It is also clear concerns about the project continue to resonate with the broader community, and may risk impacting some sectors of the public's confidence in the Victorian Government's commitment toward protecting Aboriginal cultural heritage and the delivery of other initiatives seeking to mend relationships between the State and Aboriginal peoples.

## Compliance with human rights

55. The investigation did not conclude that the actions of VicRoads and MRPV were incompatible with the distinct cultural rights of Aboriginal people identified in section 19(2) of the Charter of Rights Act, while noting that MRPV and the other authorities responsible for the project must give proper consideration to the cultural rights of Aboriginal people when determining whether and how to move forward.

# Introduction

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## Why we investigated

56. In August 2019, the Ombudsman received a number of complaints about the planning and delivery of the Western Highway duplication project. The complaints invariably raised concerns about the potential for the highway project to damage or destroy sites of Aboriginal cultural significance, including a number of trees in the vicinity of Langi Ghiran State Park, to the east of Ararat, that were said to be sacred to Djab Wurrung traditional custodians.
57. Substantive planning for duplication of the Western Highway between Ballarat and Stawell commenced in early 2008. In May 2013, the former Minister for Planning endorsed an alignment for the section of duplicated highway between Beaufort and Ararat, including the area to the south of Langi Ghiran.
58. In early 2017, the media first reported claims, endorsed by some Djab Wurrung traditional custodians, that planning authorities had failed to recognise the cultural significance of two hollow trees in the path of the approved alignment, said to have been traditionally used by Djab Wurrung women when giving birth.
59. In June 2018, as tree-clearing in the vicinity of Langi Ghiran was scheduled to commence, concerned individuals established a camp at the project site – later called the ‘Djab Wurrung Heritage Protection Embassy’ – temporarily postponing construction. At the time of this report, substantive duplication of the disputed section of the highway is yet to commence.
60. The protests concerning the Western Highway project have received considerable local and international media coverage, with reports tending to emphasise a perceived lack of consultation by the Victorian Government with Djab Wurrung traditional custodians during the project planning phase.
61. The individuals who approached the Ombudsman also raised concerns about:
  - the nature and thoroughness of the cultural heritage assessments conducted when the highway alignment was developed
  - the project proponent’s reliance upon the advice of Martang Pty Ltd (‘Martang’) – the Registered Aboriginal Party for the area during the planning phase – and the proponent’s decision to enter into a Conservation Covenant and Credit Trading Agreement with this body
  - the perceived failure of the proponent to consider alternative alignments for the duplicated highway capable of avoiding or minimising impacts to Aboriginal cultural heritage in the area.
62. These individuals, some of whom were occupying the project site, asked the Ombudsman to investigate the handling of the project.
63. Complaints and approaches to the Ombudsman concerning the Western Highway duplication project are identified in Figure 1 (on the next page).
64. After receipt of the first complaints, Ombudsman officers made enquiries with Major Road Projects Victoria (an office within the Major Transport Infrastructure Authority; ‘MRPV’) and the Aboriginal Heritage Council under section 13A of the *Ombudsman Act 1973* (Vic).
65. Ombudsman officers also met with staff of these authorities and, in December 2019, the Ombudsman visited the highway site to meet with representatives of the Djab Wurrung Heritage Protection Embassy.

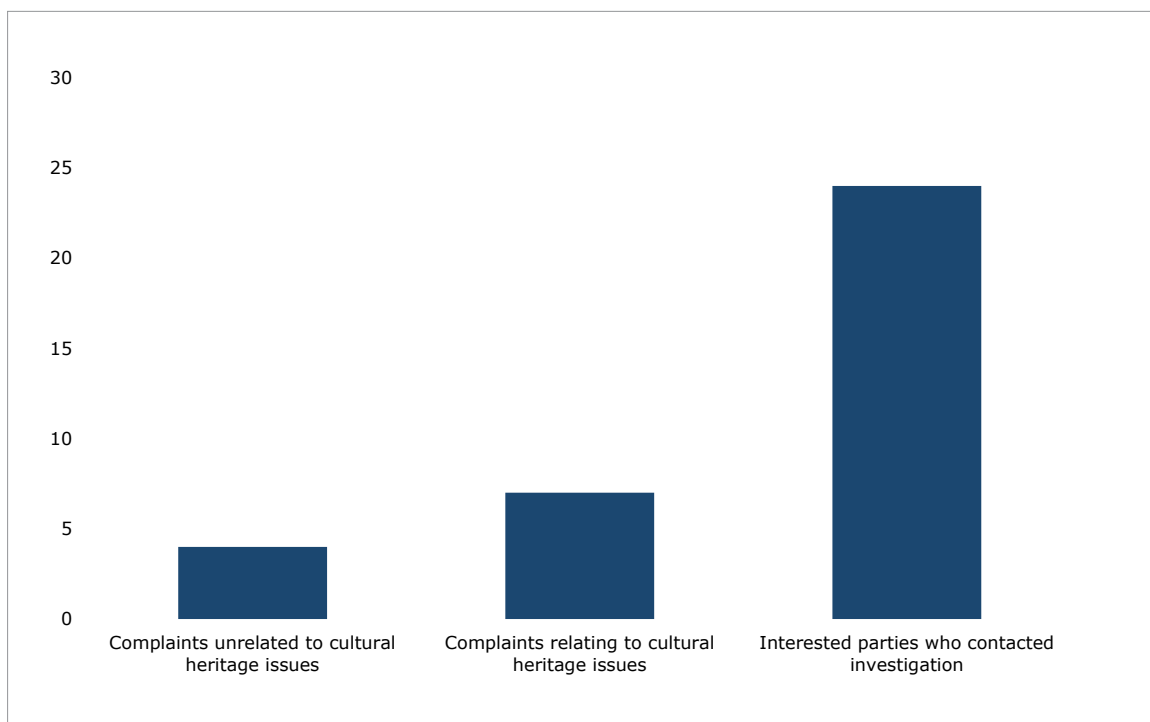
66. On 20 December 2019, the Ombudsman notified the following parties of her intention to conduct an ‘own motion’ investigation into the planning and delivery of the Western Highway duplication project, with particular regard to concerns about the protection of sacred Aboriginal sites:

- the Minister for Transport Infrastructure
- the Minister for Planning
- the Minister for Energy, Environment and Climate Change
- the Chief Executive Officer of VicRoads
- the Director-General of the Major Transport Infrastructure Authority
- the Chair of Trust for Nature.

## Jurisdiction

67. Section 16A of the Ombudsman Act provides that the Ombudsman may conduct an own motion investigation into any administrative action taken by or in an ‘authority’.
68. The definition of ‘authority’ in the Ombudsman Act includes:
- a body, whether incorporated or unincorporated, that is established by an Act for a public purpose
  - a body whose members are appointed by the Governor in Council or a Minister
  - an administrative office established under the *Public Administration Act 2004* (Vic).
69. Over the years, responsibility for the Western Highway duplication project transferred between three agencies.

Figure 1: Approaches to Victorian Ombudsman concerning Western Highway duplication project



Source: Victorian Ombudsman



70. The agencies responsible for the project are:

Table 1: Western Highway duplication project proponents		
Proponent	From	Until
VicRoads	Commencement	30 June 2018
Major Road Projects Authority	1 July 2018	31 December 2018
Major Road Projects Victoria	1 January 2019	Present

Source: Victorian Ombudsman

### VicRoads

71. During the period it was responsible for the project, VicRoads was a body corporate established by section 15(1) of the *Transport Act 1983* (Vic) to manage Victoria's road network for the benefit of the public and therefore satisfied the first definition of 'authority' identified above.
72. During this period, VicRoads was also a body consisting of one member (the Chief Executive) appointed by the Governor in Council under sections 80(2) and 84(1) of the *Transport Integration Act 2010* (Vic) and therefore also satisfied the second definition of 'authority' above.
73. On 1 January 2020, most powers and functions of VicRoads were transferred to the Head of Transport for Victoria and the Secretary of the Department of Transport.

### MRPA

74. Between 1 July 2018 and 31 December 2018, the Western Highway duplication project was managed by the now-defunct Major Road Projects Authority ('MRPA'). MRPA was an administrative office established by order under the Public Administration Act on 14 June 2018 and therefore satisfied the third definition of 'authority' identified above.

### MRPV

75. MRPV is an office within the Major Transport Infrastructure Authority. The Major Transport Infrastructure Authority is an administrative office established by order under the Public Administration Act on 21 December 2018 and therefore satisfies the third definition of 'authority' identified above.

### Western Highway Project Section 2 Inquiry and Advisory Committee

76. Between November 2012 and February 2013, proposed alignments for the relevant section of the Western Highway were examined by an entity known as the 'Western Highway Project Section 2 Inquiry and Advisory Committee' ('the Inquiry and Advisory Committee').
77. The Inquiry and Advisory Committee comprised two bodies:
- an inquiry appointed by the former Minister for Planning under section 9(1) of the *Environment Effects Act 1978* (Vic)
  - an advisory committee established by the Minister for Planning under section 151(1) of the *Planning and Environment Act 1987* (Vic).



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78. The bodies constituting the Inquiry and Advisory Committee satisfied the first definition of ‘authority’ identified above because each was established under an Act for a public planning purpose.
79. Additionally, these bodies satisfied the second definition of ‘authority’ because their members were appointed by a Minister.

### Trust for Nature (Victoria)

80. Trust for Nature (Victoria) (‘Trust for Nature’) was responsible for developing and administering the Credit Trading Agreement between VicRoads and Martang. It was also a party to the Credit Trading Agreement and the associated Conservation Covenant.
81. Trust for Nature is a body corporate established by section 2(1) of the *Victorian Conservation Trust Act 1972* (Vic) for public conservation purposes and therefore satisfies the first definition of ‘authority’ above.

### Terms of reference

82. The terms of reference for the investigation focused on the planning decisions made in connection with the project, with specific reference to the following issues:
- how the alignment of the section of the highway between Beaufort and Ararat was determined
  - the extent to which development of the project made appropriate allowances for the protection of Aboriginal cultural heritage
  - the negotiation and execution of the Credit Trading Agreement between VicRoads, Martang and Trust for Nature and the Conservation Covenant between Martang and Trust for Nature

- how the project proponents responded to concerns raised about the protection of sacred Aboriginal sites.

83. Consistent with the Ombudsman’s functions under section 13(2)(a) of the Ombudsman Act, the investigation also considered whether the actions of the project proponents were compatible with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘Charter of Rights Act’).
84. In developing the terms of reference, the investigation examined publicly available records and media reports concerning the Western Highway duplication project and obtained further information from Ararat Rural City Council, MRPV and the Aboriginal Heritage Council.
85. Information available to the Ombudsman did not indicate that Ararat Rural City Council played a significant part in decisions concerning the project, and the actions of the council therefore did not form part of the investigation.
86. The alignment for the relevant section of the highway was ultimately determined by the Minister for Planning; however, a Minister is not an ‘authority’ for the purposes of the Ombudsman Act and this decision therefore did not form part of the investigation.
87. Owing to the principles of Aboriginal self-determination underpinning their functions and the absence of clear administrative error, the actions of the Registered Aboriginal Parties and the Aboriginal Heritage Council also did not form part of the investigation.

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## Investigation methodology

88. The investigation involved:

- assessing the information provided by the individuals who complained to the Ombudsman about the project
- reviewing relevant legislation, including the:
  - Charter of Rights Act
  - Environment Effects Act
  - Planning and Environment Act
  - *Aboriginal Heritage Act 2006* (Vic)
  - *Traditional Owner Settlement Act 2010* (Vic)
  - *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)
  - *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
- making enquiries with VicRoads and the MRPV through the Department of Transport and considering the Department's responses dated 25 February 2020 and 23 April 2020
- making enquiries with Trust for Nature and considering its response dated 22 January 2020
- applying to inspect files held by the Supreme Court of Victoria and Federal Court of Australia
- reviewing information from the Victorian Aboriginal Heritage Register
- reviewing the files of the Aboriginal Heritage Council
- reviewing more than 1,000 records concerning the project, including documents obtained from:
  - VicRoads, the MRPA and MRPV (through the Department of Transport)
  - Planning Panels Victoria
  - Trust for Nature
  - Aboriginal Victoria
  - relevant court files
- reviewing historical archives, newspaper records and other resources to research the recorded history of the Djab Wurrung people, the Western Highway and the Ararat region
- consulting with Dr Ian D Clark, author of *We Are All of One Blood: A History of the Djabwurrung Aboriginal People of Western Victoria, 1836-1901* and *Scars in the Landscape: A Register of Massacre Sites in Western Victoria, 1803-1859*
- attending the highway site and meeting with representatives of the Djab Wurrung Heritage Protection Embassy
- seeking and considering the views of other Djab Wurrung traditional custodians involved in the matter
- providing a draft of this report to MRPV, VicRoads, Trust for Nature, the Department of Environment, Land, Water and Planning, the Victorian Aboriginal Heritage Council, Aboriginal Victoria, Martang and Eastern Maar Aboriginal Corporation for fact-checking and comment
- presenting the Ombudsman's tentative conclusions to representatives of the Djab Wurrung Heritage Protection Embassy and other interested parties.

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89. The Ombudsman also engaged two student interns from the University of Melbourne to undertake desktop research concerning:

- the history and traditional cultural practices of the Djab Wurrung people
- the recognition and protection of Aboriginal cultural heritage in Victoria
- the development and operation of the Aboriginal Heritage Act.

90. All respondent authorities cooperated with the investigation and, where necessary, assisted Ombudsman officers to identify and retrieve records relating to the project.

91. Due to email disposal policies, machinery of government changes and other issues associated with the passage of time, the Department of Transport advised the Ombudsman that it was unable to locate some documents requested by the investigation.

92. These documents were not deemed critical to our understanding of the project, and their absence did not meaningfully impede the investigation.

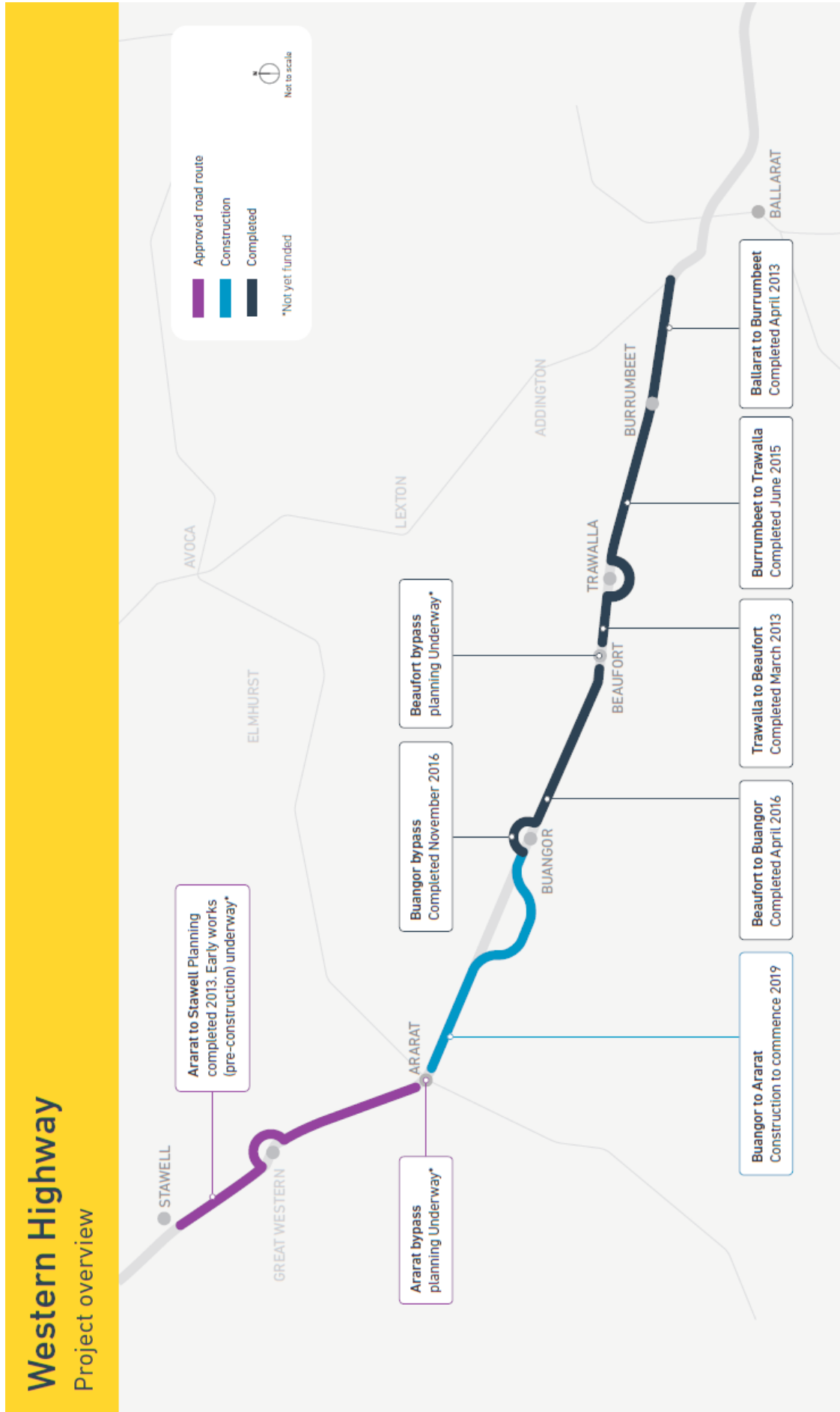
## Procedural fairness and privacy

93. This report contains adverse comments about VicRoads. In accordance with section 25A(2) of the Ombudsman Act, the Ombudsman gave VicRoads a reasonable opportunity to respond to a draft report. This final report fairly sets out its responses.

94. In accordance with section 25A(3) of the Ombudsman Act, any other persons who are or may be identifiable in this report are not the subject of any adverse comment or opinion. They are identified because the Ombudsman is satisfied:

- it is necessary or desirable to do so in the public interest; and
- identifying those persons will not cause unreasonable damage to their reputation, safety or wellbeing.

Figure 2: Western Highway construction status, March 2019



Source: MRPV

# Djab Wurrung Country

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95. The traditional lands of the Djab Wurrung people are located in Western Victoria and are generally considered to include or pass through the areas now known as Hexham (*Petereet*), Lake Bolac (*Buluk*), Middle Creek (*Wangnarra*), Buangor, Ararat (*Butingitch*), Stawell (*Kobram*), Halls Gap (*Budgem Budgem*), Dunkeld and Hamilton (*Mulleraterong*).<sup>1</sup>
96. Djab Wurrung Country is part of an ancient volcanic landscape, interspersed with temporary and perennial lakes and swamps, intermittent streams and open plains. It was historically covered by savannah woodlands and grasslands – an ecosystem characterised by scattered trees. Archaeological surveys have demonstrated that parts of this area have been occupied by Aboriginal people for more than 12,500 years, representing approximately 417 generations.<sup>2</sup>
97. Prior to European contact, wildlife and game were abundant in the region. Djab Wurrung traditional food resources included a variety of marsupials, fish, shellfish, birds and plant foods such as *murnang* (daisy yam). When in season, eels were a ‘staple food’. Along seasonal migration routes, the Djab Wurrung would use a series of complex man-made drainage systems, spanning many hundreds of metres, to harvest eels in ‘great quantity’.<sup>3</sup>
98. The Djab Wurrung cultivated the land, burning it to encourage regrowth which would in turn attract wildlife to the area. Djab Wurrung women would harvest edible roots such as *murnang* and gather birds’ eggs, shellfish and small animals. Seeds were harvested and ground for food, thistles were eaten to induce sleep and notches were cut into wattle trees to collect and store edible gum.<sup>4</sup>
99. The Djab Wurrung also used native vegetation for other purposes. Plant fibres were used to craft string, nets, bags and baskets. The stems of reeds were fashioned into spears and necklaces. Wattle gum was mixed with wood-ash to form a waterproof adhesive, and wattle bark was used to treat rheumatism and indigestion. River red gums served particularly important functions: bark from these trees was fashioned into shelters and canoes, sap and gum were used to heal burns and steam from leaves was inhaled to treat a number of illnesses.<sup>5</sup>
100. Due to the relative abundance of food sources, the Djab Wurrung population is considered to have been semi-sedentary, particularly during autumn and winter. In wetland areas, the Djab Wurrung would intermittently reside in groups of permanent huts, likened to villages. During the summer months, Djab Wurrung, Girai Wurrung and Watha Wurrung clans would gather near Hexham for hunting and ceremonial purposes. In early autumn, as many as 800-1,000 individuals, including members of the Djab Wurrung, would gather at Lake Bolac for the annual eel harvest.<sup>6</sup>

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1 Ian D Clark, ‘We Are All of One Blood’ – A History of the Djabwurrung Aboriginal People of Western Victoria 1836-1901 (Createspace, 2016) vol 1, 11-22.

2 Ibid 54; Robert G Gunn, *Langi Ghiran State Park Archaeological Survey* (Victorian Aboriginal Heritage Register, 1991) 33.

3 Clark, above n 1, vol 1, 55-58; Ian D Clark, *Scars in the Landscape: A Register of Massacre Sites in Western Victoria, 1803-1859* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 1995) 57.

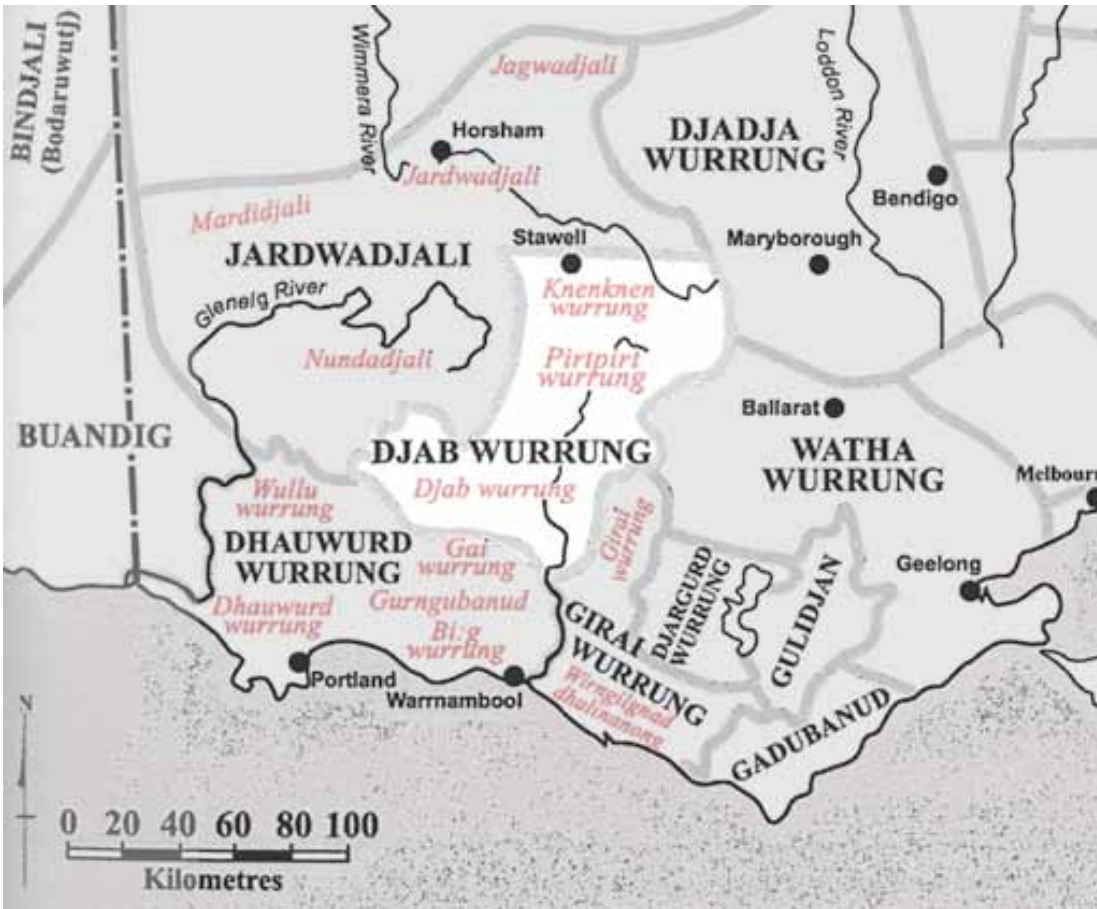
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4 Clark, above n 1, vol 1, 61; Beth Gott, ‘Grampians Aboriginal Plants’ in *Australia Felix: The Chap Wurrung and Major Mitchell* (Dunkeld and District Historical Museum, 1987) 37, 44-45.

5 Gott, above n 4, 47; Nelly Zola and Beth Gott, *Koorie Plants, Koorie People* (Koorie Heritage Trust, 1992) 14, 55.

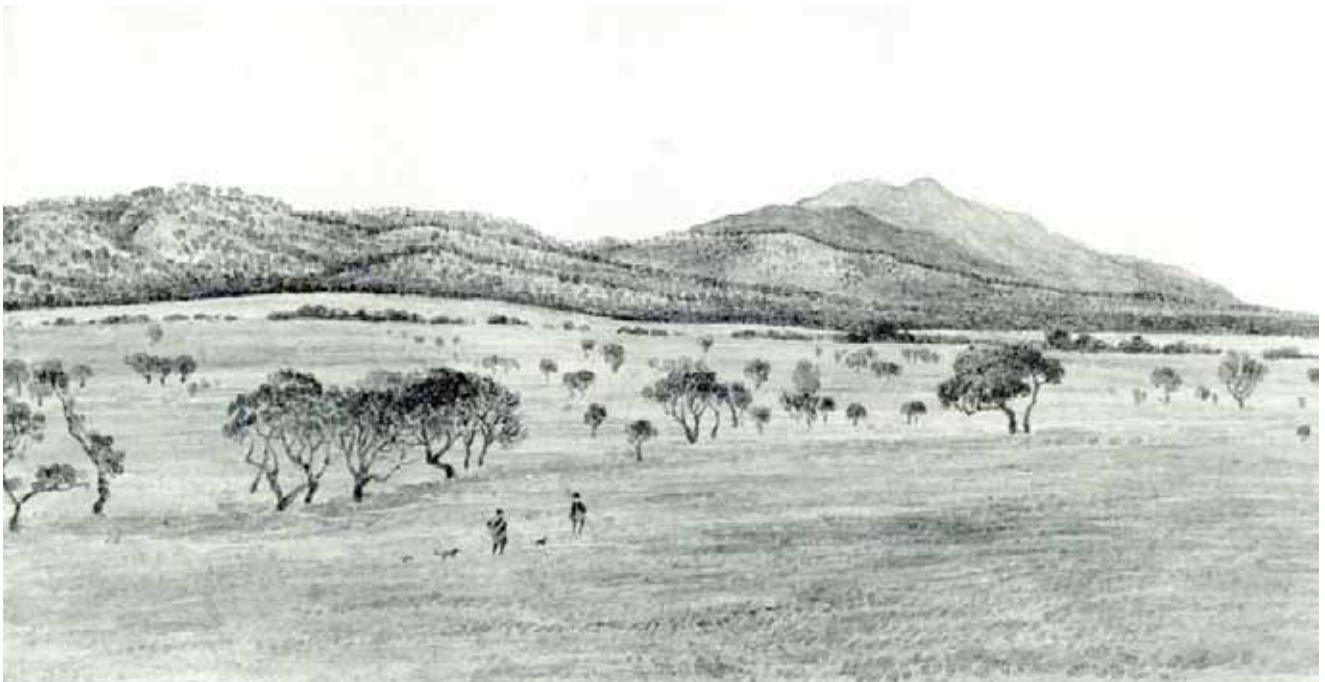
6 Clark, above n 1, vol 1, 56-57.

Figure 3: Western Victoria Aboriginal languages and dialects (Clark, 2016)



Source: Ian D Clark, 'We Are All of One Blood' - A History of the Djabwurrung Aboriginal People of Western Victoria, 1836-1901 (Createspace, 2016), vol 1, 53

Figure 4: Depiction of Aboriginal people at Middle Creek, south-east of Langi Ghiran, 1850



Source: Duncan Elphinstone Cooper, 'Middle Creek, Chalicum'; reproduced in Phillip Brown, *The Chalicum Sketchbook 1842-53 and Supplementary Paintings by Duncan Elphinstone Cooper* (National Library of Australia, 1987), 66.



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101. There were approximately 41 Djab Wurrung clans in total, the members of each of which spoke one of three dialects of the Djab Wurrung language. The area around Mount Langhi Ghiran (Larnji djerin) and Mount Cole (Burb-ba-burb) was occupied by the Utoul Balug clan, the area to the south of Ararat along the Hopkins River (Tonedidjerer) was occupied by the Tonedidgerer Balug clan, and the area surrounding Mount Cole, to the north-east of Langi Ghiran, was occupied by the Beeripmo Balug clan. Both the Utoul Balug and Beeripmo Balug clans were known to inter their dead in trees.<sup>7</sup>

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### ***'That's my country belonging to me'***

- Tung.bor.roong, head of the Tonedidgerer Balug clan, 1841

*Source: George Augustus Robinson, The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate Volume 2, 1 October 1840 - 31 August 1841* ed Ian D. Clark (Heritage Matters, 1998), 318 (entry dated 17 July 1841)

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102. Religion was very important for the Djab Wurrung - it 'gave a meaning to life, and it maintained order by a totemic geography'. Djab Wurrung traditional society was divided into two matrilineal totemic moieties - the Krokitch (white cockatoo) and Kaputch (black cockatoo). Within these moieties were a number of sub-totems such as the possum, moon, parrot and carpet snake (Krokitch) and the boa-snake, crow, bee and bunyip (Kaputch). The moiety system governed social relationships and determined whom one could marry.<sup>8</sup>

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7 Ibid 11, 22-26, 116-164; George A Robinson, *The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate: Volume 2, 1 October 1840 - 31 August 1841* ed Ian D Clark (Heritage Matters, 1998) 368 (entry dated 6 August 1841).

8 Clark, above n 1, vol 1, 62-65, 79.

103. Historically, it was recorded that the Djab Wurrung clans near Mt William (Duwil) believed in two evil spirits, a male and a female, called Corokeet, that were said to reside in the mountains near Langi Ghiran.<sup>9</sup>

104. The name 'Langi Ghiran' is generally understood to mean 'home of the black cockatoo' in the Djab Wurrung language, and archaeological surveys have demonstrated that Mount Langi Ghiran and the surrounding area have been occupied at least intermittently by Aboriginal peoples for more than 4,000 years. At least three traditional Djab Wurrung rock art sites survive at Langi Ghiran today, depicting a unique and complex art style.<sup>10</sup>

## **Post-European contact**

105. In his *History of the Djabwurrung*, Ian Clark estimates there were probably between 2,460 and 4,920 Djab Wurrung people living when Europeans began to invade their traditional lands.<sup>11</sup>

106. In July 1836, Sir Thomas Mitchell conducted the first European survey of Djab Wurrung Country. In his account of this journey, Mitchell was either unwilling or unable to identify the extent of the Aboriginal connection to the area:

We had at length discovered a country ready for the immediate reception of civilised man, and fit to eventually become one of the great nations of the earth. Unencumbered with too much wood, yet possessing enough for all purposes; with an exuberant soil under a temperate climate; bounded by the sea-coast and mighty rivers, and watered abundantly by streams from lofty mountains: this highly interesting region lay before me with all its features new and untouched as they fell from the hand of the Creator!

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9 A S Kenyon, 'The Aboriginal Protectorate of Port Phillip: Report of an Expedition to the Aboriginal Tribes of the Western District by the Chief Protector, George Augustus Robinson' (1928) 12(8) *Victorian Historical Magazine* 134, 159 (entry dated 20-25 July 1841).

10 Clark, above n 1, vol 2, 453; Gunn, above n 3, 31-33.

11 Clark, above n 1, vol 1, 52.

Figure 5: Depiction of Aboriginal people near Challicum, south-east of Langi Ghiran, 1851



Source: Duncan Elphinstone Cooper, 'Forest with Native Camp and Mia Mias'; reproduced in Phillip Brown, *The Challicum Sketchbook 1842-53 and Supplementary Paintings by Duncan Elphinstone Cooper* (National Library of Australia, 1987), 15

Of this Eden it seemed that I was only the Adam; and it was indeed a sort of paradise to me, permitted, thus to be the first to explore its mountains and streams - to behold its scenery - to investigate its geological character - and, finally, by my survey, to develop those natural advantages all still unknown to the civilised world, but yet certain to become, at no distant date, of vast importance to a new people.<sup>12</sup>

107. Little is known of how the Djab Wurrung experienced the period between 1836 and 1838. In his *History of the Djabwurrung*, Clark describes this time as the 'lull before the storm.' What followed was a decades-long process of invasion, dispossession and murder, culminating in the 'near-ethnocide' of the Djab Wurrung by the end of the 1870s.<sup>13</sup>

### Invasion by squatters

108. By 1838, squatters had begun to trespass and settle on Djab Wurrung Country. Keen to establish and defend 'their' runs, these individuals dispossessed and in many cases excluded the Djab Wurrung from their traditional lands, often after exploiting the hospitality of local clans.<sup>14</sup>

109. Within three years, 25 per cent of Djab Wurrung Country was occupied by squatters. By the end of 1841, this figure had increased to 50 per cent. The squatters invading the Western District also left their mark upon the landscape, in turn interfering with traditional Djab Wurrung cultural associations.<sup>15</sup>

<sup>12</sup> Thomas Mitchell, *Three Expeditions into the Exterior of Eastern Australia: With Descriptions of the Recently Explored Region of Australia Felix, and of the Present Colony of New South Wales* (T & W Boone, 1838), vol 2, 170 (entry dated 13 July 1836).

<sup>13</sup> Clark, above n 1, vol 1, 84, 331.

<sup>14</sup> Ibid 233.

<sup>15</sup> Ibid 28, 30, 192.



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110. Almost immediately, the Djab Wurrung attempted to defend themselves and their lands, fighting a ‘sustained guerrilla war’ against the trespassing squatters. Their tactics were:

well thought out and involved the processes of evasion, surveillance, decoy and attack. Examples of fear were paralleled by displays of boldness where no fear was shown.<sup>16</sup>

111. Djab Wurrung resistance was effective in the short term, but was ultimately broken by a combination of superior European firepower and, later, the efforts of the Native Police Corps.<sup>17</sup>

### Protectorate era

112. In 1838, the Port Phillip Aboriginal Protectorate was established to situate European colonisation ‘on a humanitarian footing’. Shortly afterwards, George Augustus Robinson was appointed Chief Protector of the Port Phillip District.<sup>18</sup>

113. Responsible for managing relations between government, the colonial settlers and Aboriginal peoples, Robinson divided the Port Phillip District into four Protectorate districts, splitting Djab Wurrung Country in the process.<sup>19</sup>

114. Ultimately, the goals of the Protectorate were at odds with government support for the activities of the squatters, and the system proved ineffective in protecting the Djab Wurrung from further dispossession and violence. The Protectorate was ultimately abolished in 1849, owing both to its poor performance and hostility from squatters.<sup>20</sup>

115. In his *Scars in the Landscape*, Clark identifies a total of 23 recorded massacres and killings of Djab Wurrung people between 1840 and 1847, the majority of which took place between 1840 and 1842, at the height of Djab Wurrung resistance.<sup>21</sup>

116. Syphilis and other venereal diseases were also common illnesses amongst the Djab Wurrung by the latter half of the 1840s, and few children were being born. By 1845, the Djab Wurrung population is estimated to have numbered just 510 individuals – a decline from pre-European contact times of between 80 and 90 per cent.<sup>22</sup>

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***‘They [Djab Wurrung] ... wished me to go round to all the people who were unkind to them and drove [them] from their country and now would not permit them near their stations, and begged of me not to let the white man shoot them. ... Their situation is to be deeply commiserated.’***

*Source: George Augustus Robinson, The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate Volume 2, 1 October 1840 – 31 August 1841 ed Ian D. Clark (Heritage Matters, 1998), 372 (entry dated 8 August 1841)*

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16 Ibid 207-209; Ian D Clark, ‘The Spatial Organisation of the Chap Wurrung – a Preliminary Analysis’ in *Australia Felix: The Chap Wurrung and Major Mitchell* (Dunkeld and District Historical Museum, 1987) 1, 31.

17 Clark, above n 1, vol 1, 217.

18 Rachel Standfield, ‘The Vacillating Manners and Sentiments of These People: Mobility, Civilisation and Dispossession in the Work of William Thomas with the Port Phillip Aboriginal Protectorate’ (2011) 15 *Law Text Culture* 162, 162.

19 Clark, above n 1, vol 1, 247.

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20 Ibid 259-260; Standfield, above n 18, 168.

21 Clark, above n 3, 57-83.

22 Ian D Clark, *Aboriginal Languages and Clans: An Historical Atlas of Western and Central Victoria* (Dept. of Geography and Environmental Science, Monash University, 1990) 98; Clark, above n 1, vol 1, 33.

Figure 6: Government advertisement of country lots at Langi Ghiran, 1857

Chief Secretary's Office, Melbourne, 21st December, 1857.

