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Phil Honeywood
Chair
Victorian Environmental Assessment Council
Level 6 / 8 Nicholson Street
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Dear Mr Honeywood

VICTORIAN ABORIGINAL CULTURAL HERITAGE ISSUES RELEVANT TO THE INVESTIGATION INTO PUBLIC LAND USE CATEGORIES

The Victorian Aboriginal Heritage Council (**Council**) is a statutory authority established under the *Aboriginal Heritage Act 2006* (**the AH Act**) to provide a “state wide voice for Aboriginal people on the management of cultural heritage.”¹ It is made up of up to 11 Victorian Traditional Owners, all with extensive knowledge and experience in cultural heritage management.

Under the AHA, one of Council’s primary functions is to appoint Registered Aboriginal Parties (**RAPs**) to manage their cultural heritage over their appointed area of land. Where native title exists, native title holders must be appointed as RAPs, so that there is alignment between the recognition of Traditional Owners’ rights under native title and the Victorian cultural heritage management system. To date, Council has appointed ten RAPs covering 60% of the State.

Council is primarily concerned that Traditional Owners, through RAPs, continue to enjoy powers to protect and determine what happens to their cultural heritage. Council’s priorities reflect the objectives of the AH Act. Council’s approach to its functions also draws support from and is in keeping with national and international laws which recognise the distinct cultural rights and responsibilities of Traditional Owners.

Another Council function is promoting public awareness and understanding of Aboriginal cultural heritage in Victoria. In this capacity, Council is participating in the Victorian Environmental Assessment Council’s (**VEAC’s**) Community Reference Group for the above investigation.

¹ Second Reading Speech, Aboriginal Heritage Bill, 6 April 2006 (Legislative Assembly).

The key points we wish to make at this time are as follows:

- The recognition of Traditional Owners rights has changed substantially since the public land use categories were established. These rights are now recognised in Victoria in a variety of ways including through determinations under the *Native Title Act 1993* and the *Traditional Owner Settlement Act 2010*. There are new forms of title and important practical implications of these changes which are of relevance to the conceptualisation of public land use categories.
- Understanding and awareness of Aboriginal cultural heritage has grown significantly in the last decade. This unique and irreplaceable asset is of importance for all Victorians and is more likely to be found on public land where there has been relatively less disturbance to the landscape. There is an opportunity to reflect this growth in knowledge and understanding through descriptions of the objectives and values associated with public land use categories.

The attachment to this letter provides more detailed information about the legal developments underpinning these changes.

Extensive and often sensitive Aboriginal cultural heritage exists across Victoria. This is true regardless of land tenure but land in public ownership often has especially well preserved tangible heritage as well as broad Aboriginal cultural landscapes with rich intangible heritage.

Council's vision is of a Victorian community that understands and respects Aboriginal cultural heritage and the cultural responsibilities of Traditional Owners. Council members are keen to work towards a proactive approach to protecting Traditional Owners' cultural heritage for all Victorians, so that this rich cultural heritage may be enjoyed by future generations.

Victorian Aboriginal cultural heritage is protected from harm under s.27-30 of the AHA and penalties may apply. Some information about this heritage is held on the Victorian Aboriginal Heritage Register (Register) but this is by no means an exhaustive record of what is known about Victoria. RAPs are ideally placed to provide information about Aboriginal cultural heritage in their appointed areas and their functions under the AHA recognise them as a primary source of advice and knowledge for the Council and others on matters relating to their heritage.

More information regarding RAPs and RAP applicants, including contact details, may be found here:

<http://www.dpc.vic.gov.au/index.php/aboriginal-affairs/registered-aboriginal-parties>

Council is committed to working alongside other agencies to develop knowledge and understanding of Victorian Aboriginal cultural heritage and the Traditional Owners, and regulatory environment, managing and protecting it. Council is also keen to continue working alongside VEAC regarding Aboriginal cultural heritage issues generally.

Please do not hesitate to contact me if you would like to discuss any of these matters further via the Council Secretariat (Kristy Yeats on ☎ 03 9208 3820 or at kristy.yeats@dpc.vic.gov.au).

Yours sincerely

Rodney Carter
Chair
Victorian Aboriginal Heritage Council
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PRELIMINARY COMMENTS RELATING TO THE VICTORIAN ENVIRONMENT ASSESSMENT COUNCIL'S INVESTIGATION INTO PUBLIC LAND USE CATEGORIES

1. Aboriginal peoples of Victoria have long fought for recognition of their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional law and customs.
2. The High Court's 1992 Mabo¹ decision and the resulting *Native Title Act 1993* (Cth) caused defining changes to the way governments and Aboriginal people interact across Australia. It resulted in a fundamental shift in the law and in government policy towards a greater recognition of the interest of Aboriginal persons and Traditional Owners specifically in their country.
3. The relationship between the Victorian Government and the Aboriginal people of Victoria has seen progressive shifts by successive governments in legislation, administration and policy towards a greater recognition of the interests of Traditional Owners to their Country. Much of this has occurred since the Land Conservation Council's assessment in 1988, which is to be addressed by the VEAC investigation into public land use categories.

