

9 November 2016

The Hon. Phil Honeywood  
Chairperson, Victorian Environmental Assessment Council  
Level 6, 8 Nicholson Street  
PO Box 500  
East Melbourne, VIC 3002

Via email: [veac@delwp.vic.gov.au](mailto:veac@delwp.vic.gov.au)

Dear Mr Honeywood

#### **VEAC Statewide Assessment of Public Land**

I write on behalf of Native Title Services Victoria Ltd (**NTSV**) and the Federation of Victorian Traditional Owner Corporations Ltd (**the Federation**). I refer to the VEAC Statewide Assessment of Public Land, the VEAC Statewide Assessment of Public Land Discussion Paper and the Statewide Assessment of Public Land Draft Proposals Paper (**the papers**).

I enclose a copy of the submission made by NTSV and the Federation on 7 November 2016 with respect to the papers. NTSV and the Federation welcome the opportunity to comment on the papers. NTSV is also grateful for the opportunity to participate in the Community Reference Group established for the investigation.

The Draft Proposals Paper provides a number of Draft Recommendations with respect to the Statewide Assessment of Public Land. The general position of NTSV and the Federation is that any recommendations about public land must acknowledge and take into account the underlying rights and interests of Traditional Owners in public land.

NTSV and the Federation emphasise that it is necessary to ensure that the Draft Recommendations proposed by the Draft Proposals Paper do not adversely affect existing Traditional Owner and native title settlement agreements or impact on rights recognised under those agreements. It is also necessary to ensure that the Draft Recommendations do not affect rights and interests which may be recognised under future native title or Traditional Owner Settlement Act outcomes.

For the reasons outlined in the enclosed submission, NTSV and the Federation are concerned that VEAC's Draft Recommendations may adversely affect Traditional Owner or native title rights and interests, or may impede land being available under Traditional Owner Settlement Act processes.

We are concerned that the VEAC proposals, which have the possibility of adversely impacting on native title and Traditional Owner Settlement Act outcomes, were put forward by a body that did not involve Traditional Owner representation except for NTSV representation on the Community Reference Group.



Native Title Services Victoria Ltd



Federation of  
Victorian Traditional  
Owner Corporations

NTSV and the Federation are also concerned that the Discussion Paper's investigation into, and documentation of, Public Land Values pays insufficient regard to Traditional Owner economic and resource rights on Crown land. NTSV and the Federation submit that the proper understanding and articulation of Traditional Owner rights and interests in Crown land is essential to effective land management that accords appropriate recognition to, and protection of, Traditional Owners' rights and responsibilities over Crown land.

We ask VEAC to ensure that the comments and concerns raised in the enclosed submission are addressed as part of the VEAC Statewide Assessment of Public Land and in the Final Report and recommendations made to the Minister for Energy, Environment and Climate Change.

NTSV and the Federation would be pleased to discuss any aspect of this letter or submission with VEAC.

Yours sincerely

Matthew Storey  
CEO  
**Native Title Services Victoria Ltd**

Encl.

Cc: The Hon. Lilians D'Ambrosio MP, Minister for Energy, Environment and Climate Change;  
Mr Don Saunders, Chair, Community Reference Group for VEAC's Statewide Assessment of  
Public Land

## ***VEAC Statewide Assessment of Public Land***

**Native Title Services Victoria Ltd**

**Federation of Victorian Traditional Owner Corporations Ltd**

### **Comments on the VEAC Statewide Assessment of Public Land Discussion Paper and Public Land Draft Proposals Paper**

**7 November 2016**

#### **Introduction**

1. The comments below are made by Native Title Services Victoria Ltd (**NTSV**) and the Federation of Victorian Traditional Owner Corporations Ltd (**the Federation**) in respect of the VEAC Statewide Assessment of Public Land Discussion Paper and the Statewide Assessment of Public Land Draft Proposals Paper. NTSV and the Federation welcome the opportunity to comment on the papers.
2. The Draft Proposals Paper provides a number of Draft Recommendations with respect to the Statewide Assessment of Public Land. The general position of NTSV and the Federation is that any recommendations about public land must acknowledge and take into account the underlying rights and interests of Traditional Owners in public land. It is necessary to ensure that the Draft Recommendations do not adversely affect existing Traditional Owner and native title

settlement agreements or impact on rights recognised under those agreements. It is also necessary to ensure that the Draft Recommendations do not affect rights and interests which may be recognised under future native title or Traditional Owner Settlement Act outcomes.

