SUBMISSION: INQUIRY INTO GREENFIELDS MINERAL EXPLORATION AND PROJECT DEVELOPMENT IN VICTORIA

Executive Summary

1. The Victorian Aboriginal Heritage Council (VAHC) is primarily concerned Traditional Owners, through registered Aboriginal parties (RAPs), continue to enjoy powers to protect and determine what happens to their cultural heritage.

2. The VAHC’s priorities reflect the objectives of the Aboriginal Heritage Act 2006 (AHA). The VAHC’s approach also draws support from and is in keeping with national and international laws which recognise the distinct cultural rights and responsibilities of Traditional Owners. This approach ensures that decisions about Aboriginal cultural heritage management can be effectively aligned with native title in Victoria. It also creates clear decision making pathways enabling Aboriginal cultural heritage to be identified and consultation to occur at the commencement of development projects that might impact on that heritage.

3. Where a RAP has been appointed and the process set out in the AHA is followed, consultation occurs and decisions are made by Traditional Owners in very short time frames. This process allows mineral exploration to proceed without unnecessary hindrances. Where there is no RAP, the arrangements for consultation with Traditional Owners can be more complex. The barriers currently preventing the appointment of RAPs across the rest of Victoria are being addressed through a range of measures, which will be augmented by the implementation of the Right People for Country Project.

4. The provisions of the AHA and the VAHC’s approach to decision making reduce the costs associated with minerals exploration by creating certainty for industry. By working with RAPs, those involved in minerals exploration can meet the legal obligations imposed on them by State and national laws. By working through the processes in the AHA, cultural heritage management decisions are made at the beginning of a project rather than after works have commenced when any delays can result in significant increases in costs.
5. In the VAHC’s view, the provisions of the AHA designed to protect and conserve Aboriginal cultural heritage should be maintained. The processes afforded by the AHA are appropriate and already exclude some activities specific to mineral exploration. Further selective exemptions would not be in the spirit of the AHA which states as its main purpose “to provide for the protection of Aboriginal cultural heritage in Victoria”.\(^1\)

6. The AHA represents a satisfactory balance between facilitating mineral exploration and ensuring effective measures for protecting and managing the impacts of exploration on Aboriginal cultural heritage. The VAHC believes any further concessions could not be justified as the AHA not only does not represent a significant impediment to mineral exploration in Victoria but in practice can reduce costs to the minerals exploration industry.

7. Mineral exploration in Victoria will be further assisted if better relationships between industry and Traditional Owners are fostered. The VAHC is keen to work with in partnership with the industry to develop knowledge and understanding of Victorian Aboriginal cultural heritage, the people and the regulatory environment that manages and protects it.

\(^1\)Section 1 of *Aboriginal Heritage Act 2006 (Vic)*
Managing and protecting Aboriginal cultural heritage in Victoria

**Legislative framework**

7. The 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. Stories told by Victorian Traditional Owners convey the strength and resilience of their people in the long and arduous struggle for land and culture. They challenged and successfully defeated the acceptance of *terra nullius*, recognising Aboriginal people's agency in history.

8. In Victoria the relationship between the Victorian Government and the Aboriginal people of Victoria has seen fundamental shifts by successive Victorian governments in legislation, administration and policy towards a greater recognition of the interests of Aboriginal people to their Country. Milestones along the way include the

- 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
- Establishment of the Victorian Aboriginal Heritage Council, the only independent decision making body in Australia entirely comprised of Traditional Owners
- Recognition of the distinct cultural rights of Aboriginal people in the *Charter of Human Rights and Responsibilities* 2006
- Gunditjmara People’s native title consent determination in 2007
- Enactment of the *Traditional Owner Settlement Act* 2010
- Recognition and Settlement Agreement between the State of Victoria and the GunaiKurnai peoples 2010
9. At a Federal level, the High Court’s 1992 Mabo decision and the resulting Native Title Act 1993 (Cth) caused a fundamental change to the way all governments and Aboriginal and Torres Strait Islander people interact across Australia. As a result of these laws, Aboriginal people in Victoria can protect their heritage through registered Indigenous land Use Agreements (ILUAs) under the Native Title Act 1993 (Cth).