Milestones include:

- Enactment of Section 1A *Constitution Act 1975* in 2004;
 - Wimmera people's native title consent determination in 2005;
 - Enactment of the *Aboriginal Heritage Act 2006* (AH Act);
 - Recognition of the distinct cultural rights of Aboriginal people in the *Charter of Human Rights and Responsibilities Act 2006* (Charter);
 - Gunditjmara people's native title consent determination in 2007;
 - Enactment of the *Traditional Owner Settlement Act 2010* (TOS Act);
 - Recognition and Settlement Agreement (RSA) between the State of Victoria and GunaiKurnai peoples 2010;
 - Gunditjmara peoples and Eastern Maar peoples joint native title consent determination 2011; and
 - RSA between State of Victoria and the Dja Dja Wurrung peoples 2013.
4. In Victoria, the *Constitution (Recognition of Aboriginal People) Act 2004* amended the *Constitution Act 1975* (Vic) to 'acknowledge that the events described in the preamble to [the Constitution Act] occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria' and to 'give recognition within that Act to Victoria's Aboriginal people and their contribution to the State of Victoria.' This amendment recognised the

¹ Mabo v State of Queensland (No 2) 1992 175 CLR 1

unique status of Victoria's Aboriginal people as descendants of the original custodians of the land who have a spiritual, social, cultural and economic relationship with their traditional lands and waters and who 'have made a unique and irreplaceable contribution to the identity and well-being of Victoria'.²

5. The amendment of the *Constitution Act 1975 (Vic)* recognised the importance of proper consultation with, and the involvement of, Aboriginal people in decision-making.³ The AH Act is a positive legal measure of protection, ensuring the effective participation of Aboriginal persons in decisions that affect them. Enacted the same year as the Charter, the AH Act continued and broadened the shift towards recognition of and consultation with Aboriginal people in Victoria, with Traditional Owner groups being appointed as RAPs with cultural heritage management responsibilities for defined areas.⁴
6. In August 2010, Victoria's Parliament passed the TOS Act. Settlements under this legislation involve the government reaching RSAs with Traditional Owner groups outside of the Federal Court's native title processes. These are formal agreements between the State and a Traditional Owner group entity and have significant effects in relation to public land in Victoria. There is an alignment of outcomes achieved under the AH Act, TOS Act and native title processes.⁵
7. Stories told by the Victorian Traditional Owners convey the strength and resilience of their people in the long and arduous struggle for land and culture. They challenge the history of terra nullius and recognise indigenous people's agency in history.
8. In November 2012, the Victorian Parliamentary Inquiry Report into 'The Establishment and Effectiveness of RAPs' saw bi-partisan support for a recommendation that the AH Act "be amended to allow for only incorporated bodies representing traditional owners to be appointed as RAPs".
9. The Aboriginal Heritage Amendment Bill 2014 included this recommendation, and reform to this end is anticipated under the present Government. Such reform is consistent with the importance of self-determination and Aboriginal people being at the centre of decision making, as highlighted in the Premier's speech on 'Closing the Gap Day'.⁶
10. The preamble of the Charter recognises:

[t]hat human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

² See Explanatory Memorandum to the Constitution (Recognition of Aboriginal People) Bill 2004.

³ Section 1 A, *Constitution Act 1975 (Vic)*

⁴ Report of the Right People for Country Project committee, page 1

⁵ See, for example, s 151(2A), AH Act.

⁶ <http://www.premier.vic.gov.au/closing-the-gap-premiers-speech>

12. The AH Act provides a statutory framework through which Aboriginal cultural heritage is protected and is an important mechanism for maintaining Aboriginal relationships with land and waters. For many Aboriginal people, the right to enjoy identity, culture, language and kinship ties is maintained through their relationship with the land. The AH Act operates to promote those distinct cultural rights which are protected by s19(2) of the Charter.
13. The AH Act objectives draw direct support from rights set out under s19(2). Section 19(2) provides for the following rights of Aboriginal persons:
- (a) to enjoy their identity and culture; and
 - (b) to maintain and use their language; and
 - (c) to maintain their kinship ties; and
 - (d) 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.
14. The AH Act objectives relevant to this investigation are:
- To recognise, protect and conserve Aboriginal cultural heritage in Victoria in ways that are based on respect of Aboriginal knowledge and cultural and traditional practices;*
- To recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;*
- To accord appropriate status to Aboriginal people with traditional or familial links with Aboriginal cultural heritage in protecting that heritage.*
15. For the purposes of the AH Act, Aboriginal cultural heritage is defined to mean Aboriginal places, Aboriginal objects and Aboriginal human remains.⁷ The AH Act sets out that cultural heritage significance includes archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance and significance in accordance with Aboriginal tradition.⁸
16. The AH Act expressly requires that Aboriginal cultural heritage should be owned by Aboriginal people with traditional and familial links to the area from which Aboriginal cultural heritage is reasonably believed to have originated in the context of Aboriginal human remains and secret or sacred objects.⁹

⁷ See s 4(1) of the *Aboriginal Heritage Act 2006*, definition of Aboriginal cultural heritage. Aboriginal places, Aboriginal objects and Aboriginal human remains are also defined in the AH Act (see s 4).

