



**Russell Kennedy**  
Lawyers

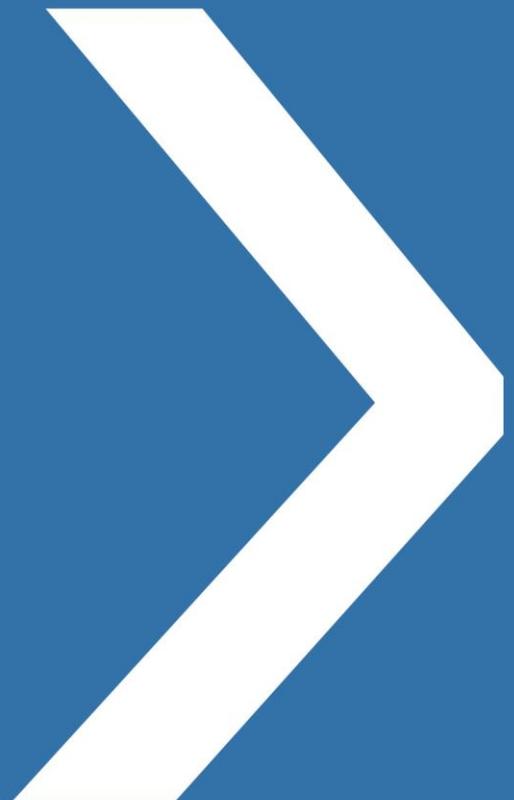
## **New Swan Hill Bridge**

Alternate bridge location considerations

prepared for

Swan Hill Rural City Council

Ian Pridgeon, Principal  
03 9609 1542  
ipridgeon@rk.com.au



## Background

### Advice structure

We are instructed that Council is considering its options in relation to potentially achieving an alternate location for a proposed new Swan Hill Bridge, to the location currently shown in the Swan Hill Planning Scheme

This advice addresses the matters specified in our instructions from Council officers and ancillary matters.

To best address the matters raised, it is considered helpful to provide the factual context and an overview of the relevant legal framework in general terms as may be relevant.

### History

It appears to be virtually universally agreed that a new bridge across the Murray River at Swan Hill is necessary for reasons, amongst other things, relating to traffic, the local and regional economy, safety and tourism.

It is understood that formal planning for a replacement bridge first started around the mid-1960s.

An alignment utilising Hastings Street was agreed to by the Swan Hill City Council in 1968.

In 1978 there was a reasonably seriously entertained proposal for a new bridge linking with Hastings and Pye Streets, agreed to by the respective Victorian and NSW authorities. Various modifications were made to the proposal over the next decade or so.

In the 1970s, land was acquired on the NSW side of the River for a proposed new road alignment linking the Swan Hill – Moulamein Road to the proposed new bridge.

A number of properties on the Victorian side of the River were also acquired by the relevant Victorian road authority around that time.

The proposal, however, was never funded and accordingly did not proceed.

One significant change that has arisen since the development of the above proposal is the establishment of the Wamba Wamba Aboriginal community on the NSW side of the River.

The Community is within close proximity to the proposed raised access ramp to the bridge on the NSW side. It is understood that this now poses a significant constraint to the original proposal, hence, amongst other reasons, the incentive to develop a new proposal (ie the current proposal).

VicRoads and the Roads and Traffic Authority (NSW) have worked collaboratively in relation to the current proposal for more than seven years.

The current proposal is based upon an extensive and detailed concept development process and multi-faceted assessment process.

### Process followed in relation to current proposal

The currently proposed location for the new bridge amongst other things arises from following a wide ranging technical investigative process and community consultation.

A total of 14 or so background technical reports were commissioned from around 2007 covering the following matters:

- traffic modelling;

- regional economics;
- land use;
- social impacts;
- landscape and visual impacts;
- landscape planning;
- flora and fauna;
- aquatic fauna;
- aboriginal heritage;
- historic heritage;
- noise;
- hydrology; and
- geotechnical.

The project for the new bridge was based upon nine stated objectives as follows:

- to improve safety and meet the long term future traffic needs of Swan Hill and the wider region, including the provision of freight;
- to meet current road design standards while maintaining existing navigation clearances for boats, access to properties and provision for rail;
- to provide a viable level of economic performance for the local and regional economy of Swan Hill;
- to protect existing land uses and the character of landscapes, open space and recreation values to the extent practicable;
- to protect residents amenity and wellbeing by minimising dislocation and severance of residents to the extent practicable;
- to minimise impacts on indigenous cultural heritage and negotiate appropriate mitigation measures to the extent practicable;
- to minimise impacts on post settlement cultural heritage and provide appropriate mitigation measures to the extent practicable;
- to minimise impacts on biodiversity and provide appropriate mitigation measures to the extent practicable;
- to minimise impacts on surface water quality, flood risks and groundwater; and
- to minimise the noise impacts on residents and provide appropriate mitigation measures to the extent practicable.