3. For the reasons outlined in this submission, NTSV and the Federation are concerned that VEAC's Draft Recommendations may adversely affect Traditional Owner or native title rights and interests, or may impede land being available under Traditional Owner Settlement Act processes.
4. NTSV and the Federation are also concerned that the Discussion Paper's investigation into, and documentation of, Public Land Values pays insufficient regard to Traditional Owner economic and resource rights on Crown land.

#### **Background to NTSV and the Federation**

5. NTSV is a Native Title Service Provider under the *Native Title Act 1993* (Cth) and the legal service that represents Victorian native title claimants. NTSV offers Traditional Owners expertise in research to establish the basis for Native Title and related claims, and expertise in law and mediation to process the claims and to make associated agreements.
6. In addition NTSV works with Traditional Owner groups to enhance their governance and capacity, and facilitates the development of their economic and natural resource management aspirations pre and post settlement.
7. The Federation is the peak body representing Traditional Owner Corporations across Victoria. Our corporations represent thousands of individual Traditional Owner members, all of whom depend on land, water and natural resources for wellbeing, the ability to practice culture, care for Country, protect sacred sites and create opportunities for economic development.
8. Together, the Traditional Owner Corporations that comprise the Federation cover 65% of the land in Victoria. The Traditional Owner Corporations enjoy legal rights and interests in land, water and resources pursuant to the *Traditional Owner Settlement Act 2010* (Vic) and the *Native Title Act 1993* (Cth), and responsibilities with respect to Aboriginal Heritage under the *Aboriginal*

*Heritage Act 2006 (Vic).*

9. The Federation was established in 2013 to unite Victorian Traditional Owners and provide a platform for our shared views. We will know we have achieved our purpose when:
- Traditional Owner Corporations are partners in government and industry decision-making about Country;
  - Traditional Owner Corporations are succeeding in the mainstream economy; and
  - Traditional Owner Corporations are keeping Country healthy.
10. In making this submission we therefore seek the opportunity to ensure high levels of protection for Traditional Owner cultural and natural values , maximise economic development opportunities for Traditional Owners, and work in partnership with Government to manage our Country.

#### **Traditional Owner rights and interests in Crown land**

11. This submission makes reference to Traditional Owner rights and interests in Crown land. These are rights and interests formally recognised by the State of Victoria and the Federal Court. It is therefore useful to briefly outline what these rights and interests may entail.
12. Traditional Owners assert distinctive rights in relation to their Country. In very broad terms, these can be described as encompassing the rights of Traditional Owners to:
- (a) the enjoyment of the culture and identity of the Traditional Owner group;
  - (b) the maintenance of a distinctive spiritual, material and economic relationship with the land and the natural resources on or depending on the land;
  - (c) the ability to access and remain on the land;
  - (d) the ability to camp on the land;
  - (e) the ability to use and enjoy the land;
  - (f) the ability to take natural resources on or depending on the land;
  - (g) the ability to conduct cultural and spiritual activities on the land;
  - (h) the protection of places and areas of importance on the land.