**REGISTRATION OF VOTERS.**—It is hereby notified for general information that FORMS of the Second Schedule to the Act of Parliament 21 Victoria, No. 23, being the CLAIM TO VOTE, may be obtained, on payment of one penny for each form, at all Post Offices, Police Offices, Offices of Petty Sessions, of Registrars of Births, Deaths and Marriages, and of Electoral Registrars, throughout the colony.

By His Excellency's command,  
**WILLIAM C. BAINES.**  
 24th Dec 29

Public Works Office, Melbourne, 22nd December, 1857.

**TENDERS** are required for a CORRUGATED IRON FENCE round the RESERVE for the new Government Offices.

Tenders to be opened (in presence of the tenders), at eleven o'clock on Tuesday, 29th December.

Full particulars at this office.  
**DAVID MOORE.**  
 24th Dec 29

Government Stores, Melbourne, 24th December, 1857.

**TENDERS**, sealed and described as "Tenders for, &c." will be received until Twelve o'clock on TUESDAY, the 29th Instant, from persons willing to supply the undermentioned Articles for the service of the Government.

Particulars and printed forms of Tender can be obtained on application at this Office, and notification will be given to the persons only whose Tenders are accepted.

1 Billiard Table (to specification).  
 1 Large Clock (ditto).  
**R. NASH, Government Storekeeper.**  
 24th Dec 29

Public Works Office, Melbourne, 24th November, 1857.

**TWO Architects.—COMPETITION DESIGNS** are invited for a new GENERAL POST OFFICE, Melbourne. The following Premiums will be awarded:—

For the best Architectural Design ..	£500
Second best do. .. .. .	200
Third best do. .. .. .	100
For the best Arrangement .. .. .	300
Second best do. .. .. .	200
Third best do. .. .. .	100

Printed particulars, and lithographed plans of the site may be obtained at this office.  
**DAVID MOORE.**  
 24th Dec 29

**COUNTRY LOTS.**  
 Benalla and Kelferra: 31 lots, varying from forty-four to 297 acres, situate on the Broken River, near the main Sydney road and distant from one mile from Benalla, and about fifty miles from Kelferra. Portions 37 to 45, parish of Kelferra, in frontage to the main road from Benalla to the tide. The soil on the banks of the Broken River is good, and well adapted for agricultural purposes. Back country is good, well grassed, and adapted for dairy purposes.  
 Upset price, £1 per acre.  
 Note.—Lithographic plans, &c., at the Survey Office, Benalla; the Survey Office, Beechworth; the Crown Lands Office, La Trobe-street, Melbourne; 7, 8, 9, 10, and 11, Land Sales at Ararat—Ararat Gold Field, on Monday the 25th Jan 1858, and four following days, at the Police Office commencing at eleven a.m. on each day.

**TOWN LOTS.**  
 Ararat—194 quarter acre lots, upset price 8 pence.

**COUNTRY LOTS.**  
 Langi Ghiran—40 lots varying from 21 to 120 acres, situate in the parish of Langi Ghiran, immediately east from the Ararat Diggings, and intersected by the main road from Ballarat to Ararat and Pleasant Creek. The land in general is of medium quality, and in portions very good; part of section 19 is moderately timbered with box and gum. Upset price 11. per acre.  
 Note.—Lithographic plans, &c., at the Police Office, Ararat, Belfast, and Warrambool, the Survey Office, Ballarat, and the Public Lands Office, Melbourne. 25th Dec

**COUNTRY LOTS.**  
 Langi Ghiran—40 lots varying from 21 to 120 acres, situate in the parish of Langi Ghiran, immediately east from the Ararat Diggings, and intersected by the main road from Ballarat to Ararat and Pleasant Creek. The land in general is of medium quality, and in portions very good; part of section 19 is moderately timbered with box and gum. Upset price 11. per acre.  
 Note.—Lithographic plans, &c., at the Police Office, Ararat, Belfast, and Warrambool, the Survey Office, Ballarat, and the Public Lands Office, Melbourne. 25th Dec

**Drapery and Clothing.**

**ATTENTION.**—Patent HALF-WELLINGTONS, 15s.; Balmoral, 12s. 6d. Fenwick Brothers, Melbourne Clothes Exchange, King-street, Flagstaff Cutting. 187 Dec 29

**CABBAGE-TREE HATS** all qualities, constantly on SALE. J. Katzenstein and Co., 21 Little Collins street east. 191 Dec 29

**LADIES.**—RICHARD LITTLE, top of Bourke-street, is Selling Fashionable Straw Crinoline, and Millinery Bonnets, at desperately low prices. 290 Dec 26

page, at eight per cent., as may suit the convenience of the purchaser. As Moreton Bay will shortly become the seat of Government of the new colony, the above property, situated in the immediate vicinity of the capital, will be a most eligible investment.  
 For further particulars apply to the proprietor, S.

**COUNTRY LOTS.**  
 Langi Ghiran—40 lots varying from 21 to 120 acres, situate in the parish of Langi Ghiran, immediately east from the Ararat Diggings, and intersected by the main road from Ballarat to Ararat and Pleasant Creek. The land in general is of medium quality, and in portions very good; part of section 19 is moderately timbered with box and gum. Upset price 11. per acre.  
 Note.—Lithographic plans, &c., at the Police Office, Ararat, Belfast, and Warrambool, the Survey Office, Ballarat, and the Public Lands Office, Melbourne. 25th Dec

Paddocks, Stockyards, Milking Yards, &c., with a very comfortable House on purchased land. Full particulars at their offices, 122 Queen-street. 13 Dec 29

**PORT FAIRY DISTRICT.—WILLIAM HURST** has for SALE, by private contract, a STATION in the Port Fairy District, with 1,400 Head of Cattle, including 200 spayed cows. Further particulars to be obtained on application at 67 Bourke-street west. 25th Dec

**STATIONS.**—William Hurst has for SALE, by private contract, TWO STATIONS on the Buffalo River, with extensive improvements. For particulars apply at 67 Bourke-street west. 24th Dec

**WELSH PONY** for SALE, very handsome, sound, quiet, very fast in harness. Andrew M'Arthur, Kirk's Bazaar. 63 Dec 29

**WORKING BULLOCKS** for SALE.—Jas. L. Loten and Co. have for SALE, Three Teams Working BULLOCKS, of Eight each. Apply at the yards. 125 Dec 28

**NIGHTMAN.**—Waterclosets thoroughly cleaned on reasonable terms. William Bobber, office 64 Bourke-street west; residence, 78 Smith-street, Collingwood. Rubbish and Dustheaps removed. 217 Dec 29

Source: The Argus (Melbourne, 26 December 1857), 8

## Gold rush and Central Board eras

117. Abolishment of the Protectorate resulted in a largely unregulated relationship between the European squatters and Aboriginal traditional custodians. During the 1850s, following the discovery of gold, almost 30,000 miners and their families descended on the region, making camp in the area surrounding Ararat. Mining activities within the northern parts of Djab Wurrung Country further damaged the landscape, bringing about 'a second wave of dispossession'.<sup>23</sup>

118. During this period, the remaining Djab Wurrung sought work on pastoral runs, where they were often exploited and underpaid. Mortality rates were higher amongst the Djab Wurrung than the European population, and this, combined with low birth rates, caused the Djab Wurrung population to further decline. One submission to a Victorian Government Select Committee reported that there were no Djab Wurrung children born between 1850 and 1858.<sup>24</sup>

*'I should not think it improbable that a very extensive area of paying shallow ground may be opened. That the ranges would pay for sluicing too, I do not for a moment doubt: but, as one peers into the future, one almost regrets that these magnificent slopes, so green and fertile, should be torn up by any other hands than that of the cultivator.'*

Source: The Star (Ballarat, 23 November 1857), 2

23 Clark, above n 1, vol 1, 35, 271.

24 Clark, above n 1, vol 1, 100, 272, 280.

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119. In 1860, a Central Board was established 'to watch over the interests' of Aboriginal people. This body quickly attempted to confine Aboriginal people 'as closely as possible' to permanent reserves and would later become infamous for its association with the Stolen Generations.<sup>25</sup>
120. In his *History of the Djabwurrung*, Clark identifies the Central Board era as marking the 'third wave of dispossession' for the Djab Wurrung. The period was characterised by a 'flood of movement', as many of the remaining Djab Wurrung were exiled to various places located outside their traditional lands; chiefly Lake Condah, Framlingham and Coranderrk.<sup>26</sup>
121. Those Djab Wurrung who fought to remain on Country were largely forced to rely upon station employment and begging to survive. Traditional gatherings and ceremonies all but ceased and, in 1862, the 'last' Djab Wurrung corroboree was observed near Hexham.<sup>27</sup>
122. The Djab Wurrung population continued to decline over the 1870s, before reaching its lowest point in 1880. Afterwards, the Djab Wurrung population is estimated to have slowly recovered.<sup>28</sup>
123. Today, many Djab Wurrung descendants live off Country, while others continue to maintain a presence on their traditional lands

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***'In the spring of 1836, some of Major Mitchell's head men spent a fortnight beside Lake Repose, a few miles south-west of Glenthompson[.] ... One of the men marked the site of the camp by cutting the inscription on a red-gum tree. For years, the [Aboriginal people] protected the tree by removing the grass around it each summer, but after they were gone it was caught in a bushfire and badly charred.'***

*Source: Lorna Banfield, Like the Ark: The Story of Ararat (Longman Cheshire, 1955) 54*

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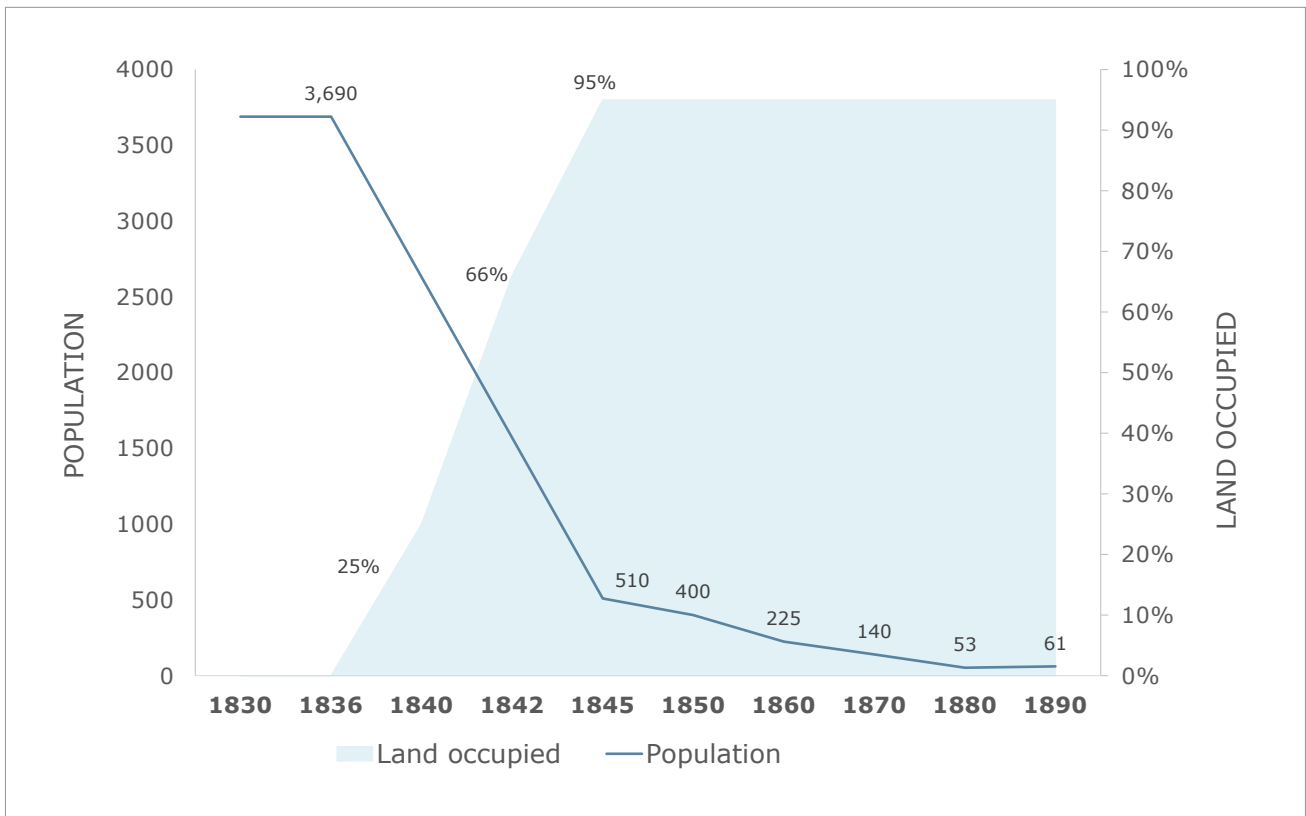
25 Ibid 287-289; Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 50.

26 Clark, above n 1, vol 1, 302, 312.

27 Clark, above n 22, 100; Clark, above n 1, vol 1, 298.

28 Ibid 326-329.

Figure 7: Estimated Djab Wurrung population decline vs. proportion of Djab Wurrung Country occupied by colonists, 1836-1890



Source: Victorian Ombudsman; data from Ian D Clark, *'We Are All of One Blood' - A History of the Djabwurrung Aboriginal People of Western Victoria 1836-1901* (Createspace, 2016) vol 1.

# The Western Highway

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124. The routes observed by Australia's colonial roads often held associations with Aboriginal history, and the precursor to the Western Highway was reportedly no exception:

Over centuries, the tracks used by [Aboriginal people], especially those across difficult country, came to be well marked. The Omeo Highway is said to partly follow one such route as it leads from the valley of the Mitta Mitta across the High Plains into the Tambo valley. Certainly river valleys were the routes by which an Aboriginal guide led Gippsland pioneer Angus McMillan to his discovery of cattle pastures. Similarly the Western Highway between Horsham and Dimboola follows part of an ancient road which elsewhere hugged the Wimmera River.<sup>29</sup>

125. Although initially nameless, parish plans and local accounts from the late 1850s identify a track travelling west from Beaufort through the foothills of Mount Langi Ghiran and into Ararat:

The road goes for several miles through a forest, and then emerges into open land of rich quality, the greater portion of which is under cultivation. The neighbourhood of Lake Burrumbeet, -- a fine sheet of fresh water, some twelve miles in circumference, -- consisting of open country, beautifully grassed, and dotted with homesteads, is perhaps the finest in the colony; and indeed as far as the Emu creek, the quality of the soil is so rich that, at no distant time, it is almost certain to be the home of a very large population.

After leaving Emu creek the coach passes a country of very auriferous appearance, extending some two miles beyond Fiery Creek. The road then skirts the plains -- past Begg's and Grattan's, Stewart's and Richardson's stations, -- with the mountains on the right hand, crossing the Hopkins reaches Ararat, through a tract almost impassable with mud.<sup>30</sup>

126. In 1853, the Central Road Board was established to administer the construction and maintenance of Victoria's expanding road network. That year, construction began on a road between Geelong and the gold diggings in Ballarat. This served as the primary route from the coast to Ballarat until 1856, when a more substantive road was developed to the west of Bacchus Marsh, along the route of the present-day Western Highway.<sup>31</sup>

127. In 1859, work was similarly completed on a section of road leading east of Ararat towards Beaufort, although use of this route was largely abandoned when local conditions rendered it impassable. By the end of 1862, a more permanent road was quarried into the hillside between Ararat and Buangor.<sup>32</sup>

128. By 1874, the road through Ballarat extended as far west as Stawell; although parts of the route remained unmade until at least the late 1920s.<sup>33</sup>

129. Identified in later sources as the 'Melbourne-Ballarat, Serviceton Road', the Western Highway was officially proclaimed in July 1925, following passage of the *Highways and Vehicles Act 1924* (Vic) and sustained lobbying by local government.

130. In 1974, the Western Highway was declared a national highway and, in 2005, it was designated as forming part of Australia's National Land Transport Network. From official inception, the highway rapidly became the predominant mode of freight transport between Melbourne and Adelaide and, by the beginning of the 21st century, carried an estimated 3.36 million tonnes of goods per year, making it the second-busiest national highway link in Australia for interstate freight movements.

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29 Susan Priestley, *The Victorians: Making Their Mark* (Fairfax Syme Weldon Associates, 1996) 9.

30 'A Trip to Mount Ararat', *Ovens and Murray Advertiser* (Beechworth, 1857) 3.

31 *An Act for Making and Improving Roads in the Colony of Victoria 1853* (Vic) s 2; Priestley, above n 29, 51-53; Hugh Anderson, *The Flowers of the Field: A History of Ripon Shire* (Hill of Content Publishing, 1969) 138.

32 Lorna Banfield, *Like the Ark: The Story of Ararat* (Longman Cheshire, 1955) 148-150.

33 Priestley, above n 29, 51-53; Anderson, above n 31, 138.



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131. Due to this increased demand, most of the highway between Melbourne and Ballarat was duplicated in 1983. Despite this, the highway to the west of Ballarat remained largely a single carriageway for several further decades.
132. In 1999, the Victorian Government *Western Highway M8/A8 Corridor Strategy* identified that duplication of this section of the highway would likely be required to meet an expected two-fold increase in traffic volume. In 2007, this initiative was identified as one of 30 'priority projects' meriting Commonwealth funding.
133. In 2008, the Commonwealth and Victorian Governments entered into a joint funding agreement through which a total of \$505 million was committed towards the proposed duplication works.
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***'At Mitchell's line, I halted and asked the natives if they knew who made that road. They said white men a long time ago and that black fellow too much frightened and plenty run away. They said they saw the pass, and that they had come a long way.'***

- George Augustus Robinson, *The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate Volume 2, 1 October 1840 - 31 August 1841* ed Ian D. Clark (Heritage Matters, 1998), 372 (entry dated 28 July 1841)

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***'In the more recently settled parts of the country, the roads are in many places bad, and the passage of the rivers and creeks is extremely difficult and dangerous: these roads are in fact nothing more than mere tracks, that have generally been formed by people who have settled themselves, or taken possession of a grazing run beyond the occupied part of the country.***

***Having ascertained the most practicable route to the spot they intend to occupy, the track is marked out by cutting pieces out of the bark of the trees along the line; this service is frequently performed by the black Natives, who have the most accurate knowledge of the country; the track thus marked is followed by such as have occasion, and becomes a beaten path, and at length a road.'***

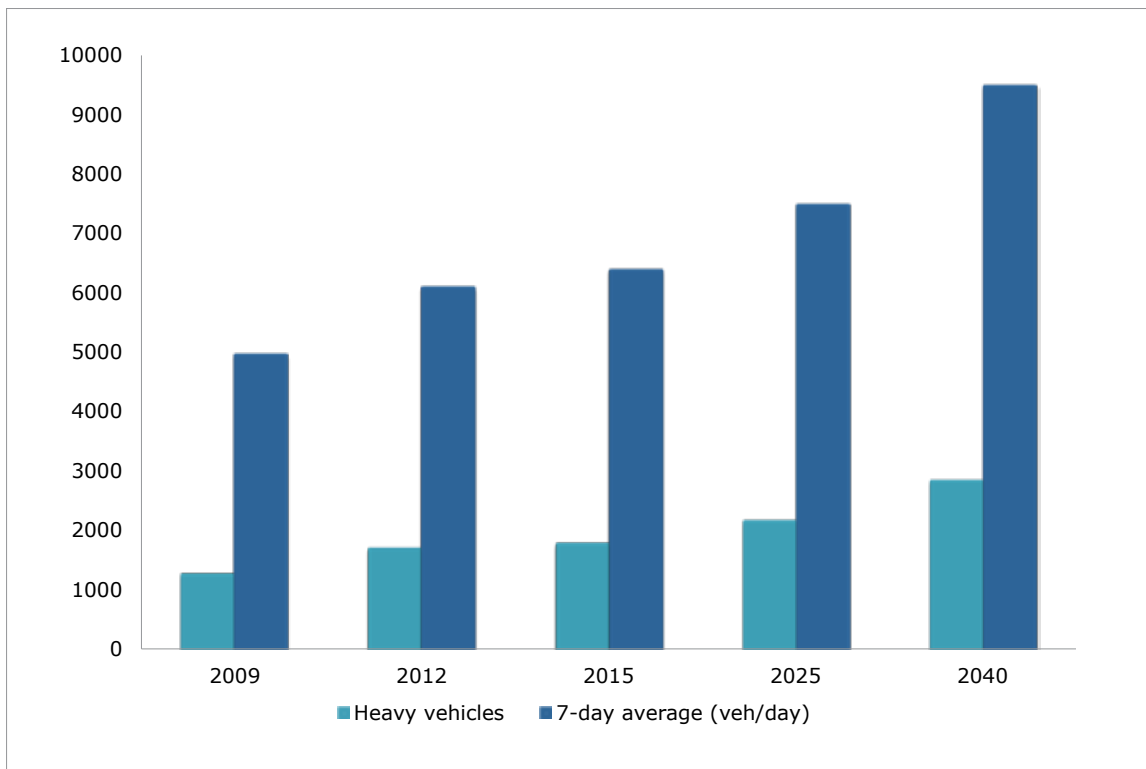
Source: James Atkinson, *An Account of the State of Agriculture and Grazing in New South Wales* (J Cross, 1826), 136

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Table 2: Western highway traffic volumes west of Buangor, 2009				
Direction	7-day average (veh/day)	Weekday average (veh/day)	Median midweek AM peak volume (veh/hr)	Median midweek PM peak volume (veh/hr)
Eastbound	Total: 2,470 Heavy: 626	Total: 2,514 Heavy: 766	180	214
Westbound	Total: 2,512 Heavy: 657	Total: 2,588 Heavy: 813	169	213
<b>Total</b>	<b>Total: 4,981</b>	<b>Total: 5,102</b>		

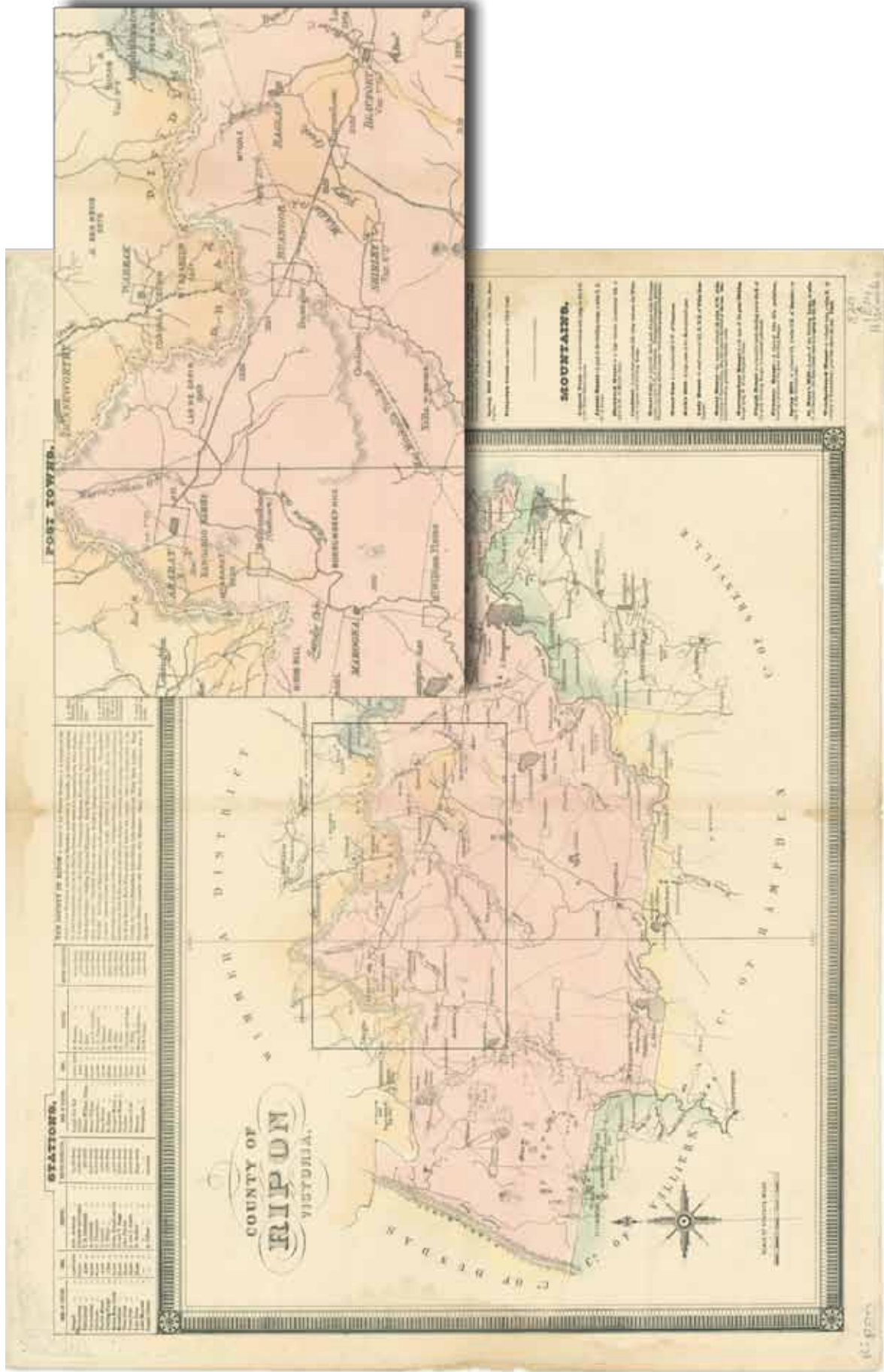
Source: Department of Transport

Figure 8: Projected Western Highway traffic volumes west of Buangor, 2009



Source: Department of Transport

Figure 9: Map of the County of Ripon depicting route from Beaufort to Ararat, 1878



Source: State Library of Victoria



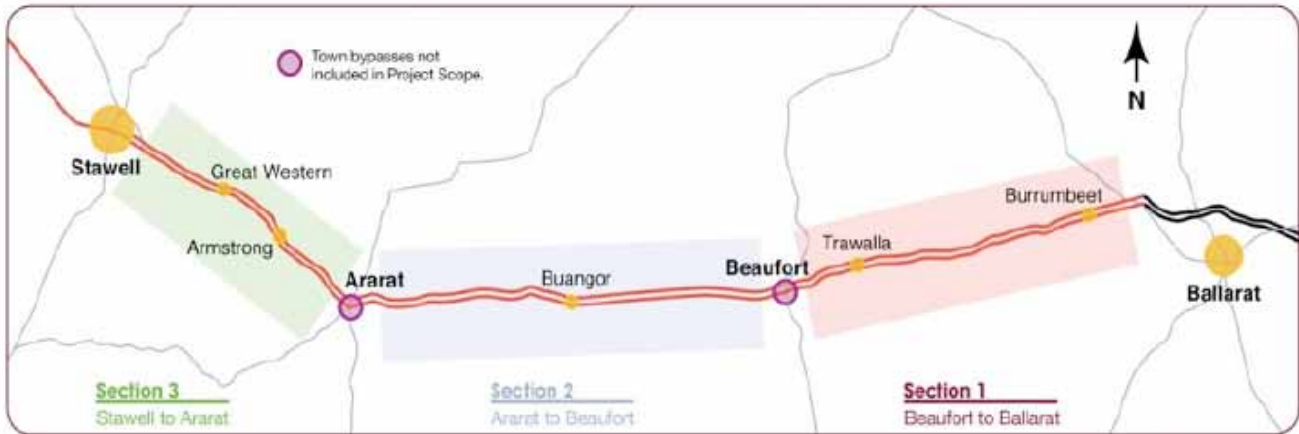
# Western Highway duplication project

134. Substantive planning for duplication of the Western Highway between Ballarat and Stawell began in early 2008, after Commonwealth funding for the project was secured.
135. At this time, VicRoads was the agency responsible for management and development of the major arterial component of Victoria's road network, including freeways and highways.
136. The duplication project was split into three sections for planning and delivery purposes:
- Ballarat to Beaufort (Section 1)
  - Beaufort to Ararat (Section 2)
  - Ararat to Stawell (Section 3).
137. These sections were later divided into several subsections. This report is concerned with the section of highway designated as 'Section 2B', encompassing the area between Buangor and Ararat, to the south of Langi Ghiran State Park.
138. The sections of the project are identified in Table 3 and Figure 10.

**Table 3: Western Highway duplication project sections**

<b>Section 1: Ballarat to Beaufort</b>		
Section 1A	Duplication of highway between Ballarat and Burrumbeet (8km)	Completed April 2013
Section 1B	Duplication of highway between Burrumbeet and Trawalla (23.5km)	Completed March 2015
Section 1C	Duplication of highway between Trawalla and Beaufort (3km)	Completed March 2013
<b>Section 2: Beaufort to Ararat</b>		
Section 2A	Duplication of highway between Beaufort and Buangor (22km)	Completed May 2016
Section 2B	Duplication of highway between Buangor and Ararat (12.5km)	Partially commenced
<b>Section 3: Ararat to Stawell</b>		
Section 3	Duplication of highway between Ararat and Stawell (25km)	Pre-construction phase

Figure 10: Western Highway duplication project sections



Source: Department of Transport

139. At the commencement of the project, VicRoads commissioned preliminary technical studies in relation to the area surrounding the existing highway.
140. VicRoads then undertook a planning study to identify and assess preliminary alignment options for the duplicated highway.
141. Between 2010 and 2012, these options were then refined through a series of technical assessments and presented in an Environment Effects Statement.
142. As part of these activities, VicRoads commissioned a number of Aboriginal cultural heritage assessments. These included:
- a preliminary desktop study in October 2008
  - an existing conditions assessment in June 2011
  - an options assessment in October 2011.
143. Additionally, VicRoads also:
- commissioned a cultural heritage impact assessment for inclusion in the project's Environment Effects Statement
  - prepared a cultural heritage management plan for the project.
144. Each of these activities is discussed in more detail in the following sections of this report.

# Preliminary project planning

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145. As one of the first major activities associated with the project, VicRoads engaged an archaeologist to prepare a cultural heritage desktop study for the full length of the highway between Ballarat and Stawell.

## Cultural heritage desktop study

146. This study identified objects and places recorded on the Victorian Aboriginal Heritage Register within 5km of the existing highway corridor.

147. The study also involved research into the history of Aboriginal occupation of the region, including the history of the Djab Wurrung and Watha Wurrung peoples, and a brief field inspection of recorded sites along the existing highway.

148. The results of this study identified that, within the area surrounding the potential construction corridor, there were:

- 20 known Aboriginal archaeological sites and four known Aboriginal post-contact historic places
- several areas of Aboriginal 'cultural heritage sensitivity', including Langi Ghiran State Park and the nearby Hopkins River.

149. The study observed that, based on the number of known sites, it was also likely that unrecorded Aboriginal cultural heritage sites existed in the area.

150. The study recommended that VicRoads prepare a cultural heritage management plan in relation to the area before beginning any high impact activities associated with the project.

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## Aboriginal objects and places

The Aboriginal Heritage Act establishes the Victorian Aboriginal Heritage Register as the 'central repository' for traditional custodians to store information about their cultural heritage.

Among other things, the Register includes details of:

- Aboriginal objects and places in Victoria
- Aboriginal ancestral remains
- information about previous surveys for Aboriginal cultural heritage.

Under the Aboriginal Heritage Act, an 'Aboriginal object' is defined as an object in Victoria or the coastal waters of Victoria that is of cultural significance to Aboriginal people and:

- relates to the Aboriginal occupation of any part of Australia (whether or not the object existed prior to the occupation of the area by non-Aboriginal people); or
- has been removed or excavated from an Aboriginal place.

An 'Aboriginal place' is defined as 'an area in Victoria or the coastal waters of Victoria that is of cultural heritage significance to Aboriginal people generally or of a particular community or group of Aboriginal people in Victoria'.

An object or place has cultural heritage significance if, among other things, it has:

- archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance
- significance in accordance with Aboriginal tradition.

Aboriginal objects and places recorded in the Victorian Aboriginal Heritage Register include:

**Earth mounds:** These are places where Aboriginal people lived and cooked their food. Stones were heated or lumps of clay were burned and placed in a cooking pit, food was placed on top, and the pit was then filled in.

Earth mounds may contain artefacts such as stone tools, as well as charcoal, burnt clay, shells and animal bones. Earth mounds are typically found near water sources, particularly on flood plains and along the banks of watercourses.

**Surface scatters:** These are areas where multiple Aboriginal artefacts such as tools, bones and ochre are distributed across or under the ground. Surface scatters may be located at traditional Aboriginal campsites or may relate to activities that occurred away from the camp. Surface scatters may be comprised of multiple layers, corresponding with successive occupations of the same area.

Large surface scatters may have several thousand artefacts and extend over more than a hectare.

**Ceremonial and spiritual places:** These are places that are important for their cultural significance to Aboriginal people. These sites may or may not contain archaeological remains and include places of spiritual or ceremonial significance, areas where traditional natural resources occurred and traditional travel and trade routes.

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**Scarred trees:** Scarred trees are trees that have been culturally modified by Aboriginal people through the removal of bark or wood. Bark and wood removed from trees was used to manufacture shelters, canoes and other implements.

Scars made by Aboriginal people can take many forms, including:

- curved bark removal scars, corresponding with the removal of a pre-formed artefact such as a canoe or container
- bark slab removal scars, corresponding with the removal of large slabs of bark for use as part of a shelter
- toe holds, used for climbing trees.

Some sources distinguish between 'resource trees' and 'marked trees'. Unlike the examples described above, marked trees represent areas of cultural significance associated with a particular activity or belief, such as a traditional boundary or spiritual place.

Some studies also identify a particular type of scarred tree, referred to as a 'habitation tree'. Aboriginal people are known to have sheltered in hollow trees when travelling between sites or during wet weather. Although tree hollows occur naturally, habitation trees may have scars from campfires or axe marks where a hollow was enlarged.<sup>34</sup>

**Mortuary trees:** Mortuary trees are particularly significant places where the remains of Aboriginal people were ritually interred. As part of this practice, the body of an Aboriginal person was first treated in another location, then placed in a hollow tree – usually a river red gum – along with other items such as possum skins, basketry and grave goods. Mortuary trees are believed to have been used during both pre-and post-contact times. Although relatively rare, mortuary trees have been recorded in Djab Wurrung Country, including in the area surrounding Ararat.

**Birthing or maternity trees:** Relatively less documented, these trees were traditionally used by Aboriginal women when giving birth.

The following passage describes a birthing tree near Wollongong:

The big tree at Figtree was a birthing tree. We used to be taken over there; Muriel (Davis), Diddo (Alma Maskell-Bell) and myself. We were never allowed to climb up there. Queen Emma Timbery had lots and lots of children and quite a few of her children were born there. And quite a few of the children that came just before us (1937) were born there as well. No man would ever go there. The tree that was at Figtree, that's dead and gone now. There were several birthing trees. After the baby was born, sometimes the placenta was taken home and buried under a wattle tree and that became part of the person's dreaming. (Sometimes) the placenta was buried under the Fig Tree. That information was handed down to me.<sup>35</sup>

Birthing (or 'maternity') trees have been described as 'highly culturally significant' sites; operating as 'ceremonial women's places that connect newborns to ancestors and country'.<sup>36</sup>

In Western Victoria, a maternity tree has been recorded in Dja Dja Wurrung Country near Talbot, approximately 60km from the Western Highway project site. This tree is estimated to be more than 500 years old.

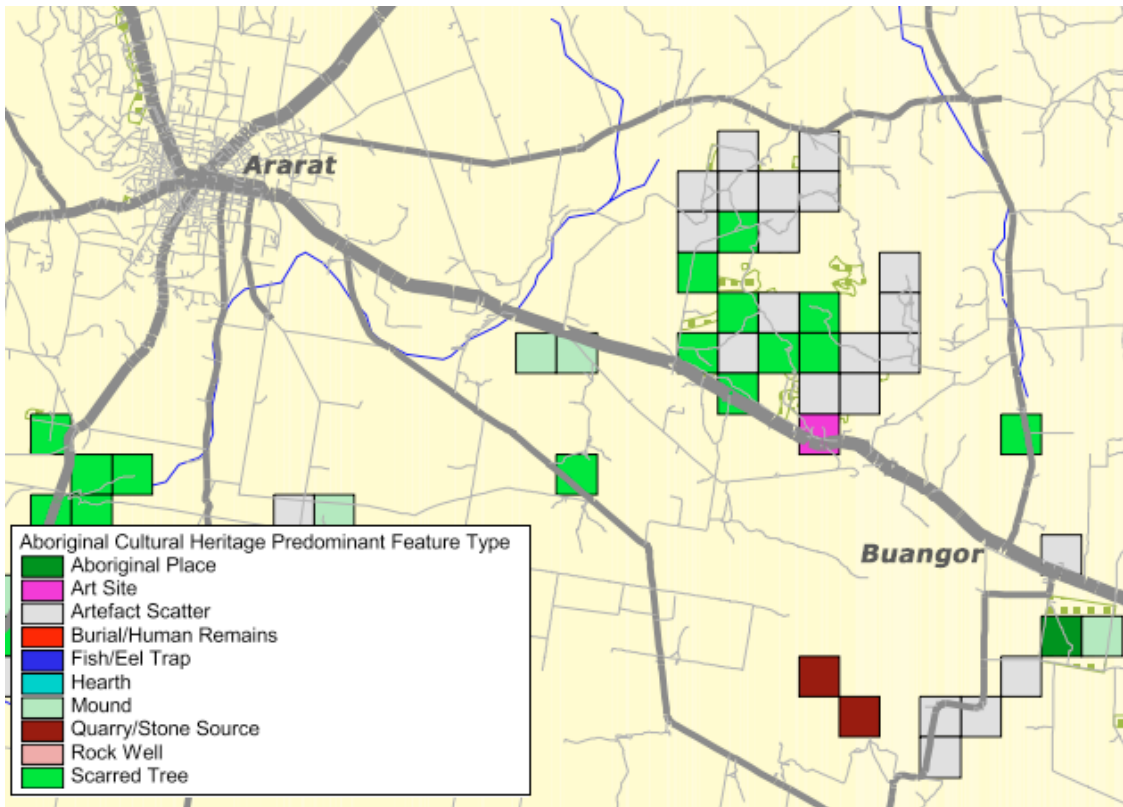
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<sup>34</sup> Greg Carver, *An Examination of Indigenous Australian Culturally Modified Trees in South Australia* (Honours Thesis, Flinders University, 2001) 100-103.

