Planning and Environment Act 1987

Interim Report and Request for Governor in Council Order

MCG Quarries – Ombersley Quarry Advisory Committee
VCAT Application for Review P281/2015

20 April 2016

VICTORIA State Government | Planning Panels Victoria

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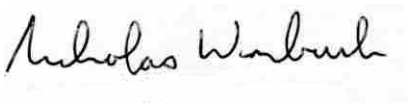

Nick Wimbush, Chair

Stephen Hancock, Member

Katherine Navarro, Legal Member

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1 Background

The MCG Quarries – Ombersley Quarry Advisory Committee (the Committee) was appointed on 18 December 2015 pursuant to section 151 of the *Planning and Environment Act 1987* (the P&E Act) following the Minister for Planning calling in a Victorian Civil and Administrative Tribunal (VCAT) proceeding under clause 58(1) of the *VCAT Act 1988* in the latter half of 2015.

The VCAT proceeding that is the subject of the Call In (VCAT P281/2015) was an application for review of Colac Otway Shire Council's (the Council) decision (Application PP169/2014-1) to refuse to grant a planning permit for the use and development of land at 320 Mooleric Road, Ombersley for basalt stone extraction in the Farming Zone.

Terms of Reference (ToR) provided to the Committee (see Appendix A) set out, amongst other things, the purpose of the Committee in providing independent, expert advice to the Minister for Planning to inform the determination of the matter by the Governor in Council under Schedule 1, clause 58(4)(b) of the VCAT Act. Under the ToR, the Committee is to provide advice to the Minister for Planning in relation to any preliminary questions, including the need for an interim order by the Governor in Council.

Prior to being called in, VCAT had ordered that a Preliminary Hearing be held to determine whether a Cultural Heritage Management Plan (CHMP) was required and whether amended plans circulated by the permit applicant could be substituted as the permit application plans. That Preliminary Hearing had not taken place prior to the VCAT proceeding being called in.

Following submissions from the parties to the Committee at the Directions Hearing on 19 February 2016, the Committee determined that the two key preliminary matters identified by VCAT needed to be resolved prior to the substantive hearing proceeding, namely:

1. Whether a CHMP is required to be prepared pursuant to the *Aboriginal Heritage Act 2006* (AHA) and Regulations; and
2. Whether the permit application could be amended by substituting for the permit application plans the proposed plans which would avoid the 50m buffer area around Aboriginal site VAHR 7621-0373.

A Preliminary Hearing was scheduled accordingly.

2 Preliminary Hearing

2.1 Background

A Preliminary Hearing to consider whether a CHMP is required and the possible substitution of plans was held at Planning Panels Victoria on 16 March 2016. The list of parties and representatives present is shown in Appendix B.

2.2 Whether a CHMP is required to be prepared under the AHA and Regulations

The key issues to be considered in relation to the first preliminary question were:

- what is the relevant activity area for purposes of the *Aboriginal Heritage Act 2006* (AHA) and Regulations
- what evidence is there, or otherwise, that the relevant activity area has been subjected to significant ground disturbance.

(i) Relevant act and regulations

Section 46 of the AHA relevantly states that a mandatory CHMP is required to be prepared for a proposed activity if (a) the Regulations require it or (b) the Minister directs its preparation under section 48 of the AHA.

Regulation 4, defines an "activity area" to mean "the area(s) to be used or developed for an activity".

Regulation 6 states that a CHMP is required for an activity if "(a) all or part of the activity area for the activity is an area of cultural heritage sensitivity; and (b) all or part of the activity is a high impact activity".

Regulation 4 defines an "area of cultural heritage sensitivity" to mean an area specified as an area of cultural heritage sensitivity in Division 3 of Part 2 of the Regulations. Regulation 4 also defines "high impact activity" to mean an activity specified as a high impact activity in Division 5 of Part 2 of the Regulations.

At the Preliminary Hearing, it was not disputed by any party that quarrying is a "high impact activity" for the purposes of the Regulations.

The parties also agreed that the area of cultural heritage sensitivity to be considered at the Preliminary Hearing under Regulation 22(2) was land on the proposed quarry site that is within 50 metres of a registered cultural heritage place (the subject land). This registered heritage place is the Victorian Aboriginal Heritage Registered site VAHR 7621-0373 which is west of Mooleric Road, towards the north west corner of the proposed quarry site.