Nine preliminary options relating to five broad corridors were developed and considered in 2007. These options were refined and modified, having regard to the project objectives (above) and the outcomes from public consultation and consultation with various authorities.

Ultimately it was narrowed down to six options, from which Option 9a was ultimately considered to be the preferred option.

In June 2011, VicRoads published a planning assessment report that, amongst other things, provided an outline of the analysis of the consideration of the various options. This formed a basis to Amendment C41 to the Swan Hill Planning Scheme.

The NSW Roads and Traffic Authority published an environmental investigation also in June 2011, intended to inform strategic land use planning associated with the NSW component of a new bridge.

It is intended that the preferred bridge option be included in the Wakool Local Environment Plan. Ultimate approval of a new bridge itself, given that it will be within NSW (apart from the Victorian approaches), would be subject to the *Environment Planning Assessment Act 1979* (NSW).

On the basis of the above suite of investigations and reports, an amendment to the Swan Hill Planning Scheme (C41) was sought to primarily introduce a public acquisition zone into the scheme to facilitate the bridge and in particular to accommodate the approaches on the Victorian side of the Murray River.

Amendment C41 for the new “Public Acquisition Overlay - Schedule 3 – Swan Hill Bridge replacement project and associated works” (“**PAO3**”) and some associated amendments to the Swan Hill Planning Scheme for the new bridge was approved by the Minister for Planning on 2 August 2012. VicRoads was the proponent and the planning authority for C41.

The PAO3 specifies VicRoads as the acquiring authority. The significance of being an acquiring authority in terms of a public acquisition overlay is that, amongst other things, if any proposal to use or develop the land within the public acquisition overlay is refused on the basis that the land is to be acquired, the requirement to compensate the owner for the land concerned is triggered.

It is noted that the land to which the PAO3 applies is Crown land within the Public Park and recreation Zone, the Public Use Zone 4 (Transport) and the Public Use Zone 6 (Local Government).

Given the land within the PAO3 is Crown land, it arguably does not need to be acquired for the purposes of constructing the bridge and its access ramps (although arrangements within the State Government agencies would be required). One basis for the PAO3 may be that it clearly puts the various agencies on notice, and others on notice, concerning the use of the land for the proposed bridge.

## Legal overview

Approval for a new bridge across the Murray River requires a suite of integrated statutory approvals, legal agreements and adequate funding.

On the Victorian side of the River, the site for the bridge and its approaches need to be acquired by VicRoads.

In order for a public acquisition overlay to be approved by the Minister, it must meet appropriate strategic and statutory planning outcomes. These include the comprehensive suite of matters addressed in the various background reports that support the current location.

Aboriginal cultural heritage matters (if triggered) must be addressed independently to planning approvals.

VicRoads is in effect the proponent for the project within Victoria and would be expected to be paying for the construction of the approaches to the bridge within Victoria and presumably also an agreed share of the cost of the bridge itself.

VicRoads approval is also required to integrate the bridge into the VicRoads managed road network.

Accordingly within Victoria, despite any concerns other persons may have regarding the best option, whether or not the project proceeds at all is virtually entirely reliant upon VicRoads support.

Further, and equally necessary is the coordinated support of the NSW Roads and Maritime Services (the NSW equivalent to VicRoads) to pursue and support the NSW component of the project.

Although a road reserve was gazetted within NSW in relation to the earlier bridge proposal that did not proceed, the establishment of the Wamba Wamba community may have now made this road alignment effectively unavailable.

It is necessary for land to be acquired within NSW for the approaches to the currently proposed new bridge.

## Specific matters raised by Council

### ***Actions to remove current PAO3 and replace it with a new PAO?***

An amendment to the Swan Hill Planning Scheme is necessary to remove the current PAO3. An amendment is also required to include a new PAO in the planning scheme to accommodate the approaches to a differently located bridge.

In terms of process, the two amendments could be done separately or together.

The key statutory steps for an amendment are:

- completing necessary background reports that provide the strategic basis supporting the amendment;
- formulating the project to which the amendment relates;
- preparing the amendment documentation;
- obtaining authorisation from the Department of Transport, Planning and Local Infrastructure;
- public exhibition of the amendment;
- consideration of submissions;
- referral of submissions to an independent panel appointed by the Minister of Planning;
- consideration of panel recommendations;
- approval of the Minister for Planning; and
- Gazettal of the approved amendment.