<sup>35</sup> Department of Environment and Conservation (New South Wales), *Aboriginal Women's Heritage: Wollongong* (2004) 46.

<sup>36</sup> Karen Adams et al, 'Challenging the Colonisation of Birth: Koori Women's Birthing Knowledge and Practice' (2018) 31 *Women and Birth* 81, 84.

Figure 11: Recorded Aboriginal cultural heritage sites between Buangor and Ararat (predominant type per 1km<sup>2</sup> area), August 2007

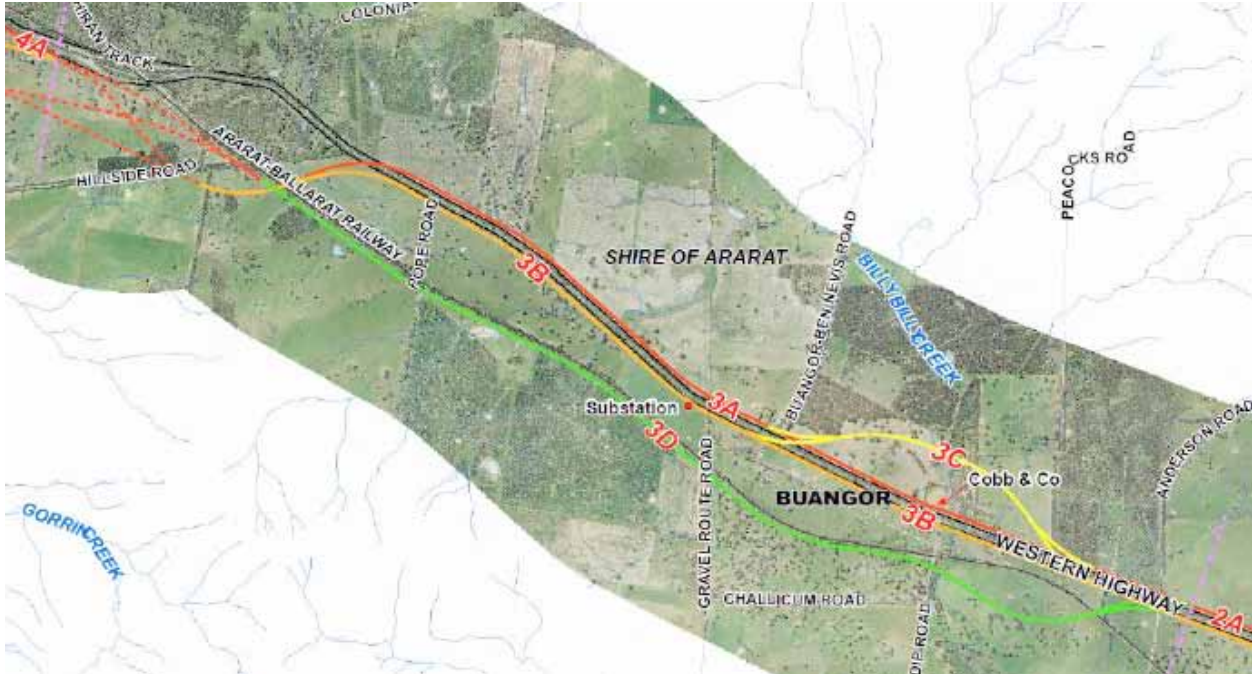


Source: State Library of Victoria

## Planning study

151. During development of the Western Highway duplication project, major projects within VicRoads were overseen by a Project Review Committee.
152. The first Project Review Committee meeting concerning the Western Highway duplication project was convened in July 2008.
153. At this meeting, the Project Review Committee considered the preliminary environmental and cultural heritage studies prepared in relation to the project.
154. Based on recommendations from VicRoads' Network and Asset Planning Division, the Project Review Committee determined to commission a formal planning study that would:
  - investigate the area surrounding the existing Western Highway corridor
  - develop preliminary alignment options in accordance with a freeway design standard, allowing for eventual further upgrade of the duplicated highway.
155. At this time, one project alternative, involving duplication and connection of the Sunraysia and Pyrenees Highways, was identified and dismissed due to its increased construction footprint and lack of connectivity with major towns and tourist sites in the region.
156. In early 2009, VicRoads publicly announced the commencement of the highway duplication project and the associated planning study.

Figure 12: Preliminary alignment options between Buangor and Langi Ghiran, July 2010

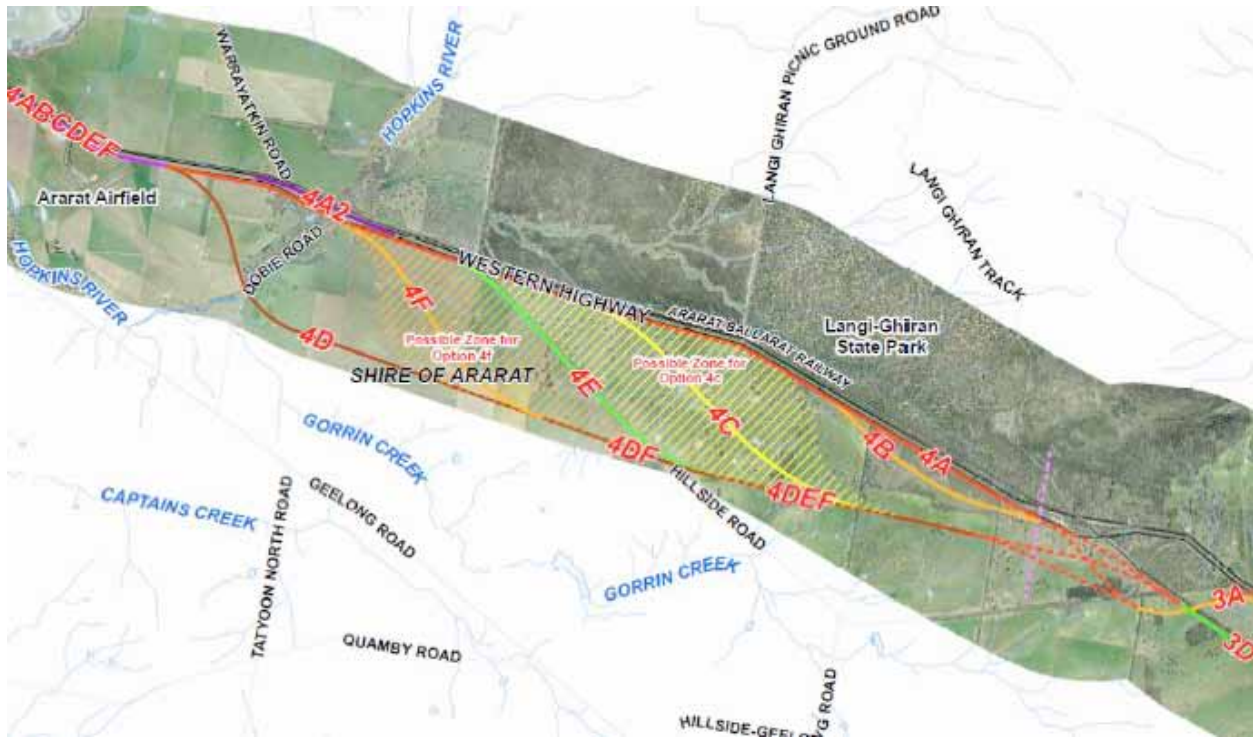


Source: Department of Transport

- 157. As part of the planning study, community members were encouraged to join a project mailing list and to contact VicRoads by telephone, email or by attending a project office near Ballarat for further information. Community consultation sessions were also held at Ararat and Buangor to seek preliminary views about the project.
- 158. VicRoads' consultation activities are discussed in more detail later in this report.
- 159. Following consultation, several preliminary alignment options were developed for the section of highway between Buangor and Langi Ghiran State Park. Although most options made some use of the existing highway, all involved construction of a new dual carriageway to the south-east of Langi Ghiran.
- 160. Several preliminary alignment options were also developed for the section of highway running from the south-east of Langi Ghiran State Park to the east of Ararat. These included options that largely followed the existing highway along the southern boundary of the State Park, and alignments that deviated through farmland to the south.
- 161. The preliminary alignment options are depicted in Figure 12 and Figure 13.



Figure 13: Preliminary alignment options between Langi Ghiran and Ararat, July 2010



Source: Department of Transport

162. As part of the planning study, the preliminary alignment options were assessed using evaluation criteria developed by VicRoads.
163. This included consideration of each option's potential environmental impacts, as well as community and social impacts (including potential impacts on Aboriginal cultural heritage), engineering considerations and economic factors.
164. Potential impacts to Aboriginal cultural heritage were evaluated based on each alignment option's intersection with areas of 'cultural heritage sensitivity'.
165. Using this metric, the planning study identified that there was little difference between the cultural heritage impacts of the preliminary alignment options between Buangor and Ararat.

#### Areas of cultural heritage sensitivity

Under the Aboriginal Heritage Regulations, an area has cultural heritage sensitivity if, among other things, it is:

- within or close to a cultural heritage place recorded on the Victorian Aboriginal Heritage Register
- within 200 metres of a waterway
- within a National or State Park.

Under the Aboriginal Heritage Act, all 'high impact activities' undertaken in areas of cultural heritage sensitivity require a cultural heritage management plan.



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166. In June 2010, the preliminary alignment options were presented to members of the local community at a consultation session in Buangor.
  167. At this session, feedback from some community members emphasised the need for the duplicated highway to make greater use of the existing carriageway to the south-east of Langi Ghiran.
  168. As a result, VicRoads developed an additional preliminary alignment option for the section of the highway between Buangor and Langi Ghiran State Park. This option is depicted as Option 3F in Figure 14 on page 50.

# Evaluation of alignment options

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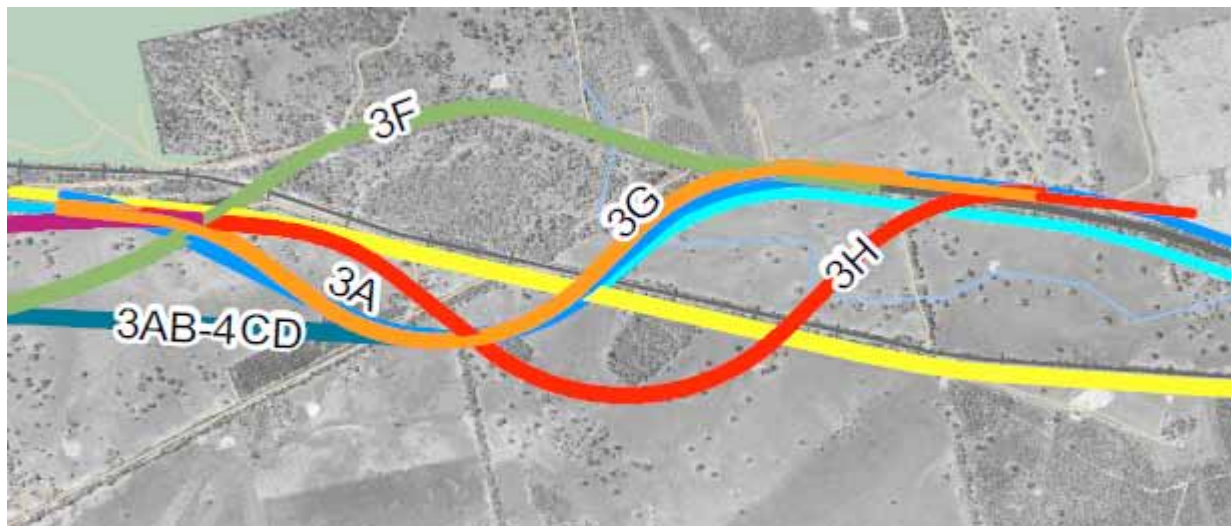
169. In October 2010, VicRoads was notified that an Environment Effects Statement would be required for the project under the Environment Effects Act.
170. As a result, VicRoads developed a three-phase assessment methodology for identifying and evaluating suitable highway alignments for presentation in this document.
171. This process involved:
- an initial brainstorming workshop, followed by a rapid assessment workshop (phase one assessment)
  - detailed technical assessment of shortlisted alignment options (phase two assessment)
  - an environmental risk assessment to identify a preferred highway alignment (phase three assessment).
172. Around this time, a Technical Reference Group was also formed by the Department of Planning and Community Development to provide advice to the project.
173. The Technical Reference Group was comprised of representatives from various stakeholder authorities, including:
- VicRoads
  - the Department of Planning and Community Development
  - the Department of Sustainability and Environment
  - Aboriginal Affairs Victoria
  - Heritage Victoria
  - Ararat Rural City Council.
174. The Environment Effects Statement is discussed in more detail later in this report.

## Phase one assessment

175. In April 2011, VicRoads held a brainstorming workshop to identify a 'longlist' of alignment options.
176. For this workshop, participants:
- considered the preliminary alignment options developed during the planning study
  - inspected the project area
  - reviewed the preliminary ecological and cultural heritage studies, as well as a summary of feedback obtained through community consultation.
177. At this workshop, approximately 10 alignment options were longlisted for the section of highway between Buangor and Ararat. These options were largely similar to the preliminary alignment options developed during the planning study.
178. The longlisted options are depicted in Figure 14 and Figure 15 on pages 50 and 51.
179. The brainstorming workshop was followed by a 'rapid assessment workshop' held in May 2011.
180. For this workshop, each of the longlisted alignment options was briefly assessed against various environmental and project objectives, including the requirement to protect Aboriginal and non-Aboriginal cultural heritage in the area.
181. This assessment involved identifying the number of recorded Aboriginal cultural heritage objects and places potentially impacted by each option.

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182. As in the case of the planning study, the workshop did not identify a meaningful difference between the anticipated cultural heritage impacts of the alignment options between Buangor and Ararat, because:
- all options between Buangor and Langi Ghiran State Park were expected to have a negligible or low impact on registered Aboriginal cultural heritage sites
  - all options between Langi Ghiran and Ararat were expected to have a 'moderately poor' impact on registered Aboriginal cultural heritage sites.
183. At the end of the workshop, the alignment options were given a numeric score for their performance against each of the evaluation criteria. The options with the lowest score were then eliminated until there were less than five options for each zone.
184. This resulted in the elimination of several alignment options for the section of highway between Buangor and Ararat. The shortlisted alignment options were also renamed at this time.
185. In July 2011, the shortlisted alignment options were presented to the Technical Reference Group for feedback.
186. Feedback from some members of the Technical Reference Group observed that the rapid assessment objectives had focused too greatly on road configuration, rather than environmental, objectives.
187. As a result, VicRoads agreed to reduce the number of road configuration objectives and increase the number of environmental objectives associated with the project.
188. Each alignment option was then reassessed according to the reconfigured objectives. This did not lead to a change in the alignment rankings.
189. VicRoads also agreed to further investigate one alignment option eliminated during the rapid assessment workshop, based on feedback from the Technical Reference Group emphasising its perceived environmental benefits. This option is depicted as Option 4D in Figure 15.
190. The preliminary, shortlisted and eliminated alignment options are described in Table 4 and Table 5 overleaf. The shortlisted alignments are also depicted in Figure 16 and Figure 17 on page 52.

Figure 14: Longlisted alignment options from west of Buangor to south-east of Langi Ghiran (option 3D depicted in yellow)



Source: Department of Transport

**Table 4: Shortlisted and eliminated alignment options from west of Buangor to south-east of Langi Ghiran, 2010-2011**

Description		Assessment	Renamed
<b>3A</b>	Duplication to the north of the existing carriageway through Buangor, then diverging from the existing highway near Pope Road.	Identified during 2010 planning study. Eliminated during phase one assessment for various reasons, including a poor rating for protecting non-Aboriginal cultural heritage.	
<b>3D</b>	Construction of a lengthy dual carriageway bypass to the south of Buangor.	Identified during 2010 planning study. Shortlisted for further investigation in May 2011 (section from Pope Road to Langi Ghiran Track only).	5C
<b>3F</b>	Duplication to north of existing carriageway until Langi Ghiran Track, then deviation through farmland to the south of Langi Ghiran.	Developed in September 2010 in response to community consultation. Eliminated during phase one assessment for various reasons, including poor ratings for improved travel time and ecological impacts.	
<b>3G</b>	Dual carriageway to south of existing highway from Pope Road to west of Hillside road.	Identified during phase one assessment in April 2011. Shortlisted for further investigation in May 2011 (incorporating 3AB-4CD connection).	5A
<b>3H</b>	Dual carriageway to the south of Option 3G, from east of Pope Road to west of Hillside Road.	Identified during phase one assessment in April 2011. Shortlisted for further investigation in May 2011.	5B

Figure 15: Longlisted alignment options between Langi Ghiran and Ararat

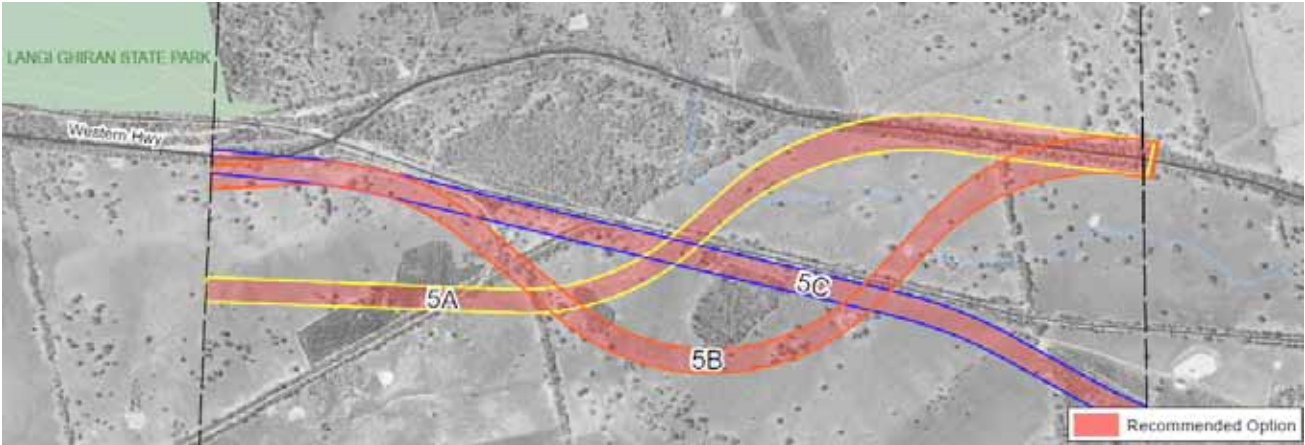


Source: Department of Transport

Table 5: Shortlisted and eliminated alignment options between Buangor and Langi Ghiran, 2010-2011

Description	Assessment	Renamed
<b>4A</b> Duplication of the existing highway on the southern side.	Identified during 2010 planning study. Shortlisted for further investigation in May 2011.	6A
<b>4B</b> New dual carriageway south of the existing highway at the east and duplication of the existing highway to the west.	Identified during 2010 planning study. Shortlisted for further investigation in May 2011.	6B
<b>4C</b> New dual carriageway further south of the 4B alignment.	Identified during 2010 planning study. Shortlisted for further investigation in May 2011.	6C
<b>4D</b> New dual carriageway well south of the existing highway, reconnecting near the east of Ararat.	Identified during 2010 planning study. Initially eliminated during phase one assessment for poor ratings against road configuration objectives. Subsequently shortlisted in July 2011 following input from Technical Reference Group.	6F
<b>4E</b> New highway from around eastern end of Hillside Road running well south of existing highway to western end of Hillside Road.	Identified during 2010 planning study. Shortlisted for further investigation in May 2011.	6D

Figure 16: Shortlisted alignment options west of Buangor to south-east of Langi Ghiran



Source: Department of Transport

Figure 17: Shortlisted alignment options between Langi Ghiran and Ararat



Source: Department of Transport



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## Phase two assessment

191. Phase two of the alignment evaluation process involved detailed technical assessment of the shortlisted alignment options.
192. As part of the process, VicRoads commissioned technical studies in relation to a broad range of disciplines, including:
- traffic and transport
  - biodiversity and habitat
  - air quality
  - groundwater
  - soil and geology
  - cultural heritage.
193. The cultural heritage study involved an 'existing conditions assessment' and an 'options assessment'. Both assessments were conducted by an archaeologist specialising in Aboriginal cultural heritage assessments and are described in more detail below.

### Cultural heritage existing conditions assessment

194. The existing conditions assessment was commissioned in May 2011. This assessment involved more detailed consideration of the potential presence of Aboriginal and non-Aboriginal cultural heritage sites within the area surrounding the shortlisted alignment corridors.
195. Among other things, this assessment involved:
- research concerning the history of the Aboriginal occupation of the region, including the history of the Djab Wurrung people
  - research concerning the prior uses of the area, including following European colonisation
  - a review of prior cultural heritage assessments and other published works relating to the region
- searching the Victorian Aboriginal Heritage Register for all recorded objects and places within the area.
196. Among other things, this assessment indicated that:
- the study area included 118 watercourse crossings, resulting in more than 100 hectares of 'cultural heritage sensitivity' for the purposes of the Aboriginal Heritage Act
  - mortuary trees had been documented in the region, meaning that mature river red gums had the potential to contain Aboriginal ancestral remains
  - there were two recorded Aboriginal earth mounds to the west of Langi Ghiran, within 100 metres of all shortlisted alignment options.

### Cultural heritage options assessment

197. The cultural heritage options assessment was commissioned in August 2011.
198. For this assessment, the shortlisted alignment options were evaluated against each other for their potential impacts on Aboriginal cultural heritage.
199. Each alignment option was rated using the following evaluation criteria, which were developed in consultation with the Registered Aboriginal Parties for the area:
- impact on registered and potential Aboriginal objects and places
  - impact on registered and potential mortuary trees and burnt mounds – allowing these impacts to be weighted differently.
200. The evaluation criteria incorporated feedback from the Registered Aboriginal Parties relating to the cultural values associated with the area and the need for assessment of the project to take into account predicted, as well as recorded, Aboriginal cultural heritage sites.

201. As a result, the assessment involved:

- use of a predictive model, developed using data from the Victorian Aboriginal Heritage Register and other sources, including information obtained through consultation with the Registered Aboriginal Parties
- development of a 'cultural values map', where areas of particular cultural heritage sensitivity were identified by the Registered Aboriginal Parties during cultural heritage workshops and then spatially mapped against each alignment option

- specialist studies into the possible presence of mortuary trees and earth mounds in the area.

202. The assessment singled out Option 6F, representing the most substantial southern deviation from the existing highway east of Ararat, as rating very poorly for its potential to encounter unrecorded mortuary trees and burnt mounds.

203. The options assessment ratings for each shortlisted alignment are identified in Table 7 and Table 8 on pages 56-58.

### **Mortuary tree specialist report**

In October 2011, a mortuary tree specialist report was prepared in relation to the project area. This study formed part of the cultural heritage options assessment of the shortlisted alignment options.

The mortuary tree study involved a review of the history and common features of mortuary trees previously recorded in Western Victoria. Using this data, the study developed a predictive model for assessing each alignment option's potential to encounter unrecorded mortuary trees within the project area.

The study observed:

- there was recent evidence for the continued existence of mortuary trees close to the project area
- there was a 'small risk' of mortuary trees being encountered under any alignment option passing through the area.

The study otherwise noted that the area surrounding Buangor was unusual in Victoria for its preservation of trees pre-dating European colonisation:

the Buangor area retains extensive pockets of the remnant river red gum, which are a significant, potentially rare expression of the pre-1850 woodland landscape. Although there has been no scientific dating, the characteristics of many surviving trees, both in terms of their size, advanced stage of development and complexity of growth patterns, are consistent with overmature and senescent trees known to be of sufficient age to preserve evidence of cultural marking that have become obscured behind more recent growth, both through chance discoveries and systematic investigation [...]

[T]here is a good probability that living trees of suitable age used for such purposes may survive relatively undisturbed within the project area.<sup>37</sup>

An additional specialist report was prepared in relation to the potential presence of Aboriginal earth mounds near the alignment corridors. This study concluded that earth mounds could occur widely throughout the project area, particularly near Fiery Creek and the Hopkins River.

<sup>37</sup> A Long, *Western Highway Project - Section 2 Duplication (Beaufort to Ararat): Mortuary Trees Desktop and Route Options Assessment* (2011) 8.



## Outcome of phase two assessment

204. In August 2011, an options assessment workshop was held to analyse the technical studies and recommend alignment options for further investigation. This workshop involved input from several key specialists, including an archaeologist specialising in Aboriginal cultural heritage assessments.

205. For this workshop, an 'options assessment matrix' was developed to rate each alignment option's potential impact on the environmental and project objectives. Within each discipline, ratings were then weighted according to criteria determined by the relevant specialist.

206. The methodology and weighting used to assess the cultural heritage impacts of each alignment option is identified in Table 6.

207. Ratings across the disciplines were totalled and each alignment option was then ranked according to its score. For this process, each discipline was weighed equally, save for those relating to flora and fauna objectives, which received additional emphasis at the recommendation of the project's Technical Reference Group.

208. As a result of this process, several alignment options were selected for further investigation, including:

- three options for the section of highway between Buangor and Langi Ghiran State Park
- two options for the section between Langi Ghiran and Ararat.

209. Selection of alignment options did not directly correspond with the final rankings, as some lower-ranked options were selected for further investigation in order to provide connections to higher-ranked options within other zones.




210. The selected and eliminated alignment options are depicted in Table 7 and Table 8.

**Table 6: Options assessment workshop methodology – cultural heritage**

Criteria	Weighting
Impact on registered and potential mortuary trees and burnt mounds.	0.5
Impact on other registered and potential Victorian Aboriginal Heritage Register sites.	0.22
Impact on registered and potential Victorian Heritage Inventory places, local planning schemes Heritage Overlay places and other Historical Heritage Registers.	0.28




**Table 7: Selected and eliminated alignment options from west of Buangor to south-east of Langi Ghiran, August 2011**

**West of Buangor to south-east of Langi Ghiran**


	<p><b>Option 5A</b> New dual carriageway, extending southwest from the existing highway.</p> <p><b>Options assessment ratings:</b></p> <table border="1"> <tbody> <tr> <td>Registered and potential places of Aboriginal cultural heritage significance</td> <td>Poor</td> </tr> <tr> <td>Registered and potential mortuary trees and burnt mounds</td> <td>Moderately poor</td> </tr> <tr> <td>Weighted impact rank - protection of cultural heritage</td> <td>3</td> </tr> <tr> <td>Rank (all disciplines)</td> <td>3</td> </tr> <tr> <td>Outcome</td> <td><b>Selected</b></td> </tr> </tbody> </table>	Registered and potential places of Aboriginal cultural heritage significance	Poor	Registered and potential mortuary trees and burnt mounds	Moderately poor	Weighted impact rank - protection of cultural heritage	3	Rank (all disciplines)	3	Outcome	<b>Selected</b>
Registered and potential places of Aboriginal cultural heritage significance	Poor										
Registered and potential mortuary trees and burnt mounds	Moderately poor										
Weighted impact rank - protection of cultural heritage	3										
Rank (all disciplines)	3										
Outcome	<b>Selected</b>										
	<p><b>Option 5B</b> New dual carriageway, extending southwest from the existing highway on a different alignment to 5A.</p> <p><b>Options assessment ratings:</b></p> <table border="1"> <tbody> <tr> <td>Registered and potential places of Aboriginal cultural heritage significance</td> <td>Poor</td> </tr> <tr> <td>Registered and potential mortuary trees and burnt mounds</td> <td>Moderately poor</td> </tr> <tr> <td>Weighted impact rank - protection of cultural heritage</td> <td>2</td> </tr> <tr> <td>Rank (all disciplines)</td> <td>2</td> </tr> <tr> <td>Outcome</td> <td><b>Selected</b></td> </tr> </tbody> </table>	Registered and potential places of Aboriginal cultural heritage significance	Poor	Registered and potential mortuary trees and burnt mounds	Moderately poor	Weighted impact rank - protection of cultural heritage	2	Rank (all disciplines)	2	Outcome	<b>Selected</b>
Registered and potential places of Aboriginal cultural heritage significance	Poor										
Registered and potential mortuary trees and burnt mounds	Moderately poor										
Weighted impact rank - protection of cultural heritage	2										
Rank (all disciplines)	2										
Outcome	<b>Selected</b>										
	<p><b>Option 5C</b> New dual carriageway, extending along the southern side of the railway line.</p> <p><b>Options assessment ratings:</b></p> <table border="1"> <tbody> <tr> <td>Registered and potential places of Aboriginal cultural heritage significance</td> <td>Moderately poor</td> </tr> <tr> <td>Registered and potential mortuary trees and burnt mounds</td> <td>Moderately poor</td> </tr> <tr> <td>Weighted impact rank - protection of cultural heritage</td> <td>1</td> </tr> <tr> <td>Rank (all disciplines)</td> <td>1</td> </tr> <tr> <td>Outcome</td> <td><b>Selected</b></td> </tr> </tbody> </table>	Registered and potential places of Aboriginal cultural heritage significance	Moderately poor	Registered and potential mortuary trees and burnt mounds	Moderately poor	Weighted impact rank - protection of cultural heritage	1	Rank (all disciplines)	1	Outcome	<b>Selected</b>
Registered and potential places of Aboriginal cultural heritage significance	Moderately poor										
Registered and potential mortuary trees and burnt mounds	Moderately poor										
Weighted impact rank - protection of cultural heritage	1										
Rank (all disciplines)	1										
Outcome	<b>Selected</b>										

**Table 8: Selected and eliminated alignment options from Langi Ghiran to Ararat, August 2011**

**Langi Ghiran to east of Ararat**

	<p><b>Option 6A</b> Duplication of the existing highway on the southern side.</p>	
	<p><b>Options assessment ratings:</b></p>	
	Registered and potential places of Aboriginal cultural heritage significance	Moderately poor
	Registered and potential mortuary trees and burnt mounds	Moderately poor
	Weighted impact rank - protection of cultural heritage	1 (equal)
	Rank (all disciplines)	1
Outcome	<b>Selected</b>	
	<p><b>Option 6B</b> New dual carriageway south of the existing highway at the east and duplication of the existing highway to the west.</p>	
	<p><b>Options assessment ratings:</b></p>	
	Registered and potential places of Aboriginal cultural heritage significance	Moderately poor
	Registered and potential mortuary trees and burnt mounds	Moderately poor
	Weighted impact rank - protection of cultural heritage	1 (equal)
	Rank (all disciplines)	3
Outcome	<b>Eliminated</b>	
	<p><b>Option 6C</b> New dual carriageway south of the 6B alignment at the east and duplication of the existing highway to the west.</p>	
	<p><b>Options assessment ratings:</b></p>	
	Registered and potential places of Aboriginal cultural heritage significance	Moderately poor
	Registered and potential mortuary trees and burnt mounds	Moderately poor
	Weighted impact rank - protection of cultural heritage	1 (equal)
	Rank (all disciplines)	4
Outcome	<b>Selected</b>	

**Table 8: Selected and eliminated alignment options from Langi Ghiran to Ararat, August 2011**

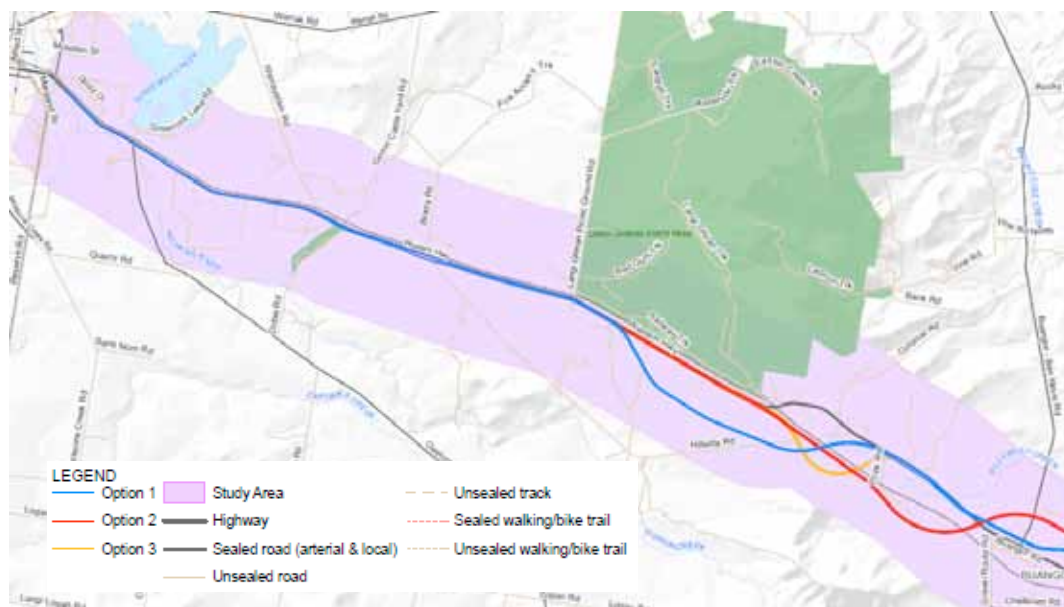
Langi Ghiran to east of Ararat											
	<p><b>Option 6D</b> New dual carriageway south of the existing highway, extending north along Hillside Road and then duplication of the highway on the southern side.</p> <p><b>Options assessment ratings:</b></p>										
	<table border="1"> <tr> <td>Registered and potential places of Aboriginal cultural heritage significance</td> <td>Poor</td> </tr> <tr> <td>Registered and potential mortuary trees and burnt mounds</td> <td>Poor</td> </tr> <tr> <td>Weighted impact rank – protection of cultural heritage</td> <td>4</td> </tr> <tr> <td>Rank (all disciplines)</td> <td>2</td> </tr> <tr> <td>Outcome</td> <td><b>Eliminated</b></td> </tr> </table>	Registered and potential places of Aboriginal cultural heritage significance	Poor	Registered and potential mortuary trees and burnt mounds	Poor	Weighted impact rank – protection of cultural heritage	4	Rank (all disciplines)	2	Outcome	<b>Eliminated</b>
	Registered and potential places of Aboriginal cultural heritage significance	Poor									
	Registered and potential mortuary trees and burnt mounds	Poor									
	Weighted impact rank – protection of cultural heritage	4									
	Rank (all disciplines)	2									
Outcome	<b>Eliminated</b>										
<p><b>Option 6F</b> New dual carriageway well south of the existing highway and reconnecting near the east of Ararat.</p> <p><b>Options assessment ratings:</b></p>											
<table border="1"> <tr> <td>Registered and potential places of Aboriginal cultural heritage significance</td> <td>Poor</td> </tr> <tr> <td>Registered and potential mortuary trees and burnt mounds</td> <td>Very poor</td> </tr> <tr> <td>Weighted impact rank – protection of cultural heritage</td> <td>5</td> </tr> <tr> <td>Rank (all disciplines)</td> <td>5</td> </tr> <tr> <td>Outcome</td> <td><b>Eliminated</b></td> </tr> </table>	Registered and potential places of Aboriginal cultural heritage significance	Poor	Registered and potential mortuary trees and burnt mounds	Very poor	Weighted impact rank – protection of cultural heritage	5	Rank (all disciplines)	5	Outcome	<b>Eliminated</b>	
Registered and potential places of Aboriginal cultural heritage significance	Poor										
Registered and potential mortuary trees and burnt mounds	Very poor										
Weighted impact rank – protection of cultural heritage	5										
Rank (all disciplines)	5										
Outcome	<b>Eliminated</b>										
<table border="1"> <tr> <td>Registered and potential places of Aboriginal cultural heritage significance</td> <td>Poor</td> </tr> <tr> <td>Registered and potential mortuary trees and burnt mounds</td> <td>Very poor</td> </tr> <tr> <td>Weighted impact rank – protection of cultural heritage</td> <td>5</td> </tr> <tr> <td>Rank (all disciplines)</td> <td>5</td> </tr> <tr> <td>Outcome</td> <td><b>Eliminated</b></td> </tr> </table>		Registered and potential places of Aboriginal cultural heritage significance	Poor	Registered and potential mortuary trees and burnt mounds	Very poor	Weighted impact rank – protection of cultural heritage	5	Rank (all disciplines)	5	Outcome	<b>Eliminated</b>
Registered and potential places of Aboriginal cultural heritage significance	Poor										
Registered and potential mortuary trees and burnt mounds	Very poor										
Weighted impact rank – protection of cultural heritage	5										
Rank (all disciplines)	5										
Outcome	<b>Eliminated</b>										



## Phase three assessment

211. In October 2011, the alignment options selected during the options assessment workshop were connected to form three complete alignments, which were then designated 'Option 1', 'Option 2' and 'Option 3'.
212. Options 1, 2 and 3 are depicted in Figure 18.
213. These options were then subject to an environmental risk assessment. As part of this process, technical specialists were asked to identify how each option was expected to interact with 'assets, values and uses' associated with the area.
214. In January 2012, a multi-disciplinary risk assessment workshop was held to discuss the risks identified by each specialist. A risk register was then established and updated as mitigation measures were identified to distinguish between initial and residual risks associated with the project.
215. A cultural heritage specialist did not participate in the risk assessment workshop, as site surveys were being undertaken at the time; however, input from this specialist was later incorporated into the risk register.
216. As a result of the environmental risk assessment:
- 149 'risk pathways' were identified for Option 1
  - 150 'risk pathways' were identified for Options 2 and 3.
217. The workshop observed that, although the risks of each alignment option were broadly comparable:
- Option 1 was preferred by the biodiversity and habitat, social, traffic, and soils and geology specialists
  - Option 2 was preferred by the surface water and economic specialists
  - Option 3 was preferred by the noise specialist
  - no particular option was preferred by the Aboriginal cultural heritage specialist.
218. As a result of this assessment, VicRoads determined to eliminate Option 3 from further consideration.