The effect of Regulation 22(2) is that a CHMP is required to be prepared unless the "exemption" under sub regulation (3) applies.

Regulation 22(3) provides that if land identified in sub regulation (2) has been subject to significant ground disturbance, then that part is not considered to be an area of cultural heritage significance. The effect of this sub regulation is that no CHMP would be required to be prepared.

Regulation 4 also defines "significant ground disturbance" to mean "disturbance of (a) the topsoil or surface rock layer of the ground by machinery in the course of grading, excavating, digging, dredging or deep ripping, but does not include ploughing other than deep ripping".

Prior to the Preliminary Hearing, the Committee made an unaccompanied site visit and considered all aspects of the proposed quarry site, including the subject land.

The submissions at the Preliminary Hearing in relation to whether a CHMP is required to be prepared or not can be summarised as follows:

- The permit applicant contended that a CHMP was not required on the basis that the subject land had been subjected to significant ground disturbance and the exemption set out in Regulation 22(3).
- The objectors contended that as part of the subject land had not been the subject of significant ground disturbance, a CHMP was required to be prepared.
- The permit applicant submitted in the alternative that no CHMP was required as the permit application can be amended to excise the subject land from the planning permit and therefore any potential trigger for a mandatory CHMP consideration.
- The objectors submitted that any such application to excise the subject land from the planning permit was to circumvent the purposes of the Act and Regulations and the applicant should not be permitted to do so. This secondary preliminary question will be considered later in this report.

The Committee notes the earlier VCAT decision in relation to a similar permit application on the current site[1]. In that case, VCAT held that no CHMP was required but noted that this could change subject to the registration of any sites following investigations undertaken for the Mt Gellibrand Wind Farm Project[2].

The following principles are relevant before considering the evidence set out at the Preliminary Hearing.

It was common ground between the parties that the burden is on the permit applicant to prove the subject land has been subject to significant ground disturbance so that the exemption in Regulation 22(3) applies[3]. Further, both parties submitted it is a matter of fact to determine whether significant ground disturbance has occurred[4].

It was also common ground between the parties that the level of proof the permit applicant needs to satisfy in proving the subject land is subject to significant ground disturbance is the *balance of probabilities*[5]. The Committee also noted "*that satisfaction should not be derived*

1 *Beach v Colac Otway Shire Council* [2011] VCAT 2086
2 ibid [66]-[69]
3 *Stanley Pastoral v Indigo SC* [2015] VCAT 36 at [16] (***Stanley***) and *Mainstay Australia Pty Ltd v Mornington Peninsula SC and Ors* [2009] VCAT 145 at [27] (***Mainstay***)
4 Ibid. This is also consistent with VCAT cases such as *Azzure Investment Group Pty Ltd v Mornington Peninsula SC* [2009] VCAT 1600.
5 *Stanley* at [16] and *Mainstay* at [28]

from inexact proofs or indirect references, and little weight should be given to a mere assertion by an applicant or landowner"[6].

Both main parties submitted that all of the subject land (i.e. within the 50m buffer area to VAHR 7621-0373 containing the boundary tree shelterbelt and part of a paddock on the quarry site) needs to be subject to significant ground disturbance for the exemption to apply. This is because if only part of the subject land has been so subjected, then the remaining part of the land would be considered to be within an area of cultural heritage sensitivity and therefore a CHMP would be required[7].

Mainstay is one of the leading cases on determining the meaning and application of "significant ground disturbance". In that case, VCAT considered that the significance of the ground disturbance was the use of machinery and type of disturbance. Disturbance of the topsoil by machinery needs to be to a meaningful depth[8].

In *Mainstay*, VCAT identified four levels of evidence that the permit applicant could lead to prove the subject land has been subject to significant ground disturbance[9]. These levels can be summarised as follows:

- common knowledge (Level 1)
- publicly available records (Level 2)
- further information from the applicant (Level 3)
- expert evidence (Level 4).

2.3 Does the evidence support significant ground disturbance has occurred on the subject land

The Committee has considered the submissions of all of the parties, as well as the written and oral evidence of the various witnesses. The Committee will not recite or refer to all of the contents of those documents in this report, but notes that they have been duly considered.