Whether or not there is universal support for the merits of the current PAO3, the systematic and comprehensive processes followed means that in legal terms the decision making process and the outcome are arguably sound.

To arrive at a different outcome, a similar process would need to be followed, but for technical or other reasons, the preferred outcome that arises from such a process results in a different preferred option.

The project objectives are critical to what is ultimately deemed to be the preferred option.

As VicRoads is the proponent for the project, it sets the objectives for the project, which in turn influences which option is ultimately deemed to produce the best outcome (ie in terms of the project objectives).

### ***Consents required regarding new amendment process?***

At least two types of consents are required regarding a new amendment for a proposed revised bridge location to that shown in PAO3.

The first type of consents are of a statutory nature and relate to matters under the *Planning and Environment Act 1987*, such as authorisation for a planning scheme amendment, the support of an independent Ministerially appointed planning panel, the adoption of the amendment by the planning authority and the approval of the Minister for Planning.

Such consents may also include matters under other legislation, such as the *Aboriginal Heritage Act 2006* and *Environment Protection and Biodiversity Conservation Act 1999*.

The second type of consent required relates to the practical permissions and support required for the project to succeed, for example, support from VicRoads, support from the Wakool Shire, support from Roads and Maritime NSW and approval of the funding necessary for the project (Victorian, NSW and Commonwealth as the case may be).

### ***Obligations to VicRoads in finding a new location?***

Council is under no legal obligation to VicRoads with regard to Council investigating a new potential site, however, in practical terms the support of VicRoads would be essential if there was to be any real benefit in Council finding a new potential location.

The support of VicRoads is essential, amongst other things, on the basis that the replacement bridge and the Victorian and NSW approaches are part of a joint VicRoads project with its NSW counterpart and the Wakool Shire.

Council could potentially undertake a new suite of technical investigations, background reports and community consultation similar to that carried out by VicRoads and arrive at a different preferred outcome (having regard to VicRoads' project objectives). However, even if this was able to be achieved, the support of the NSW agencies would also be required for the bridge replacement project to be viable.

In practical terms, for a new location to have a chance of being adopted, VicRoads would need to be convinced that the proposed new location was better, in terms of meeting the project objectives, than the current proposal. Similarly, however, the NSW agencies would also need to agree that a revised location resulted in a better outcome in terms of their objectives.

### ***Potential issues and barriers?***

One very significant potential barrier to Council successfully preparing a new proposal that may be adopted by VicRoads, Roads and Maritime Services and Wakool Shire would be the cost of

the background investigations and reports (even if some existing reports could be relied upon) required to substantiate the benefits of a new location.

Other significant barriers with regard to establishing a new bridge location include:

- the cost of developing a new concept design based upon new investigation reports;
- the cost of public consultation;
- the potential for a lack of public support;
- the possibility that the alternate proposal may not be better in terms of the project objectives;
- the possibility that VicRoads may not approve, or simply may not wish to revisit, the location of the new bridge;
- the possibility that Roads and Maritime Services NSW may not approve, or simply may not wish to revisit, the location of the new bridge; and
- the possibility that the replacement bridge (in any location) may not receive funding within a reasonable period.

All of the barriers identified above are considered significant and any one of them could potentially prevent the construction of a replacement bridge at a new location.

***Background documents required for the amendment?***

To provide the necessary basis to support an amendment of the planning scheme to remove the PAO3 and introduce a new PAO a similar suite of documents to those used by VicRoads and NSW Roads and Maritime Services.

The suite of documents required is significant and has been previously discussed in this advice.

***Cost estimates for preparing background documents?***

The cost associated with preparing the necessary documents for a new amendment would include background reports relating to various technical matters, preparing compilation reports that combine the various issues, concept designs, consultation and project management.

Based upon experience with regard to planning related expert reports, the cost of a report, including the author providing evidence at panel hearing, can generally range from \$10,000 to \$100,000, depending on the complexity of the matter and the nature and purpose of the report.

VicRoads and Roads and Maritime Services NSW commissioned at least 16 reports that formed the basis for the current bridge proposal and amendment C41 which introduced the PAO3 into the Swan Hill Planning Scheme.

Given that significant work has already been done in relation to the current proposal, some reports may be able to be less detailed. However, on the other hand the investigation of a new proposal may raise issues not considered previously that require additional investigation and consideration.

The estimated background costs, in very broad terms, may be as follows:

- background reports - \$200,000
- proposal reports - \$60,000

- panel documents and costs - \$10,000
- project management including liaising with VicRoads and Roads and Maritime NSW, public consultation and panel advocacy \$70,000

***Compensation for impacted landowners?***

Compensation is payable to owners of land that is compulsorily acquired.