13. Federal Court determinations of native title, the *Native Title Act 1993* (Cth) and *Traditional Owner Settlement Act 2010* (Vic) can recognise and give effect to these distinctive rights.
14. A native title or Traditional Owner Settlement Act outcome can recognise the rights of traditional owners to access and use land and waters, take and use natural resources and provide input into the management of land and natural resources.
15. Traditional Owners may be afforded rights to comment on or consent to certain activities on Crown land, as provided under the Land Use Activity Regime of the Traditional Owner Settlement Act 2010 or the Future Acts regime of the Native Title Act. In certain circumstances these rights are afforded to Traditional Owners prior to a native title determination being made or prior to the entering of a Traditional Owner Settlement Act agreement.
16. The Traditional Owner Settlement Act allows Traditional Owners to enter into a Land Agreement which provides for grants of land in freehold title for cultural or economic purposes, or as Aboriginal Title to be jointly managed in partnership with the state.

#### **Public land classification**

17. The legal recognition and protection of Traditional Owner rights has changed substantially since the public land use categories were established. It is imperative that Traditional Owner rights and interests are incorporated into the conceptualisation of public land use categories. This is necessary to ensure that the management of Crown land upholds, and affords appropriate recognition of, Traditional Owner and native title holder rights and interests.
18. A number of options are available to achieve this.
19. NTSV and the Federation note the VEAC Draft Recommendation that land in Aboriginal Title and public land under joint management be designated through a legislated 'Aboriginal land' public land overlay.<sup>1</sup> NTSV and the Federation welcome this recommendation and view it as a positive step towards incorporating Traditional Owner interests into the conceptualisation of public land use categories.

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<sup>1</sup> VEAC Statewide Assessment of Public Land Draft Proposals Paper, Draft Recommendation 8

20. However, Traditional Owner rights and interests in Crown land also extend beyond Aboriginal Title. To reflect this, NTSV and the Federation suggest that Traditional Owner and native title holder rights and interests in Crown land can be included in descriptions of the objectives and values associated with public land use categories.

### **Legislative reform**

21. VEAC has recommended for a revised and consolidated system of primary public land use categories and overlays.<sup>2</sup> Recommendations are also made for the introduction of new legislation, and amendments to existing legislation, to implement this.<sup>3</sup>

22. NTSV and the Federation acknowledge that the proposed changes in categorisation 'are not intended to change the level of protection or the permitted uses on the public land.'<sup>4</sup> However, separate to this issue is the potential impact of the proposed changes on the distinct rights and interests of Traditional Owners and native title holders. Whether such rights may be inadvertently affected is a technical question dependent on a number of issues, and NTSV and the Federation require further information to assess whether this is possible. NTSV and the Federation request the opportunity to receive a briefing in relation to this possibility and both organisations reserve the right to provide additional comment on the recommendation if further scrutiny results in issues or concerns being identified. NTSV and the Federation emphasise that any proposed changes which may affect Traditional Owner or native title holder rights and interests will require consultation with Traditional Owners and native title holders.

23. NTSV and the Federation emphasise that any change should not adversely impact on rights and interests recognised under existing, or capable of being recognised under future, native title or Traditional Owner Settlement Act outcomes.

24. For example, the changes should not adversely affect Traditional Owner or native title holder rights and interests in accessing and using land or natural resources (including hunting, fishing, gathering, camping rights). Reforms should also not adversely affect the possibility of Aboriginal

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<sup>2</sup> VEAC Statewide Assessment of Public Land Draft Proposals Paper, VEAC Draft Recommendation 1

<sup>3</sup> VEAC Statewide Assessment of Public Land Draft Proposals Paper, Draft Recommendations 2 - 3

<sup>4</sup> VEAC Statewide Assessment of Public Land Draft Proposals Paper, page 15

Title being granted over a particular area, and should not adversely impact Future Act rights or rights afforded by the Land Use Activity Regime.

25. VEAC has also recommended options to expedite the reservation of land. It has recommended that:

- (a) legislation be amended or introduced to streamline implementation of government accepted recommendations;<sup>5</sup> and
- (b) the Wildlife Act be amended to remove requirement for further classification of areas reserved under Crown Land (Reserves) Act.<sup>6</sup>

26. For the reasons that follow, NTSV and the Federation are concerned that the expediting of reservation of land may adversely affect Traditional Owner or native title rights and interests.