The objectors relied upon the expert evidence of Ms Karen Kapteinis (Archaeology at Tardis), a geomorphologist and cultural heritage advisor with approximately five years experience. Ms Kapteinis stated that her report (dated 8 March 2016) falls within the Levels 3 and 4 of evidence considered in Mainstay[10].

The permit applicant relied upon two witnesses to support its contention that the subject land was affected by significant ground disturbance. The first witness was Mr Stewart, who is the owner of the proposed quarry site for the previous 10 year period. Mr Stewart provided evidence in the form of an affidavit dated 15 October 2015, which annexed a number of exhibits, such as photos, plans and invoices.

The second witness the permit applicant relied upon is the expert evidence of Ms Oona Nicolson (Ecology and Heritage Partners), a heritage specialist with over 20 years experience.

6 *Stanley* [16] referring to *Mainstay* [28]-[29]
7 *Stanley* [12] and *Mainstay* [24]
8 *Mainstay* at [16]
9 *Mainstay* at [30]-[34]
10 Section 5.5 of report.

In her report, Ms Kapteinis appears to have relied on and accepted the following aspects of Mr Stewart's affidavit:

> *Most of the activity area has been subject to significant ground disturbance associated with the initial mechanical clearing of surface and subsurface basalt rocks (involving heavy machinery in rocks and boulders to a depth of 6m), followed by the import and levelling of topsoil. The shelterbelt of trees along the western boundary of the activity area was deep ripped in places to a depth of 90-110cm to enable planting of tree species.*[11]

Ms Kapteinis concluded that:

> *These past ground disturbing activities can be considered to have impacted the most (sic) of the subject site. However, as there are parts of the western boundary that have **not** been significantly disturbed, these small areas can be considered culturally sensitive under the Aboriginal Heritage Act 2006*[12]*.*

Due to this concession, the issue between the experts was whether the **whole area** of the subject land had been subject to significant ground disturbance.

Mr Stewart's evidence was that the entire area of subject land and surrounding area had been subjected to deep ripping and removal of stones; including ripping for tree planting along the western boundary to Mooleric Road. Mr Stewart gave evidence of initially carrying out stone clearing to improve cropping throughout the proposed quarry site over a period of time. It was through this stone clearing that Mr Stewart states he thought the site could become a quarry. Mr Stewart referred to a number of exhibits annexed to his affidavit that shows various types of machinery being used to pull out rocks and boulders and scraper filling in contour drains[13]. Mr Stewart gave evidence that a similar process of deep ripping throughout the proposed quarry site was adopted for the subject land. Mr Stewart gave evidence of the ploughing and ripping lines that can be seen in the photos where the trees are planted. He stated that although he had not commissioned the deep ripping in the treed area along Mooleric Road, he had spoken to the company who undertook the work and was satisfied that it has been deep ripped.

Under cross-examination, Mr Stewart agreed with the notion that you can still plant into an unripped area, however he stated this would restrict the life and health of the trees. Mr Stewart also conceded that ripping can leave parts of the soil undisturbed as is suggested by the descriptions presented by Ms Kapteinis of the soil profiles for her auger holes 5, 7, and 9 as set out in her report. However, Mr Stewart disagreed with the contention that there was no rock ripping on the subject land; rather all of the subject land had been ripped.

Ms Nicolson conducted a site inspection of the proposed quarry site, including the subject land in September 2015. Ms Nicolson also considered Mr Stewart's affidavit dated 15 October 2015 in drafting her report in relation to significant ground disturbance. Ms Nicolson concluded that the subject land had undergone significant ground disturbance[14].

[11] Section 5.5 of report.
[12] Ibid
[13] SS-11 and SS-14
[14] Section 2.7 page 14

Ms Nicolson concluded that a CHMP is not required under the AHA as, relevantly, the subject land has been subjected to significant ground disturbance[15].

Ms Nicolson gave evidence that it was common to rely on second hand information that Mr Stewart gave in reference to evidence of similar earlier deep ripping on the proposed quarry site as compared to the deep ripping that appears to have occurred on the subject land. Ms Nicolson was not overly concerned with Mr Stewart's reliance on his experience with the type of tree planting rather than direct observation (i.e. that he engaged the same contractors Oz Trees who did the tree planting in the subject land to do similar tree planting further south; but did not witness them plant the subject land), which took into account the type of machinery and what this type of machinery usually does. Ms Nicolson further stated that it is very rare to have first hand evidence.

