

Our Ref: F16/142

Victorian Aboriginal Heritage Council
GPO Box 2392
Melbourne VIC 3001
Tel: 03 8392 5392
vahc@dpc.vic.gov.au

Tuesday 8 November 2016

Phil Honeywood
Chair Victorian Environmental Assessment Council
Level 6/8 Nicholson Street
EAST MELBOURNE
VIC 3002

Dear Mr Honeywood

VICTORIAN ENVIRONMENTAL ASSESSMENT COUNCIL'S (VEAC'S) STATEWIDE ASSESSMENT OF PUBLIC LAND DRAFT PROPOSALS PAPER AND DISCUSSION PAPER

The Victorian Aboriginal Heritage Council (Council) wishes to make the following comments regarding VEAC's Statewide Assessment of Public Land Draft Proposal Paper (Draft Proposal Paper) and Discussion Paper (Discussion Paper).

Firstly, Council would like to commend VEAC for its statewide assessment of public land. Many of VEAC's recommendations, if approved by the Minister of Environment and Climate Change (MCEE), will enable an effective whole-of-government approach to the management of public land in Victoria. In making these comments, Council's objective is to ensure the papers reflect Aboriginal peoples, particularly Registered Aboriginal Parties (RAPs), and Council's legislative rights and responsibilities in relation to the management of public land in Victoria.

1. Amendments to relevant State Legislation

VEAC's Discussion Paper Chapter 1 Introduction refers to key policies currently being developed that are of particular relevance to VEAC's Terms of Reference. Council suggests that the review of the *Aboriginal Heritage Act 2006* (AHA) and the *Heritage Act 1995* be included in this section of the Discussion Paper considering their relevance to the third specific point in VEAC's Terms of Reference "an inventory of the types of values on public land".

2. Native title rights and interests recognised under the Native Title Act 1993 (Cth) and traditional owner rights recognised under the Traditional Owner Settlement Act 2010 (Vic)

Victorian native title holders have a Federal Court order which entitles them to exercise and enjoy their native title rights and interests over the Crown land and waters in their Determination Area. Four traditional owner groups have had their native title rights and interests recognised by way of a Federal Court Native Title Determination. These are: the Wotjobaluk People in the Wimmera-Mallee Area (2005); the Gunditjmara in the South-West (2007); the Gunaikurnai in Gippsland (2010); and the Eastern Maar as part of a joint Determination with the Gunditjmara also in the South-West (2011).

To date, the Dja Dja Wurrung in Central Victoria (2013) is the only group that has traditional owner rights recognised in a Recognition and Settlement Agreement entered into under the *Traditional Owner Settlement Act 2010*. The Dja Dja Wurrung are entitled to exercise and enjoy their traditional owner rights over Crown land and waters in their Agreement Area.

Native title rights recognised in Victoria so far include rights to hunt, fish, camp, gather grasses and vegetation and protect areas of cultural heritage significance. Under the *Native Title Act 1993*, these rights may be exercised and enjoyed without reference to statutory licensing regimes and regulations. This is because their exercise is governed by the traditional laws and customs of the native title holders. Similar rights have been recognised under the *Traditional Owner Settlement Act 2010* although one difference is that traditional owner rights are to be exercised in accordance with specifically drafted Authorisation Orders.

In addition, these groups have statutory rights to be consulted about infrastructure and other works that will effect Crown land and waters in their Determination Area or Agreement Area, respectively. These rights flow from the operation of the *Native Title Act 1993* and the *Traditional Owner Settlement Act 2010*.

Native title holders with a Co-operative Management Agreement and Traditional Owners with a Traditional Owner Land Management Agreement (TOLMA), have a contractual right to co-manage agreed areas and to plan for the future management of these areas together with State land managers such as Parks Victoria and Department of Environment Land Water and Planning (DELWP). As part of this, traditional owner groups are assisting with the development of Joint Management Plans.

A significant recent development has also been the introduction of Aboriginal Title. This relates to land which was previously Crown land but is now a conditional form of freehold held by traditional owner groups who have entered into a TOLMA with the State. So far, this includes the Gunaikurnai and the Dja Dja Wurrung who both hold the land which is the subject of the TOLMA as Aboriginal Title.