Figure 18: Complete alignment options between Buangor and Ararat, 2011-2012



Source: Department of Transport

219. Options 1 and 2 were then refined through a number of 'micro alignments' and incorporated into the project's Environment Effects Statement.

Figure 19: Parishes of Langi Ghiran, Gorrinn and Burrumbeep, 1858



Source: State Library of Victoria

# Project consultation

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220. Project consultation began in early 2009 and continued during preparation of the Environment Effects Statement.

221. As part of its consultation program, VicRoads:

- developed a Consultation Plan
- issued information bulletins and mailouts concerning the planning process
- maintained an online mailing list
- circulated online and paper-based surveys
- visited affected properties and businesses
- issued media releases to local newspapers
- held community information sessions and public displays
- met with organisational stakeholders.

## Consultation Plan

222. The scoping requirements for the Environment Effects Statement required VicRoads to develop and publish a Consultation Plan for the project. This document was finalised in August 2011.

223. Ministerial Guidelines relating to the Environment Effects Statement process recommend that project proponents make early contact with relevant Aboriginal organisations to identify potential concerns and opportunities for further involvement.

224. While the Consultation Plan provided for a detailed consultation program, the document did not propose any Aboriginal-focused engagement other than discussions between VicRoads and the Registered Aboriginal Parties for the area.

225. At the time, VicRoads' *Cultural Heritage Guidelines* recognised that a broader class of Aboriginal stakeholders could be interested in the cultural heritage impacts of a project:

In addition to [the] registered Aboriginal parties there may be other Indigenous stakeholders, such as native title claimants and traditional owner groups [...] who have an interest in the Aboriginal heritage of a project area but who are not affiliated with the registered Aboriginal parties under the *Aboriginal Heritage Act*.

It is important to contact these organisations or individuals where they are relevant to ensure that their views are represented in any cultural heritage work done.

226. The *Cultural Heritage Guidelines* recommended that a cultural heritage consultation plan be developed for projects likely to have an impact on Aboriginal cultural heritage:

In many cases it will be beneficial to develop a cultural heritage consultation plan for the project. This plan should outline:

- How key cultural heritage stakeholders will be involved in cultural heritage management;
- The names and key contact details of Indigenous and non-Indigenous stakeholders;
- The methods of consultation that will be used (eg. regular meetings, newsletters);
- Parameters for ongoing involvement in the cultural heritage management process;
- Any resources required to implement the plan (eg. Indigenous representatives may need to be resourced in order to be able to attend meetings); and
- The timeframes involved.



- 
227. On the information available to the investigation, it does not appear that VicRoads prepared a cultural heritage consultation plan for the project.
228. The Department of Transport, responding to the Ombudsman's draft report on behalf of VicRoads, submitted:

The 2007 [Cultural Heritage] Guidelines were prepared at a time where there was little experience in working with a Registered Aboriginal Party [...] The step of considering whether to prepare a Cultural Heritage Consultation Plan was a direct carry over from VicRoads' 2003 guidelines and was in many ways transitional in nature as VicRoads became familiar with the purpose and function of RAPs under the new Aboriginal Heritage legislation.

By August 2011, when the Environment Effects Statement [...] consultation plan was finalised, any potential need for a separate Cultural Heritage Consultation Plan had in effect been superseded by the Aboriginal Heritage legislative framework processes for consultation and Aboriginal Victoria [...] and Victorian Aboriginal Heritage Council (VAHC) guidance.

If a Cultural Heritage Consultation Plan was implemented in 2011 in accordance with the 2007 Guidelines [...] it may well have been subject to [...] criticism [from] VAHC.

229. VicRoads advised the investigation that its decision to consult exclusively with the Registered Aboriginal Parties was consistent with published advice from the Aboriginal Heritage Council, which recognised these bodies as the 'primary guardians, keepers and knowledge holders of Aboriginal cultural heritage'.

## Community consultation

230. In January 2009, VicRoads opened a project office in Ballarat. As part of the 2009-10 planning study, initial community information sessions were held at Great Western, Ararat and Buangor in November and December 2009. Members of the community were also invited to provide written feedback via invitation to comment forms.
231. VicRoads considered community feedback when developing preliminary alignment options for the duplicated highway. In June 2010, these options were presented to the community at an information session in Buangor. In response to community feedback, VicRoads then developed additional alignment options for further investigation.
232. Regular information bulletins outlined the planning process and invited community members to join a project mailing list. Media releases also provided progress updates and information about future community information sessions.
233. Throughout the planning phase, VicRoads also met with affected landowners and undertook site visits to relevant properties and businesses.
234. Members of the public were invited to comment on the shortlisted alignment options at a community information session held in Buangor in June 2011. Online and paper-based surveys were also distributed at this time.
235. VicRoads received more than 150 written community submissions during this stage of the project.
236. A further community information session was held in Buangor in December 2011, where members of the public were asked to comment on the three completed alignment options.

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237. Consultation activities during the project planning phase tended to focus on local and regional audiences.

238. Subsequent events revealed there was broad community interest in the impacts of the highway duplication works.

239. VicRoads later recognised this, and, in May 2016, began to advertise community information sessions concerning the project in state-wide media outlets.

## Consultation with organisational stakeholders

240. VicRoads also sought feedback from local organisations through a Professional and Local Services Group. This body met throughout 2011-12 to discuss the alignment options and issues affecting members.

241. Organisational stakeholders were also consulted through the project's Technical Reference Group. The Technical Reference Group met a total of eight times between May 2011 and September 2012, when the project's Environment Effects Statement was finalised.

242. Feedback from the Technical Reference Group caused VicRoads to reconsider some eliminated alignments and reconfigure its options assessment matrix to better emphasise the environmental objectives of the project.

243. A summary of VicRoads' consultation activities during the project planning phase is included in Appendix A of this report.

### Community feedback

Records available to the investigation indicate that community interest in the project was high and information sessions were well attended.

Prior to finalisation of the Environment Effects Statement, most community submissions about the project concerned the potential impacts of the different alignment options on private residences and businesses.

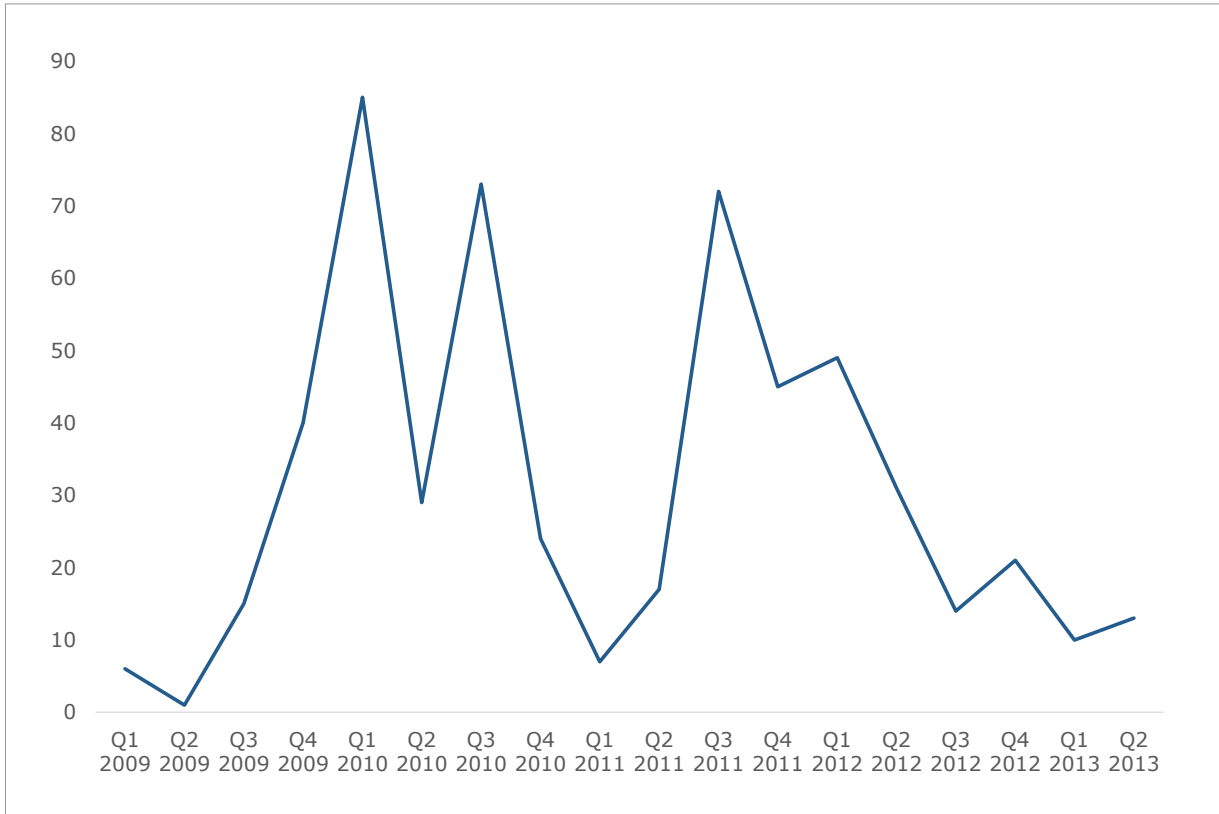
Many community submissions welcomed the project and the perceived safety benefits of a duplicated highway.

Other submissions emphasised the need to protect native vegetation in the area, including river red gums near Langi Ghiran State Park. Some community members also identified the need to protect previously recorded Aboriginal and European heritage sites between Buangor and Ararat.

Feedback provided by the local community influenced the development of several preliminary alignment options and was later incorporated into the project's Environment Effects Statement.

Records available to the investigation indicate that VicRoads was not notified of the presence of possible birthing trees near Langi Ghiran State Park until early 2017.

Figure 20: Public approaches to VicRoads concerning Western Highway duplication project (Q1 2009 - Q2 2013)



Source: Department of Transport

Figure 21: Community information bulletin issued in July 2011

## Western Highway Project Beaufort to Ararat & Ararat to Stawell

Community update  
July 2011

**Progress report**  
VicRoads is preparing Environment Effects Statements (EES) for the Western Highway Project between Beaufort and Stawell. This information bulletin provides an update of the planning of the Western Highway duplication between Beaufort and Stawell.

**Shortlisted route options**  
After consultation with government agencies, businesses and the community, some of the options you may have seen earlier are no longer being investigated; and some new options are being considered. Maps on pages 2 & 3 show an outline of the options being investigated.




**Public information displays**  
The project is holding four public information sessions to display the shortlisted routes and provide an opportunity for the community to meet the project team and provide feedback.

We hope to see you at one of the sessions. If you can't make it but would like to have more information, contact details are on Page 4.

**Information displays**

Wednesday July 13 Buangor Coach House Western Highway Buangor	4pm -7pm
Thursday July 14 Great Western Public Hall Western Highway Great Western	4pm -7pm
Saturday July 16 Beaufort Community Centre 7 Lawrence Street Beaufort	9am -12pm
Tuesday July 19 Ararat College 4 - 30 Barkly Street Ararat	9am -12pm

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# Environment Effects Statement

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244. Under the Environment Effects Act, the Minister for Planning may require a person undertaking a development to prepare an Environment Effects Statement identifying its potential environmental effects or impacts.

245. According to Guidelines issued by the Minister for Planning, an Environment Effects Statement will generally be required when:

- it is likely that the development will have significant adverse effects on the environment
- integrated assessment of the environmental effects of the project is required
- ordinary statutory processes would not provide sufficiently comprehensive and transparent assessment of the project.

246. If an Environment Effects Statement is required, the Minister for Planning will ordinarily issue detailed scoping requirements for the project, identifying the matters to be investigated and set out in the document.

247. In September 2010, VicRoads referred the relevant section of the Western Highway duplication project to the Minister for Planning for advice as to whether an Environment Effects Statement would be required. In the referral, VicRoads identified that the project had the potential to damage Aboriginal cultural heritage in the area.

248. In October 2010, the Minister wrote to VicRoads to confirm that an Environment Effects Statement would be necessary.

249. In September 2011, scoping requirements for the Environment Effects Statement were finalised and issued to VicRoads.

250. The scoping requirements required the Environment Effects Statement to evaluate the project against 10 objectives, including:

- to provide for the duplication of the highway in a manner that addressed safety, efficiency and capacity issues
- to avoid or minimise effects on flora and fauna species and ecological communities listed under Victorian and Commonwealth legislation
- to protect residents' wellbeing and minimise severance of communities
- to protect Aboriginal and non-Aboriginal cultural heritage
- overall, to identify an alignment and conceptual design for the Western Highway Duplication from Beaufort to Ararat that would achieve a sustainable balance of economic, environmental and social outcomes.

## Cultural heritage impact assessment

251. In early 2012, VicRoads commissioned a number of specialist environmental impact assessments for inclusion in the project's Environment Effects Statement.

252. This included a cultural heritage impact assessment, completed in July 2012.

253. This assessment was conducted by an archaeologist and involved more detailed evaluation of the complete alignment options selected by VicRoads during the phase three assessment. This included evaluation of Option 3, which had not yet been eliminated when the study began.

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254. The assessment involved:

- a further, more detailed, desktop study into the history of Aboriginal occupation of the area
- use of spatial datasets to determine the number of identified Aboriginal cultural heritage sites potentially impacted by each option
- identification of mitigation measures to reduce risks to impacted Aboriginal cultural heritage sites.

255. The impact assessment observed that all three alignment options would directly encounter 12 known Aboriginal cultural heritage sites and run immediately adjacent to between eight and nine additional sites. These included several scarred trees, artefact scatters and one earth mound.

256. Two of these sites were first identified during the standard assessment completed as part of the project's cultural heritage management plan, discussed later in this report.

257. Of the approximately 20 sites identified, three were located in the area between Buangor and Ararat:

- an artefact scatter near the Hopkins River
- an earth mound between the Hopkins River and the western boundary of Langi Ghiran State Park
- a scarred tree on the lower-western slopes of Mt Langi Ghiran, 100 metres north of the existing highway.

258. The impact assessment identified these sites would be impacted equally by each alignment option. Of these, only the artefact scatter was considered likely to be directly encountered during construction.

259. The impact assessment recommended that impacts to this site be managed through preparation of a cultural heritage management plan.

260. The impact assessment otherwise observed:

- there was a 'moderate' risk that each alignment option would encounter previously unrecorded Aboriginal cultural heritage sites
- there was an 'unlikely' risk that each alignment option would encounter previously unrecorded burnt mounds or mortuary trees.

261. The impact assessment concluded:

Overall, from an Aboriginal cultural heritage perspective there is no difference between the options.<sup>38</sup>

262. The assessment identified that risks to previously recorded and unrecorded Aboriginal cultural heritage sites could be managed or mitigated by:

- undertaking a complex assessment and preparing a cultural heritage management plan for the project
- including specific cultural heritage information and stop work requirements in the project contract
- including contingency measures and specific procedures relating to the discovery of ancestral remains in the project's cultural heritage management plan.

263. These measures were subsequently implemented by VicRoads. Information from the impact assessment was also incorporated into the project's risk register.

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<sup>38</sup> A Long, *Report for Western Highway Project: Impact Assessment Report - Cultural Heritage: Aboriginal* (2012) 91.



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## Nomination of the preferred alignment

264. The specialist environmental impact assessments were incorporated into the project's Environment Effects Statement.

265. After considering these assessments, VicRoads determined to present Option 2 as its preferred alignment option in this document. Option 1 was otherwise retained as an alternative alignment.

266. This decision contradicted internal advice to the Project Review Committee in February 2012, which favoured designation of Option 1 as the preferred alignment due to its perceived environmental benefits:

Although there is little difference between the three options across all the disciplines, there is a strong preference for Option 1 having the least impact on State listed flora and fauna. Option 1 avoids an area of very high significance native vegetation which is located immediately south of Langi Ghiran State Park.

Option 1 is strongly supported by the Department of Sustainability and Environment (DSE) because it avoids the sensitive native vegetation to the south of Langi Ghiran State Park. Local DSE officers have indicated that the native vegetation to the south of Langi Ghiran State Park represents the highest value native vegetation for the Western Highway Corridor between Ballarat and Stawell.

267. Based on project records, the investigation was unable to determine why VicRoads designated Option 2 as its preferred alignment.

268. While the project's Environment Effects Statement included a comparison of the two options, this document did not identify which environmental objectives, if any, influenced VicRoads' decision.

269. VicRoads advised the investigation that it was unable to locate further records explaining the decision to nominate Option 2 as the preferred alignment.

270. The Department of Transport, responding to the Ombudsman's draft report on behalf of VicRoads, submitted:

VicRoads' usual practice at the time was that prior to recommending any option in an EES, senior executive approval was obtained. As such, the inclusion of the alternative option and why [Option 2] was nominated as the preferred option would, we believe, have been the subject of an executive briefing.

271. The internal advice indicated that Option 2 would cost approximately \$12 million less than Option 1. Based on the records retained by VicRoads, the investigation could not determine whether this influenced the decision.

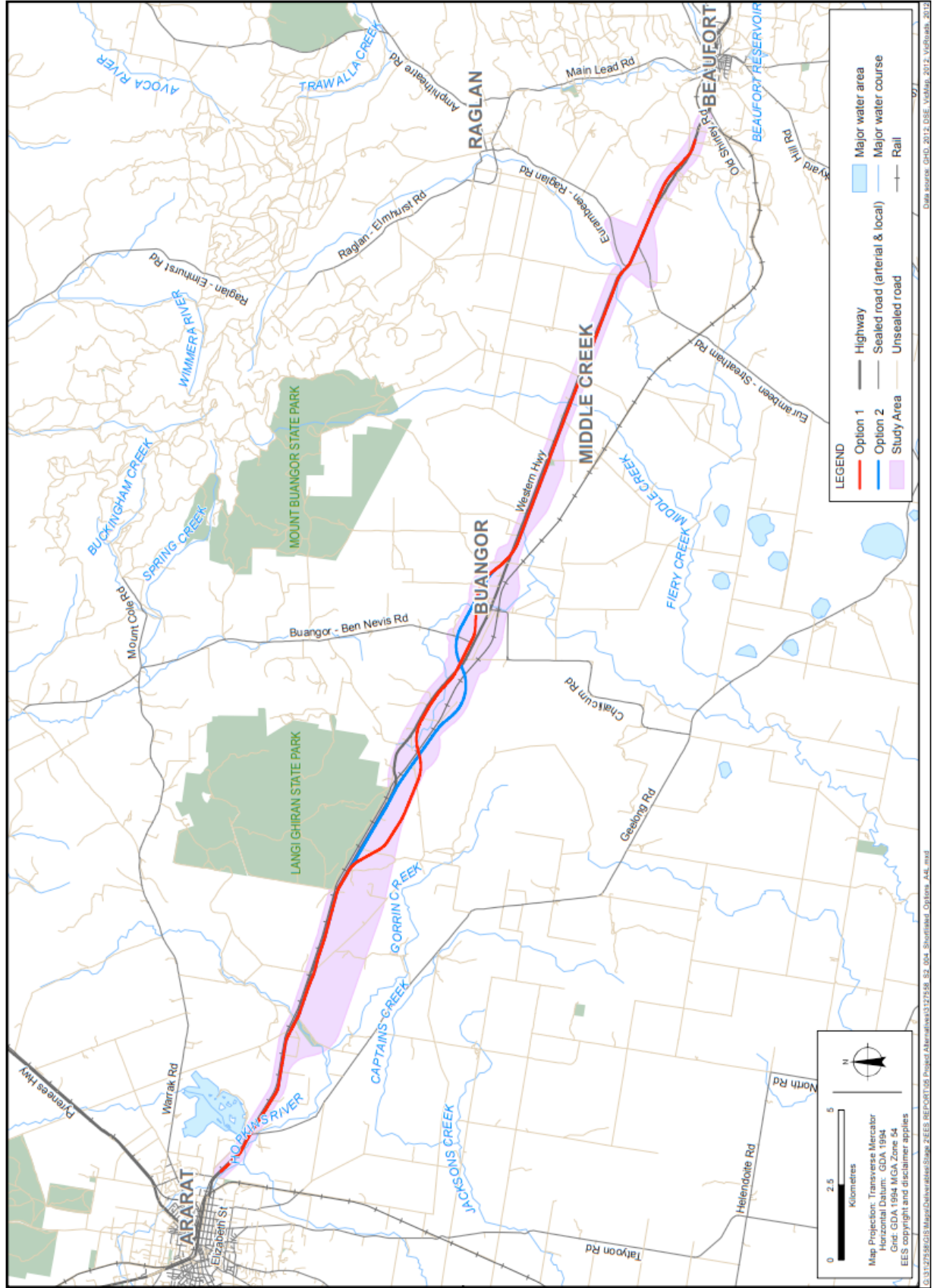
272. In response to the Ombudsman's draft report, the Department of Transport observed that the decision to nominate Option 2 as the preferred alignment was likely made after VicRoads obtained a better understanding of the project's impacts than was available at the time of the initial advice to the Project Review Committee.

273. The Department of Transport also emphasised that, in its view, both alignment options presented in the Environment Effects Statement were appropriate for consideration and reflective of consultation undertaken with the community and other stakeholders.

274. VicRoads presented its preferred and alternative alignments to the community at public displays held in Buangor, Great Western, Beaufort and Ararat in July 2012.

275. VicRoads' preferred and alternative alignments are depicted in Figure 22.

Figure 22: VicRoads' preferred (Option 1) and alternative (Option 2) highway alignments (Option 1) highway alignments, September 2012



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## Exhibition

276. The project's Environment Effects Statement was finalised in August 2012 and exhibited to the public between September and October 2012.

277. VicRoads promoted the Environment Effects Statement at community information sessions held in Beaufort and Ararat and via mailouts, information bulletins and public advertisements in regional, state-wide and national newspapers.

278. The Environment Effects Statement:

- provided an overview of the proposed duplication works, including the reasons for the project and VicRoads' assessment of project alternatives
- explained the scoping requirements
- summarised stakeholder and community feedback concerning the project
- summarised the various impact assessments
- explained how the different alignment options were identified, evaluated and then eliminated or selected
- appended several technical reports, including in relation to the standard assessment conducted under the Aboriginal Heritage Act (discussed in a later section of this report).

279. Potential impacts on Aboriginal cultural heritage were identified in Chapter 14 of the Environment Effects Statement. This section of the document:

- summarised the cultural heritage assessments conducted in relation to the project

- identified the number and nature of recorded Aboriginal cultural heritage sites in proximity to the project
- summarised the Aboriginal cultural heritage risks identified in the project's risk register
- identified how the project proposed to mitigate the risk of encountering mortuary trees.

280. The scoping requirements issued by the Minister for Planning requested that, among other things, VicRoads:

- provide relevant information on pre-contact and contemporary activities in the project area by Aboriginal people
- clearly document consultation undertaken to gain the knowledge and views of local Aboriginal communities
- identify proposed measures to avoid, mitigate or manage potential effects on known and unknown sites of cultural significance.

281. While the technical reports appended to the Environment Effects Statement included detailed information addressing these criteria, much of this information was not incorporated into the body of the document.

282. This would have made the information less accessible to persons, including Aboriginal traditional custodians, who may have been interested in understanding the potential cultural heritage impacts of the project.

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283. Responding to the Ombudsman's draft report on behalf of VicRoads, the Department of Transport commented:

[It is] relevant to note that certain information relied on in the EES [Environment Effects Statement] is sourced from the Victorian Aboriginal Heritage Register. Access to that Register is restricted as it contains culturally sensitive information [...]. As such, it is common practice for Aboriginal cultural heritage information to be summarised, rather than fully detailed, in the publicly exhibited EES. [...]

[A]n EES is a very long and detailed document and [...] it is common practice to include the detailed technical reports (which cover a broad range of issues not limited to Aboriginal cultural heritage matters) in annexures rather than the main body of the EES report.

Figure 23: Western Highway between Ararat and Langi Ghiran, 2012



Source: Department of Transport



# Inquiry and Advisory Committee

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284. At the conclusion of the Environment Effects Statement process, the Minister for Planning will ordinarily assess the environmental effects of the proposed development. This assessment is then provided to the relevant planning authority to inform their decision.
285. In some cases, the Minister for Planning may establish and seek advice from specialist planning bodies before making an assessment.
286. In November and December 2012, the Minister determined to appoint the following bodies to provide advice concerning the project:
- an advisory committee under section 151 of the Planning and Environment Act, to consider and hear submissions about proposed amendments to the Ararat and Pyrenees Planning Schemes associated with the project
  - an inquiry panel under section 9 of the Environment Effects Act, to provide advice about the project's environmental effects.
287. These bodies were comprised of the same three planning experts and effectively sat as a single entity, designated the 'Western Highway Project Section 2 Inquiry and Advisory Committee'.
288. Under its terms of reference, the Inquiry and Advisory Committee was required to provide the Minister with a written report presenting, among other things:
- the Committee's findings regarding the potential environmental effects of the project and alignment alternatives documented in the Environment Effects Statement
  - advice about possible measures to prevent, minimise or compensate for environmental impacts, including any measures proposed by VicRoads, other agencies and members of the public
  - advice on the most suitable alignment for the project, taking into account VicRoads' preferred alignment and the alternative alignment identified in the Environment Effects Statement
  - any recommended modifications or feasible alternatives to the project, including in relation to alignment and design.
289. Information about the Inquiry and Advisory Committee process was included in public notices promoting the Environment Effects Statement.
290. Those wishing to comment on the Environment Effects Statement and associated draft planning scheme amendments were invited to make written submissions to Planning Panels Victoria by 25 October 2012.
291. Information promoting the Committee process was also published on VicRoads' and Planning Panels Victoria's websites.
292. One member of the public who made a submission to the Inquiry and Advisory Committee told the Ombudsman they felt disadvantaged by a relative lack of information concerning the purpose and scope of the process.
293. In a 2017 review, the Victorian Auditor-General observed that imbalances between proponents and members of the public can create perceptions of unfairness during the inquiry process.
294. Records reviewed by the investigation indicate that the terms of reference for the Inquiry and Advisory Committee were made available to people who attended the public hearings.

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## Submissions

295. The Inquiry and Advisory Committee received 23 written submissions in response to the Environment Effects Statement, including 16 submissions from members of the public.
296. One notable written submission was made by the Department of Sustainability and Environment.
297. In this submission, the Department expressed a preference for alignment Option 1 over VicRoads' preferred alignment because it would have 'less overall environmental impact', particularly in relation to the removal of native vegetation and impacts on Langi Ghiran State Park.
298. The written submissions to the Inquiry and Advisory Committee are listed in Appendix B of this report.

## Public hearings

299. The Inquiry and Advisory Committee held a directions hearing in Beaufort in November 2012. Members of the Committee also inspected the highway site at this time.
300. Public hearings were held in Beaufort in December 2012. Individuals and organisations who made written submissions to the Committee were invited to speak at the hearings. In total, nine parties chose to address the Committee, including representatives of VicRoads.
301. Oral submissions to the Committee generally focused on:
- the impact of the project on private properties and local amenities
  - the ecological impacts of the two nominated alignment options.

302. One member of the public was represented by an ecologist, who spoke in favour of two alternative 'northern options' that followed the existing highway alignment between Buangor and Ararat.
303. The proposed northern option is discussed in more detail later in this report.

## Recommendations

304. At the conclusion of the hearings, the Committee assessed the project against the objectives identified in the scoping requirements for the Environment Effects Statement.
305. In February 2013, the Committee presented its report to the Minister for Planning. In its report, the Committee concluded:
- the Environment Effects Statement prepared by VicRoads generally identified and addressed the key environmental impacts of the project
  - the environmental effects of the project could be adequately managed through the implementation of mitigation measures proposed by VicRoads.
306. In its report, the Committee also assessed the two competing alignment options proposed by VicRoads.
307. The Committee ultimately disagreed with VicRoads' preference for the Option 2 alignment. In doing so, the Committee placed significant emphasis on the perceived environmental benefits of the Option 1 alignment.



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308. The Committee observed:

the avoidance of significant vegetation, coupled with the lesser severance impact on agricultural land around and west of Buangor, and maintenance of the design objectives (such as 110 kilometres an hour for the whole project length) for Option 1 outweigh the marginal benefits of Option 2 (such as estimated costs and benefits, and less severance west of Hillside Road).

309. At the conclusion of its report, the Inquiry and Advisory Committee recommended:

- draft planning scheme amendments be approved by the Minister for Planning
- subject to minor design changes, the Option 1 alignment be adopted for planning and design purposes.

### **Submission concerning a possible Aboriginal scarred tree**

Advice concerning the potential cultural heritage impacts of the project was presented in Chapter 12 of the Committee's report.

Based on the cultural heritage impact assessment included in the Environment Effects Statement, the Inquiry and Advisory Committee concluded there would be a 'low impact' to Aboriginal cultural heritage associated with the project.

In this Chapter, the Committee observed the 'only submissions on cultural heritage matters came from VicRoads'.

This does not appear accurate, as although the majority of public submissions focused on other subjects, one written submission complained the Environment Effects Statement failed to document the existence of an Aboriginal scarred tree close to the highway in Buangor:

Removal of this tree would have an environmental effect as well as cultural, so is surely worthy of illustration in an EES. [...] I expect the proximity of this tree to the highway (approx. 6 metres) would mean its future is doomed.

On the records retained by the Inquiry and Advisory Committee, it was not possible for the investigation to identify how these comments were addressed by the Committee, if at all.

Based on the description provided by the member of the public, it is possible that this tree was identified and managed under the project's cultural heritage management plan.

The Department of Transport, responding to the Ombudsman's draft report, emphasised that 'a number of scarred trees were identified and included' in the project's cultural heritage management plan.

# Cultural heritage management plan

310. In Victoria, activities requiring an Environment Effects Statement must also be evaluated under the Aboriginal Heritage Act.
311. The Aboriginal Heritage Act commenced operation in May 2007. This legislation was developed following consultation with Aboriginal peoples, who emphasised the need for Victoria’s heritage protection framework to recognise the role of traditional custodians in managing their cultural heritage.
312. Among other things, the Aboriginal Heritage Act:
- regulates the possession and ownership of Aboriginal ancestral remains and secret or sacred Aboriginal objects
  - establishes the Aboriginal Heritage Council as the key body responsible for advising the Minister for Aboriginal Affairs in relation to the protection of Aboriginal cultural heritage in Victoria
- establishes the Victorian Aboriginal Heritage Register as the central repository in which Aboriginal places and objects are recorded in Victoria
  - regulates activities that are likely to harm or destroy Aboriginal cultural heritage.
313. In many cases, evaluation of a project under the Aboriginal Heritage Act is undertaken through the preparation and approval of a ‘cultural heritage management plan’.
314. In total, three cultural heritage management plans were prepared in relation to the Western Highway duplication works between Beaufort and Ararat. These are summarised in Table 9.
315. This section of the report concerns CHMP 12327, which was prepared in relation to the area between Buangor and Ararat (‘the cultural heritage management plan’).

**Table 9: Cultural heritage management plans for Section 2 duplication works**

Plan	Activity area	Approved by	Plan date
CHMP 11813	Beaufort to Fiery Creek (approximately 8km east of Buangor)	Wadawurrung Aboriginal Corporation	5 April 2013
CHMP 11812	Fiery Creek to Mile Post Lane (east of Buangor)	Martang	23 May 2013
CHMP 12327	Mile Post Lane to Ararat	Martang	19 September 2013

Source: Victorian Aboriginal Heritage Register

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## Cultural heritage management plans

Under the Aboriginal Heritage Act, a cultural heritage management plan is required for any 'high impact activity' undertaken within an area of cultural heritage sensitivity. Additionally, all projects requiring an Environment Effects Statement automatically require a cultural heritage management plan.

Preparation of a cultural heritage management plan involves:

- assessment of the area to determine the nature of any Aboriginal cultural heritage present in it
- preparation of a written report (the plan itself) setting out the results of the assessment and the conditions that must be complied with before, during and after the proposed activity to **'manage and protect'** the Aboriginal cultural heritage identified during the assessment.

Once approved, a developer must comply with the conditions of a cultural heritage management plan. Failure to do so may constitute an offence.

Under section 52 of the Aboriginal Heritage Act, a decision-maker must not grant a statutory approval for an activity requiring a cultural heritage management plan before such a plan has been approved. This includes an amendment to a planning scheme.

### Registered Aboriginal Parties

Registered Aboriginal Parties are Aboriginal representative bodies registered under the Aboriginal Heritage Act to 'act as a primary source of advice and knowledge' to the Victorian Government on matters relating to Aboriginal cultural heritage in their designated area.

Registered Aboriginal Parties are eligible to receive funding from Aboriginal Victoria and are, among other things, responsible for evaluating cultural heritage management plans.

Registered Aboriginal Parties are appointed by the Aboriginal Heritage Council in accordance with criteria identified in the Aboriginal Heritage Act.

### Aboriginal Heritage Council

The Aboriginal Heritage Council is an independent statutory authority made up of traditional owners appointed by the Minister for Aboriginal Affairs.

Among other things, the Aboriginal Heritage Council:

- acts as the central coordinating body responsible for overseeing, monitoring and managing Aboriginal ancestral remains in Victoria
- advises the Minister on the protection of Aboriginal cultural heritage in Victoria
- receives and determines applications for the registration of Registered Aboriginal Parties.

In 2016, following a lengthy review of the legislation, the Aboriginal Heritage Act was amended to increase the powers and functions of the Aboriginal Heritage Council.

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As a result of these amendments, the Aboriginal Heritage Council was made responsible for overseeing and supervising the operations of Registered Aboriginal Parties and was granted the power to impose conditions on the registration of these entities.

The Aboriginal Heritage Council receives administrative support from Aboriginal Victoria.

### **Aboriginal Victoria**

Aboriginal Victoria is the office within the Department of Premier and Cabinet responsible for administering the Aboriginal Heritage Act.

Aboriginal Victoria also:

- maintains the Victorian Aboriginal Heritage Register
- provides funding to Registered Aboriginal Parties
- carries out enforcement activities in relation to the Aboriginal Heritage Act
- implements the Government's Victorian Aboriginal Affairs Framework.

Prior to 2016, Aboriginal Victoria was known as the Office of Aboriginal Affairs Victoria.

## **Preparation**

316. Preparation of the cultural heritage management plan began in July 2011 and concluded in September 2013.

317. This process involved:

- consultation with the Registered Aboriginal Party for the area, Martang
- investigations into potential cultural heritage sites within the project area
- finalisation and approval of the cultural heritage management plan.

318. Under the Aboriginal Heritage Act, a person seeking to undertake an activity requiring a cultural heritage management plan (the 'sponsor') must give written notice of their intention to prepare the plan to Aboriginal Victoria and each Registered Aboriginal Party for the area.

319. The Registered Aboriginal Party must then notify the sponsor whether it intends to evaluate the plan.

320. If a Registered Aboriginal Party chooses to evaluate a cultural heritage management plan, the sponsor must submit the plan to the Registered Aboriginal Party for approval.

321. In July 2011, VicRoads formally notified Aboriginal Affairs Victoria and Martang of its intention to prepare a cultural heritage management plan for the proposed duplication works between Buangor and Ararat.