Ms Nicolson gave evidence that the auger holes as reported by Ms Kapteinis did not show a naturally occurring profile or could account for consistency of soil. Rather, it was Ms Nicolson's view that there was intermittent soil disturbance based on the auger holes results. Ms Nicolson queried whether the soil detected in auger holes 5, 7 and 9 was soil that had been brought in for the planting of the trees. Ms Nicolson noted that there was no comparator or baseline for undisturbed soils in the immediate area and so it was difficult to conclude that on the balance of probabilities the auger holes 5, 7 and 9 were evidence of undisturbed original soil profile. Ms Nicolson stated on the balance of probabilities it is unlikely to be the original topsoil, but rather may be part of the topsoil horizon but not the intact soil horizon.

Ms Kapteinis in evidence for the objectors relied on three of six auger holes results revealing an undisturbed soil profile. Ms Kapteinis concluded that these three auger holes contained natural soil profile as compared to the remaining auger holes that shows disturbed soil profiles. Ms Kapteinis confirmed that she only investigated a small area and did not take a baseline or comparator sample of auger holes.

Ms Kapteinis confirmed that the auger holes in the field away from boundary showed soil profile consistent with deep ripping as described in Stewart's affidavit. Ms Kapteinis agreed that deep ripping did not have to be depths of 60cm, however she did not believe deep ripping had occurred on the subject land, as 8 out of the 9 clay holes occurred at 14cm and 35cm depth. Ms Kapteinis accepted that the depth of the rock will affect the ability of the trees or plants to grow but stated she had limited knowledge of what it takes to make a tree grow.

The permit applicant submitted that significant weight should be placed on both Mr Stewart's and Ms Nicolson's evidence as compared to Ms Kapteinis'. It was submitted that Mr Stewart's evidence is sufficient to provide insight into the nature of machinery used in and around the subject land and the level of disturbance that usually arises from the use of such machinery. As there was no comparator or baseline auger holes, the permit applicant submitted that it was speculation at best that the soil profile was naturally occurring in auger holes 5, 7 and 9 referenced in Ms Kapteinis' evidence. This, the permit applicant submitted, should raise significant doubts in the Committee's mind as to the reliability of the conclusion

[15] Section 2.8 page 17

of the auger holes. The permit applicant also submitted that there were no observations of neighbours contesting ripping activity occurring in or around the subject land.

The objectors submitted that the auger holes showing undisturbed soils were uncontested. The objectors submitted that Ms Nicolson relied too heavily on second hand evidence and noted that Mr Stewart was not present when the trees on the subject land were planted.

Council made submissions in relation to the stony rises that are located in areas outside of the subject land. Council noted that these rises were not before the Committee at the Preliminary Hearing. Council made submissions that the Committee consider including in any recommendation to the Governor in Council that the relevant Minister administering the Act direct under section 48 of the Act that a CHMP be prepared for the proposed quarry site to include the three stony rises.

2.4 Findings and conclusions

Based on material provided both in written form and in evidence during the Preliminary Hearing, the Advisory Committee is satisfied on the balance of probabilities that the whole of the subject land has been subject to significant ground disturbance by machinery in the course of grading, excavating, digging, dredging or deep ripping for the purposes of the AHA and Regulations.

In particular, the Committee is satisfied on the balance of probabilities that the subject land was disturbed by machinery and that the level of disturbance was sufficient to be significant based on the evidence of Mr Stewart and Ms Nicolson. Mr Stewart's evidence provided detailed information of significant ground disturbance through a number of photos, invoices and detailed understanding of what has occurred on the quarry site and the basis for his conclusions as to why these activities would on the balance of probabilities have occurred on the subject land. Ms Nicolson's evidence supported the conclusions of Mr Stewart. The Committee is of the view that these landowner conclusions amounts to more than mere assertions. The Committee placed higher weight on the evidence of Mr Stewart and Ms Nicolson to the evidence of Ms Kapteinis.