3. Rights and roles of Registered Aboriginal Parties (RAPs) under the AHA

Chapter Five of VEAC's Discussion Paper would be improved by a comprehensive understanding of the statutory responsibilities of RAPs under the AHA. This shortfall could be addressed by including on page 86 a summary of RAP's rights and responsibilities in relation to Aboriginal cultural heritage sites and objects located on public land as discussed below.

Cultural Heritage Management Plans

Cultural Heritage Management plans (CHMPs) provide a mechanism to protect and manage Aboriginal cultural heritage with the involvement of RAPs. CHMPs must be prepared by a public land manager (the sponsor) in the following circumstances:

- if required under the Aboriginal Heritage Regulations 2007 (i.e. if all or any part of a proposed activity is in an area of cultural sensitivity and all or part of the activity is a high impact activity);
- if directed by the Minister for Aboriginal Affairs; or
- if an activity is subject to completion of an Environmental Effects Statement under the *Environment Effects Act 1978*.

The evaluation of CHMPs is one of the most significant responsibilities of RAPs. When a CHMP is prepared, it is evaluated by the relevant RAP/s for the area of the proposed activity. RAPs have 30 days from receipt of the CHMP to approve or refuse the CHMP. RAPs are also consulted during the preparation of a CHMP. A RAP approved CHMP allows managers of public land to upgrade a major roadway while minimising harm to Aboriginal cultural heritage sites along the route.

Cultural Heritage Permits (CHP)

Under the AHA, RAPs are one of the approval bodies for permit applications. An application by a public land agency must be made to a RAP for a CHP if a person/entity proposes to carry out the following activities;

- for the purpose of uncovering or discovering Aboriginal cultural heritage;
- for the purpose of carrying out research on an Aboriginal place or object;
- that will, or is likely to, harm Aboriginal cultural heritage;
- involving selling an Aboriginal object; or
- involving the removal of an Aboriginal object from Victoria;
- to inter Aboriginal Ancestral Remains at an Aboriginal place;
- to rehabilitate land at an Aboriginal place, including land containing burial grounds for Aboriginal Ancestral Remains.

The RAPs have 30 days to approve or refuse permit applications. This period ceases to run if the RAP requests in writing, additional information from the applicant to assist its decision and recommences to run on receipt of the information. RAPs can attach “reasonable” conditions to an approved permit such as:

- that the activity is supervised by a heritage advisor;
- that any Aboriginal cultural heritage found in the course of the activity be conserved in a particular way; or
- that specified things are to be done to the satisfaction of the RAP.

An example of the application of a RAPs statutory role regarding CHPs is their recent approval of a CHP application from Parks Victoria to construct an extensive walking track through a National Park.

Aboriginal Cultural Heritage Land Management Agreements (ACHLMAs)

ACHLMAs are voluntary agreements between a RAP and a public land manager for the purpose of managing and protecting cultural heritage and cultural landscapes during land management activities within a specific area, for an agreed period. In effect they provide a mechanism for joint management of land of Aboriginal cultural heritage value.

ACHLMAs must be prepared in accordance with prescribed standards, as set out in Schedule 4 of the Aboriginal Heritage Regulations 2007. ACHLMAs may include conditions; they can also be amended with consent from all parties. ACHLMAs cannot be used for any activity that would require a CHMP. ACHLMAs are a new type of agreement that became available following recent amendments to the AHA which came into effect on 1 August 2016. Although very new, the Council is aware that RAPs and some local governments are already developing these agreements.

The Victorian Aboriginal Heritage Register (the Register)

RAPs amongst other groups and individuals, have access to the Register for the purpose of obtaining information relating to the area(s) over which the RAP is registered. RAPs have the power to authorise persons who wish to gain access to the Register for the purpose of obtaining information relating to the area(s) over which the RAP is registered (Section 146 A (1) of the AHA). Authorisation from the RAP must be given in writing.