27. The reservation status of land can, depending on the particular reservation, impede land being available under Traditional Owner Settlement Act processes. Currently, Aboriginal Title is only able to be granted with respect to public land that falls within the following categories:

- (a) land reserved under the Crown Land (Reserves) Act (other than land under the Alpine Resorts Act);
- (b) land in any park within the meaning of the National Parks Act;
- (c) reserved forest within the meaning of the Forests Act;
- (d) unreserved Crown land under the Land Act;
- (e) land in any Nature Reserve or State Wildlife Reserve within the meaning of the Wildlife Act, other than land in a State Game Reserve.

28. Relevantly, land reserved as a State Game Reserve cannot be subject to Aboriginal Title. If the suggested amendment to the Wildlife Act (to remove the requirement for further classification of areas reserved under Crown Land (Reserves) Act) has the effect of expediting the reservation of land as State Game Reserve, and removes the possibility of Aboriginal Title being granted over such land, this raises serious concerns for NTSV and the Federation. NTSV and the Federation

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<sup>5</sup> VEAC Statewide Assessment of Public Land Draft Proposals Paper, Draft Recommendation 2

<sup>6</sup> VEAC Statewide Assessment of Public Land Draft Proposals Paper, Draft Recommendation 4



request clarification from VEAC in relation to this recommendation to enable this important risk to be considered and assessed.

29. NTSV and the Federation emphasise that the reservation status of Crown land may affect Traditional Owner or native title rights and interests. Land status changes may, for example, impact on the ability of a Traditional Owner to access land and use natural resources where the change brings the subject land under a different legislative or regulatory regime, and where that regime has the effect of more restrictively regulating access to or use of land and natural resources. For example, certain regulations applicable to a particular land reservation may exempt a Traditional Owner from committing an offence for accessing a natural resource without a permit if authorised under a Natural Resource Agreement, whereas other regulations (applicable to a different land reservation) may not provide such exemption. It remains to be seen how the Traditional Owner Settlement Bill 2016 (and associated legislative or regulatory amendments) may, if enacted, affect these considerations.
30. Land status changes, or changes to land categorisation, are significant to Traditional Owners as they can affect the way in which land is managed or impact on activities permitted on land, which can affect Traditional Owner rights and interests. The Land Use Activity Regime can afford Traditional Owners procedural rights (such as the right to be notified and consulted with) where a change in the status of land is proposed. The amendment of existing land status may constitute a Future Act and afford rights under that regime.
31. NTSV is grateful for the opportunity to participate in the Community Reference Group established for the investigation. However NTSV and the Federation are concerned that the above proposals, which have the possibility of adversely impacting on native title and Traditional Owner Settlement Act outcomes, were put forward by a body that did not involve Traditional Owner representation except for NTSV representation on the Community Reference Group.

### **Public land values**

32. The VEAC Statewide Assessment of Public Land terms of reference asked VEAC to investigate and provide 'an inventory of the types of values on public land.' Relevantly, NTSV and the Federation note that:

- (a) the overarching terms of reference indicate that ‘the focus of the investigation is to provide information and recommendations to assist management effectiveness’; and
- (b) VEAC has sought to provide ‘a comprehensive stocktake of the values on public land, as this information is otherwise dispersed and not readily available’.<sup>7</sup>