It is unclear to the Committee why Ms Kapteinis did not conduct baseline or comparator auger holes in the land immediately west of the proposed quarry site, which is known for being undisturbed. In the absence of such baseline comparisons, the Committee can only consider Ms Kapteinis' conclusions go so far.

In the absence of baseline or comparator auger holes, the Committee agrees with the reservations Ms Nicolson has in relation to the reliability of the results for auger holes 5, 7 and 9.

Further, the evidence of Ms Kapteinis does not sufficiently outweigh evidence of both Mr Stewart and Ms Nicolson. The Committee is satisfied on the balance of probabilities that the significant ground disturbance that has been carried out on other parts of the proposed quarry site, and as conceded by Ms Kapteinis in her report[16], has occurred on the subject land.

[16] Section 5.6, page 11

Accordingly, the Committee recommends the Minister for Planning seek an order from the Governor in Council that the permit applicant has proven on the balance of probabilities that the exemption in Regulation 22(3) should be applied in this case and that a CHMP is not required to be prepared in respect of the proposal.

Council made a submission that the Committee recommend to the Governor in Council that the relevant Minister administering the AHA direct under section 48 of the AHA that a CHMP be prepared for the three stony rises located within the permit application area. The Committee does not support that submission. The AHA and Regulations contain ongoing obligations on the permit applicant in relation to these stony rises. Any relevant planning permit conditions can be considered and discussed at the substantive hearing.

2.5 Whether to substitute permit application plans with proposed amended plans

The parties submitted that the effect of substituting the permit application plans with the proposed amended plans (see Figure 1) was that, if substituted, the activity area under consideration by the Committee would no longer trigger consideration of the Act or Regulations due to the removal of the subject land from the north west corner of the activity area.

In recommending that no CHMP is required, the Committee has determined that it is not necessary for it to provide advice to the Minister for Planning and Governor in Council on this second preliminary matter. However, should the Governor in Council make an order that a CHMP is in fact required to be prepared, then the Committee provides the following advice on this further preliminary issue.

Clause 64 Schedule 1 of the VCAT Act allows for VCAT to decline to exercise its discretion to grant leave to substitute amended plans. This power is in addition to its power under section 127 of the VCAT Act in which the Tribunal can order that at any time any document in the proceeding can be amended.

There are a number of VCAT cases that have considered when the Tribunal should exercise this discretion, such as if the Tribunal determines the changes may substantially change the design and impact of the original proposal. This may particularly be the case if such substitution may raise new planning issues that were not before the Council in the original permit application.

The parties made various submissions as to whether the Governor in Council could exercise clause 64 of Schedule 1 of the VCAT Act, or whether the Committee could make recommendations to the Minister for Planning and Governor in Council to make such an order exercising that power. The objectors stated that to do so would be beyond the Committee's ToR.