Sensitive Aboriginal Heritage Information

RAPs can recommend to the Secretary of the Department of Premier and Cabinet (DPC) that information on the Register relating to Aboriginal cultural heritage or Aboriginal intangible heritage, is sensitive Aboriginal heritage information (Sections 146A and 148(ff) of the AHA). If, on the recommendation of a RAP, information on the Register is determined to be sensitive, access to that information will be restricted unless written approval from the relevant RAP is obtained. It is at the RAP's discretion whether to approve an application for access to sensitive Aboriginal heritage information (Section 146A (2) of the AHA).

Aboriginal intangible heritage and Aboriginal intangible heritage agreements

Aboriginal intangible heritage is defined by the AHA as any knowledge of, or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts and ecological knowledge. It does not include anything widely known to the public. RAPs, Registered Native Title Holders and Traditional Owner Group Entities may nominate Aboriginal intangible heritage to be recorded on the Register by lodging an application to the Secretary of the DPC. Registration of Aboriginal intangible heritage allows that heritage to become the subject of an Aboriginal intangible heritage agreement. For example, if a land manager like Parks Victoria would like to utilise intangible heritage on the VAHR as part of its Aboriginal cultural tour of a National Park, it will need to enter into an Aboriginal intangible agreement with the relevant RAP/Registered Native Title Holder. The agreement is then lodged with Aboriginal Victoria.

Protection Declarations, Enforcement and Compliance

RAPs have a role in enforcement and compliance through the employment of Aboriginal Heritage Officers (AHOs). AHOs are RAP employees appointed by the Minister for Aboriginal Affairs on the basis that they have both the appropriate level of, knowledge and experience in the identification and protection of Aboriginal cultural heritage. AHOs are legally authorised to issue and deliver 24-hour stop orders. Although employed by RAPs, their statutory authority extends beyond RAP boundaries to encompass the whole of Victoria. AHOs are also authorised to monitor compliance of CHMPs, CHPs and ACHLMAs.

Some Aboriginal places and objects are of particular cultural heritage significance to Aboriginal people and the broader Victorian community. The AHA allows the Minister for Aboriginal Affairs to make declarations for the protection of Aboriginal places or objects. There are two types of protection declarations - Interim Protection Declarations and Ongoing Protection Declarations. Both types of declaration provide specific measures for the protection and management of an Aboriginal place or object. For example, a declaration may restrict the public's access to an area. The Council or any RAP can ask the Minister to make an Interim Protection Declaration or an Ongoing Protection Declaration and the Minister can place an Interim Protection Declaration over an area to protect it while an assessment is undertaken to see if it warrants permanent protection.

The Minister has put two ongoing Protection Declarations in place to date with another three areas currently being considered. In 2011, the Minister placed an ongoing Protection Declaration on Garradha Molwa located in Barmah National Park after a recommendation by the RAP for that area, Yorta Yorta National Aboriginal Corporation. To this date the declared area is subject to the following measures: the area must be enclosed by fencing and gates by Parks Victoria and maintained to a standard acceptable to the DELWP; livestock is not permitted to enter the area; native trees, plants or grasses in the area are not to be destroyed or removed; and no trees, grasses or plants other than local indigenous flora may be planted.

4. Council's legislative role and responsibilities

The VEAC Discussion Paper could also be supplemented by additional information about the role of Council as outlined in the attached fact sheet (Attachment 1).

Council noted that VEAC has not consulted with RAPs, Traditional Owners and other Aboriginal groups as part of its assessment of public land. Council understands that VEAC has confirmed it plans to engage with Aboriginal people in the next stage of this study. However, with the Statewide Assessment of Public Land Discussion Paper Final report due to the MECC in February 2017, Council is concerned that there is a lack of appropriate time to allow for genuine, inclusive and meaningful consultation with RAPs and other Traditional Owner groups. Council strongly encourages VEAC to seek an extension from the MECC to enable detailed consultations with the RAPs on their roles and responsibilities with respect to public land.

5. Council's review of VEAC's 19 recommendations in the Proposals Paper

In relation to VEAC's 19 recommendations in the Proposals Paper, three directly affect Council and the management by RAPs of Aboriginal cultural heritage located on public land in Victoria.