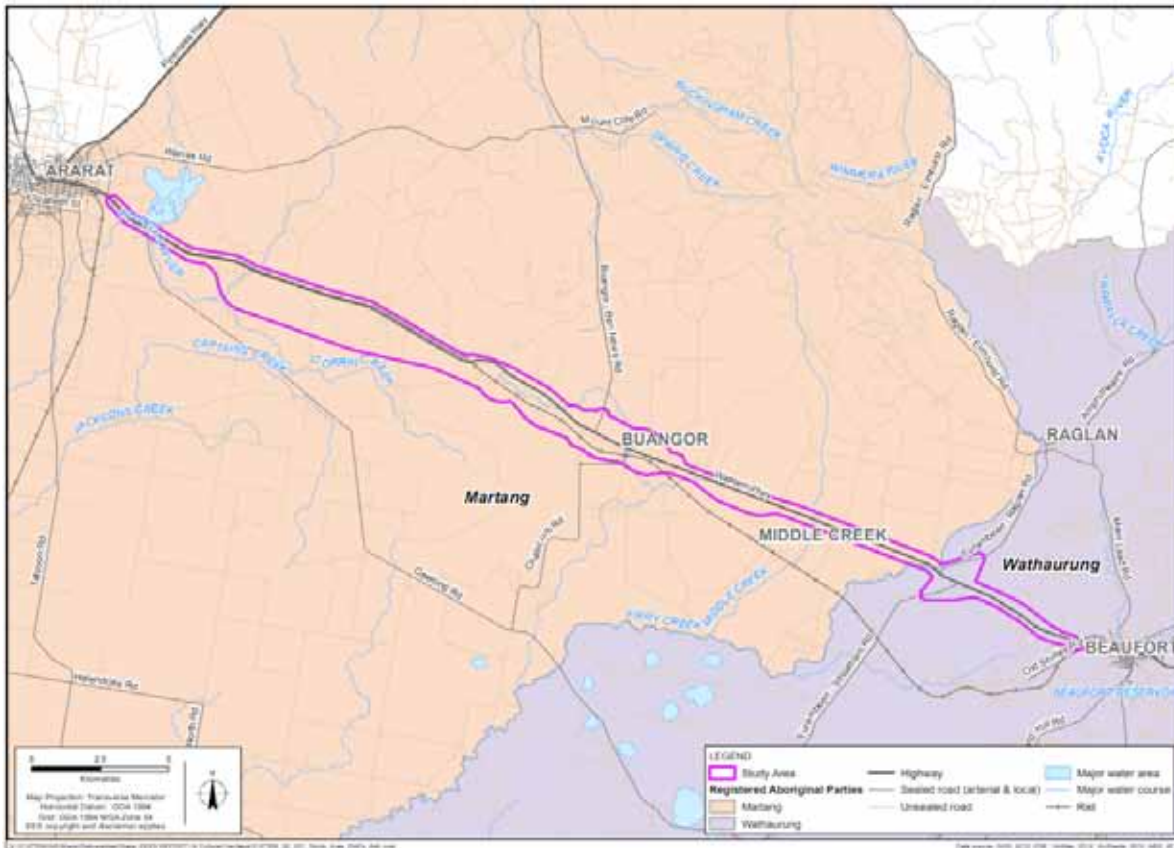
322. That same month, Martang wrote to VicRoads to confirm its intention to evaluate this document.

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## Martang

323. During the development of the Western Highway project, Martang was the Registered Aboriginal Party for the area of Djab Wurrung Country between Buangor and Ararat.
324. Martang was appointed the Registered Aboriginal Party for this area in September 2007. At the time, Martang was a proprietary company limited by shares. Martang's ownership was limited to nine shareholders, all of whom were members of the same family group.
325. In its application for registration as a Registered Aboriginal Party, Martang included records demonstrating that it represented more than 50 Djab Wurrung traditional custodians.
326. Martang's application for registration was supported by letters from several Djab Wurrung elders, as well as traditional owner groups from other parts of Victoria.
327. When considering applications for registration as a Registered Aboriginal Party, the Aboriginal Heritage Council is required to consider, among other things:
- whether the applicant is a native title party for the area
  - whether the applicant is a body representing Aboriginal people that has:
    - o historical or contemporary interest in the Aboriginal cultural heritage relating to the area
    - o demonstrated expertise in managing and protecting Aboriginal cultural heritage in the area
  - whether the applicant has entered into an agreement with the State of Victoria in relation to land and natural resource management in the area
  - any other matter considered relevant.
328. When assessing Martang's application, the Aboriginal Heritage Council noted Martang had substantial cultural heritage management experience and had maintained a connection to Djab Wurrung Country.
329. While the Aboriginal Heritage Council recognised Martang's limited ownership, it observed that Martang had 'agreed to implement processes to ensure that it represents all Djab Wurrung Traditional Owners'.
330. When approving Martang's application, the Aboriginal Heritage Council observed:
- Various members of the Djab Wurrung have advised the Council that they support the Martang RAP Application. No Djab Wurrung person objected to this arrangement, nor has the Council been informed of any other organisation that might better represent Djab Wurrung people as a RAP.
- Council is satisfied that Martang would be able to represent Djab Wurrung people should it be made a RAP.
331. At the time of this decision, a co-director of Martang was also a member of the Aboriginal Heritage Council. This individual declared a conflict of interest in relation to the matter and was not involved in the decision to approve Martang's application.
332. In February 2012, the Aboriginal Heritage Council declined to extend Martang's registration area over an area to the north-west of Ararat. In doing so, the Council observed it was 'not aware of any changes by Martang to its corporate structure to establish broader representation of Djab Wurrung community interests'.
333. In August 2016, the Aboriginal Heritage Act was amended to require that Registered Aboriginal Parties be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). Martang's Registered Aboriginal Party status lapsed in August 2019, when it did not reincorporate under this legislation.

Figure 24: Registered Aboriginal Parties along Western Highway between Beaufort and Ararat, 2012



Source: Department of Transport

334. The relevant boundaries of Martang's former Registered Aboriginal Party area are depicted in Figure 24.

## Cultural heritage investigations

335. Where a Registered Aboriginal Party indicates that it intends to evaluate a cultural heritage management plan, the sponsor must take reasonable efforts to consult with the Registered Aboriginal Party before and during its preparation.

336. The Registered Aboriginal Party is in turn required to use reasonable efforts to cooperate with the sponsor.

337. The Registered Aboriginal Party may also choose to:

- consult with the sponsor in relation to the assessment of the activity area
- consult with the sponsor in relation to the conditions to be included in the cultural heritage management plan
- participate in any assessments relating to the activity area.

338. In July 2011, VicRoads and Martang met to discuss the project and the processes to be followed for preparation of the cultural heritage management plan.

339. During this meeting, VicRoads and Martang agreed that a standard assessment of the project area would be required under the *Aboriginal Heritage Regulations 2007* (Vic).



340. The forms of assessment required under the Aboriginal Heritage Regulations are summarised in Table 10.

<b>Table 10: Forms of assessment required when preparing a cultural heritage management plan</b>		
<b>When required</b>		<b>Nature of assessment</b>
Desktop assessment	When preparing any cultural heritage management plan.	<p><i>Must</i> involve, among other things:</p> <ul style="list-style-type: none"> <li>• a search of the Victorian Aboriginal Heritage Register</li> <li>• a review of reports and published works about Aboriginal cultural heritage in the activity area and the broader region</li> <li>• a review of historical accounts of Aboriginal occupation of the area and the broader region.</li> </ul> <p><i>May</i> involve the collection and review of oral history relating to the area.</p>
Standard assessment	If a desktop assessment shows that it is 'reasonably possible' that Aboriginal cultural heritage exists in the area.	<p><i>Must</i> involve a ground survey of all or part of the area to detect the presence of Aboriginal cultural heritage, including an on-the-ground examination of:</p> <ul style="list-style-type: none"> <li>• the surface of the area</li> <li>• any mature indigenous tree in the area</li> <li>• any cave, rock shelter or cave entrance in the area.</li> </ul> <p><i>May</i> involve:</p> <ul style="list-style-type: none"> <li>• the collection and review of oral history relating to the area</li> <li>• sub-surface investigations within the area.</li> </ul>
Complex assessment	If a desktop or standard assessment shows that Aboriginal cultural heritage is, or is likely to be, present in the area and it is not possible to identify its extent, nature and significance without a complex assessment.	<p><i>Must</i> involve the disturbance of all or part of the area or an excavation of all or part of the area to uncover or discover Aboriginal cultural heritage.</p> <p><i>May</i> involve the collection and review of oral history relating to the area.</p>

Source: Aboriginal Heritage Regulations

341. In January 2012, VicRoads and its cultural heritage advisor met with Martang to discuss the project in further detail.

342. That same month, VicRoads began desktop and standard assessments of the area. These were followed by a complex assessment in November 2012.

### Desktop assessment

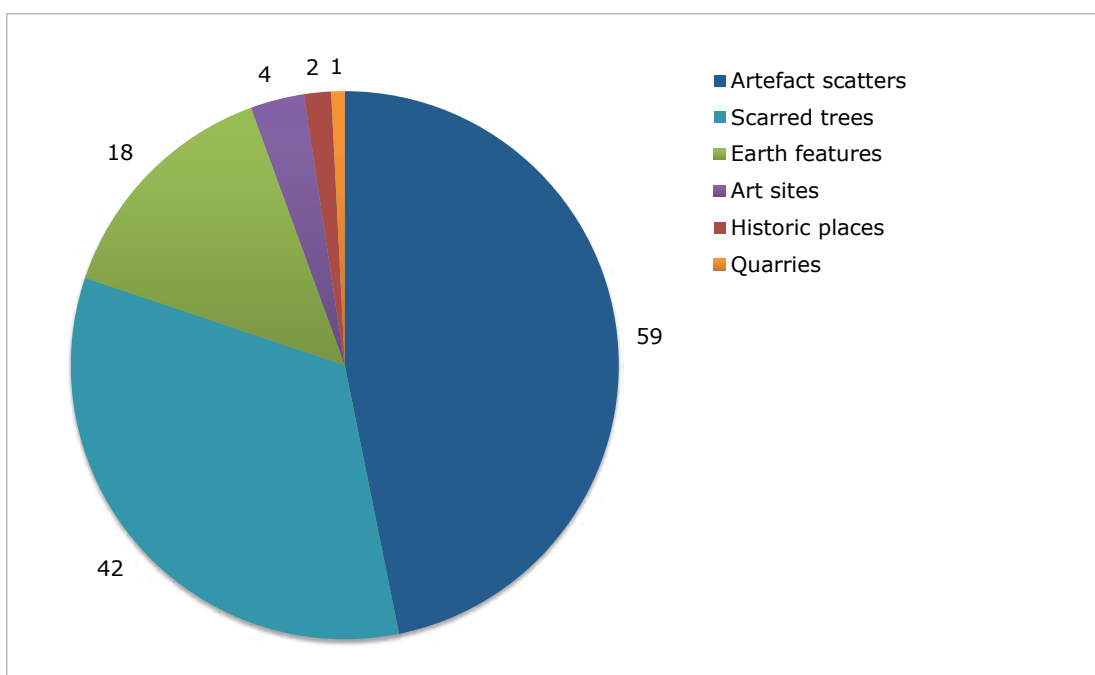
343. As part of the desktop assessment, VicRoads engaged a cultural heritage advisor to:

- analyse information recorded on the Victorian Aboriginal Heritage Register, the National and Commonwealth Heritage Lists and relevant heritage overlays and planning schemes
- undertake background research into the history of the area and surrounding region
- review previous cultural heritage assessments completed in the area and surrounding region, including the assessments undertaken by VicRoads when planning the project.

344. The desktop assessment identified:

- there were at least 769 previously recorded Aboriginal objects and places within the area surrounding the project, including 121 objects and places within 5km of the activity area
- the geographic region included several landforms that would have been traditionally utilised by Aboriginal people
- there was a high possibility of locating Aboriginal scarred trees in parts of the project area, particularly in areas close to waterways
- overall, there was a high chance of locating Aboriginal archaeological sites within undisturbed parts of the project area.

Figure 25: Aboriginal cultural heritage sites within 5km of project site identified by desktop assessment



Source: Victorian Aboriginal Heritage Register

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## Previous Aboriginal cultural heritage assessments

Prior to the Western Highway duplication project, a number of cultural heritage assessments had already been conducted in the Ararat and Buangor region.

These included:

**Recording and Assessment of BN1 Aboriginal Rock Art Site, Mt Cole State Forest** (Gunn, 1988): This assessment involved inspection of an Aboriginal rock art site located in Mount Cole State Forest, north-east of Langi Ghiran. The assessment observed that the motifs of the art were 'so far, unique for Victoria' and recommended that the site be protected and conserved.

**Langi Ghiran State Park Archaeological Survey** (Gunn, 1991): This assessment involved a detailed cultural heritage survey of Langi Ghiran State Park and an adjoining area of Crown land. The assessment identified a total of 64 archaeological sites within the study area, including 24 Aboriginal scarred trees, 18 isolated artefacts, 12 artefact scatters and 10 rock shelter sites.

The assessment observed:

Considering the many years of timber harvesting that has occurred in the park to date, the location of so many (24) scarred trees was surprising. [...] It can be seen that the area was used by the Djab Wurrung during the contact period (1840-1870). How long prior to this they, or any other group had been using Langi Ghiran is unknown but from the presence of backed blades and blade technology it is likely that the area was used at least intermittently over the past 4000-5000 years. It should be remembered however that occupation at Lake Bolac, within Djab Wurrung country, has been dated to at least 12,500 years.

The assessment recommended various measures to conserve the cultural sites identified within the area.

**Victorian Honorary Correspondent Supply Depots: A Preliminary Historical and Archaeological Investigation** (Long and Clark, 1999): This assessment involved a historical and archaeological investigation of six places associated with the former Victorian Honorary Correspondent Supply Scheme, including a field survey of a site located at the former Buangor Station.

The assessment identified two previously unrecorded burnt earth mounds at the Buangor property. The assessment otherwise observed that, while the property contained 'many examples of highly mature river red gums', 'no tree examined displayed convincing evidence of Aboriginal scarring practices'.

**Western Highway Section, Dobie, Western Victoria - Archaeological Survey** (Gunn, 2001): This assessment was commissioned by VicRoads prior to the Western Highway duplication project for widening of a small section of the Western Highway near Dobie, between Ararat and Langi Ghiran. The assessment included a survey of a 1.36km area between the Hopkins River and Mount Langi Ghiran.

The survey examined several large river red gums in the area but did not identify any Aboriginal scarred trees.

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The assessment noted the views of the Ballarat and District Aboriginal Cooperative, the then-recognised representative body for the area under Commonwealth heritage protection legislation:

All Aboriginal sites are important to the [Cooperative] as they provide an important link to their past. The Cooperative however, regards the focus on artefacts and sites to be a European approach to Aboriginal heritage. To the Ballarat Aboriginal Community, a locality or place has more importance than the artefacts on or in it because they have a spiritual connection with the land itself. The natural context of a place then, often extends beyond the boundaries of an archaeological site.

**Challicum Hills Cultural Heritage Assessment** (Vines, 2002): This assessment was conducted for the purposes of a proposed wind farm development at Challicum, approximately 5km south of Langi Ghiran State Park.

The assessment identified more than 40 previously recorded Aboriginal cultural heritage sites within 5km of the study area, including a number of scarred trees, artefact scatters and earth mounds. The assessment also located two previously unrecorded stone source outcrops, which appeared to have been quarried by Aboriginal people.

**Ballarat and District Aboriginal Cultural Heritage Field School** (Pavrides, 2003): This assessment involved a survey at the former Gorrinn Station, to the south-east of Ararat, and identified four previously unrecorded Aboriginal scarred trees.

**Ararat Renewable Energy Park Cultural Heritage Management Plan** (Gilchrist et al, 2009): This cultural heritage management plan was commissioned by Ararat Rural City for development of an industrial park. It included a standard assessment of an area of land along the Western Highway, near Ararat Airport, involving Martang.

No Aboriginal cultural heritage places or objects were identified during the assessment. The assessment noted that discovery of heritage sites in this area was unlikely given the high level of ground disturbance in the area.

## Standard assessment

345. The standard assessment was conducted over 12 days between January and August 2012. The purpose of this assessment was to:

- determine if any Aboriginal cultural heritage objects or sites were located within the project area
- identify potential areas of Aboriginal archaeological sensitivity
- determine whether a complex assessment involving sub-surface testing was needed.

346. The standard assessment involved:

- ground surveys of the area surrounding the project, informed by the results of the desktop assessment
- inspection of previously recorded Aboriginal cultural heritage sites
- a separate mortuary tree inspection.

347. Ground surveys were conducted in January, February and August 2012, and involved the participation of VicRoads' cultural heritage advisors, representatives of Martang and staff from Aboriginal Affairs Victoria. The surveys covered areas within and near the construction footprints for both the Option 1 and Option 2 alignment corridors.

348. In the area between Buangor and Ararat, the survey identified a total of eight Aboriginal cultural heritage sites within 50 metres of the possible highway construction footprint, comprising:

- four previously unrecorded Aboriginal scarred trees
- one previously unrecorded artefact scatter
- one previously recorded Aboriginal scarred tree
- two previously recorded earth mounds.

349. The results of the ground surveys relating to the area between Langi Ghiran and Ararat are identified in Table 11.

Stage	Location	Ground visibility	Effective survey coverage	Archaeological sites
11	Pope Road - Hillside Extension Road	~5%	<5%	None identified.
12	Hillside Extension Road - Langi Ghiran State Park	~5%	<5%	None identified.
13	South of Langi Ghiran State Park	~1%	1%	None identified.
14	Langi Ghiran State Park to the Hopkins River	~1%	1%	One previously recorded Aboriginal scarred tree. One previously recorded earth mound. One artefact scatter.
15	Hopkins River to Ararat	~1%	1%	None identified.

Source: Victorian Aboriginal Heritage Register

Figure 26: Standard assessment ground survey area and stages



Source: Victorian Aboriginal Heritage Register

Figure 27: Aboriginal scarred tree near Buangor identified during standard assessment



Source: Victorian Aboriginal Heritage Register



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350. During the ground surveys, mature hollow trees with the potential to store human remains were identified and recorded. In March 2012, these trees were then inspected by an arborist to confirm their approximate age and species.

351. As a result of this process, more than a dozen trees were identified for further investigation. Between March and August 2012, the hollows within these trees were inspected for ancestral remains. No mortuary trees were identified during this process.

352. The ground surveys observed that dense grass cover made ground visibility 'extremely poor' throughout the study area. For this reason, following consultation with Martang, the standard assessment recommended that a complex assessment be undertaken:

Low ground surface visibility hindered the ability to accurately determine the extent of the artefact scatter, as such, it is not possible to determine with any accuracy the nature, extent and significance of this artefact scatter and other potential archaeological deposits without undertaking a stage of complex testing.

Based on the very small artefact sample, very little can be said about the site beyond the fact that Aboriginal people were clearly using the landscape.

### Complex assessment

353. In October 2012, VicRoads and its cultural heritage advisor met with Martang to discuss the methodology for the complex assessment.

354. Among other things, the complex assessment was intended to:

- locate previously unidentified Aboriginal cultural heritage objects and places
- establish the nature, extent and significance of objects and places identified during this process.

355. The complex assessment involved:

- digging 43 test pits in areas within 200 metres of named waterways
- digging a further 41 test pits in other potentially sensitive areas identified by Martang
- undertaking lengthy machine excavator scrapes at one-kilometre intervals.

356. Fieldwork for the complex assessment took place between December 2012 and August 2013. In total, the assessment involved 54 days of additional field work.

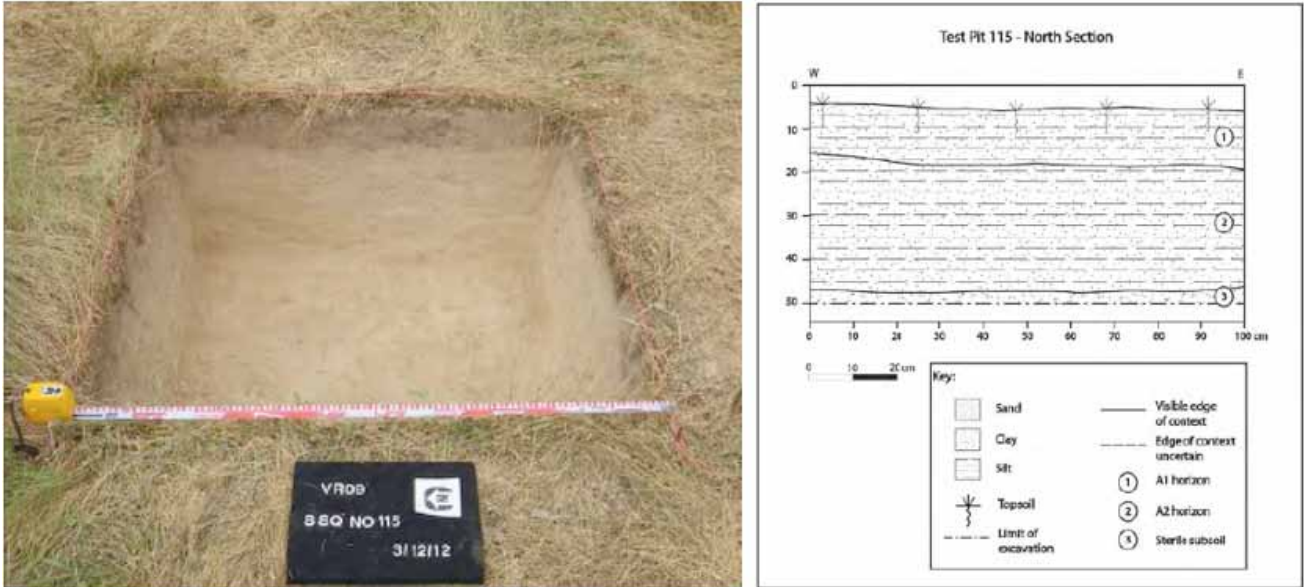
357. Representatives of Martang were present during all fieldwork and provided advice on specific locations for excavation.

358. The complex assessment identified:

- nine previously unrecorded artefact scatters
- seven previously unrecorded low-density artefact distributions
- more than 300 individual lithic artefacts.

359. Of the 16 sites identified, six were located in the area between Langi Ghiran State Park and Ararat.

Figure 28: Test pit excavated during complex assessment



Source: Victorian Aboriginal Heritage Register

## Finalisation

360. The cultural heritage management plan was finalised in September 2013.

361. The cultural heritage management plan:

- described the methodologies of the desktop, standard and complex assessments and summarised the information obtained during these processes
- identified the previously recorded and unrecorded Aboriginal cultural heritage sites near the project area and their significance
- identified sites likely to be harmed by the project and how this harm could be minimised.

362. When assessing the likely cultural heritage impacts of the project, the cultural heritage management identified:

- eight sites would be harmed by construction

- one additional site would possibly be harmed by construction, depending on final refinements to the design

- harm to four sites close to the alignment corridor would be avoided.

363. The cultural heritage management plan included a program for the collection and relocation of objects affected by the project. This generally involved the salvage and reburial of artefacts and the relocation of scarred trees within the construction corridor.

364. The impacted sites and management measures identified in the cultural heritage management plan are summarised in Table 12 on pages 90 and 91.

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365. Among other things, the cultural heritage management plan also required VicRoads to:

- meet with Martang every three months to discuss compliance with the cultural heritage management plan
- allow Martang access to the project site as necessary to assess compliance
- ensure that its employees and contractors received cultural awareness and cultural heritage training, including in relation to the specific requirements of the cultural heritage management plan
- observe contingency 'stop work' plans if previously unidentified Aboriginal cultural heritage or ancestral remains were discovered during construction.

366. In September 2013, VicRoads formally submitted the cultural heritage management plan to Martang for approval.

## Approval

367. Under section 61 of the Aboriginal Heritage Act, a Registered Aboriginal Party must consider the following matters when determining whether to approve a cultural heritage management plan:

- whether the activity will be conducted in a way that avoids harm to Aboriginal cultural heritage
- if it does not appear to be possible to conduct the activity in a way that avoids harm, whether the activity will be conducted in a way that minimises harm to Aboriginal cultural heritage
- any specific measures required for the management of Aboriginal cultural heritage likely to be affected by the activity, including after the activity has ended
- any contingency plans required
- requirements relating to the custody and management of Aboriginal cultural heritage during the activity.

368. Section 62(4) of the Aboriginal Heritage Act requires the sponsor and the Registered Aboriginal Party to 'make every reasonable effort to reach agreement' on the assessment criteria identified above.

369. Under the Aboriginal Heritage Act, a Registered Aboriginal Party may only refuse to approve a cultural heritage management plan if:

- it has not been prepared in accordance with the standards identified in the Aboriginal Heritage Regulations; or
- the Registered Aboriginal Party is not satisfied that the plan adequately addresses the assessment criteria identified above.

370. In October 2013, Martang notified VicRoads of its decision to approve the cultural heritage management plan.

371. In this notification, Martang observed:

The management plan meets the standards prescribed for the purposes of section 53 of the *Aboriginal Heritage Act 2006* [...]. Martang is also satisfied that the management plan adequately addresses the matters set out in section 61 of the Act.

372. Some Djab Wurrung traditional custodians who spoke with the Ombudsman said they did not believe the investigations conducted for the cultural heritage management plan were sufficiently thorough.

373. These parties said surface visibility during the standard assessment was likely too low to identify evidence of past Aboriginal use of the area.

374. The investigation noted this was acknowledged during the standard assessment and influenced the decision to undertake a complex assessment in relation to the project.

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375. Some Djab Wurrung traditional custodians said they believed the field inspections conducted for the cultural heritage management plan did not involve female representatives of Martang. These individuals said this meant the inspections would not have considered past Aboriginal uses of the area relating to women's business.

376. Information available to the investigation indicates that several female representatives of Martang participated in the field work undertaken for the complex assessment of the project area.

377. Further, the investigation considered that it was not for VicRoads to determine which representatives of Martang would participate in the inspections.

378. In a submission to the investigation, Martang emphasised that the protection of Djab Wurrung cultural heritage was always foremost in its activities as a Registered Aboriginal Party.

379. Martang stated the cultural heritage management plan was in its view comprehensive and 'ensured that all assets have been subject to best practice procedures [...] as well as our Aboriginal community expectations and demands'.

380. Martang otherwise noted it was not involved in determining the approved highway alignment.

## Salvage and compliance

381. Salvage and relocation of sites identified in the cultural heritage management plan took place over 35 days between November 2013 and June 2014.

382. During this process:

- more than 2,000 individual artefacts were salvaged and reburied
- two scarred trees were relocated
- one scarred tree was ultimately deemed safe from construction.

383. Later, VicRoads incorporated the requirements of the cultural heritage management plan into project contracts and Environmental Management Plans.

384. Among other measures, these documents required VicRoads' contractors to undertake daily and weekly inspections of the cultural heritage sites identified near the project area.

385. In May 2015, Aboriginal Victoria undertook an informal compliance check in relation to the cultural heritage management plan. This involved a site inspection, review of project records and consultation with VicRoads and its contractors.

386. A compliance report was not produced in relation to this check. However, Aboriginal Victoria advised the investigation:

[N]o compliance issues [were] identified in the conduct of management conditions of CHMP 12327 as a result of the compliance check.

387. This is consistent with contemporaneous records reviewed by the investigation.

388. Compliance with the cultural heritage management plan was also audited by VicRoads in December 2015. This audit was conducted by an independent archaeologist and involved inspection of a 5km section of the project area near Buangor.

389. No issues of non-compliance with the cultural heritage management plan were identified during this audit. The audit also confirmed all employees and contractors had been inducted in relation to the cultural heritage management plan.

390. Records supplied to the investigation indicate Martang also monitored compliance with the cultural heritage management plan and raised potential issues as they arose.

**Table 12: Impacts on Aboriginal cultural heritage sites identified in cultural heritage management plan**

Type	Location
Previously recorded earth mound in poor condition.	Between Ararat and Langi Ghiran State Park
Previously recorded living scarred tree. Single scar measuring 2.4m in length.	Between Ararat and Langi Ghiran State Park
Previously unrecorded artefact scatter consisting of 11 quartz artefacts.	Between Ararat and Langi Ghiran State Park
Previously unrecorded artefact scatter consisting of 41 quartz artefacts, five silcrete artefacts and 1 crystal quartz microlith.	Buangor
Previously unrecorded artefact scatter consisting of 28 quartz flakes and two silcrete artefacts.	Between Ararat and Langi Ghiran State Park
Previously unrecorded artefact scatter consisting of 21 quartz flakes, two crystal quartz artefacts and one quartzite flake.	Buangor
Previously unrecorded artefact scatter consisting of eight quartz flakes, one crystal quartz flake and one backed quartz flake.	Buangor
Previously unrecorded artefact scatter consisting of six quartz artefacts.	Buangor
Previously unrecorded artefact scatter consisting of 54 quartz artefacts, one hornfels and two backed quartz flakes.	Buangor
Previously unrecorded artefact scatter consisting of 19 silcrete artefacts and one quartz flake.	Between Buangor and Beaufort
Previously unrecorded dead scarred tree. Multiple toe-hold scars.	Buangor
Previously unrecorded dead scarred tree. Single scar located on trunk.	Buangor
Previously unrecorded dead scarred tree. Single small oval scar, suggesting a shield.	Buangor

Source: Victorian Aboriginal Heritage Register

Impact	Recommended measures
Harm to be avoided	<p>Site to be fenced prior to construction.</p> <p>'No Go Zone' signage to be installed and no access allowed into area.</p>
Harm to be avoided	
Harm to be avoided	
Harm to be avoided	
Harm unavoidable	<p>Artefacts to be salvaged and reburied in a ceramic container at a place that will not be disturbed as close as possible to the original location, as determined by Martang.</p> <p>Reburial to be supervised by Martang. Sample may be retained by Martang for display and training purposes.</p>
Harm unavoidable	
Harm unavoidable	
Harm unavoidable	
Harm unavoidable	
Harm unavoidable	<p>Relocation of tree to a location as close as possible to the original position by agreement between VicRoads and Martang. Relocation to be supervised by Martang and guided by arborist to ensure long-term protection.</p> <p>Interpretative signage to be installed, as agreed with Martang. Tree to be regularly treated for termites to prevent infestation.</p>
Harm unavoidable	
Harm possibly avoidable, depending on final design	<p>Two management options identified:</p> <p>If final project design means harm can be avoided, site to be fenced prior to construction. 'No Go Zone' signage to be installed and no access allowed into area.</p> <p>If final project design means harm cannot be avoided, tree to be relocated to a location as close as possible to the original position by agreement between VicRoads and Martang. Relocation to be supervised by Martang and guided by arborist to ensure long-term protection. Interpretative signage to be installed, as agreed with Martang. Tree to be regularly treated for termites to prevent infestation.</p>



# Planning approvals

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391. Between October 2013 and April 2014, the project was subject to Victorian and Commonwealth assessment and received necessary planning approvals.

392. This included:

- assessment of the project's environmental effects by the Minister for Planning under the Environment Effects Act
- amendments to the Ararat and Pyrenees Planning Schemes
- assessment of the project under Commonwealth legislation.

## Assessment under the Environment Effects Act

393. In May 2013, the Minister for Planning assessed the environmental effects of the project under the Environment Effects Act.

394. The Minister's assessment considered the Environment Effects Statement prepared by VicRoads and the report and recommendations of the Inquiry and Advisory Committee.

395. The Minister's assessment endorsed the Option 1 alignment recommended by the Inquiry and Advisory Committee.

396. The Minister's assessment observed:

- Option 1 provided 'a more appropriate balance between the likely environmental effects, social and economic outcomes'
- subject to management measures, the potential environmental effects of the project were acceptable
- the likely effects on Aboriginal and non-Aboriginal cultural heritage were 'acceptable' and could be 'managed through standard approaches'.

## Planning scheme amendments

397. The Minister's assessment formed the basis for amendments to the Ararat and Pyrenees Planning Schemes.

398. Planning schemes set out the policies and specific objectives for planning in relation to each local government area and regulate the use or development of land.

399. Under section 6(2)(j) of the Planning and Environment Act, planning schemes may incorporate a document setting out specific development controls which override the provisions that ordinarily apply under the planning scheme.

400. In October 2013, the Minister for Planning amended the Ararat and Pyrenees Planning Schemes to include an incorporated document relating to the Western Highway duplication project.

401. Among other things, the incorporated document:

- exempted the project from planning restrictions, including the requirement to obtain a planning permit
- required VicRoads to develop a Native Vegetation Offset Management Plan
- included a public acquisition overlay, allowing land along the Option 1 alignment corridor to be acquired for the project.

402. The public acquisition overlay included in the Ararat Planning Scheme is depicted in Appendix C of this report.

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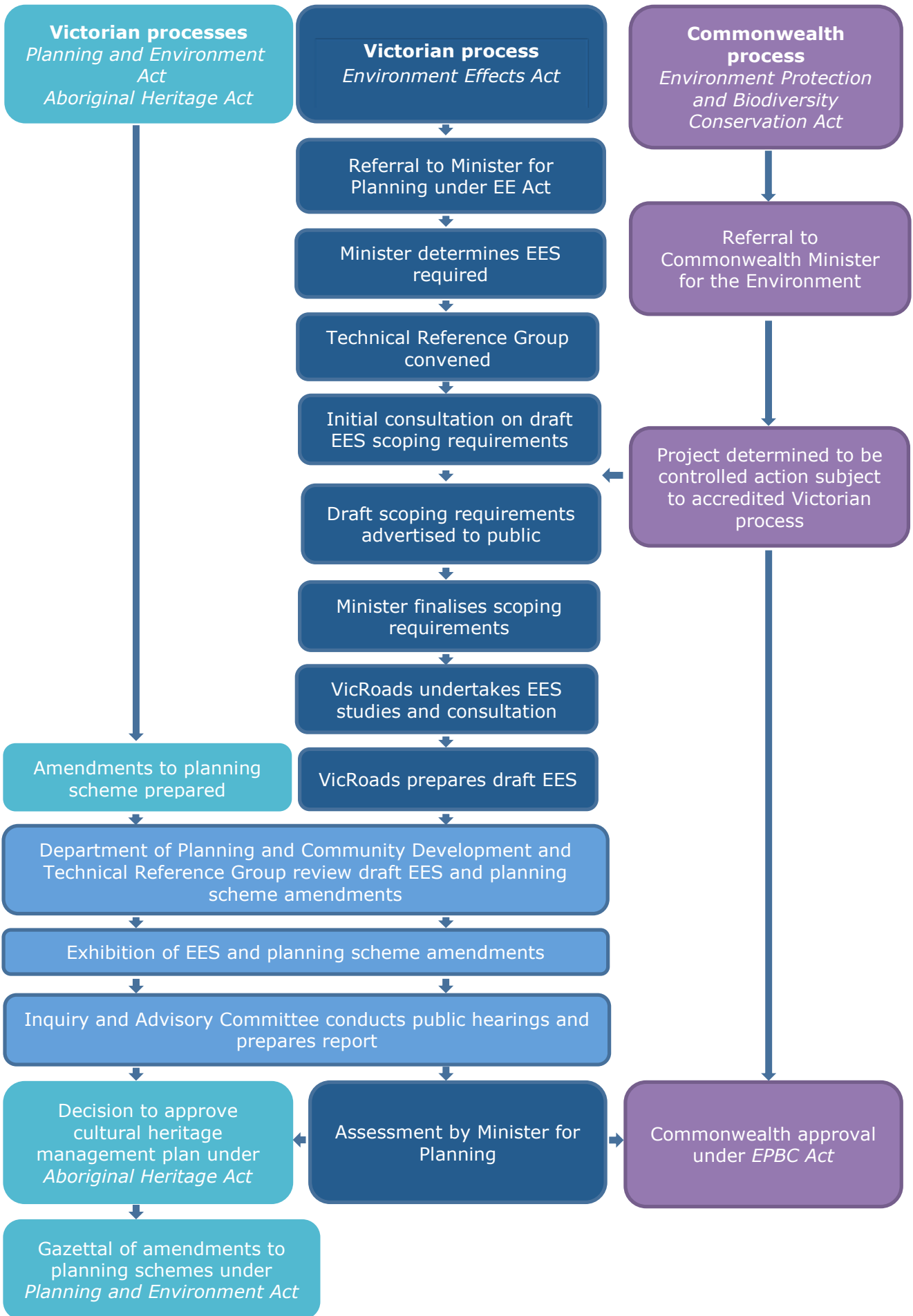
## Commonwealth environmental approvals

403. The Commonwealth Environment Protection and Biodiversity Conservation Act establishes a national framework for the protection of the environment and conservation of Australian biodiversity.
404. Under this Act, proposed developments that are likely to have a significant impact on the environment must be referred to the Commonwealth Minister for the Environment for assessment and approval.
405. To avoid duplication of processes, the Victorian and Commonwealth governments have entered into a bilateral agreement allowing the Commonwealth Minister to rely upon assessments conducted under Victorian legislation.<sup>39</sup>
406. In April 2014, the Commonwealth Minister for the Environment approved the project under the Environment Protection and Biodiversity Conservation Act.
407. This decision relied upon the Victorian Minister for Planning's earlier assessment of the project under the Environment Effects Act.

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<sup>39</sup> *Bilateral Agreement Made under Section 45 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) relating to Environmental Assessment between the Commonwealth of Australia and the State of Victoria, 27 October 2014.* This replaced a similar agreement dated 20 June 2009.

Figure 29: Primary assessment and approval processes observed by Western Highway Section 2 duplication project



# Credit trading agreement

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408. The amendments to the Ararat and Pyrenees planning schemes required VicRoads to prepare a Native Vegetation Offset Management Plan in accordance with Victoria's *Native Vegetation Management Framework* and the Commonwealth Government's *Environmental Offsets Policy*.

409. The purpose of a Native Vegetation Offset Management Plan is to compensate for damage to the environment caused by the removal of native vegetation.