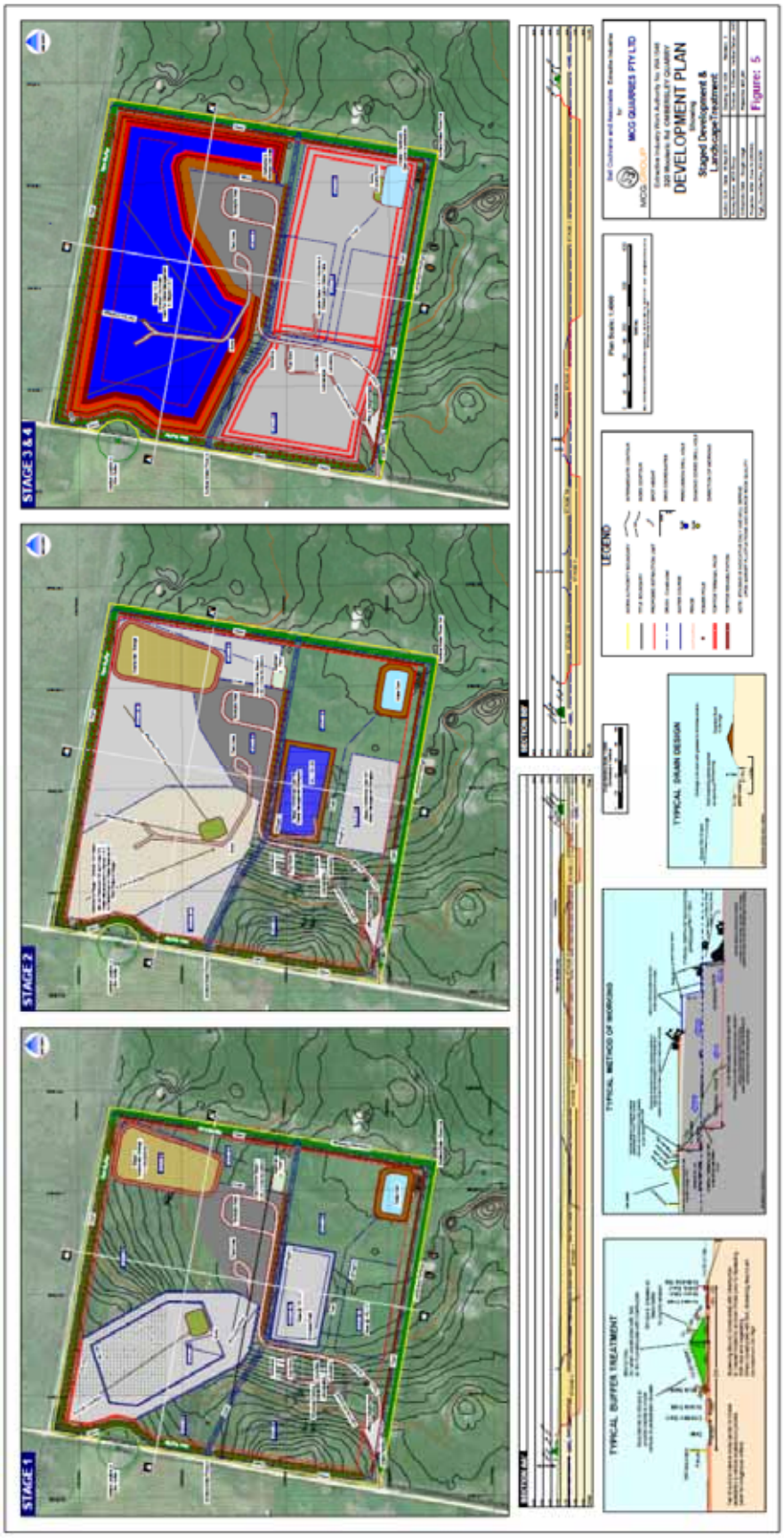

Figure 1: Proposed plan amendment showing 50m exclusion around VAHR 7621-0373

The permit applicant contended it was not asking the Committee to formally substitute the proposed plans but to consider the proposed plan and the appropriateness of granting a planning permit with conditions that include substituting plans. The permit applicant further submitted that the Committee could request the Minister for Planning to amend its ToR to include the proposed amended plans, however clarified that submission with the suggestion that this revision of the ToR was unnecessary due to sections 15 and 16(c) of the ToR.

The Committee's view is that the effect of the proposed plans does not materially change the design and the impact of the original proposal. Such substitution does not raise any new planning issues that were not before Council in the original permit application. The Committee is of the view that the subject land is a small discrete area that can be excised from the permit application and to do so does not offend the principles and purpose of the AHA and Regulations.

Should the Governor in Council decide not to accept the recommendation that a CHMP is not required, then the Committee can still conduct the substantive Hearing on the merits. If the Committee advises that a permit should issue, the Committee could include in that recommendation that the Governor in Council order the amended plans be substituted, removing the AHA and Regulation triggers for a CHMP.

2.6 Power of Governor in Council

The Minister for Planning called in this matter and referred it for determination by the Governor in Council under Clause 58 of Schedule 1 of the VCAT Act.

Clause 61 of Schedule 1 of the VCAT Act describes the effect of such a referral to the Governor in Council. Clause 61(1)(b) of Schedule 1 provides that the Governor in Council may determine the proceeding and make any orders in relation to the proceeding that could have been made by the Tribunal. Clause 61(2) of Schedule 1 deems such an order made under clause 61(1)(b) as being an order of VCAT.

Whilst it was submitted to the Committee that it was not necessary for it to seek orders from the Governor in Council in relation to the preliminary matters, the Committee is of the view that it should advise the Governor in Council to make the orders recommended in this report. This is consistent with clauses 4(a) and 28 of the ToR.