- a. Recommendation 8: Land in Aboriginal title and public land under joint management be designated through a legislated "Aboriginal land" public land overlay*

In relation to Recommendation 8, Council can see the value in including such an overlay. However, it would be useful to step out the merits of this recommendation by explaining how managers of public land and RAPs could benefit from the overlay. Council suggests VEAC may wish to consider employing Aboriginal staff or staff with expertise in Aboriginal land rights to provide public land managers with up-to-date and correct information regarding the *Native Title Act 1993* and the *Traditional Owner Settlement Act 2010*. In the alternative, VEAC may wish to consider developing mechanisms that will ensure RAPs and other Traditional Owner groups are consulted and included in the implementation phases.

- b. Recommendation 15: An inventory of state government-owned freehold land be undertaken to identify distribution and extent, ownership, and values and uses; and a register be compiled and maintained.*

Council notes this recommendation includes reference to the values associated with freehold land owned by the state government. If this is intended to refer to Aboriginal cultural heritage values, Council draws attention to the provisions regarding the Victorian Aboriginal Heritage Register in Section 146 (1) of the AHA 2006. In this case, Council would expect these provisions particularly the access restrictions for sensitive information (especially Ancestral Remains and Secret or Sacred objects) to be replicated and to apply to the proposed register.

Alternatively, Council strongly encourages VEAC to discuss with Aboriginal Victoria options, for example, whether the proposed inventory could be linked to the Register.

- c. Recommendation 12: Following a review of the number and types of coastal reserves outside the protected area system, reserves with high environmental, social and economic value be identified and values at risk from climate change be identified, as specified in the Victorian Coastal Strategy 2014.*

Council suggests VEAC add "cultural heritage value" to this recommendation. The Discussion Paper could outline significant Aboriginal cultural heritage sites currently threatened by climate change such as Moyjil and the National Heritage Listed site of Budj Bim.

Lastly, on a more general note, *Figure 5.8 Registered Aboriginal Parties in Victoria* (page 86) lacks a label for the Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc. *Table 5.8 Current agreements with Traditional owner groups* (page 88) currently shows Gunditjmarra as the sole Traditional Owner group for that region. Eastern

Maar also has Native Title in this area and needs to be included. Further on 7 November, Gunaikurnai Land and Waters Aboriginal Corporation was deregistered after being placed in special administration by the Office of the Registrar of Indigenous Corporations.

Council is pleased for the opportunity to input into these important papers and stresses the importance of consultation with RAPs and including information regarding the statutory role of RAPs with respect to Aboriginal cultural heritage and its relationship to land management in future stages. The papers are an important opportunity to educate Victorian public land managers about the role of Traditional Owners and RAPs in particular. At the very least, they should be seen as partners in the management of landscapes given the legal rights and responsibilities they hold. Land stewardship in Victoria has irrevocably changed as a consequence of this and these changes require that Traditional Owners rights and values are embedded within the management of public land.

If you have any queries or comments about matters raised in this letter, please contact the Council Secretariat member Lucia Lancellotti on Lucia.Lancellotti@dpc.vic.gov.au or on 9208 3295.

Yours sincerely

Eleanor A Bourke
Chairperson
Victorian Aboriginal Heritage Council

What is the Victorian Aboriginal Heritage Council?

The Victorian Aboriginal Heritage Council (Council) was created under the *Aboriginal Heritage Act 2006* (Act) to ensure the preservation and protection of Victoria's rich Aboriginal cultural heritage. With important decision making responsibilities and all its members being Traditional Owners, the Council is the only statutory body of its kind in Australia.

The Council's vision is of a community that understands and respects Aboriginal cultural heritage and the cultural responsibilities of Traditional Owners. The Council recognises Traditional Owners as the primary guardians, keepers and knowledge holders of their heritage.

The Council is made up of up to eleven Traditional Owners who are appointed by the Minister for Aboriginal Affairs. Members of the Council must reside in Victoria and have demonstrated traditional or familial links to an area in Victoria. They are also required to have relevant knowledge or experience in the management of Aboriginal cultural heritage in Victoria because the Council's role is as a specialist body rather than a representative one.