⁸ See s 4(1) of the *Aboriginal Heritage Act 2006*, definition of cultural heritage significance.

⁹ Section 12, *Aboriginal Heritage Act 2006*

17. Council sees traditional Aboriginal cultural heritage as inextricably connected to traditional country, as recognised by its principles and consistent with its decision making in appointing Traditional Owner groups as RAPs. This is consistent with the position taken under international human rights law (and the jurisprudence of the UN Human Rights Committee) in respect of the cultural rights of indigenous groups
18. 'Culture' manifests in a number of forms and embraces the maintenance and expression of traditional beliefs, practices and social and economic activities that are part of a group's tradition. It includes a particular way of life associated with land resources, especially in the case of indigenous peoples. It may also include traditional activities for Aboriginal people including fishing or hunting.¹⁰ Certain activities may be cultural even though undertaken for economic gain. Where that is the case, they must be an essential element in the culture of a community.¹¹
19. Council's view views that Aboriginal cultural heritage and connection to Country are intertwined is also consistent with s 19(2)(a) of the Charter. Section 19(2)(d) is directly relevant to the protection of Aboriginal cultural heritage in Victoria as it provides that Aboriginal persons hold distinct cultural rights and must not be denied the right to maintain their distinctive spiritual, material and economic relationship to the land, waters and other resources with which they have a connection under traditional laws and customs. The right is an express recognition of the role of Traditional Owners in the protection of their heritage. This recognition draws support from Article 25 of the United Nations Draft Declaration on Indigenous Rights,¹² which reads:¹³
- Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.*
20. This right is designed to protect the distinctive relationship between Aboriginal persons and traditional lands, waters and other resources. The former Chairperson-Rapporteur of the working group on indigenous

¹⁰ Human Rights Committee, *General Comment No. 23: The Rights of Minorities*, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994).

¹¹ *Kitok v Sweden*, United Nations Human Rights Committee, Communication No. 197/1985, UN Doc. CCPR/C/33/D/197/1985 (10 August 1988) [9.2].

¹² See Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill*, clause 19.

¹³ Article 25, UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994). This declaration was adopted by the Human Rights Council of the United Nations on 29 June 2006. The wording in the final Declaration is substantially the same. Australia along with Canada, New Zealand and the United States, originally voted against the Declaration when it was adopted by the General Assembly in September 2007, but signed the Declaration in April 2009.

populations identifies a number of unique elements that explain the nature of the relationship to the land of indigenous peoples, as follows:¹⁴

A profound relationship exists between indigenous peoples and their lands, territories and resources;

This relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities;

The collective dimension of this relationship is significant; and

The intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability.

21. An Aboriginal person has traditional or familial links to an area when the person has particular knowledge about traditions, observances, customs or beliefs associated with the area and has certain responsibilities under Aboriginal tradition, or is a member of a family or clan group that is recognised as having traditional responsibility for significant Aboriginal places or objects to an area.¹⁵ This incorporates the individual and group aspects of cultural rights¹⁶ and focuses on recognition rather than strictly biological descent. This is consistent with Australian case law that emphasises the role of self-identification and community recognition in determining indigenous identities and membership in Aboriginal groups.¹⁷
22. Places on public land provide unique opportunities to understand the interrelationship between Aboriginal and non-Aboriginal values and natural and cultural value. These opportunities could include developing innovative options for future management of these places that accord appropriate recognition to Traditional Owners' rights and responsibilities over their Country.
23. The investigation in to public land use categories provides an opportunity to consider the impacts of the developments outlined above. The categories of public land use together with the objectives and values associated with the categories could be reconceptualised in ways that strengthen the respectful and meaningful recognition of Traditional Owners, which goes hand in hand with protection of Aboriginal cultural heritage.

¹⁴ *Final Working Paper on Indigenous Peoples and their Relationship to Land*, UN Doc. E/CN.4/Sub.2/2001/21 (11 June 2001), [20].

¹⁵ See s 7(1) of the *Aboriginal Heritage Act 2006*.

¹⁶ See Human Rights Committee, Communication No.197/1985, UN Doc CCPR/C/33/D/197/1985 (1988) (*Kitok v Sweden* and UN General Comment 23, para 9.

¹⁷ *Shaw v Wolf* (1998) 83 FCR 113 at 117-122.