In Victoria, land can generally only be compulsorily acquired if it is reserved for such a purpose or if it is subject to a PAO.

Once land is within a PAO, compensation is triggered if the land is acquired or if permission for the use or development of the land is refused on the basis that it is set aside to be acquired.

The entity that is specified in the planning scheme with regard to a particular PAO as the acquiring authority is the authority that is liable to pay compensation to the owners of the land as a result of the compulsory acquisition of that land.

In the current case, VicRoads is the acquiring authority under the PAO3 and would be required to pay any compensation for the compulsory acquisition of the land within the PAO3 (if that was to be required).

If a new PAO was to be introduced into the planning scheme for an alternate bridge location, the acquiring authority could potentially be VicRoads or the Council.

It would be expected, however, that for any planning scheme amendment for a proposal for an alternate bridge location to be commenced and ultimately approved (ie authorisation and final approval), it would be necessary for it in effect to be a VicRoads project, and accordingly, VicRoads would also be the acquiring authority.

There is no compensation triggered on the basis of Council merely investigating a new potential location.

***Potential claims by VicRoads against Council?***

In practical and legal terms there are no apparent grounds upon which VicRoads or another entity could sue the Council as a result of Council investigating a potential new bridge location.

It is noted that Council has very limited statutory powers in relation to the new bridge proposal.

Council's powers and functions in relation to the approval of the new bridge proposal are in practical terms limited to its role as the municipal council for the district in which part of the bridge is proposed to be located. In this capacity it can participate in the amendment process where VicRoads is the planning authority, as was the case with Amendment C41 for PAO3.

With most planning scheme amendments within the municipality, Council is the planning authority. In some cases, as with C41, a government agency (or the Minister for Planning) may be the planning authority.

As a planning authority Council can prepare and put forward amendments to the planning scheme, such as an amendment for a PAO for a new bridge location.

If Council was to propose an amendment to the planning scheme that was not supported by VicRoads, it is unlikely that such an amendment would ever be approved.

If Council was to seek to progress an amendment contrary to VicRoads advice, there may be scope for a costs order against the Council.

### ***Risks to Council?***

The most significant risk to the Council in pursuing an alternate bridge proposal is that it will simply waste significant Council resources in doing so. The current proposal could have cost an estimated total of from \$500,000 to \$800,000 to reach its current stage.

If VicRoads and Roads and Maritime Services NSW did not support such a proposal, it is considered that there would be no reasonable prospect of it ever succeeding.

Even if VicRoads did support Council investigating such a proposal, for example, subject to Council funding new investigations and reports, there is a real chance that the alternate location may not be better overall in terms of the project criteria identified by VicRoads.

### ***Council resolution Notice of Motion D.14.1 Bridge Option, 15 April 2014***

The resolution indicates that the Council prefers Option 4B (or a variation of this option) over Option 9A currently preferred by VicRoads, Roads and Maritime Services NSW and Wakool Shire.

There is nothing to stop Council advising other relevant parties of its position with regard to the bridge options.

This advice outlines the steps that would be necessary to amend the Swan Hill Planning Scheme to include a Public Acquisition Overlay that is consistent with the 4B option and remove the PAO3 that relates to Option 9A.

As outlined in this advice, Council cannot make these amendments on its own, without support from VicRoads in particular, and also support from Roads and Maritime Services NSW and Wakool Shire. There is nothing to stop Council investigating Option 4B further, however, for the reasons identified in this advice, this is likely to be futile without support from the other relevant agencies.

## **Concluding comments**

Council has a very limited statutory role in terms of the replacement bridge project.

Council has no particular power by which it can require a new bridge location be investigated by VicRoads or Roads and Maritime Services NSW.

The cost to investigate a potential new bridge location is estimated to be in excess of \$300,000. Even having completed a new investigation, there is no guarantee that a better location will be identified in terms of the project objectives, or even if one is identified, that it will be supported by all the relevant parties.

In practical terms Council would be unable to achieve an alternate bridge location, without the full support of VicRoads and Roads and Maritime Services NSW.

**Ian Pridgeon**

Principal

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## Contact



### **Ian Pridgeon, Principal**

Ian is a Law Institute of Victoria Environment and Planning Law Accredited Specialist and is a Fellow of the Planning Institute of Australia. His focus includes delivering quality advice to clients in the areas of town planning, local government, environment and statutory building control. Prior to his career in law, Ian was involved in the management of natural resources in the State Government and was also a former manager of development approvals with local government.