(Council Members with Natalie Hutchins MP, Minister for Aboriginal Affairs Victoria in June 2016. Clockwise from top left: Nellie Flagg, Rodney Carter, Tim Chatfield, Eleanor Bourke, Jill Gallagher, Jennifer Beer, Mick Harding, Minister Hutchins and Jim Berg).

What does the Council do?

The Council plays an important role in the implementation of the Act. The Council's principal functions are outlined below.

1. Making decisions on Registered Aboriginal Party (RAP) applications

Since its establishment in 2006, the Council has appointed ten RAPs which collectively cover more than 60 per cent of Victoria. RAPs are organisations that hold decision-making responsibilities for protecting Aboriginal cultural heritage in a specified geographical area.

From 1 August 2016, the Council has 270 days to make a decision on RAP applications. If the Council requires an applicant to provide additional information to assist in making the decision, the 270 day timeframe is put on hold until the Council gets the information requested. From 1 August 2016, the Council will also be able to include conditions on the registration of a RAP.

2. Monitoring RAPs

Since 1 August 2016, the Council is responsible for overseeing and supervising the operations of RAPs. The Council is currently designing its approach to this work in collaboration with RAPs and with organisations already involved in monitoring RAPs.

3. Protecting Ancestors' resting places and returning Ancestors to Country

From 1 August, the Council is the central coordinating body responsible for Ancestral Remains in Victoria. Over time, this new role will allow the Council to strengthen the protection of Aboriginal burial places and deliver better support for Traditional Owners returning Ancestors to Country. To help implement the new legislation, the Council's Secretariat now includes an Ancestral Remains Unit made up of three full-time staff.

4. Secret or sacred objects in Victoria

From 1 August 2016, there are new obligations in relation to Aboriginal objects that are secret or sacred. A person who has custody of an Aboriginal object that is a secret or sacred object but who is not the owner of that object must, as soon as practicable, take all reasonable steps to transfer the object into the custody of the Council. The Council is working with key stakeholders to develop some general guidance about secret or sacred objects and will work with Traditional Owners and the broader Victorian community to keep these objects safe and preserve them for future generations.

5. Managing the Victorian Aboriginal Cultural Heritage Fund

The first Aboriginal Cultural Heritage Fund ever created in Victoria was established on 1 August 2016. The Council will be responsible for managing this Fund as guided by the Act. Over time, the Council is hoping to build up the Fund and to use it for initiatives to protect Aboriginal cultural heritage and to promote understanding and awareness of this unique heritage, managed by Traditional Owners for all Victorians.

6. Measures to promote understanding and awareness

The Council's work includes promoting understanding and awareness of Aboriginal cultural heritage in Victoria. The Council achieves this through establishing partnerships and consulting with key stakeholders, making submissions to reviews of legislation, investigations and inquiries that impact on Aboriginal cultural heritage, participating in external committees and reference groups.

7. Providing Advice to the Minister for Aboriginal Affairs and the Secretary of the Department of Premier and Cabinet

The Council provides advice to the Minister for Aboriginal Affairs (Minister), both voluntarily and on request, on the protection and management of Aboriginal cultural heritage in Victoria.

The Council also advises the Secretary of the Department of Premier and Cabinet on establishing standards and fee guidelines for consultation fees payable to RAPs by sponsors when preparing Cultural Heritage Management Plans (CHMPs) and assessments, and exercising his/her powers in relation to Cultural Heritage Permits, CHMPs and agreements.

8. Reporting to the Minister

From 1 August 2016, the Council must report to the Minister annually and produce a *State of Victoria's Aboriginal Cultural Heritage* report every five years.

For more information about the Council, visit

<http://dpc.vic.gov.au/index.php/aboriginal-affairs/victorian-aboriginal-heritage-council>

Contact the Council

Post: GPO Box 2392, Melbourne 3001

Email: vahc@dpc.vic.gov.au

Phone: 03 9208 3243