The Committee considers the Governor in Council has the power under clause 61(1)(b) to make the order the Committee is recommending and should make such an order.

3 Order sought from the Governor in Council

The Committee may produce an interim written report and recommendations in the case of any preliminary questions arising, including the need for any interim order to be made by the Governor in Council (clause 28 ToR).

The Advisory Committee recommends the Minister for Planning seek the following order from the Governor in Council under clause 61(1)(b) of Schedule 1 of the *Victorian Civil and Administrative Act 1998*:

> **A Cultural Heritage Management Plan (CHMP) is not required under the *Aboriginal Heritage Act 2006* or *Aboriginal Heritage Regulations 2007* in respect of the proposed Ombersley Quarry planning permit application PP169/2014-1 in the Colac Otway Shire.**

Appendix A Terms of Reference

Terms of Reference

MCG Quarries - Ombersley Quarry Advisory Committee

Advisory Committee appointed pursuant to section 151 of the *Planning and Environment Act 1987* to report on an application for review of Colac Otway Shire Council's (council) decision to refuse to grant a planning permit for the use and development of land at 320 Mooleric Road, Ombersley for basalt stone extraction (Victorian Civil and Administrative Tribunal proceeding ref P281/2015 and Colac Otway Planning Scheme planning permit application PP169/2014).

Name

1. The Advisory Committee is to be known as the '**Error! Use the Home tab to apply Name of Advisory Committee to the text that you want to appear here.**'.
2. The Advisory Committee is to have members with the following skills:
    a. general planning skills in a rural land use context
    b. expertise in the assessment of amenity and environmental impacts associated with extractive industries
    c. planning law.
3. The Advisory Committee may also seek specialist advice as appropriate.

Purpose

4. The purpose of the Advisory Committee is to provide all parties to the Victorian Civil and Administrative Tribunal (VCAT) proceeding an opportunity to present submissions, and to provide independent expert advice to the Minister for Planning to inform the determination of the matter by the Governor in Council under clause 58 of Schedule 1 to the Victorian Civil and Administrative Tribunal Act 1998, including:
    a. any preliminary questions (including the need for any interim order by the Governor in Council); and
    b. whether a planning permit should be issued in consideration of planning permit application PP169/2014 under the Colac Otway Planning Scheme (the Scheme) and if so, what conditions should be applied.

Background

5. Colac Otway Shire Council (council) refused MCG Quarries Pty Ltd's application for a planning permit (PP169/2014) for a basalt stone quarry at 320 Mooleric Road, Ombersley, 20 kilometres east of Colac on 17 December 2014.
6. On 10 February 2015, MCG Quarries Pty Ltd applied to VCAT (P281/2015) for a review of council's decision.
7. On 5 October 2015, council requested that the Minister for Planning call in the proceeding from VCAT on the grounds that the proceeding raises a major issue of policy in relation to the impacts of stone extraction on agricultural areas; and that the determination of the proceeding will have an impact on planning objectives related to agricultural areas and environmental issues including unacceptable risk to accessibility and quality of ground water.

8. On 26 October 2015, the Minister for Planning called in the proceeding from VCAT under clause 58(2)(a) of Schedule 1 to the Victorian Civil and Administrative Tribunal Act 1998 on the grounds that the proceeding raises a major issue of policy, including potentially significant affects beyond the immediate locality, and the impacts of stone extraction uses on agricultural areas and accessibility to and quality of ground water; and the determination of the proceeding may have a substantial effect on the achievement or development of planning objectives relating to agricultural areas, in particular section 4(1)(a) of the Planning and Environment Act 1987 (to provide for the fair, orderly, economic and sustainable use, and development of land) and section 4(1)(g) (to balance the present and future interests of all Victorians).
9. The current application follows a previous quarry permit application in 2011 (P1484/2011), which was refused by VCAT on 3 November 2011.
10. The land is situated in the Farming Zone. No overlay provisions apply to the land.
11. The application was referred under section 55 of the Planning and Environment Act 1987 (the Act) to VicRoads and notice under section 52 of the Act was given to Southern Rural Water, the Environment Protection Authority, the then Department of Environment and Primary Industries, Corangamite Catchment Management Authority, Barwon Water, Powercor, Aboriginal Affairs Victoria, and the then Department of State Development, Business and Innovation.
12. The extraction of ground water for the quarry is subject to a separate licensing process in accordance with section 51 of the Water Act 1989.
13. On 26 October 2015, VCAT ordered, among other things, that a Preliminary Hearing be held to determine whether a cultural heritage management plan is required and whether amended plans circulated by the applicant should be substituted as the application plans, having regard to the objection of respondents.