10. In addition to native title laws, Aboriginal Victorians can utilise the heritage provisions of other Federal legislation such as the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act) and the Protection of Movable Cultural Heritage Act 1986.

11. In November 2004 in Victoria, the Constitution (Recognition Of Aboriginal People) Act 2004 was passed to amend 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.”

12. This amendment acknowledges the 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 within Victoria. It also recognises their “unique and irreplaceable contribution to the identity and well-being of Victoria.” Fundamentally, it recognises the importance of proper consultation with, and the involvement of, Traditional Owners in decision-making particularly regarding Aboriginal cultural heritage.

13. The implementation of the Aboriginal Heritage Act 2006 (AHA), which was enacted in the same year as the Charter of Human Rights and Responsibilities 2006 (Charter), broadened this shift towards recognition of and consultation with Traditional Owners in Victoria.

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2 Mabo v State of Queensland (No 2) 1992 175 CLR 1
3 Section 1 A, Constitution Act 1975 (Vic)
4 Section 1, Constitution (Recognition Of Aboriginal People) Act 2004
5 See Explanatory Memorandum to the Constitution (Recognition of Aboriginal People) Bill 2004.
6 Section 1 A, Constitution Act 1975 (Vic)
7 Report of the Right People for Country Project committee, page 1
14. This recognition is in keeping with, and draws support from, national and international laws which recognise that Indigenous people 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. These rights are recognised in Article 25 of the United Nations Declaration On Indigenous Rights \(^8\) to which Australia is a signatory.

15. The AHA is a positive legal measure of protection, ensuring the effective participation of Traditional Owners in decisions which affect them. The VAHC is firmly of the view that Aboriginal cultural heritage can only be effectively managed and protected if Traditional Owners are involved in all facets of decision making. It is helpful to recall that, for the purposes of the AHA, Aboriginal cultural heritage is defined to mean Aboriginal places, Aboriginal objects and Aboriginal human remains. \(^9\) The comments in this submission relating to Aboriginal cultural heritage should be read in this light.

Role of the VAHC

16. The VAHC is established under the AHA to provide a “state wide voice for Aboriginal people on the management of cultural heritage.” \(^10\) It is made up of Victorian Traditional Owners, all with extensive knowledge and experience in cultural heritage management.

17. One of the most important functions of the VAHC is the registration of registered Aboriginal parties (RAPs). In Victoria, there is an alignment of Aboriginal cultural heritage management and native title outcomes partly through the provisions of the AHA \(^11\) and partly through the principles adopted by the VAHC in relation to RAP decision making \(^12\). This ensures there are clear consultation and decision making processes available in relation to the protection and management of Aboriginal cultural heritage where RAPs have been appointed. As at 15 August

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\(^8\) 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.

\(^9\) See section 4(1) of the Aboriginal Heritage Act 2006.

\(^10\) Second Reading Speech, Aboriginal Heritage Bill, 6 April 2006 (Legislative Assembly).

\(^11\) Sections 6, 7 and 10, Aboriginal Heritage Act 2006.

2011, the VAHC has appointed nine RAPs covering 56% of Victoria and has declined another twenty-two applications.

18. The alignment achieved by the VAHC has significant benefits for the mineral exploration industry. It creates certainty for industry and allows them to meet the legal obligations imposed on them under State and Commonwealth legislation by identifying the correct group to work with in relation to heritage at the beginning of a project. This also reduces costs by streamlining decision making and ensuring there are no additional costs caused by delays after a project has commenced, since the management of Aboriginal cultural heritage is dealt with at the outset.

19. The VAHC acknowledges complexities can arise where a RAP has not been appointed, which can reduce the benefits the Victorian system affords to the minerals exploration industry. The VAHC is addressing barriers currently preventing the appointment of RAPs across the rest of Victoria through a range of measures such as conducting research and encouraging agreement making between Traditional Owners. Another option to support agreement making will be available through the implementation of the Right People for Country (RPFC) Project. RPFC will support Traditional Owner groups to make their own decisions about who is a member of the group and what is the extent of their traditional country. This will assist Traditional Owner groups to reach durable agreements that can support better native title and cultural heritage outcomes.