410. Developers can ordinarily achieve native vegetation offset requirements by:

- protecting and managing native vegetation or an area of revegetation on their own property
- purchasing an existing offset from a third party, in the form of 'native vegetation credits'
- securing a 'third-party offset site' through which native vegetation credits are generated by a third party and sold back to the developer.

411. The creation of a third-party offset site involves:

- a legally binding agreement between the third-party landowner and a relevant agency to protect and manage the third-party offset site in perpetuity - this can take the form of a Conservation Covenant between the landowner and Trust for Nature
- a separate commercial agreement between the developer and the third-party landowner in which the landowner agrees to sell native vegetation credits generated under the Conservation Covenant to the developer (a Credit Trading Agreement).

## Trust for Nature

Trust for Nature (Victoria) is a statutory authority established by section 2(1) of the Victorian Conservation Trust Act to encourage and assist in:

- the preservation of areas that are ecologically significant, of natural interest or of historical interest
- the conservation of wildlife and native plants
- the conservation and creation of areas for scientific study.

Trust for Nature is empowered to enter into Conservation Covenants with landowners under Section 3A of the Victorian Conservation Act.

Conservation Covenants are registered on the title of a property in order to:

- restrict the manner in which the landowner is able to develop or use the property
- require the conservation or care of native features located on the property.

Developers are able to approach Trust for Nature for assistance in developing Conservation Covenants in order to meet biodiversity offset requirements associated with a development. This may also involve the preparation of a Credit Trading Agreement.

According to its most recent Annual Report, during the 2018-19 financial year, Trust for Nature registered a total of 36 Conservation Covenants, protecting 1,918 hectares of native vegetation in Victoria.

Trust for Nature is governed by between six and 10 trustees appointed by the Governor in Council. The board of trustees meets periodically throughout the year.

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## Credit trading agreement with Martang

412. As part of its 2010 *Sustainability and Climate Change Strategy* and 2011 *Indigenous Action Plan*, VicRoads resolved to develop Area-Based Agreements with all Registered Aboriginal Parties.
413. Through these agreements, VicRoads and the Registered Aboriginal Parties settled upon standard commitments and processes for VicRoads' engagement with Aboriginal communities, including in relation to the preparation of cultural heritage management plans required for VicRoads projects.
414. VicRoads entered into an Area-Based Agreement with Martang in April 2012. Under this document, VicRoads agreed to investigate opportunities for Martang and VicRoads to enter into a Credit Trading Agreement to offset native vegetation losses associated with the Western Highway duplication project.
415. In a written submission to the investigation, Martang advised:

During the discussions on the ABA [Area-Based Agreement] with VicRoads' legal team, a number of items were raised by Martang, specifically relating to the removal of a significant number of old growth and other trees along their proposed route and the need for protection and replacement of as many trees as possible, through re-vegetation and restoration activities. [...]

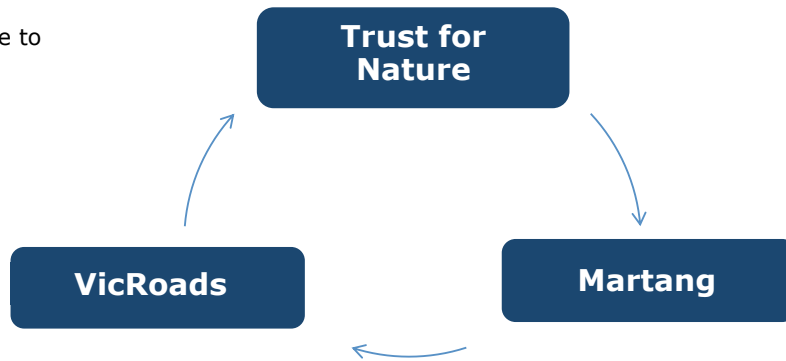
At the time Martang preferred that VicRoads would provide a contract for our Community Members to be involved, say for five years, in a revegetation program along the preferred route. This was to provide employment, income, training and skills to our members over a significant time.

However, VicRoads took the initiative itself to independently hold discussions with the Victorian Department of Environment, Land, Water and Planning (DELWP) to identify a property with significant remnant vegetation credits as an offset for the loss of native vegetation from the highway duplication.

416. In October 2012, VicRoads notified Martang that it had located a suitable property with the required native vegetation offsets at Elmhurst, approximately 20km from the Western Highway project site.
417. In January 2013, VicRoads and Martang approached Trust for Nature for assistance in formalising a Credit Trading Agreement in relation to the Elmhurst property.
418. Under this agreement:
- Martang agreed to purchase the Elmhurst property from a private landowner and rehabilitate it in accordance with a ten-year Offset Management Plan, selling the resulting native vegetation credits to VicRoads
  - VicRoads agreed to pay approximately \$1.06 million to Trust for Nature to distribute to Martang in return for the native vegetation credits
  - Trust for Nature agreed to monitor Martang's performance of its obligations under the Offset Management Plan and distribute the funds provided by VicRoads to Martang in accordance with a ten-year payment schedule.

Figure 30: Simplified depiction of responsibilities of VicRoads, Trust for Nature and Martang under the Credit Trading Agreement

VicRoads pays \$1.06 million to Trust for Nature to distribute to Martang



Trust for Nature monitors Martang's performance and distributes funds over 10-year period

Martang rehabilitates Elmhurst property and provides native vegetation credits to VicRoads

Source: Victorian Ombudsman

419. The Credit Trading Agreement and associated Conservation Covenant were executed in July 2014.

420. The payment schedule included an initial payment of \$620,000 to Martang, ostensibly to provide the necessary funds for Martang to purchase the Elmhurst property from its former owner.

421. The payment schedule included in the Credit Trading Agreement is identified in Table 13 on the following page.

422. The fact and nature of the Credit Trading Agreement between VicRoads and Martang, and the sizeable initial payment to Martang under the Agreement, featured in media reports and complaints to the Ombudsman.

423. Members of the public expressed concern that Martang had been offered a financial benefit or had been 'gifted' a property in return for its approval of the cultural heritage management plan relating to the Western Highway project.



Table 13: Credit Trading Agreement payment schedule	
Date of payment to Martang	Amount payable
Initial payment	\$620,000
At the end of the first year	\$34,077
At the end of the second year	\$35,014
At the end of the third year	\$35,977
At the end of the fourth year	\$36,966
At the end of the fifth year	\$37,983
At the end of the sixth year	\$39,028
At the end of the seventh year	\$40,101
At the end of the eighth year	\$41,204
At the end of the ninth year	\$42,337
At the end of the tenth year	\$87,313

Figure 31: Media article concerning Credit Trading Agreement



## Documents expose land deal behind Victoria's Western Highway sacred trees dispute

By Charlotte King, Andy Burns and Sian Johnson

**A contentious highway upgrade has again come under scrutiny after revelations a land deal was struck between Victoria's roads department and the former Aboriginal cultural heritage authority which approved the development.**

It is one of the country's busiest rural highways, and fast becoming the most contentious.

RELATED STORY: Victorian Premier issues Western Hwy protesters ultimatum over sacred tree stalemate

RELATED STORY: Highway project held up as protesters dig in over 'sacred' trees

RELATED STORY: VicRoads slammed for Western Highway blunder

Source: ABC News Online, 5 September 2019

424. Some individuals who approached the Ombudsman also suggested the Credit Trading Agreement was unduly lucrative to Martang and did not represent value for money.

425. These allegations were not substantiated by the investigation.

426. Costings prepared by VicRoads in May 2014 show that funds paid to Martang under the Credit Trading Agreement were below credit trading market prices for the relevant period.

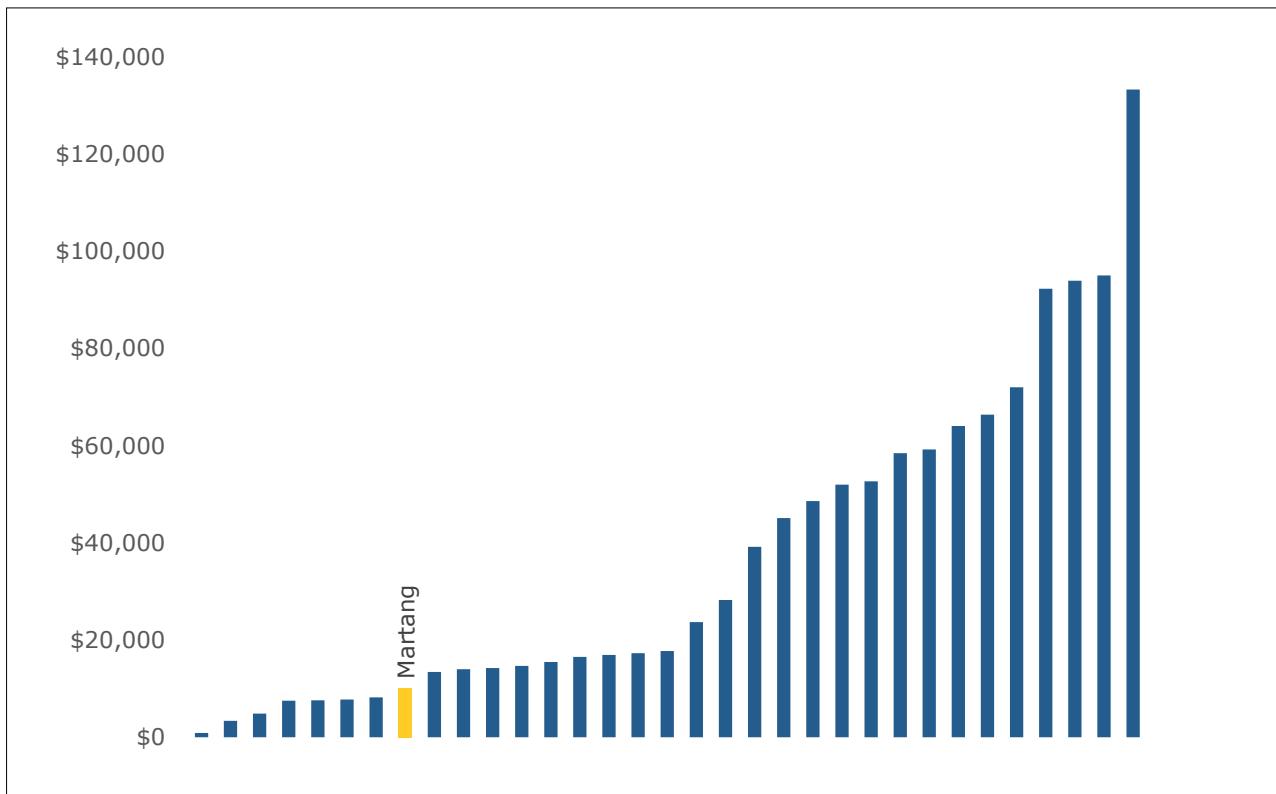
427. The investigation also compared the terms of the Martang Credit Trading Agreement with other agreements brokered by Trust for Nature during the 2013-14 period.

428. Adjusting for different variables, this analysis showed that the amount payable to Martang under the Credit Trading Agreement was consistent with those other agreements.

429. Records concerning the Credit Trading Agreement show that the initial payment of \$620,000 to Martang was a partial advance of the amount otherwise earned by Martang over the life of the agreement, rather than an additional windfall.

430. This initial payment represented 60 per cent of the total purchase price under the agreement.

Figure 32: Amount payable per conservation hectare under Covenants brokered by Trust for Nature, 2013-14



Source: Victorian Ombudsman

431. At the relevant time, Trust for Nature's *Native Vegetation Offset Program Policies* provided:

Trust for Nature will only administer payments to landowners according to the following schedule which will be included in the [Memorandum of Understanding], Covenant and [Credit Trading Agreement]:

<b>Date of Payment to Credit Owner</b>	<b>Payment to Credit Owner payable by the Trust</b>
Initial Payment on Commencement of the Deed (Initial Payment)	20% of total
At the end of the first year	15% of total
At the end of the second year	5% of total
At the end of the third year	5% of total
At the end of the fourth year	5% of total
At the end of the fifth year	5% of total
At the end of the sixth year	5% of total
At the end of the seventh year	5% of total
At the end of the eighth year	5% of total
At the end of the ninth year	10% of total
At the end of the tenth year	20% of total

432. In response to the investigation, Trust for Nature acknowledged the sizeable initial payment to Martang was not in accordance with the above payment structure, and that it was 'unusual' for a Credit Trading Agreement to also facilitate purchase of the land to be used as the offset site.

433. The investigation identified one other agreement brokered by Trust for Nature during the 2013-14 period that included such a payment.

434. Records concerning the Credit Trading Agreement show that Trust for Nature considered an independent assessment of the cost to Martang of completing its responsibilities under the Conservation Covenant.

435. This assessment demonstrated that, despite the sizeable initial payment to Martang, the yearly payments under the agreement would be enough for Martang to meet its land management obligations.

436. Trust for Nature advised the investigation that this assessment, and the need for Martang to finance its purchase of the Elmhurst property for the agreement to proceed, informed its decision to structure the payments in the manner requested by the parties.

437. Trust for Nature's records show that it:

- independently scrutinised the proposed arrangement, including the price to be paid to Martang
- assessed the Conservation Covenant and Elmhurst property as having 'exceptional' conservation potential
- independently costed the payments under the arrangement as being 'in the middle' of prices available on the credit trading market at the time.

438. Trust for Nature informed the investigation that it has monitored Martang's land management activities over the years following execution of the Conservation Covenant and is presently satisfied that Martang is meeting its obligations under the agreement.

439. Records reviewed by the investigation do not support the allegation that the Credit Trading Agreement was intended to influence Martang's decision to approve the cultural heritage management plan for the Western Highway duplication project.

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440. To the contrary, records reviewed by the investigation indicate that both VicRoads and Trust for Nature saw the Credit Trading Agreement as a valuable opportunity to engage with Aboriginal traditional custodians and extend their work on Country.

441. Despite this, the arrangement offered to Martang by VicRoads was arguably capable of creating a conflict of interest. This was because:

- Martang received a benefit under the Credit Trading Agreement
- the Credit Trading Agreement was linked to offsets required by the Western Highway duplication project
- at the time the Credit Trading Agreement was developed, Martang was required to provide a necessary statutory approval for the project.

442. Information available to the investigation suggests VicRoads did not recognise this issue when it determined to develop the Credit Trading Agreement with Martang.

443. This situation could have been avoided if VicRoads had waited to negotiate the Credit Trading Agreement until after Martang concluded its evaluation of the cultural heritage management plan.

444. The Department of Transport, responding to the Ombudsman's draft report on behalf of VicRoads, submitted:

the timing and contemporaneous negotiations may not have been avoidable in this situation, noting that:

- negotiation of and entry into the [Credit Trading Agreement] was required under the relevant environmental legislation and fulfilment of the relevant conditions was a condition of the relevant Project planning approvals;

- approval of the [cultural heritage management plan] was also required prior to commencement of delivery; and
- there were limited opportunities to source the relevant offsets, given that offsets trading was still a market in early development[.]

445. The Department of Transport also emphasised that the Credit Trading Agreement and cultural heritage management plan were prepared under separate legislative processes and by different teams within VicRoads.

446. The investigation noted that these facts notwithstanding, there was no requirement that VicRoads develop a Credit Trading Agreement specifically with Martang.

447. Despite the possible conflict of interest, the investigation did not identify any evidence to suggest Martang's decision to approve the cultural heritage management plan was influenced by the Credit Trading Agreement.

448. Information available to the investigation indicates Trust for Nature was not aware of Martang's broader involvement in the Western Highway duplication project when it formalised the Credit Trading Agreement.

## Common funding agreement

449. Some complaints to the Ombudsman also alleged Martang received a payment of \$90,000 in return for approving the cultural heritage management plan.

450. This allegation appears to have been based on media articles, first published in 2014, that announced further funding from the Victorian Government to Registered Aboriginal Parties.

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451. One media article, published in October 2014, stated that Martang had received a payment of \$90,000 'to help with work related to the Western Highway upgrade'.
452. The investigation established that this payment was made under a Common Funding Agreement between the State of Victoria and Martang executed in September 2014.
453. This followed a 2012 parliamentary inquiry into the effectiveness of the Registered Aboriginal Party system, which identified that there was widespread concern about the sustainability of the system and its financial impacts on some Registered Aboriginal Parties.
454. Under the Common Funding Agreement, funds were provided to Martang to assist it to perform its functions under the Aboriginal Heritage Act.
455. In return for the funding, Martang undertook, among other things, to evaluate cultural heritage management plans in a timely manner and actively participate in heritage assessment activities during the 2014-15 period.
456. The Common Funding Agreement did not create an incentive for Martang to approve any cultural heritage management plans, nor was it actually linked to the Western Highway duplication project.
457. A separate Common Funding Agreement, in operation during development of the Western Highway project, also did not create incentives for Martang to approve the cultural heritage management plan for the project.
458. Reimbursements provided to Martang in connection with its participation in the assessments undertaken for the cultural heritage management plan also appear to have been consistent with VicRoads' corporate rates during the relevant period.

# Construction delays

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459. Duplication of Section 2A of the highway between Beaufort and Buangor took place between April 2014 and May 2016.
460. Preconstruction activities for Section 2B of the highway between Buangor and Ararat began in August 2016.
461. These works were interrupted in October 2016, when proceedings were initiated in the Supreme Court in relation to the project.

## Supreme Court proceedings

462. In October 2016, two landowners and an associated community group, 'Keep the Old Route Supporters Inc', filed an application for judicial review concerning the project in the Supreme Court of Victoria.
463. The application challenged the validity of the project's Environment Effects Statement and various planning decisions made by the Minister for Planning in connection with the project.
464. The application argued there were errors in the data included in the Environment Effects Statement, including:
- significant miscalculation of the number of large old trees impacted by the project
  - insufficient mapping and classification of native vegetation and habitats.
465. Discrepancies within the data included in the Environment Effects Statement were first identified by VicRoads in May 2014, when an onsite assessment revealed significantly higher numbers of large old trees would be impacted by the project than identified in previous estimates.
466. In 2015, members of the project's Environmental Consultation Group became aware of the error. The issue subsequently attracted significant public interest.
467. VicRoads publicly apologised for the 'significant miscalculation', temporarily halted tree clearing works and commissioned an internal review into the error by a senior environmental and heritage advisor.
468. The internal review, which was finalised in March 2016, attributed the error to the sampling method used by an environmental consultant, as well as incorrect assumptions by VicRoads when preparing the Environment Effects Statement.
469. The internal review concluded that the errors in the Environment Effects Statement were unlikely to have affected the alignment selection process because the impact of the project on large old trees was not a 'priority consideration' of the Inquiry and Advisory Committee or the Minister for Planning.
470. The internal review otherwise noted:
- VicRoads' recent experiences certainly suggest that people readily relate to old growth trees, probably because they are large visible entities that people connect with as part of their 'sense of place'. For the general community, large old trees are likely to be a more tangible or personally accessible element of nature than less conspicuous threatened species or communities that may not have a strong public profile. [...]
- For these reasons, VicRoads needs to shift its thinking beyond a compliance-based statutory focus, and understand that in some instances, the focus may need to be broadened beyond threatened species and ecological communities to encompass important local values.
471. After further concerns were raised by an affected landowner about the data included in the Environment Effects Statement, VicRoads agreed to commission an independent peer review of the project's compliance with Victoria's *Native Vegetation Management Framework*.



472. The independent peer review concluded that some of the ecological data relied upon by VicRoads was 'inadequate to achieve the objectives' of the Environment Effects Statement process.

473. The independent peer review also observed the 'many and varied issues with the dataset' made it 'difficult to reach the conclusion that a reasonable and logical comparison could be made to discriminate between the two alignment options' identified by VicRoads in the Environment Effects Statement.

474. In response to the independent peer review, VicRoads asked its original consultant to undertake a supplementary ecological assessment of the area impacted by the approved alignment.

475. This assessment concluded that, even allowing for differences in the assessment of native vegetation losses from the data included in the Environment Effects Statement, the approved alignment 'would have resulted in lower vegetation losses than Option 2.'

476. The results of the supplementary assessment are summarised in Table 14.

477. VicRoads subsequently prepared an internal response to the independent peer review and supplementary assessment. In this document, VicRoads stated it believed it had complied with Victoria's *Native Vegetation Management Framework*.

478. In June 2016, VicRoads published the independent peer view, supplementary assessment and internal response on its website.

479. The application for judicial review filed in the Victorian Supreme Court argued inaccurate data in the Environment Effects Statement, including the errors identified in the independent peer review, caused the Inquiry and Advisory Committee and the Minister for Planning to err in their decision to endorse the approved alignment.

480. The applicants in the Supreme Court proceedings argued the errors in the Environment Effects Statement merited reconsideration of the 'northern option' as an alternative to the approved alignment.

**Table 14: Results of supplementary ecological assessment, May 2016**

Assessment	Vegetation losses			Large old trees		
	Total losses (ha)	Total losses (habitat hectares)	Net gain target (habitat hectares)	Total losses	Total protected	Total to be recruited
Option 1 (2012)	110.77	39.38	65.54	221	1,414	7,070
Option 1 (2014)	95.61	38.59	66.59	1,355	7,032	35,160
Option 1 (2016)	102.18	40.80	69.69	1,359	7,044	35,220
Option 2 (2012)	131.86	52.98	86.98	214	1,254	6,270

Source: Department of Transport

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481. In November 2016, the Supreme Court determined that the relative strength of the applicants' arguments did not justify an injunction restraining VicRoads from continuing works associated with the project.

482. The application proceeded to a trial in March 2020. In June 2020, the Supreme Court determined that the Minister for Planning's assessment of the project was not unreasonable and dismissed the proceedings.

### Northern option

483. Since project planning began, some members of the community have petitioned VicRoads to consider duplicating the section of the highway between Buangor and Ararat using an alignment as close as possible to the existing highway.

484. This alignment has subsequently been referred to as the 'northern option' because, unlike the approved alignment, it would not involve construction of a new dual carriageway through farmland to the south of Langi Ghiran State Park.

485. The northern option is supported by Keep the Old Route Supporters Inc. After cultural heritage concerns were raised about the project, some Djab Wurrung traditional custodians have also called for further investigation of this option.

486. Supporters of the northern option argue its environmental impacts would be less than the approved alignment because it would make use of existing highway infrastructure and land already cleared for a powerline easement.

487. VicRoads initially considered and dismissed a version of the northern option during the 2010 planning study. At the time, the planning study observed that the option:

- presented a significant safety issue, as an existing railway crossing to the south-east of Langi Ghiran State Park was deemed 'currently unsafe even for the existing road'
- was likely to have significant environmental impacts due to its proximity to Langi Ghiran State Park
- generally did not rate well during preliminary community consultation.

488. Later, in light of feedback provided during community information sessions, VicRoads agreed to develop an additional alignment option which followed the existing highway to the south-east of Langi Ghiran State Park.

489. This alignment option, which partly resembled the northern option, was eliminated during phase one of the alignment evaluation process because it rated poorly for improvements to travel time and road safety and very poorly for impacts on the environment.

490. In December 2011 and June 2012, following sustained approaches from some affected landowners, VicRoads asked its consultant to prepare and evaluate two further versions of this alignment. These options were not carried forward into the Environment Effects Statement after the consultant identified problems with their design and environmental impacts.

491. Affected landowners later presented expert evidence to the Inquiry and Advisory Committee in support of a request that it consider a version of the northern option as an alternative to VicRoads' two nominated alignments.

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492. In its 2012 report, the Inquiry and Advisory Committee concluded that the northern option was a 'less than ideal design solution' that involved greater impacts on native vegetation than the approved alignment.

493. In July 2015, following further pressure from some members of the community, VicRoads agreed to develop a concept design for the northern option to illustrate the issues it said existed with the alignment.

494. The concept design for the northern option is depicted in Appendix D of this report.

495. In July 2015, and again in June 2016, VicRoads met with an affected landowner to discuss the relative advantages and disadvantages of the northern option in more detail.

496. Following the 2016 meeting, the Chief Executive of VicRoads wrote to this individual:

[H]aving listened to your issues and alternate proposals, VicRoads will not be undertaking any further investigation of the alignment you are seeking.

497. Opponents to the approved alignment later developed a different design for the northern option, which is said to overcome the shortcomings identified by VicRoads.

498. A version of the northern option was briefly evaluated again in July 2018, after some Djab Wurrung traditional custodians expressed concerns about the project. This option was rejected by the Minister for Transport Infrastructure in January 2019, following advice from MRPV.

499. VicRoads, MRPV and their consultants have consistently stated it is not possible to develop a freeway standard road using the existing highway alignment without causing substantially more damage to the environment than suggested by proponents of the northern option.

500. In particular, VicRoads and MRPV have disputed it is possible to fit a new single carriageway within the existing powerline easement.

501. MRPV has also claimed the northern option:

- does not meet the safety standards required for a national highway
- would have a much greater impact on Langi Ghiran State Park
- would likely have a 'significant' impact on Aboriginal cultural heritage sites near the boundaries of Langi Ghiran State Park
- would require construction of two new rail bridges
- would require removal of high value vegetation within and around the powerline easement, including removal of an additional 188 large old trees
- does not account for necessary access roads and the relocation of existing powerline infrastructure, understating its environmental footprint
- would require preparation of a new Environment Effects Statement, new planning approvals and a further cultural heritage management plan
- would involve additional costs of up to \$73 million.

502. Many of these claims are disputed by proponents of the northern option.

503. Construction of the northern option would not avoid the area to the south-west of Langi Ghiran State Park that some Djab Wurrung traditional custodians are seeking to protect.

504. The northern option is also not supported by some conservationists whom, although not in favour of the duplication works, have identified the approved alignment as the 'least bad' option from an environmental perspective.

505. MRPV has also observed that the approved alignment was determined by the Minister for Planning and that, as matters stand, works associated with the project must take place within the corridor identified in the public acquisition overlay included in the Ararat Planning Scheme.

**Table 15: Comparison of estimated costs and impacts of northern option prepared by MRPA, 2018**

	Approved alignment	Northern option
Estimated costs	\$85m (contract value)	\$104m-\$120m
Vegetation losses	17.31 Ha	39.55 Ha
Large old trees losses	113	301
Scattered trees losses	73	2
Total tree losses	3,000	6,000-10,000 (estimate)

Source: Department of Transport

Figure 33: Media editorial concerning northern option

## Western Highway protest: Alternative routes not given proper scrutiny by MRP

Neil R Marriott Comment

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Many questions remain unanswered about Major Road Projects (formerly VicRoads) and whether it acted with integrity in the dispute about the alignment of the Western Highway at Buangor.

Source: The Courier, 27 May 2019

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## Further construction delays

506. Works associated with the project recommenced in November 2016, after the Supreme Court declined to issue an injunction concerning the project.

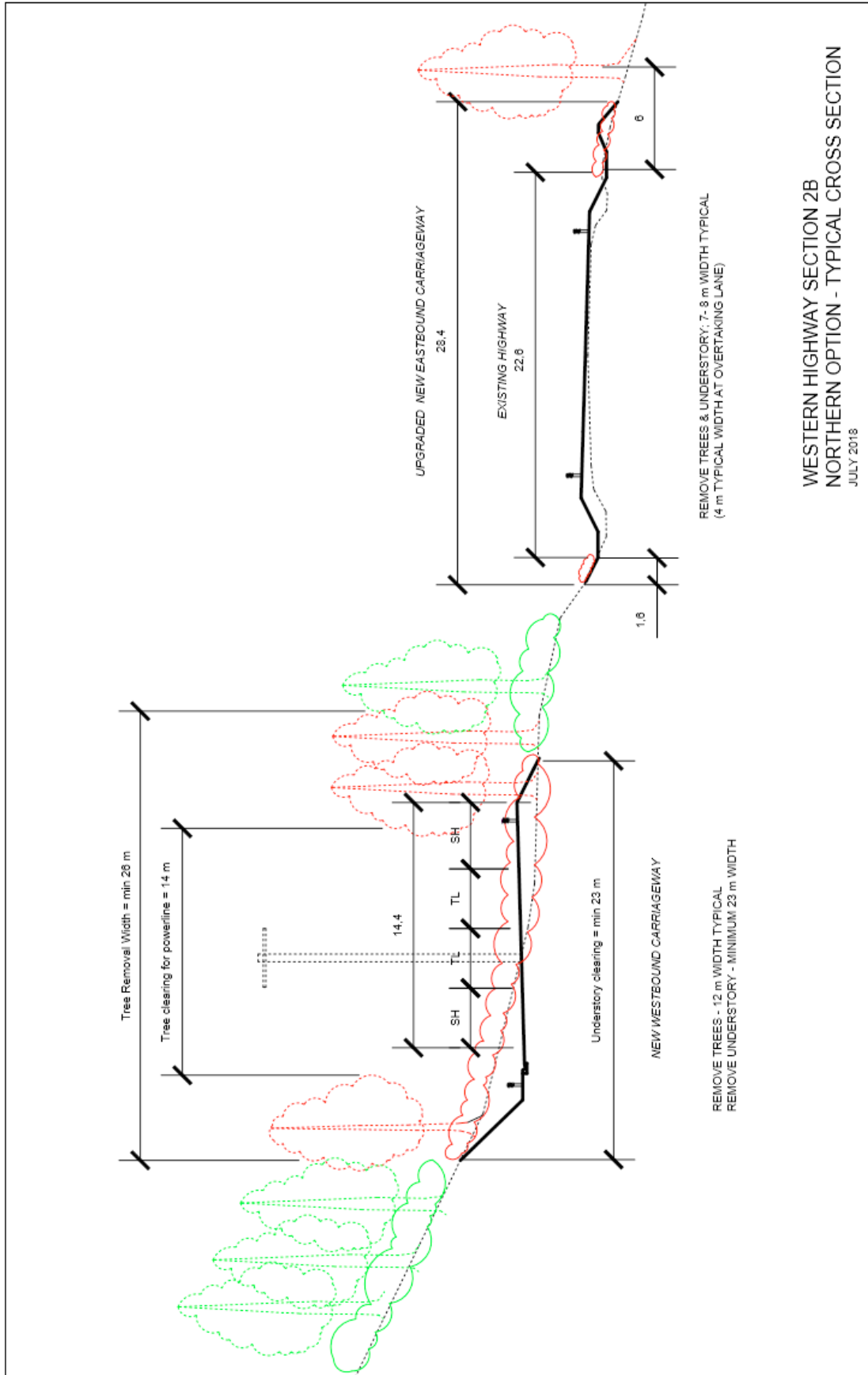
507. Works were again halted in February 2017 after VicRoads became aware that the amendments made to the Ararat Planning Scheme for the project had expired.

Figure 34: Depiction of hollow red gum along waterway south of Langi Ghiran, 1850



Source: Duncan Elphinstone Cooper, 'Bank of the Creek, Challicum'; reproduced in Phillip Brown, *The Challicum Sketchbook 1842-53 and Supplementary Paintings by Duncan Elphinstone Cooper* (National Library of Australia, 1987), 75.

Figure 35: Typical cross-section for northern option prepared by MRPV, showing purported impact on native vegetation surrounding powerline easement and existing highway



Source: Department of Transport



# Reports of possible birthing trees

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508. In early February 2017, Aboriginal Victoria notified VicRoads that it had received a preliminary report from a member of the public concerning a hollow tree to the south-east of Langi Ghiran State Park, in the path of the approved highway alignment.
509. Members of the public, specialists and traditional custodians are able to submit preliminary reports concerning possible Aboriginal heritage places to Aboriginal Victoria for investigation.
510. The preliminary report identified that this tree 'had all the hallmarks of a sacred birthing tree' significant to Aboriginal women. Although not included with the preliminary report, this information was later said to have been endorsed by senior Djab Wurrung traditional custodians.
511. In the days that followed, Aboriginal Victoria informed VicRoads that it had received reports of other culturally significant trees in the area, including a second possible birthing tree between Ararat and the south-western boundary of Langi Ghiran State Park.

## First inspection – Martang

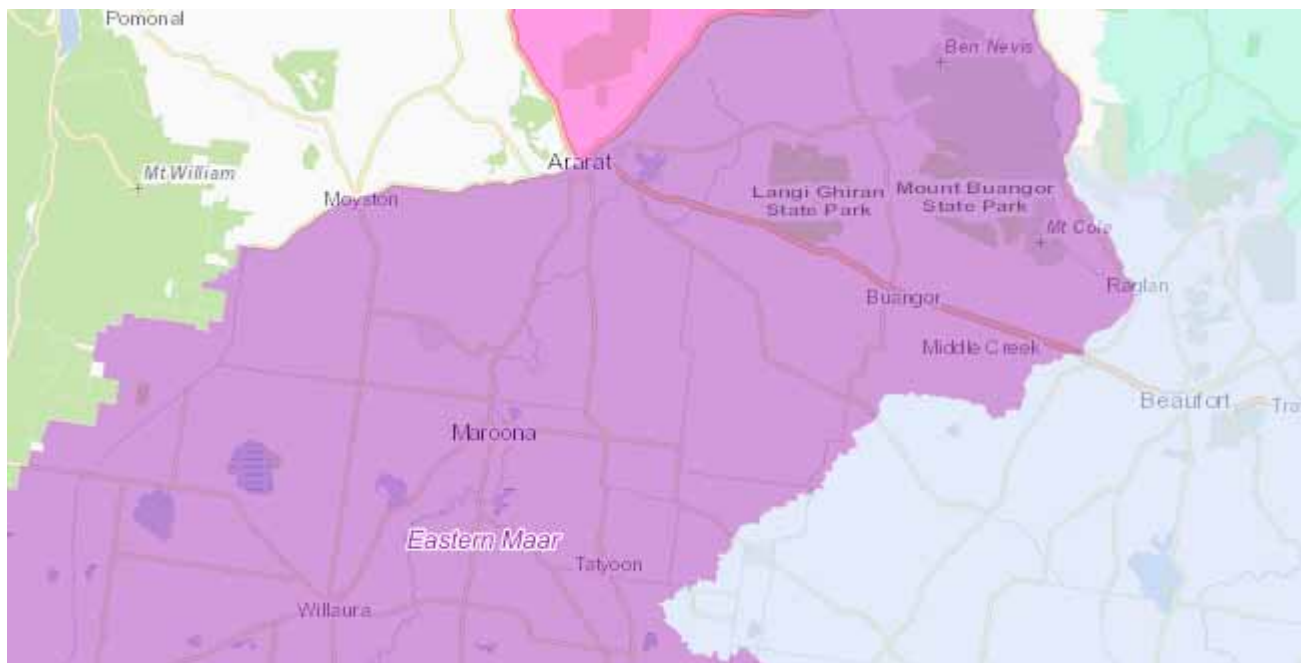
512. In February 2017, Aboriginal Victoria arranged for its heritage staff to inspect the nominated trees with senior male and female representatives of Martang.
513. Aboriginal Victoria subsequently wrote to VicRoads to report that 'no cultural values' or signs of cultural modification had been identified by this inspection.
514. Aboriginal Victoria informed VicRoads that Martang had recommended that Aboriginal Victoria contact senior Djab Wurrung women associated with Eastern Maar Aboriginal Corporation ('Eastern Maar') to seek any information they held about the possible cultural values associated with the nominated trees.

## Eastern Maar

515. Eastern Maar is an Aboriginal Corporation and Registered Native Title Body Corporate representing the members of 12 family groups, many of whom have an association with the former Framlingham Aboriginal Mission Station.
516. Members of Eastern Maar must be descendants of ancestors identified in Eastern Maar's membership criteria and may identify as belonging to one or more of several south-western Victorian Aboriginal peoples, including the Djab Wurrung.
517. Eastern Maar was registered in July 2011, when the Federal Court of Australia recognised that the Eastern Maar and Gunditjmarra peoples held native title rights in relation to land located between Dunkeld and Yambuk.
518. In December 2012, a further native title application was made on behalf of the Eastern Maar peoples. This application related to a large area of land in south-western Victoria overlapping with Martang's Registered Aboriginal Party area, including the section of the Western Highway between Buangor and Ararat.
519. This application was formally registered in March 2013, granting the Eastern Maar peoples certain procedural rights in relation to the area.
520. Between July 2011 and August 2014, Eastern Maar made two applications for registration as a Registered Aboriginal Party. The area identified in Eastern Maar's second application overlapped with Martang's Registered Aboriginal Party area and included the section of the Western Highway between Buangor and Ararat. The Aboriginal Heritage Council subsequently divided Eastern Maar's applications into different parts and assessed these over several years.

521. In November 2017, the Victorian Government announced it had agreed to begin negotiating a Recognition and Settlement Agreement with the Eastern Maar peoples under the Traditional Owner Settlement Act. The area under negotiation for this process also overlapped with Martang's Registered Aboriginal Party area.
522. In February 2019, the Aboriginal Heritage Council declined to appoint Eastern Maar a Registered Aboriginal Party in relation to Martang's area. In its reasons for this decision, the Aboriginal Heritage Council identified that, although some members of Eastern Maar were traditional custodians of the area, it was not satisfied that Eastern Maar was a body representing such custodians.
523. In October 2019, following Martang's deregistration as a Registered Aboriginal Party, Eastern Maar made a further application for registration as a Registered Aboriginal Party in relation to Martang's former area.
524. In its application, Eastern Maar advised the Aboriginal Heritage Council that some members of Martang had decided to join Eastern Maar.
525. In February 2020, the Aboriginal Heritage Council agreed to register Eastern Maar as the Registered Aboriginal Party for this area.
526. The relevant boundaries of Eastern Maar's Registered Aboriginal Party area are depicted in Figure 36.