Method

14. The Advisory Committee may apply to vary these Terms of Reference in any way it sees fit prior to submission of its report.
15. The Advisory Committee is to have regard to the orders made by VCAT in the application dated 26 October 2015.
16. The Advisory Committee may inform itself in anyway it sees fit, but must consider:
    a. relevant provisions of the Planning and Environment Act 1987 and the Colac Otway Planning Scheme, including any adopted plans, strategies or planning scheme amendments;
    b. any relevant provisions of the State Planning Policy Framework and G21 Regional Growth Plan;
    c. any relevant documentation prepared by or for the proponent, or otherwise provided to the Advisory Committee; and
    d. all submissions or objections provided to Colac Otway Shire Council regarding planning permit application PP169/2014 and all submissions or material provided to VCAT regarding proceeding P281/2015.
17. All parties to VCAT proceeding P281/2015 must be given notice of the Advisory Committee hearing and be given the opportunity to present.
18. The Advisory Committee is not expected to carry out any additional public notification or referral, but may do so if it considers it to be appropriate.
19. The Advisory Committee must consider all relevant submissions.

20. The Advisory Committee is expected to carry out a public hearing.

21. The following parties should be asked to present to the Advisory Committee:

    a. All parties to the VCAT proceeding (P281/2015).

    b. Southern Rural Water.

22. The Advisory Committee may meet and invite others to meet with them when there is a quorum of at least two of the Committee members.

23. The Advisory Committee may limit the time of parties appearing before it.

24. The Advisory Committee may prohibit or regulate cross-examination.

Submissions are public documents

25. The Advisory Committee must retain a library of any written submissions or other supporting documentation provided to it until a decision has been made on its report or five years has passed from the time of its appointment.

26. Any written submissions or other supporting documentation provided to the Advisory Committee must be available for public inspection until the submission of its report, unless the Advisory Committee specifically directs that the material is to remain 'in camera'.

Outcomes

27. The Advisory Committee must produce a written report for the Minister for Planning providing:

    a. An assessment of submissions to the Advisory Committee.

    b. Advice on the expected scale and nature of impacts of the proposed quarry on the surrounding agricultural land and activity.

    c. Advice on the expected scale and nature of impacts on ground water within the local ground water catchment.

    d. A recommendation as to whether or not a planning permit should be issued and the reasons for this recommendation.

    e. A (without prejudice) draft planning permit including relevant conditions from section 55 referral authorities).

    f. Advice on any other relevant matters raised in the course of the Advisory Committee hearing.

    g. A list of persons who made submissions considered by the Advisory Committee.

    h. A list of persons consulted or heard.

28. The Advisory Committee may produce an interim written report and recommendations in the case of any preliminary questions arising (including the need for any interim order to be made by the Governor in Council).

Timing

29. The Advisory Committee is required to submit its report in writing as soon as practicable, but no later than 40 business days from the completion of its hearings.

30. The fee for the Advisory Committee will be set at the current rate for a Panel appointed under Part 8 of the Planning and Environment Act 1987.

Appendix B Parties to the Preliminary Hearing

Party[17]	Represented by
MCG Quarries Pty Ltd (Proponent and permit applicant)	Ms Susan Brennan SC and Ms Nicola Collingwood of Counsel instructed by Mills Oakley Lawyers
Harold, Barbara, Geoffrey and Rodney Beach; Malcolm and Joyce Walters; Mooleric Pastoral Pty Ltd; Nigel, Tanya and Jordan Burnett; Russell and Rosemary Young; and Jane and Daryl Collins (Objectors)	Mr Paul Chiappi and Mr Daniel Robinson of Counsel instructed by Rigby Cooke Lawyers
Colac Otway Shire Council (Responsible Authority)	Mr Barnaby McIlwrath of Maddocks Lawyers

[17] Note there are other parties to the permit application, appeal and call-in but their issues did not relate to the CHMP.