Role of RAPs and Cultural Heritage Management Plans

19. RAPs are the primary source of advice and knowledge on matters relating to the cultural heritage of their areas and are responsible for managing this heritage. They do this largely through participating in and evaluating Cultural Heritage Management Plans (CHMPs).

20. CHMPs are documents providing proponents with recommendations to mitigate harm to Aboriginal cultural heritage that may be affected by development within an activity area. CHMPs are required under certain circumstances outlined in the AHA:
   - If the Minister for Aboriginal Affairs requires one to be prepared
   - If the development requires an Environment Effects Statement
• If the Aboriginal Heritage Regulations 2007 (the Regulations) requires one

22. A CHMP may also be voluntarily prepared. If one is required, a CHMP must be approved before an exploration licence (EL) applicant can begin works.

23. The mechanisms regarding the preparation of CHMPs ensure decisions are made about the management of Aboriginal cultural heritage before works begin, eliminating the prospect of increased costs arising from projects being delayed after works have begun.

Issues
24. The balance of the submission responds to relevant aspects of the terms of reference below.

(b) The regulatory environment and (i) Costs and benefits of Greenfields mineral exploration
25. The AHA has now been operational for five years and is currently being reviewed. The VAHC is currently preparing a submission to the Review which will address, among other matters, the circumstances in which CHMPs are required.

26. The main purpose of the AHA is “to provide for the protection of Aboriginal cultural heritage in Victoria.”13 It establishes a clear process for proponents to follow in cases where a CHMP is required prior to works proceeding. Where a RAP has been appointed and the process set out in the AHA is followed, it ensures that consultation occurs with Traditional Owners and decisions are made in a timely manner that allows mineral exploration to proceed without unnecessary hindrances.

27. Where no RAP is appointed, the arrangements for consultation with Traditional Owners can be more complex. The VAHC is committed to establishing RAPs in accordance with the provisions of the AHA14 and the VAHC’s principles.15 The VAHC is also undertaking its own research and agreement making projects in order to progress decisions about RAPs. For example, the VAHC conducted a

13 Section 1, Aboriginal Heritage Act 2006
14 Sections 151, 153, Aboriginal Heritage Act 2006
workshop in Gariwerd (the Grampians National Park) in July 2011 to bring together Traditional Owners of the area to discuss how to best manage Aboriginal cultural heritage in Gariwerd. The VAHC will continue to implement these measures alongside the implementation of RPFC Project, which will provide another option for those who wish to utilise it.

28. The VAHC does not believe the AHA impedes mineral exploration in Victoria. When the AHA requires a CHMP, it does so in a targeted way and with good reason. Drilling operations do not require a CHMP unless proponents are also planning to excavate. The AHA identifies significant areas and high impact activities, and as such already confines the requirement to prepare a CHMP for mineral exploration operations using mechanical excavation for areas identified as culturally significant.

20. Further, the Victorian system creates certainty for industry, allowing ready identification of the correct group to work with in relation to Aboriginal cultural heritage. It also specifies a clear decision making pathway with strict timelines imposed on all parties. Taken as a whole, the decisions of the VAHC and the provisions of the AHA reduce costs by streamlining decision making and ensuring there are no additional costs caused by delays after a project has commenced, since the management of Aboriginal cultural heritage is dealt with at the outset.

29. The VAHC’s view is that the Regulations already contain significant concessions that ease mineral exploration, such as excluding drilling from the definition of significant ground disturbance. This dramatically reduces the number of required CHMPs across the exploration industry.

30. The VAHC would be concerned about any further concessions being made available for mineral exploration, as it is of the view that existing protective measures for Aboriginal cultural heritage are the minimum acceptable standards.

31. Instead consideration should be given to better guiding potential and current explorers through AHA requirements and through the CHMP process. There are some indications that industry understanding of the AHA, and of Aboriginal cultural heritage generally, is low. The VAHC is keen to play a role here and also supports RAPs being part of an educative process which could result in an
improvement in relationships between Traditional Owners and the exploration industry in Victoria.