33. NTSV and the Federation are therefore aware that the Discussion Paper and Draft Proposals Paper will function as reference documents for Crown land management and land values in the future. It is therefore essential that public land values, and Traditional Owner interests in public land, are accurately recorded in these documents. NTSV and the Federation submit that the proper understanding and articulation of Traditional Owner rights and interests in Crown land is essential to effective land management that accords appropriate recognition to, and protection of, Traditional Owners’ rights and responsibilities over Crown land.
34. NTSV and the Federation are concerned that VEAC’s discussion of public land values pays insufficient regard to Traditional Owner economic, resource, and natural resource use rights on Crown land. There are several reasons.
35. Firstly, NTSV and the Federation note that the Discussion Paper section on Cultural Heritage<sup>8</sup> addresses Indigenous tangible heritage, joint management and settlement agreement outcomes under the Traditional Owner Settlement Act. However, the Discussion Paper does not sufficiently address Traditional Owner or native title holder interests in land. The focus appears to be on the Traditional association of Traditional Owners to the exclusion of active management of natural assets, economic use and harvesting of resources for subsistence, ceremonial, sharing or trading interests. It therefore does not address: economic interests of Traditional Owners in land and resources, or Land Use Activity Regime and Future Act rights and interests.
36. Secondly, there is also scope to recognise Traditional Owner interests in the Discussion Paper’s analysis of Recreation and Tourism (Hunting, Fishing and Camping Public Land Values).<sup>9</sup> These

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<sup>7</sup> VEAC Statewide Assessment of Public Land Discussion Paper, page 57

<sup>8</sup> See: VEAC Statewide Assessment of Public Land Discussion Paper, pages 84-88; VEAC Statewide Assessment of Public Land Draft Proposals Papers, page 13

<sup>9</sup> See VEAC Statewide Assessment of Public Land Discussion Paper, pages 91-105

sections do not address the distinct rights and interests of Traditional Owners in accessing and using land and natural resources.

37. Thirdly, the Discussion Paper's discussion of Resource Use as public land values<sup>10</sup> does not refer to Traditional Owner rights and interests in resource use. Traditional Owners and native title holders have interests in and rights with respect to natural resource use and access under native title and Traditional Owner Settlement Act outcomes, and are afforded rights with respect to resources under the Land Use Activity and Future Act regimes. The discussion of Resource Use can address this.

#### *Summary of Traditional Owner agreements*

38. NTSV and the Federation are pleased that the discussion of Public Land values includes a summary of Traditional Owner and native title agreements.<sup>11</sup> However, this summary can be improved by addressing the Gunditjmarra people's native title consent determination of 2007, as the settlement agreements mentioned in the Discussion Paper were linked to this native title determination.

39. NTSV also suggests that the summary address the Gunditjmarra peoples and Eastern Maar peoples joint native title consent determination of 2011, although it is noted that this native title determination did not result in agreements between the native title holders and the State.

40. It would also be beneficial for the summary to define what is meant by the 'Wimmera Groups,' as the summary does not define this term. The Wimmera Groups consist of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk native title holders.

#### **Development of Standard Regulations**

41. VEAC has recommended that standard regulations be developed for each public land category in the revised system, together with amendments to the Crown Land (Reserves) Act that provide a simplified means to revoke any existing regulations when new regulations are made.<sup>12</sup>

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<sup>10</sup> See VEAC Statewide Assessment of Public Land Discussion Paper, pages 106-123

<sup>11</sup> VEAC Statewide Assessment of Public Land Discussion Paper, page 88

<sup>12</sup> VEAC Statewide Assessment of Public Land Draft Proposals Paper, VEAC Draft Recommendation 5

42. NTSV and the Federation would appreciate the opportunity to be consulted in the development of such standard regulations where they may impact on Traditional Owner or native title holder rights and interests.
43. It is hoped that the Statewide Assessment of Public Land will lead to greater public accessibility of regulations concerning management of land, thereby addressing issues of public availability and scrutiny of regulation. Currently it is either not possible, or it is very difficult, to access regulations made under section 13 of the Crown Land (Reserves) Act, in the context where these may impact on Traditional Owner rights and interests such as rights to access and use land and natural resources.
44. NTSV and the Federation would be pleased to discuss any aspect of this submission with VEAC, and NTSV looks forward to continuing to participate in the Community Reference Group.

7 November 2016

Native Title Services Victoria Ltd

Federation of Victorian Traditional Owner Corporations Ltd