Figure 36: Relevant boundaries of Eastern Maar's Registered Aboriginal Party area, February 2020



Source: Aboriginal Heritage Council

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## Second inspection – Martang and Eastern Maar

527. In May 2017, Aboriginal Victoria arranged to inspect the two nominated birthing trees with representatives of Eastern Maar.

528. This inspection involved the participation of a senior female Djab Wurrung representative of Eastern Maar and a senior female representative of Martang.

529. Aboriginal Victoria's files record that following this inspection, both senior female representatives were 'firm' in their view that the trees were not birthing trees.

530. On 24 May 2017, Aboriginal Victoria wrote to VicRoads:

As a result of this assessment process, none of the reported possible Aboriginal Places were determined to have any cultural heritage significance and are therefore not considered to be Aboriginal Places as defined by the Aboriginal Heritage Act 2006.

VicRoads is able to proceed with the Western Highway Duplication project between Buangor and Ararat in relation to Aboriginal cultural heritage in accordance with the management recommendations of approved cultural heritage management plan (CHMP) 12327.

533. At the conclusion of the inspection, Eastern Maar indicated that it would provide Aboriginal Victoria with a formal response addressing the claims made about the area.

534. In November 2017, having received no response from Eastern Maar, Aboriginal Victoria again wrote to VicRoads:

AV [Aboriginal Victoria] staff have undertaken further consultation with Traditional Owners but has not received any definitive evidence or other support to identify these trees as Aboriginal Places for the purposes of the [Aboriginal Heritage] Act. AV has also received information from the persons reporting these trees, but again AV has determined that this does not support the identification of these trees as Aboriginal Places for the purposes of the Act.

VicRoads is authorised to proceed with the Western Highway Duplication project between Buangor and Ararat in relation to Aboriginal cultural heritage in accordance with the management recommendations of approved cultural heritage management plan 12327.

## Third inspection – Eastern Maar

531. In September 2017, following additional approaches about the matter, Aboriginal Victoria arranged to inspect the nominated birthing trees a further time with representatives of Eastern Maar.

532. Aboriginal Victoria's files indicate that, during this inspection, representatives of Eastern Maar discussed the age and possible significance of the nominated trees to Djab Wurrung ancestors.

# Intervention to protect the site

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535. In June 2017, VicRoads wrote to the Minister for Planning to request the expired planning scheme amendments be re-issued in relation to the project.
536. VicRoads acknowledged to the Minister that some of the works undertaken between mid-2015 and February 2017 may have lacked planning approval.
537. VicRoads informed the Minister for Planning of the preliminary report made to Aboriginal Victoria and Aboriginal Victoria's subsequent assessment of the claims made about the area.
538. VicRoads also informed the Minister of the discrepancies in the environmental data included in the Environment Effects Statement and the associated Supreme Court challenge to the project.
539. VicRoads provided the Minister with a new ecological assessment concerning the impacts of the approved alignment and an independent review of this assessment, which largely endorsed its conclusions.
540. In December 2017, the Minister for Planning determined to make further amendments to the Ararat Planning Scheme to allow the project to proceed.
541. Following the Minister's decision, VicRoads recommenced preconstruction work associated with the project.
542. In June 2018, VicRoads issued a media release announcing it would begin tree removal between Buangor and Ararat during the following week.
543. Shortly afterwards, several individuals, including some Djab Wurrung traditional custodians, began to occupy the project site, causing works to cease.
544. Members of this group later established the Djab Wurrung Heritage Protection Embassy at several locations along the approved highway alignment.

## Djab Wurrung Heritage Protection Embassy

545. Representatives of the Djab Wurrung Heritage Protection Embassy have been continuously occupying the project site since June 2018.
546. This group has used traditional and social media platforms to call upon the Victorian Government to abandon duplication works between Buangor and Ararat and protect the area set to be impacted by the project.
547. Representatives of the Embassy who spoke with officers of the Ombudsman at the highway site said the area impacted by the project is sacred to the Djab Wurrung and forms an integral part of their dreaming and songlines.
548. While early advocacy by the group focused on the expected removal of the two nominated birthing trees, representatives of the Embassy who spoke with the Ombudsman emphasised they were seeking protection of the full 12.5km area of Djab Wurrung Country traversed by the approved alignment.
549. They explained the natural features and contours of this area were associated with Djab Wurrung dreaming and expressed concern about the impact of the project on traditional songlines.

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***'It connects all our mob, through that one dreaming and one songline. [...] [The highway duplication works] will take out part of our dreaming.'***

- Oral submission to investigation.

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550. Representatives of the Embassy also spoke of the special significance of the area to Djab Wurrung women. They said the area was associated with women's business and reflected traditional knowledge passed between Djab Wurrung women over many generations.

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***'There have been discussions about bringing birthing back on country. A number of women are keen to be part of that process. [...] This country holds a great importance [for] past times but it also holds as much importance for the future.'***

- Email submission to investigation.

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551. Representatives of the Embassy said that they did not trust the processes observed under the Aboriginal Heritage Act. They said cultural heritage assessments under this legislation were outcome-driven, and that Registered Aboriginal Parties were compromised by their relationship with government.

552. These individuals said neither Martang nor Eastern Maar represented all Djab Wurrung people and that VicRoads should have consulted more broadly with traditional custodians when designing the highway alignment.

553. Representatives of the Embassy also referred to the errors in the environmental data included in the project's Environment Effects Statement as evidence that VicRoads had mismanaged assessments relating to the project. They emphasised that for Aboriginal people, environment and culture were interconnected.

554. Some representatives of the Embassy said they also held concerns about the 'northern option' favoured by some Djab Wurrung traditional custodians and non-Aboriginal opponents to the project.

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***'[The northern option is] still going to go through and take out sacred Country. [...] We need to go back to the drawing board and do the right due diligence.'***

- Oral submission to investigation.

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555. Representatives of the Embassy related their efforts to protect the site to the historical and continuing dispossession of the Djab Wurrung from their traditional lands, as well as the many other injustices that Aboriginal people continue to experience in Australia.

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***'We're holding on to the last of what's left.'***

- Oral submission to investigation.

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## Community interest in the project

The efforts of members of the Djab Wurrung Heritage Protection Embassy have received considerable media attention, including international coverage in the *New York Times*.

Reports concerning the opposition to the project have included claims that the nominated birthing trees are more than 800 years old and have 'seen the delivery of an estimated 10,000 Djab Wurrung babies'.

Records reviewed by the investigation indicate community interest in the Western Highway project increased dramatically after details concerning the efforts of the Djab Wurrung Heritage Protection Embassy were first published in traditional and social media platforms.

This interest reached its peak between July and October 2019, when the Victorian Government received almost 2,000 individual approaches from members of the public about the project.

This appears to have coincided with efforts by MRPV to evict representatives of the Djab Wurrung Heritage Protection Embassy from the project site.

The overwhelming majority of public approaches to the Government expressed concern about the impacts of the highway on the nominated birthing trees.

Many members of the public said they had been motivated to contact the Government after reading reports about the project in newspapers and social media.

Although the Ombudsman did not call for public submissions, after details of the investigation were published online, more than 20 members of the public also contacted the Ombudsman to express solidarity with Djab Wurrung opponents to the project.

Many of these individuals said they believed it would be possible for MRPV to develop an alternative alignment that would bypass the areas identified by the Djab Wurrung Heritage Protection Embassy.

Some individuals also said they believed that the concerns of Djab Wurrung opponents to the project were emblematic of broader deficiencies in the environmental due diligence undertaken in relation to the project.

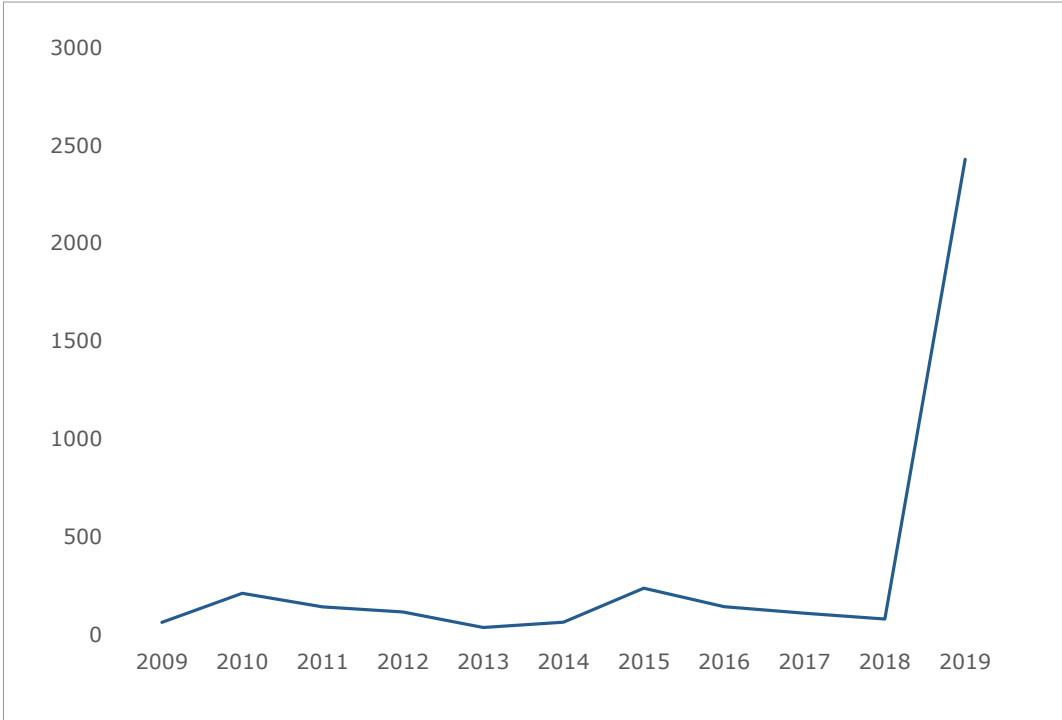
Members of the Djab Wurrung Heritage Protection Embassy and concerned members of the community have conducted demonstrations against the project outside the offices of VicRoads and the Victorian Parliament.

Supporters of the Djab Wurrung Heritage Protection Embassy have also used the phrase 'No Trees No Treaty' to link their concerns about the project with the treaty process currently underway between the Victorian Government and Aboriginal peoples.

More than 179,000 people have signed an online petition calling upon the Victorian Government to halt works associated with the project.



Figure 37: Public approaches to VicRoads, MRPA and MRPV concerning Western Highway project, 2009-2019



Source: Department of Transport

Figure 38: Online petition concerning Western Highway project

**Protect sacred Djab Wurrung birthing trees from expansion of the Western Hwy by Vicroads.**

179,841 have signed. Let's get to 200,000!

██████████ signed 22 hours ago

██████████ signed 3 days ago

██████████ started this petition to Daniel Andrews (Premier of Victoria)

Sacred Djab Wurrung birthing trees are due to be cut down by VicRoads any time now. **Some of these trees are over 800 years old and have birthed more than 10,000 Djab Wurrung babies.**

First name:

Last name:

Email:

Sydney, 2000 Australia

Display my name and comment on this petition

**Sign this petition**

Source: Change.org

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## Application for Commonwealth protection

556. In June 2018, several Djab Wurrung traditional custodians also wrote to the Commonwealth Government to request protection of the project area under the Aboriginal and Torres Strait Islander Heritage Protection Act.
557. Under this legislation, the Commonwealth Minister for the Environment is empowered to make declarations relating to the protection of areas that hold particular significance under Aboriginal tradition.
558. The Victorian Government subsequently undertook to postpone works in relation to the project until the application was determined.
559. Later, following mediation, the Victorian Government agreed to temporarily limit significant construction activities associated with the project to a 3.85km 'interim works area', preserving the areas of particular concern to the applicants.
560. The interim works area is depicted in Appendix E of this report.
561. The application to the Commonwealth Government spoke of the significance of the Hopkins River basin and Mount Langi Ghiran within Djab Wurrung songlines.
562. The application referred to the possible destruction of six trees within the path of the approved alignment, including the two nominated birthing trees, that were said to be of particular cultural significance to Djab Wurrung traditional custodians.
563. The application acknowledged that Martang had not confirmed the cultural values associated with the area; however, the application asserted that Martang had a 'limited membership' and did not represent all Djab Wurrung people.
564. The application included a desktop assessment concerning the six trees, originally commissioned by community members opposed to the approved alignment ('the KORS assessment').

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## **KORS assessment**

This desktop assessment was commissioned by Keep the Old Route Supporters Inc, a community group opposed to the approved highway alignment.

The assessment was undertaken by a landscape archaeologist claiming expertise in the identification of culturally modified trees.

This archaeologist reported it was 'beyond doubt' that the two nominated birthing trees were habitation trees traditionally used by Aboriginal people.

The assessment observed that another four trees within the project area were also likely culturally modified by Aboriginal people.

The assessment does not appear to have involved a field inspection of the project site or the nominated trees, nor does it appear to have involved consultation with Djab Wurrung traditional custodians.

The KORS assessment was provided to Aboriginal Victoria in September 2017, around the time of the third inspection of the nominated birthing trees involving Eastern Maar.

In a submission to the Commonwealth Minister for the Environment, Aboriginal Victoria stated it did not accord any authority to the KORS assessment because it was 'methodologically unsound', was 'not based on any field evidence' and did not 'include the views of Traditional Owners'.

The KORS assessment was followed by a further assessment by the same archaeologist, finalised in August 2018.

This assessment involved research into traditional Djab Wurrung occupation of the area, consultation with representatives of the Djab Wurrung Heritage Protection Embassy and field surveys of the project area.

The further assessment endorsed the conclusions of the desktop study and identified parts of the approved alignment corridor as forming part of a 'cultural landscape' deserving of protection.

The further assessment recommended the Victorian Government consider adopting the 'northern option' alignment favoured by Keep the Old Route Supporters Inc and some Djab Wurrung traditional custodians.

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565. In December 2018, the Commonwealth Minister for the Environment declined to intervene in relation to the matter.
566. While the Commonwealth Minister accepted that the area and trees nominated in the application held particular significance under Aboriginal tradition, the Minister referred to correspondence from the Victorian Government indicating that it would modify the highway alignment to avoid the two nominated birthing trees.
567. The Commonwealth Minister's decision was set aside in April 2019 after an application for judicial review was filed in the Federal Court of Australia.
568. In July 2019, the Commonwealth Minister for the Environment again declined to intervene in relation to the project. This decision was set aside a further time by the Federal Court of Australia in December 2019.
569. The Commonwealth Minister is yet to make another decision concerning the application for protection.

# Response to cultural heritage concerns

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570. In June and July 2018, representatives of VicRoads attended the project site to speak with representatives of the Djab Wurrung Heritage Projection Embassy.

571. Representatives of the Embassy informed VicRoads that the nominated birthing trees and surrounding area were culturally significant to the Djab Wurrung. These individuals urged VicRoads to consult more broadly with Djab Wurrung traditional custodians in relation to the impacts of the project.

572. During this same period, VicRoads and the Office of the Minister for Roads also undertook several meetings and phone discussions with representatives of Martang and Eastern Maar.

573. During discussions with VicRoads, Martang emphasised it considered that the assessments undertaken during preparation of the cultural heritage management plan were thorough and in accordance with the processes established under the Aboriginal Heritage Act.

574. In separate discussions, Eastern Maar urged VicRoads to undertake efforts to protect the two nominated birthing trees.

575. VicRoads subsequently agreed to cover the costs of a new, independent cultural heritage assessment concerning the nominated birthing trees, to be commissioned by Eastern Maar ('the On Country assessment').

576. VicRoads also undertook to present more information about the project to Eastern Maar's board.

577. VicRoads advised the Ombudsman that it determined to engage with Eastern Maar because:

[VicRoads] understood that, given Martang's reluctance to participate in a process with the protestors,

[Eastern Maar] would be an appropriate alternative Traditional Owner group as it identified with the Djab Wurrung community and was the native title claimant for the area. In addition, [Eastern Maar] had relevant background, having been involved in the February 2017 investigations by AV[.]

578. Around this time, VicRoads' Major Projects Division was transferred to the newly established MRPA. This authority then held responsibility for the delivery of the Western Highway project until January 2019.

579. In August 2018, representatives of MRPA delivered a presentation concerning the project to Eastern Maar's board members.

580. The presentation explained the alignment evaluation process, the various cultural heritage assessments undertaken by VicRoads and the perceived impediments to adopting the northern option proposed by some project opponents.

581. At the request of Eastern Maar's board, MRPA also delivered a presentation to a meeting of Eastern Maar's members.

582. Following this meeting, Eastern Maar wrote to the Minister for Roads and Road Safety to request the Victorian Government investigate alternatives to the approved highway alignment.

## On Country assessment

583. The On Country assessment was commissioned by Eastern Maar in approximately July 2018 and was finalised in December 2018.

584. This assessment involved:

- a desktop review of previous cultural heritage assessments conducted in relation to the project area, including the cultural heritage management plan approved by Martang

- consultation with representatives of Eastern Maar and the Djab Wurrung Heritage Protection Embassy
- field surveys of two 'focus areas' surrounding the nominated birthing trees.

585. This assessment acknowledged 'extensive work' had previously been undertaken by VicRoads to investigate the cultural heritage impacts of the duplication project.

586. However, the assessment criticised prior studies for being 'too archaeologically focused' and for largely limiting assessment of hollow trees to their potential to store ancestral remains.

587. The On Country assessment observed:

While artefacts and archaeological sites should indeed be considered as cultural heritage, they are only part of the overall story for the cultural heritage that exists within a place or landscape and within Aboriginal culture, both past and present.<sup>40</sup>

588. The On Country report included a description of the cultural values identified in relation to the area, as described by representatives of Eastern Maar and the Djab Wurrung Heritage Protection Embassy. This included oral history relating to Mount Langi Ghiran and the Hopkins River basin.

589. The On Country assessment also discussed the significance attributed to the nominated birthing trees by Djab Wurrung traditional custodians participating in the assessment and identified archaeological signs suggestive of their traditional use by Aboriginal people.

590. The On Country assessment identified 18 potential Aboriginal sites within the two focus areas. These included the nominated birthing trees and other potential culturally significant trees. These sites were subsequently reported to Aboriginal Victoria for inclusion on the Victorian Aboriginal Heritage Register.

591. The On Country assessment recommended:

- Eastern Maar be included in future consultation concerning the project
- the nominated birthing trees and surrounding areas be avoided through wholesale realignment of the highway, rather than modifications to the approved alignment
- the Aboriginal sites identified during the assessment be further investigated with representatives of Martang and Eastern Maar, including through consultation with female elders
- archaeological excavation of the nominated birthing trees be considered if the trees could not be avoided by the duplication works
- MRPA conduct on-site consultation with representatives of Eastern Maar to identify and discuss the protection of trees marked for removal by the project.

592. In a written submission to the Ombudsman, several Djab Wurrung traditional custodians alleged MRPA failed to supply a copy of the On Country assessment to the Commonwealth Minister during the period when the Commonwealth Government was considering whether to intervene in relation to the dispute.

<sup>40</sup> N Saunders, *Community Consultation on Two Culturally Significant Trees along the Proposed Western Highway Duplication, between Buangor and Ararat, Victoria* (On Country Heritage and Consulting, 2018) 18.



593. While the On Country assessment was indirectly funded by MRPA, it was commissioned by Eastern Maar to enable its members to arrive at a formal position concerning the cultural significance of the trees at issue.

594. The investigation did not identify evidence that MRPA was ever provided with a final copy of the assessment. Nor did the investigation identify evidence that MRPA was aware that the assessment had not been provided to the Commonwealth Minister by Eastern Maar.

595. The Department of Transport advised the Ombudsman that a final copy of the assessment was only obtained later, after it was identified in the Federal Court litigation concerning the project.

596. In the circumstances, the investigation did not consider that this criticism of MRPA was substantiated.

## Modifications to the highway alignment

597. In late 2018, following preliminary discussions with Eastern Maar, MRPA began to develop modifications to the approved alignment that would avoid one of the two nominated birthing trees.

598. Martang later informed MRPA that it did not wish to participate in this process.

599. Around this time, MRPA also reviewed the relative advantages and disadvantages of the approved alignment, the northern option proposed by some opponents to the project and a possible 'southern alignment'.

### Southern alignment

Identified by MRPA as an alternative to both the approved alignment and the northern option, a southern alignment would involve construction of a new dual carriageway through farmland further to the south of both alignments.

Through internal analysis, MRPA identified that, while such an alignment would avoid most of the areas surrounding the nominated birthing trees, it would be likely to impact other Aboriginal cultural heritage sites along the Hopkins River.

This analysis observed that a southern alignment would also:

- require a new Environment Effects Statement
- delay completion of the project by over two years
- involve significant impacts to local properties and residents
- involve additional estimated costs of between \$33 million and \$48 million.

Previous cultural heritage assessments also emphasised there were greater risks of encountering mortuary trees within this area.

Following this analysis, the southern alignment was not presented to the Minister for Transport for consideration.

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600. In January 2019, MRPA was abolished and responsibility for the project was transferred to MRPV, a unit within the newly established Major Transport Infrastructure Authority.

601. Around this time, MRPV provided a briefing to the Minister for Transport Infrastructure that outlined three options for resolution of the dispute.

602. The first option involved undertaking 'minor design enhancements' to the approved alignment to avoid the nominated birthing tree to the south-west of Langi Ghiran State Park.

603. MRPV's advice to the Minister observed that Eastern Maar and representatives of the Djab Wurrung Heritage Protection Embassy were unlikely to support this option because it would still involve removal of the other nominated birthing tree to the south-east of Langi Ghiran.

604. The second option, which was recommended by MRPV, involved undertaking a 'localised realignment' of the highway to avoid both nominated birthing trees.

605. MRPV observed this option:

- involved additional estimated costs of \$8 million
- was supported by Aboriginal Victoria and the Department of Environment, Land, Water and Planning
- would likely be supported by Eastern Maar
- was unlikely to address all of the concerns of the members of the Djab Wurrung Heritage Protection Embassy.

606. The third option involved adopting the 'northern option' by duplicating the highway along the existing alignment to the south-east of Langi Ghiran.

607. MRPV's advice to the Minister observed that while this option was preferred by some opponents to the project, it would:

- require a new Environment Effects Statement process and further Victorian and Commonwealth planning approvals
- involve cancellation of the project contract and undertaking a new tender process
- result in much greater impacts to the environment
- involve additional costs of between \$57 million and \$73 million
- delay the project by approximately two years
- likely not be supported by conservation groups, local councils and most of the local community.

608. In January 2019, the Minister for Transport Infrastructure determined to approve implementation of the second option, involving a localised realignment to avoid the two nominated birthing trees.

609. In February 2019, MRPV met with representatives of Eastern Maar and the Djab Wurrung Heritage Protection Embassy to discuss the proposed modifications to the alignment.

610. At this meeting, MRPV advised that, under the modifications to the highway alignment approved by the Minister:

- six potential culturally significant trees identified during the On Country assessment would be avoided entirely, including the two nominated birthing trees
- six potential culturally significant trees would be removed
- impacts to another three trees required further investigation.

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611. Representatives of the Djab Wurrung Heritage Protection Embassy who spoke with officers of the Ombudsman said they did not feel heard by MRPV during this and other meetings concerning the project. These individuals said they felt that MRPV was only interested in coercing them into accepting an outcome that did not fully address their concerns.
612. Following this meeting, Eastern Maar wrote to the Minister for Transport Infrastructure to reiterate its request that the Victorian Government 'genuinely consider an alternative route' through further consultation with Eastern Maar.
613. In this letter, Eastern Maar observed:
- [T]he Eastern Maar people were not provided with sufficient information to provide Free Prior and Informed Consent to this project. The Heritage Services unit of Aboriginal Victoria saw the cultural heritage management plan in relation to the road signed off in 2013 without prior consultation with Eastern Maar people, rightful traditional owners of the area in question.
614. In March 2019, the Minister responded to Eastern Maar:
- The fieldwork and assessments to enable the preparation of the CHMP predated the registration of EMAC's [Eastern Maar's] native title claim in March 2013 and EMAC's subsequent application for Registered Aboriginal Party (RAP) status over the Western Highway Section 2b project area in August 2014. This should clarify why EMAC were not formally involved in the assessment work and evaluation of the CHMP.
615. In April 2019, following further discussions with Eastern Maar, MRPV engaged an arborist to inspect all 'trees of interest' within the project area for possible impacts caused by the modified alignment.
616. This included both nominated birthing trees, each of the trees identified during the On Country assessment and several other trees nominated by Djab Wurrung traditional custodians present during the inspection.
617. During and following this assessment, MRPV and representatives of Eastern Maar discussed further opportunities to avoid trees impacted by the alignment.
618. Following the assessment, MRPV and Eastern Maar executed a confidential preliminary agreement concerning the project.
619. Under the terms of this preliminary agreement, MRPV undertook, among other things, to:
- avoid an additional four trees through further modifications to the highway design
  - work with Eastern Maar to develop a monitoring and salvage program for the remaining trees requiring removal
  - develop an Aboriginal Employment and Procurement Strategy in consultation with Eastern Maar
  - commit to an Aboriginal Employment Target for all future projects within Eastern Maar's native title registration area
  - fund Eastern Maar to employ a Cultural Heritage and Employment Manager to work with MRPV in relation to future projects
  - fund scoping works for a cultural mapping exercise relating to Eastern Maar's native title registration area
  - work with Eastern Maar to identify locations along the highway for interpretative signs acknowledging the cultural significance of the area.

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620. In return for these undertakings, Eastern Maar agreed, among other things, to publicly acknowledge that its concerns about the highway design had been addressed and encourage its members to withdraw the heritage protection application made to the Commonwealth Government.
621. The trees included in the preliminary agreement are identified in Table 16 on the following page.
622. In May 2019, Eastern Maar and MRPV issued separate press releases announcing the modifications made to the approved alignment. Each expressed satisfaction that the project redesign adequately protected Aboriginal cultural heritage in the area.
623. Eastern Maar's press release observed:
- EMAC [Eastern Maar] recognises the considerable efforts made by Major Road Projects Victoria to realign the roadworks to avoid the two trees initially identified by the community as culturally significant.
- EMAC noted that a further 13 trees have been able to be retained along the alignment as a result of the consultations. They were grateful to members of their community who stood strong in protection of the trees.
- [An] Eastern Maar elder and senior custodian for the trees stated that "no one argues with the fact this highway needs to be upgraded. Now the upgrade is going ahead in a way that protects our cultural heritage. The government has listened to our concerns."
624. Consistent with the agreement with Eastern Maar, MRPV developed a series of modifications to the approved highway alignment. This involved:
- acquisition of additional land and realignment of approximately 1km of the highway to avoid the nominated birthing tree to the south-east of Langi Ghiran
  - modification to the design of a connecting road to avoid the second nominated birthing tree
  - redesign of an intersection near the south-western boundary of Langi Ghiran State Park to avoid an additional nominated tree
  - realignment of a connecting road to avoid several nominated trees near the Hopkins River.
625. Changes made to the approved alignment to avoid the first nominated birthing tree are depicted in Figure 39 on page 128.
626. Some Djab Wurrung traditional custodians submitted to the Ombudsman that it was inappropriate for MRPV to agree to fund Eastern Maar to employ a Cultural Heritage and Employment Manager as part of the agreement securing its support for the project. These individuals said this undertaking amounted to a financial inducement intended to compromise Eastern Maar's position.
627. The investigation did not consider that this aspect of the agreement amounted to an inappropriate use of public funds because, among other reasons, Eastern Maar was not performing statutory functions in relation to the project that could have been improperly influenced by the arrangement.
628. MRPV and Eastern Maar are currently developing a final agreement concerning the project. The investigation reviewed the most recent version of the draft agreement between the parties and noted that its terms were consistent with the preliminary agreement.
629. After the preliminary agreement with Eastern Maar was announced, the Chair of the Aboriginal Heritage Council wrote to the Minister for Transport Infrastructure to express concern that MRPV's negotiations with Eastern Maar were disrespectful to Martang's role as Registered Aboriginal Party for the area.

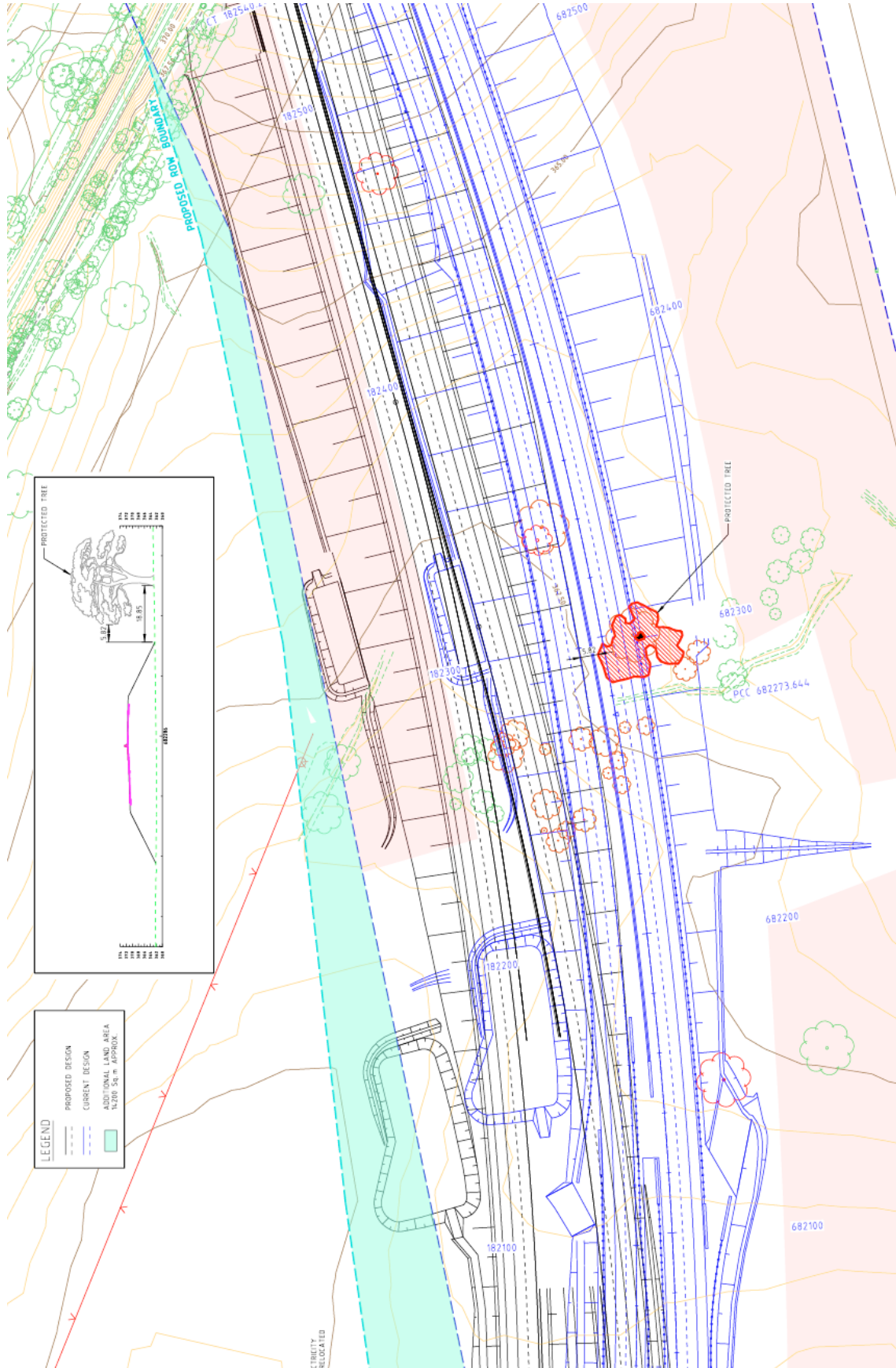
**Table 16: Trees to be avoided and removed under preliminary agreement between MRPV and Eastern Maar**

	<b>Description</b>	<b>Notes</b>
E1	Potential scarred tree.	Scar considered by Eastern Maar to be of European origin. One of six trees identified in Federal Court proceedings.
E2	Potential culturally modified tree.	One of six trees identified in Federal Court proceedings.
E3	Nominated birthing tree to south-east of Langi Ghiran.	One of six trees identified in Federal Court proceedings.
E4	Potential scarred tree.	One of six trees identified in Federal Court proceedings.
E5	Potential scarred tree.	Identified as 'directions' tree. One of six trees identified in Federal Court proceedings.
E6	Nominated birthing tree to the west of Langi Ghiran.	One of six trees identified in Federal Court proceedings.
CMT2	Potential culturally modified tree.	
CMT3	Potential culturally modified tree.	Tree considered by Eastern Maar to have 'no cultural scarring'.
CMT4	Potential culturally modified tree.	Tree considered by Eastern Maar to have 'no cultural scarring'.
CMT6	Potential culturally modified tree.	
CMT8	Potential culturally modified tree.	
CMT9	Potential scarred tree.	
CMT10	Potential scarred tree.	Identified as 'boundary' or 'marker' tree.
CST1	Potential culturally sensitive tree associated with nominated birthing tree to west of Langi Ghiran.	
CST2	Potential culturally modified tree associated with nominated birthing tree to south-east of Langi Ghiran.	
ST1	Potential scarred tree.	
ST2	Potential scarred tree.	
ST3	Potential scarred tree.	
ST4	Potential scarred tree.	
N/A	Additional potential culturally significant tree nominated during inspection.	Identified as 'placenta tree'. Tree considered by Eastern Maar to have no signs of Aboriginal cultural modification.
N/A	Additional potential culturally significant tree nominated during inspection.	Identified as 'Grandmother tree'.
N/A	Additional potential culturally significant tree nominated during inspection.	

<b>Status</b>	<b>Impact (pre-April 2019)</b>	<b>Outcome</b>
Fair condition	Impacted	To be removed
Dead and fallen	Avoided	Avoided
Fair condition	Avoided	Avoided
Not stated	Possibly impacted	Avoided through redesign
Healthy	Possibly impacted	Avoided through redesign
Health compromised	Avoided	Avoided
Healthy	Avoided	Avoided
Poor stability	Impacted	To be removed
Poor stability	Impacted	To be removed
Healthy	Avoided	Avoided
Severely damaged	Avoided	Avoided
Healthy	Avoided	Avoided
Healthy	Avoided	Avoided
Healthy	Avoided	Avoided
Fair condition	Impacted	To be removed
Dead	Impacted	To be removed
Healthy	Avoided	Avoided
Healthy	Avoided	Avoided
Healthy	Avoided	Avoided
Severe deterioration	Impacted	To be removed
Not stated	Possibly impacted	Avoided through redesign
Health compromised	Possibly impacted	Avoided through redesign



Figure 39: Proposed modifications (black) to approved highway alignment (blue) to avoid nominated birthing tree to south-east of Langi Ghiran



Source: Department of Transport

# Project status

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630. As at mid-February 2020, construction delays and modifications to the approved alignment are estimated to have cost the Victorian Government approximately \$50-60 million.

631. MRPV informed the investigation that, subject to any declaration made by the Commonwealth Minister for the Environment, it intends to proceed with duplication of the highway in accordance with the modified alignment agreed with Eastern Maar.

632. MRPV said it believed it had followed all relevant legislative requirements and processes applicable to the project.

633. MRPV submitted to the investigation:

It continues to be [MRPV's] understanding that the trees the subject of the Djab Wurrung Protection Embassy protests are still not considered an Aboriginal place for the purposes of the AH [Aboriginal Heritage] Act by AV [Aboriginal Victoria]. This is in accordance with the comprehensive assessment process AV has undertaken in consultation with the recognised Traditional Owners from both Martang and EMAC.

Irrespective, 16 of the 22 trees have been saved through [MRPV] realigning sections of the road carriageways to accommodate the retention of additional trees.

634. Eastern Maar, the Federation of Victorian Traditional Owner Corporations (of which Eastern Maar is a member) and Aboriginal Victoria have all expressed public support for the preliminary agreement reached between Eastern Maar and MRPV.

635. Despite earlier misgivings about MRPV's engagement with Eastern Maar, the Aboriginal Heritage Council has also publicly stated that it supports this outcome.

636. Over the years, the highway duplication project has also received expressions of support from local councils, community associations and emergency services representatives.

637. On the other hand, representatives of the Djab Wurrung Heritage Protection Embassy advised the Ombudsman that they were not satisfied with MRPV's intention to duplicate the relevant section of highway in accordance with the preliminary agreement reached with Eastern Maar.

638. They explained that the trees and landscape were interconnected in Aboriginal beliefs and, for this reason, preservation of some significant trees was not enough to protect Aboriginal cultural heritage within the area.

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***'You can't separate the land from the tree, or the tree from the land. [...] It's still going to go through and take out a part of sacred Country.'***

- Oral submission to investigation.

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***'We don't believe we've been given a fair hearing. So far it's been the government's way.'***

- Oral submission to investigation.

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639. Some Djab Wurrung traditional custodians who spoke with the investigation also emphasised that they did not identify as Maar and therefore did not recognise Eastern Maar’s authority to negotiate an agreement on behalf of Djab Wurrung people.

640. The preliminary agreement is also not supported by the Djab Wurrung traditional custodians who are seeking Commonwealth protection of the area.