(c) Fees, charges and royalties

31. CHMP requirements have been designed to match the complexities of the Aboriginal cultural heritage values being considered. The Regulations provide for both standard and complex assessments as part of the preparation of CHMPs.\textsuperscript{16} Some Victorian cultural heritage landscapes are very complex and at times this necessitates greater investigation. While more intensive CHMPs can be costly for explorers, VAHC is of the view that these are normally justified.

32. Guidelines have been developed by the Department of Planning and Community Development (DPCD) for the fees and conduct of RAPs, with the in principle support of the VAHC. Whilst not mandatory, these Guidelines can assist proponents and RAPs to work out suitable fees for the participation in the cultural heritage assessment process. The development of a similar set of guidelines providing information about fees charged by cultural heritage advisers could also be helpful, especially considering that by far the largest proportion of fees and charges involved in preparing CHMPs are charged by cultural heritage advisers.

21. Further, the costs involved in preparing and evaluating CHMPs must be balanced with the benefits provided in Victoria for the minerals exploration industry. Taken as a whole, the Victorian system of managing and protecting Aboriginal cultural heritage reduces costs by identify the Traditional Owners that have decision making responsibilities, streamlining decision making and ensuring there are no additional costs caused by delays after a project has commenced, since the management of Aboriginal cultural heritage is dealt with at the outset.

33. The VAHC is of the view that more can be done to develop awareness and understanding of the role of RAPs by the mineral exploration industry. For instance, it does not seem to be broadly understood that RAPs are expected to operate according to the usual commercial principles adopted by consultancy firms. Efforts should be directed to informing and educating the industry broadly about Aboriginal cultural heritage requirements in Victoria. The VAHC is keen to

\textsuperscript{16} Part 3 of the Aboriginal Heritage Regulations 2007
play a role here and also supports RAPs being part of an educative process in order to encourage better relationships between RAPs and the mineral exploration industry. The VAHC encourages members of the industry to be active partners in the development of appropriate workshops and training activities.

(g) The different roles of government (this may include but is not limited to targeted industry engagement, facilitation and generation of geological survey information)

34. Targeted industry engagement and facilitation would be of great benefit to Traditional Owners and industry. It would lead to better cultural heritage outcomes as well as smoother and less costly industry compliance in the long term.

35. The VAHC is keen to partner with Government in this regard and notes that significant efforts were made by Government to engage with industry in the implementation phase of the AHA. The time seems right to revive these efforts alongside the review of the AHA and in doing so, to target industries such as the mineral exploration industry where it appears that understanding of the AHA, and of Aboriginal cultural heritage generally, is low.

(g) Consideration of the costs and benefits of Greenfields minerals exploration (economic, social and environmental) and whether there are opportunities to improve the management of potential conflicts between exploration and other land uses

36. The VAHC is of the view that the AHA works best when RAPs have been appointed and are well resourced to meet their statutory obligations. Where this is not the case, either because no RAP is appointed or because RAPs are operating under strained circumstances, consultation with Traditional Owners can be more complex.

37. Resources and support for RAPs are provided through a mix of fees generated through involvement in cultural heritage activities, funding and capacity building support provided by Government. These matters will be addressed in the VAHC's submission to the review of the AHA and the Parliamentary Inquiry to be
undertaken by the Environment and Natural Resources Committee into the establishment and effectiveness of RAPs.\textsuperscript{17}

38. The VAHC will continue to move as quickly as possible to make decisions in respect of applications from Aboriginal groups seeking to be RAPs. However, it must balance its duty to act in a timely manner with its duty to make fair decisions. To fulfil these duties, the VAHC will continue to act with due diligence to establish RAPs in accordance with the AHA and the VAHC's principles, as well as developing measures that address barriers currently preventing the establishment of RAPs.

\textsuperscript{17} The Parliamentary Inquiry report is scheduled to be tabled by 30 September 2012. For the terms of reference and further information about the Inquiry, see http://www.parliament.vic.gov.au/enrc/article/1420