641. In a written submission to the Ombudsman, these traditional custodians said the preliminary agreement between Eastern Maar and MRPV was legally invalid, that the modifications to the highway alignment failed to protect one of the trees identified in the application to the Commonwealth Minister, and that MRPV and VicRoads had failed to properly investigate the ‘northern option’ as an alternative to the approved alignment.

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***‘We’ve been denied natural justice through this process. [...] MRPV are above the law – most government departments are.’***

– Oral submission to investigation.

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642. Despite the modifications made to the highway alignment, MRPV has also continued to receive criticism from some members of the public for its perceived failure to reconsider the merits of the duplication works in light of the remaining opposition to the project.

643. Members of the public also contacted the Ombudsman to state they were not satisfied with the proposed modifications to the highway alignment.

644. Several of these individuals told the Ombudsman that they still wished for a comprehensive review of the approved alignment, including further investigation of the ‘northern option’.

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***‘I am a 16 year-old Australian student. I write to you about something close to my heart – the intended destruction of culture and environment, the proposed bulldozing of the 800-year-old sacred trees in the Djab Wurrung country in Victoria.’***

– Online comment to MRPV on 29 August 2019.

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***‘I have never sent an email of this nature to a government body of any kind, but feel compelled to in this situation.’***

– Email sent to MRPV on 22 August 2019.

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***‘Saving 15 trees?? What about the rest? You’re a bunch of disgraceful shameful racists. How can you live with yourselves?’***

– Email sent to MRPV on 18 August 2019.

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***‘Dear Ombudsman, I am very sad to think that the trees and the cultural area will be damaged by the MRPV (or anyone!). Please do not allow this cultural heritage to be destroyed by roadbuilding.’***

– Email to the Ombudsman dated 10 April 2019.

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***‘Thank you for reading this letter and adding my concerns to the review that your office is undertaking. The mass destruction of these trees for a proposed highway is the same as tearing down Flinders Street Station or St. Paul’s cathedral. It would be unlawful and destroy irreplaceable heritage. These trees are sacred to the Djab Wurrung people, the history of these trees goes back further than white settlement.’***

– Letter to the Ombudsman dated 15 April 2019.

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# Conclusions

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## Cultural heritage due diligence

645. VicRoads recognised that the Western Highway duplication project was likely to impact Aboriginal cultural heritage in early 2008, when it began preliminary planning activities associated with the project.
646. This led VicRoads to commission a desktop report into Aboriginal cultural heritage within the vicinity of the existing highway corridor. This report recognised the traditional Djab Wurrung connection to the region and cautioned that previously unrecorded cultural heritage sites were likely to be encountered within the area.
647. Protection of Aboriginal cultural heritage sites was subsequently identified as one of several key objectives for the project. In 2011, two further Aboriginal cultural heritage assessments were commissioned for the purposes of evaluating alignment options for the section of highway between Buangor and Ararat, the focus of the present-day dispute.
648. The first of these assessments focused on previously identified Aboriginal cultural heritage sites within the area. At the recommendation of the Registered Aboriginal Party for the area, Martang, the latter assessment also attempted to predict the occurrence of undiscovered cultural heritage sites within the potential alignment corridors. Information concerning the broader cultural sensitivities of the area was also solicited from Martang and mapped against the shortlisted alignment options.
649. Specialist reports were also commissioned into the potential presence of mortuary trees and Aboriginal earth mounds within the project area. The decision to undertake detailed enquiries concerning these sites was guided by expert advice, which emphasised their relative prevalence in the region and significance according to Aboriginal tradition.
650. The results of the cultural heritage assessments were considered and weighed against other project objectives. It is noted that information identified during the cultural heritage assessments influenced VicRoads to favour some alignment options and eliminate others.
651. The two alignment options nominated by VicRoads for inclusion in the project's Environment Effects Statement were the subject of a further cultural heritage impact assessment, conducted in early 2012. This assessment concluded that, while both alignment options could encounter previously unrecorded Aboriginal cultural heritage sites, this risk could be managed by undertaking targeted archaeological excavations and through preparation of a cultural heritage management plan for the project. VicRoads subsequently followed this advice.
652. The investigation established that VicRoads did not receive reports of possible birthing trees within the project area until early 2017, after the highway alignment had been determined by the Minister for Planning.

## Project consultation

653. Some parties submitted to the Ombudsman that late identification of the possible birthing trees was attributable to a failure to consult more broadly with Djab Wurrung traditional custodians during the project planning phase.
654. While often challenging to coordinate, early, broad and culturally inclusive public consultation invariably assists public authorities to understand different perspectives about planned initiatives and major infrastructure projects.

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655. VicRoads' consultation with local residents and affected landholders was thorough and responsive. Feedback from community information sessions and stakeholder meetings led to the identification and assessment of additional alignment options and the reconfiguration of alignment evaluation criteria.

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

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

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

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

660. In response to the Ombudsman's draft report, the Aboriginal Heritage Council addressed this issue:

[the] suggestion that broad Aboriginal-focused consultation could be undertaken without interfering with the primacy of RAPs is erroneous [and would]

unreasonably interfere with RAPs' rights to exercise their statutory function as the primary source on Cultural Heritage matters relating to their Registration Area.

661. The Department of Transport, responding to the Ombudsman's draft report on behalf of VicRoads, similarly emphasised:

The relevant statutory frameworks and [Aboriginal Heritage Council] guidance provides that the Registered Aboriginal Party [...] is the relevant Traditional Owner group with which to consult on cultural heritage matters, and VicRoads, MRPA and MRPV have acted consistently with the requirements of this statutory framework and VAHC guidance in the planning and delivery of the Project.

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

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

664. In this regard, the investigation noted that Aboriginal Victoria – the office responsible for administering the Aboriginal Heritage Act – observed that the Ombudsman's draft report:

point[ed] to some areas of Victoria's cultural heritage management and protection system which AV could explore for both policy and legislative improvement.



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## Selection of the highway alignment

665. Owing to the location of Langi Ghiran State Park, alignment options for the relevant section of highway were effectively limited to those which followed the existing highway alignment, either in full or in part, and those which deviated through farmland to the south.
666. It is noted that, largely owing to this constraint, none of the alignment options shortlisted by VicRoads would have entirely avoided the areas later identified for protection by some Djab Wurrung traditional custodians.
667. Following the alignment evaluation process, VicRoads resolved to present two alignment options for further consideration in the project's Environment Effects Statement, finalised in August 2012. VicRoads determined to endorse one of these options, Option 2, as its preferred alignment for the duplicated highway.
668. The investigation noted that this decision contradicted internal advice presented to VicRoads' executive team. While the Environment Effects Statement provided a detailed description of the alignment evaluation process, it did not include sufficient information to identify why this alignment was favoured by VicRoads. Further, VicRoads does not appear to have kept sufficient internal records concerning this decision.
669. Again, it is noted that neither option presented in the Environment Effects Statement would have entirely avoided the areas surrounding the nominated birthing trees – both options followed the same route between Ararat and Langi Ghiran State Park, where one such tree is located, and both diverged south of the existing highway between Langi Ghiran and Buangor, intersecting to different degrees the area surrounding the other tree.
670. VicRoads has publicly apologised for errors in the environmental data included in the Environment Effects Statement, although some community members maintain that the issues with this document are broader than have been acknowledged. These matters were largely outside of the terms of reference for the investigation and were not explored in detail by the Ombudsman.
671. The two alignment options presented in the Environment Effects Statement were subsequently evaluated by the Inquiry and Advisory Committee established by the Minister for Planning. In early 2013, this authority determined to recommend VicRoads' alternative alignment, Option 1, at the expense of VicRoads' preferred alignment, owing to its perceived environmental benefits. This was consistent with advice from the then-Department of Sustainability and Environment and was not unreasonable in the circumstances.
672. The Inquiry and Advisory Committee concluded that there would be a 'low impact' to Aboriginal cultural heritage associated with the project. This conclusion was consistent with the cultural heritage impact assessment included in the Environment Effects Statement and was also not unreasonable in the circumstances.
673. The Inquiry and Advisory Committee process appears to have provided a reasonable opportunity for members of the community to be heard about the project's impacts.

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## Cultural heritage investigations

674. Aboriginal cultural heritage sites within the approved alignment corridor were investigated during preparation of the project's cultural heritage management plan. This involved three levels of cultural heritage assessment, including 66 days of field surveys and excavation activities undertaken in cooperation with Martang between January 2012 and August 2013.
675. The assessments undertaken for the cultural heritage management plan identified a number of new cultural heritage sites within and surrounding the project area. This included several culturally modified trees located near Buangor that were subsequently managed in accordance with measures agreed with Martang.
676. The investigation noted that, while reasonably thorough in themselves, information concerning the desktop and standard assessments could have been made more accessible in the project's Environment Effects Statement.
677. VicRoads consulted with Martang throughout the cultural heritage management plan process. This consultation did not lead to the identification of the possible birthing trees or the more significant cultural values that were subsequently attributed to the area.
678. This should not be interpreted as criticism of the advice provided by Martang. Evidently, there are differing views within the Djab Wurrung community concerning the degree to which the project will impact cultural values associated with the area.
679. Several individuals who approached the investigation said they believed the field inspections undertaken for the cultural heritage management plan did not involve participation of female Djab Wurrung traditional custodians and therefore may have failed to consider cultural values relating to women's business.
680. The investigation noted that several female representatives of Martang participated in the field work undertaken for the complex assessment of the project area. Further, senior female representatives of Martang also participated in the cultural values workshop undertaken for the purposes of the alignment evaluation process.
681. In any case, the investigation considered that VicRoads was required to rely upon Martang's judgement as to which of its representatives were best suited to participate in the inspections. It is noted that senior female representatives of Martang were involved in later inspections of the nominated birthing trees coordinated by Aboriginal Victoria and did not endorse the values attributed to these sites by other parties.
682. It is acknowledged that some traditional custodians have claimed that Martang was not sufficiently representative of Djab Wurrung people. These parties have suggested that it was inappropriate for VicRoads to have relied upon the advice provided by Martang when considering the cultural heritage impacts of the project.
683. During the relevant period, Martang was recognised by the Aboriginal Heritage Council as the primary source of cultural heritage advice and the body representing Djab Wurrung people for the area. The Aboriginal Heritage Act required VicRoads to consult with Martang before and during preparation of the cultural heritage management plan.
684. Presently, entities seeking registration as a Registered Aboriginal Party do not need to satisfy that they are the only, or even the most, representative body for traditional custodians of the relevant area; although this may still be a matter that the Aboriginal Heritage Council takes into account when considering an application.



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685. Yet the degree to which a Registered Aboriginal Party represents traditional custodians is very important because, once registered, such bodies have sole responsibility for evaluating projects that may impact Aboriginal cultural heritage within their designated area.
686. Martang's limited ownership structure was recognised by the Aboriginal Heritage Council when it determined to approve Martang's application for registration as a Registered Aboriginal Party in September 2007. Despite this, the Aboriginal Heritage Council identified reasons why it was satisfied that Martang met the criteria for registration under the Aboriginal Heritage Act and was accordingly capable of speaking for Djab Wurrung cultural heritage.
687. The actions of the Aboriginal Heritage Council were not a subject of the investigation and it is not suggested that the Council's decision to approve Martang's application for registration was wrong.

## Cultural heritage management plan

688. Under the Aboriginal Heritage Act, VicRoads was required to prepare a cultural heritage management plan in relation to the project. While this document was finalised prior to selection of the approved highway alignment in October 2013, it is unlikely to have meaningfully influenced the decision.
689. The cultural heritage management plan documented the Aboriginal cultural heritage sites identified during the investigations conducted with Martang and proposed measures intended to reduce the risks to Aboriginal cultural heritage associated with the project.
690. Martang indicated that it was satisfied that the cultural heritage management plan suitably minimised harm to Aboriginal cultural heritage when it determined to approve this document in October 2013.

691. This was in accordance with the criteria identified in the Aboriginal Heritage Act, which, while prioritising principles of harm avoidance, require only that a cultural heritage management plan minimise harm to Aboriginal cultural heritage associated with an activity. It is acknowledged that to some traditional custodians, any harm to Country and cultural heritage will be unacceptable.
692. Although its actions were not a subject of the investigation, records reviewed by the Ombudsman indicate that Martang approached its responsibilities concerning the project diligently and in accordance with the requirements established under the Aboriginal Heritage Act.

## Credit trading agreement

693. The investigation did not substantiate allegations that VicRoads unduly influenced Martang to approve the cultural heritage management plan.
694. Despite this, VicRoads' decision to negotiate a Credit Trading Agreement relating to the project with Martang during the period when Martang was required to evaluate the cultural heritage management plan was ill-advised and arguably created a conflict of interest.
695. Trust for Nature was not informed of Martang's role in evaluating the cultural heritage management plan and deserves no criticism for its involvement in the arrangement.
696. There is no evidence that the Credit Trading Agreement was actually intended to influence Martang or that it had any impact on Martang's decision to approve the cultural heritage management plan.
697. Other payments from the Victorian Government to Martang during the relevant period did not create an incentive for Martang to approve the cultural heritage management plan.

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## Response to cultural heritage concerns

698. VicRoads was first informed of reports of possible birthing trees within the project area in early 2017.
699. VicRoads subsequently facilitated Aboriginal Victoria's inspection of the nominated trees. Those inspections involved senior female Djab Wurrung representatives of Martang and Eastern Maar. At the time, the former body had been recognised by the Aboriginal Heritage Council as the primary source of cultural heritage advice for the area and the latter body represented Aboriginal peoples with a registered native title claim concerning the region.
700. Aboriginal Victoria later wrote to VicRoads to report that these inspections had not substantiated the claims made about the area. Aboriginal Victoria informed VicRoads that it was authorised to proceed with the project in accordance with the cultural heritage management plan approved by Martang. That advice was reiterated after a further inspection of the area by representatives of Eastern Maar.
701. Under the Aboriginal Heritage Act, VicRoads was not responsible for assessing the preliminary reports concerning the possible birthing trees. It was reasonable in the circumstances for VicRoads to have relied upon the advice of Aboriginal Victoria regarding this issue.
702. In June 2018, after works associated with the project were effectively halted by efforts to protect the site, VicRoads resolved to undertake further consultation with Djab Wurrung opponents to the project, as well as representatives of Martang and Eastern Maar.
703. Following these discussions, VicRoads undertook to support a further, independent cultural heritage assessment of the area impacted by the project. After responsibility for the project was transferred to MRPA, this agency also began work to redesign the proposed highway to avoid the nominated birthing trees.
704. The announcement of a subsequent agreement with Eastern Maar was later criticised by the Aboriginal Heritage Council for its perceived disrespect to Martang's role under the Aboriginal Heritage Act, underscoring the complexity of the situation.
705. The independent On Country assessment commissioned by Eastern Maar identified a number of previously unrecorded trees that were said to be culturally significant to Djab Wurrung people. Several of these trees were previously inspected during the investigations conducted for the project's cultural heritage management plan.
706. While the On Country assessment did not speak in definitive terms regarding the issue, it discussed the significance attributed to the nominated birthing trees by some Djab Wurrung traditional custodians and identified archaeological signs suggestive of their traditional use by Aboriginal people.
707. The On Country assessment recommended that the areas surrounding the nominated birthing trees be avoided by wholesale redesign of the proposed highway alignment. It also expressed qualified criticism of the earlier cultural heritage assessments undertaken in relation to the project for their perceived focus on archaeological sites, rather than intangible values, associated with past Aboriginal use of the area.

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708. The latter observation is reminiscent of the advice provided to VicRoads by one local Aboriginal body in the years prior to the duplication project:

To the Ballarat Aboriginal Community, a locality or place has more importance than the artefacts on or in it because they have a spiritual connection with the land itself. The natural context of a place then, often extends beyond the boundaries of an archaeological site.<sup>41</sup>

709. In some ways, this criticism also echoed observations made by VicRoads' internal review into environmental errors associated with the project, which recognised the need for future environmental assessments to consider the 'important local values' often imbued into large old trees.

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

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

## Modifications to the alignment

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

713. In January 2019, responsibility for the project was transferred again to MRPV. Following further discussions with representatives of Eastern Maar and the Djab Wurrung Heritage Protection Embassy, this agency developed several localised modifications to the approved alignment.

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

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

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

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

## Alternatives to the approved alignment

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

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

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<sup>41</sup> Robert G Gunn, *Western Highway Section, Dobie, Western Victoria: Archaeological Survey* (Victorian Aboriginal Heritage Register, 2011) 12.

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720. The northern option does not enjoy the unanimous support of the Djab Wurrung traditional custodians who hold concerns about the project. While this option is supported by the individuals seeking Commonwealth protection of the area, some representatives of the Djab Wurrung Heritage Protection Embassy who spoke with the investigation said that it would still involve unacceptable impacts to cultural values associated with the area.
721. It is also noted that the northern option, like the approved alignment, would not wholly avoid the area surrounding the second nominated birthing tree, to the west of Langi Ghiran State Park.
722. Further, although private assessments have been conducted, parts of this option have not been assessed for the potential presence of Aboriginal cultural heritage sites under the Aboriginal Heritage Act.
723. Alignment options resembling the northern option were developed and evaluated by VicRoads during preliminary project planning and as part of the formal alignment evaluation process. Following sustained pressure from some community members, versions of the northern option were developed and considered again in 2011, 2012 and 2015.
724. Independent from VicRoads, a version of the northern option was also considered and rejected by the Inquiry and Advisory Committee established by the Minister for Planning.
725. The northern option was also later presented to and rejected by the Minister for Transport Infrastructure as a possible resolution to some of the cultural heritage concerns about the project.
726. VicRoads and MRPV have publicly and privately maintained that it is not possible to construct a suitable road using the alignment identified by proponents of the northern option without causing significant additional impacts to the environment.
727. The decision not to pursue development of the northern option appears to have been based on a combination of environmental, cultural heritage, financial and road configuration considerations. Importantly, records reviewed by the investigation confirmed that the option was not dismissed on cost considerations alone.
728. While some parties may disagree with VicRoads and MRPV's assessment of the northern option, the investigation was ultimately satisfied that these authorities had given fair and appropriate consideration to this possible design alternative.
729. It is noted that, as matters stand, MRPV is constrained to ensure that duplication of the highway occurs within the area identified in the public acquisition overlay included in the Ararat Planning Scheme.

## Observations

730. While VicRoads' initial project consultation did not appear to have reached all interested audiences, the investigation ultimately concluded that VicRoads, MRPA and MRPV had made legally sound and good faith efforts to consult with traditional custodians and arrive at a compromise solution to the cultural heritage concerns about the project, once raised.
731. On one view, this outcome – which will see the proposed highway avoid 16 trees of significance, including the two nominated birthing trees – represents a significant achievement for those who mobilised to speak up for Country.

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732. Yet it is also clear that the terms of the preliminary agreement between MRPV and Eastern Maar have not satisfied all Djab Wurrung traditional custodians who have expressed concerns about the project. These individuals have observed that the duplication works will inevitably harm a landscape that was once nurtured and revered by Djab Wurrung ancestors, and which continues to be of immense contemporary significance to many.
733. It is evident that these parties continue to distrust the motivations and actions of public authorities associated with the project. That distrust, and the resilience displayed by some Djab Wurrung traditional custodians in seeking to protect their traditional lands, is hardly surprising considering past and ongoing Aboriginal experiences of government. It is a reminder that the trust of Aboriginal communities must be earned, and never assumed.
734. It is also recognised that the concerns raised by Djab Wurrung opponents to the project – some of which relate to matters of legislation and policy – are much broader than could ever be addressed by the investigation.
735. Many of those concerns appeared to derive from tensions at the heart of Victoria’s Aboriginal heritage protection framework. In this regard, the investigation observed that the processes under the Aboriginal Heritage Act, while intended to empower traditional custodians when speaking for Country, also have the potential to exclude some voices from the discussion.
736. In response to the Ombudsman’s draft report, Aboriginal Victoria submitted:
- [Aboriginal Victoria] devotes considerable resources to assist Traditional Owners form sustainable representative organisations, and supports the Victorian Aboriginal Heritage Council in its policy to only appoint Registered Aboriginal Parties (RAPs) that are representative of the Traditional Owners of their areas. However, issues such as the representativeness of RAPs and the degree to which Aboriginal oral traditions are explored in cultural heritage management plan processes are areas for which AV could explore improvements.
737. It is clear that the concerns about the project also continue to resonate with the broader community, and may risk impacting some sectors of the public’s confidence in the Victorian Government’s commitment toward protecting Aboriginal cultural heritage and the delivery of other initiatives seeking to mend the relationships between the State and Aboriginal peoples.
738. It must be recognised that complaints relating to systemic issues often require systemic responses. In such cases, it may not be enough for public authorities to rely upon assurances as to the observance of proper processes to satisfy significant and far-reaching concerns about the way that government functions.
739. In this manner, it is recognised that the conclusions of the investigation are similarly unlikely to resolve remaining concerns about the impacts of the project. While no doubt likely to disappoint many of the individuals who approached the Ombudsman, the observations in this report do nothing to question the commitment and motivations of those who continue to speak for Djab Wurrung Country.

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## Compliance with human rights

740. Section 19(2) of the Charter of Rights Act recognises that Aboriginal people hold distinct cultural rights. This section provides that among other things, Aboriginal people must not be denied the right, along with other members of their community:

- to enjoy their identity and culture
- to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

741. Decisions by the United Nations Human Rights Committee have recognised that the following matters may be relevant to whether the cultural rights of indigenous peoples have been denied by an administrative action:

- the degree to which indigenous people were consulted in relation to, or participated in, the decision to undertake the action
- the relative adverse impacts on traditional cultural practices and relationships associated with the action, including any measures adopted by the decision-maker to minimise those impacts.<sup>42</sup>

742. The investigation did not conclude that the actions of VicRoads and MRPV were incompatible with section 19(2) of the Charter of Rights Act, while noting that MRPV and the other authorities responsible for the project must give proper consideration to the cultural rights of Aboriginal people when determining whether and how to move forward.

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<sup>42</sup> *Länsman v. Finland*, Human Rights Committee, UN Doc. CCPR/C/52/D/511/1992 (8 November 1994); *Mahuika v. New Zealand*, Human Rights Committee, UN Doc. CCPR/C/70/D/547/1993 (15 November 2000). Section 19(2) of the Charter of Rights is based on rights recognised in the International Covenant on Civil and Political Rights and the United Nations Declaration on the Rights of Indigenous Peoples.





# Appendix A

Summary of consultation activities undertaken by VicRoads during project design phase	
Date	Activity
January 2009	Western Highway duplication project office opened in Ballarat. Project team are available to meet with the public.
April 2009	Information bulletin announcing project. Community members are invited to join project mailing list and to contact VicRoads for further information. By March 2012, 170 people have registered to receive updates.
September 2009	Information bulletin providing update on planning process and progress of works.
November 2009	VicRoads holds community meeting in Great Western. Approximately 150 people attend.
November 2009	Publication of media release concerning outcome of community meeting in Great Western.
December 2009	Circulation of invitation to comment forms.
December 2009	Media update about upcoming community meetings in Buangor and Ararat.
December 2009	Community meetings in Buangor and Ararat. Approximately 130 people attend. Discussion of individual project sections.
January 2010	VicRoads responds in writing to individuals who provided comment as part of previous consultation.
February 2010	Information bulletin concerning Burrumbeet to Beaufort section. Brief update on planning progress of Beaufort to Stawell sections.
April 2010	Media release issued advising that alignment options for Beaufort to Ararat section should be available in coming months.
May 2010	Newspaper placement advising that an initial display of options for section between Beaufort and Ararat is planned for the coming month in Buangor.
May 2010	Information bulletin providing update on route options between Ararat and Stawell.
June 2010	Media release promoting upcoming community consultation session in Buangor.
June 2010	VicRoads holds community consultation session in Buangor. Section 2 preliminary alignment options displayed for feedback. Approximately 80 people attend.
July 2010	Media release concerning outcome of community consultation session.
August 2010	Information bulletin providing update about planning for works between Beaufort to Ararat.
December 2010	Information bulletin advising of the selection of options for further development.
December 2010	Letters sent to community explaining commencement of Environment Effects Statement process and outlining opportunity to make public submissions on preferred alignment. Advertises community information session in Buangor where project staff will be available to answer questions.
December 2010	VicRoads holds community information session at Buangor concerning Environment Effects Statement process.

Date	Activity
April 2011	Technical Reference Group established. Comprises statutory authorities with an interest in the project, including Aboriginal Affairs Victoria. Group meets approximately every four weeks during preparation of Environment Effects Statement.
April 2011	Media release concerning development of Environment Effects Statement. Provides update on consultation process.
May 2011	VicRoads conducts meeting with Catchment Management Authorities to discuss project.
June 2011	Draft scoping requirements for Environment Effects Statement are placed on public exhibition.
June 2011	Media release issued reminding community of deadline to make submissions on draft scoping requirements
June 2011	VicRoads distributes online and paper surveys seeking community feedback on each shortlisted alignment option
July 2011	Multiple media releases and a community update promoting upcoming public information sessions.
July 2011	VicRoads holds public information sessions in Buangor, Great Western, Beaufort and Ararat to display shortlisted alignment options. Approximately 250 people attend across all four sessions.
July 2011	Information concerning shortlisted alignment options distributed at VicRoads customer service centres, council offices, Australia Post offices, libraries and service stations along Western Highway.
July 2011	Professional and Local Services Group formed. Comprises emergency services, private infrastructure operators, local service providers, tourism and progress associations and community representatives. Meets multiple times throughout 2011-2012.
July 2011	Media release issued concerning outcome of public information sessions held in July.
July 2011	Information bulletin promoting Environment Effects Statement process.
August 2011	VicRoads releases Consultation Plan for project.
October 2011	Mailouts to landowners and businesses announcing that VicRoads has determined preferred highway alignments. Community bulletin also issued with images of preferred alignment and details of upcoming information sessions in November. Landowners directly impacted are encouraged to contact office.
November 2011	Information bulletin providing update about planning process, including maps and public display dates.
November 2011	VicRoads displays preferred alignments at public display sessions in Great Western, Buangor, Beaufort and Ararat. Approximately 180 people attend.
November 2011	Media release issued concerning outcome of public display sessions.

# Appendix A – continued

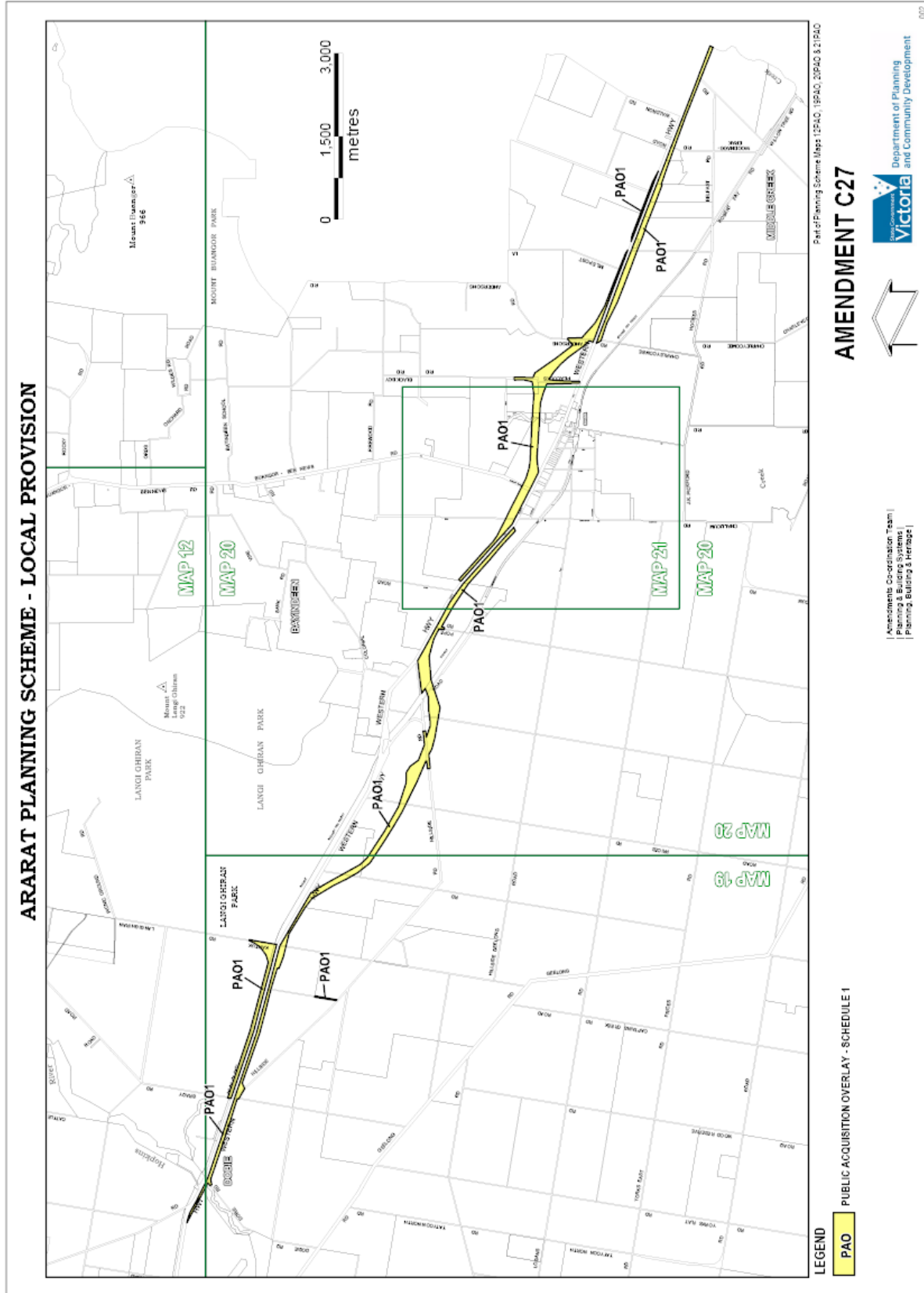
Summary of consultation activities undertaken by VicRoads during project design phase	
Date	Activity
May 2012	VicRoads displays detailed maps and highway upgrade proposals at public display session in Buangor. Information about access and interchange at Buangor provided. Approximately 40 people attend.
May 2012	Information bulletin explaining Environment Effects Statement planning process. Includes alignment map and counselling service information.
June 2012	Media placements in local newspaper providing update on planning process. Advises that Environment Effects Statement documents are to be made public later in the year. Public are welcome to make formal submissions regarding proposal.
September - October 2012	<p>Environment Effects Statement and Draft Planning Scheme Amendments placed online and for public display at Western Highway project office, local councils, community libraries and government libraries in Melbourne and Canberra.</p> <p>Exhibition of Environment Effects Statement is publicised to landowners via a mailout of summary brochure, FAQs and DVD. Broader promotion by email updates to individuals registered on mailing list, public advertisements in regional, state-wide and national newspapers and media releases to local newspapers. Community information sessions are also held in Beaufort and Ararat.</p> <p>Members of the public are invited to make written submissions in response to the Environment Effects Statement.</p>

# Appendix B

List of written submissions received by Inquiry and Advisory Committee	
Submitter	Nature of submission
Ararat Rural City Council	Expression of qualified support for project, with preference for VicRoads' preferred alignment.
Dep of Sustainability and Environment	Expression of support for Option 1 alignment due to reduced environmental impacts.
La Trobe University Botany Department	Submission seeking protection of endangered native vegetation planted in adjacent reserve.
Member of public	Opposition to VicRoads' preferred alignment due to impacts on property.
Member of public	Submission concerning compensation for land acquisition and raising highway connectivity issues.
Member of public	Opposition to diversion of creek due to impacts on property.
Member of public	Submission concerning land zoning and requesting reconsideration of highway interchange arrangements.
Member of public	Opposition to VicRoads' preferred alignment due to impacts on property.
Member of public	Opposition to VicRoads' preferred alignment due to loss of local heritage and impacts on property.
Member of public	Opposition to VicRoads' preferred alignment due to impacts on property.
Member of public	Opposition to VicRoads' preferred alignment due to impacts on property.
Member of public	Opposition to diversion of watercourse due to impacts on property.
Member of public	Submission requesting consideration of duplication along existing highway alignment.
Member of public	Submission requesting consideration of duplication along existing highway alignment.
Member of public	Opposition to VicRoads' preferred alignment due to impacts on property.
Member of public	Submission requesting consideration of duplication along existing highway alignment.
Member of public	Submission requesting compensation for land acquisition.
Member of public	Opposition to duplication of highway on ecological and other grounds.
Member of public	Opposition to proposed alignment due to impacts on local properties and amenities.
Northern Grampians Shire Council	Expression of support for project by local council.
Pyrenees Shire Council	Expression of support for project by local council.
VicRoads	Expression of support for project by proponent.
Western Highway Action Committee	Expression of support for project by local council association.

# Appendix C

Public acquisition overlay included in Ararat Planning Scheme





# Appendix D

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Concept design for northern option developed by VicRoads in July 2015



# Appendix E

Interim works area identified in October 2019 agreement





## Victorian Ombudsman's Parliamentary Reports tabled since April 2014

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### 2020

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Ombudsman's recommendations - third report

June 2020

Investigations into allegations of nepotism in government schools

May 2020

Investigation of alleged improper conduct by Executive Officers at Ballarat City Council

May 2020

Investigation into three councils' outsourcing of parking fine internal reviews

February 2020

### 2019

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Investigation of matters referred from the Legislative Assembly on 8 August 2018

December 2019

WorkSafe 2: Follow-up investigation into the management of complex workers compensation claims

December 2019

Investigation into improper conduct by a Council employee at the Mildura Cemetery Trust

November 2019

Revisiting councils and complaints

October 2019

OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people

September 2019

Investigation into Wellington Shire Council's handling of Ninety Mile Beach subdivisions

August 2019

Investigation into State Trustees

June 2019

Investigation of a complaint about Ambulance Victoria

May 2019

Fines Victoria complaints

April 2019

VicRoads complaints

February 2019

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## 2018

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Investigation into the imprisonment of a woman found unfit to stand trial

October 2018

Investigation into allegations of improper conduct by officers at Goulburn Murray Water

October 2018

Investigation of three protected disclosure complaints regarding Bendigo South East College

September 2018

Investigation of allegations referred by Parliament's Legal and Social Issues Committee, arising from its inquiry into youth justice centres in Victoria

September 2018

Complaints to the Ombudsman: resolving them early

July 2018

Ombudsman's recommendations – second report

July 2018

Investigation into child sex offender Robert Whitehead's involvement with Puffing Billy and other railway bodies

June 2018

Investigation into the administration of the Fairness Fund for taxi and hire car licence holders

June 2018

Investigation into Maribyrnong City Council's internal review practices for disability parking infringements

April 2018

Investigation into Wodonga City Council's overcharging of a waste management levy

April 2018

Investigation of a matter referred from the Legislative Council on 25 November 2015

March 2018

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## 2017

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Investigation into the financial support provided to kinship carers

December 2017

Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre

November 2017

Investigation into the management of maintenance claims against public housing tenants

October 2017

Investigation into the management and protection of disability group home residents by the Department of Health and Human Services and Autism Plus

September 2017

Enquiry into the provision of alcohol and drug rehabilitation services following contact with the criminal justice system

September 2017

Investigation into Victorian government school expulsions

August 2017

Report into allegations of conflict of interest of an officer at the Metropolitan Fire and Emergency Services Board

June 2017

Apologies

April 2017

Investigation into allegations of improper conduct by officers at the Mount Buller and Mount Stirling Resort Management Board

March 2017

Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville

February 2017

Investigation into the Registry of Births, Deaths and Marriages' handling of a complaint

January 2017

## Victorian Ombudsman's Parliamentary Reports tabled since April 2014

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### 2016

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Investigation into the transparency of local government decision making

December 2016

Ombudsman enquiries: Resolving complaints informally

October 2016

Investigation into the management of complex workers compensation claims and WorkSafe oversight

September 2016

Report on recommendations

June 2016

Investigation into Casey City Council's Special Charge Scheme for Market Lane

June 2016

Investigation into the misuse of council resources

June 2016

Investigation into public transport fare evasion enforcement

May 2016

### 2015

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Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting

December 2015

Investigation of a protected disclosure complaint regarding allegations of improper conduct by councillors associated with political donations

November 2015

Investigation into the rehabilitation and reintegration of prisoners in Victoria

September 2015

Conflict of interest by an Executive Officer in the Department of Education and Training

September 2015

Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight

June 2015

Investigation into allegations of improper conduct by officers of VicRoads

June 2015

Investigation into Department of Health oversight of Mentone Gardens, a Supported Residential Service

April 2015

Councils and complaints – A report on current practice and issues

February 2015

Investigation into an incident of alleged excessive force used by authorised officers

February 2015

## 2014

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Investigation following concerns raised by  
Community Visitors about a mental health  
facility

October 2014

Investigation into allegations of improper  
conduct in the Office of Living Victoria

August 2014



Victorian Ombudsman  
Level 2, 570 Bourke Street  
Melbourne VIC 3000

Phone 03 9613 6222  
Email [complaints@ombudsman.vic.gov.au](mailto:complaints@ombudsman.vic.gov.au)  
[www.ombudsman.vic.gov.au](http://www.ombudsman.vic.gov.au)

Investigation into the planning and delivery of the Western Highway duplication project