INQUIRY INTO THE ESTABLISHEMENT AND EFFECTIVENESS OF ABORIGINAL PARTIES

Native Title Services Victoria (NTSV) welcomes the opportunity to provide a submission to the above Inquiry. This submission draws on our recent submission to the Review of the Aboriginal Heritage Act 2006.

For Victorian Traditional Owners, culture and connection to country are inextricably linked. NTSV recognises the primacy of Traditional Owners’ rights under traditional law and custom to manage and protect cultural heritage that relates to their traditional country. To adequately reflect this relationship, a key principle of the attached submission is that the legislative mandate for giving control over cultural heritage decisions to Traditional Owners needs to be maintained and strengthened. In particular, Victoria needs a legislative mandate for appointing Traditional Owner entities as Registered Aboriginal Parties (RAPs).

Further key principles underpinning NTSV’s submission are:

- that all participants in the cultural heritage management system should be appropriately resourced and accountable for their decision making.
- the standard of protection given to Aboriginal cultural heritage in Victoria, needs to be maintained and improved.
- Victoria needs overarching and harmonious policy between cultural heritage, native title and settlements under the Traditional Owner Settlement Act 2010.

Thank you for the opportunity to provide input into the Committee’s deliberations and NTSV looks forward to participating in the next stage of the Inquiry.

Yours sincerely

Chris Marshall
CEO
Submission to the Parliamentary Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties

Native Title Services (Victoria) Ltd (‘NTSV’) welcomes the opportunity to respond to the Parliamentary Inquiry into the establishment and effectiveness of Registered Aboriginal Parties. NTSV is a corporation carrying out the functions of a Native Title Service Provider under the Native Title Act 1993 (Cth) (‘NTA’) for the State of Victoria. It is also the legal representative of many native title claimants throughout Victoria in Federal Court proceedings under the NTA and in negotiations under the Traditional Owner Settlement Act 2010 (Vic) (‘TOSA’).

This submission is provided on behalf of NTSV rather than any native title claimants it represents or Victorian Traditional Owners in general. A separate submission has been prepared on behalf of the Victorian Traditional Owner Land Justice Group (‘VTOLJG’).

Introduction

For Victorian Traditional Owners, culture and connection to country are inextricably linked. NTSV recognises the primacy of Traditional Owners’ rights under traditional law and custom to manage and protect cultural heritage that relates to their traditional country. To adequately reflect this relationship, a key principle of this submission is that the legislative mandate for giving control over cultural heritage decisions to Traditional Owners needs to be maintained and strengthened. In particular, Victoria needs a legislative mandate for appointing Traditional Owner entities as Registered Aboriginal Parties (RAPs).

The protection and management of cultural heritage is also seen by Victorian Traditional Owners as an important aspect of the settlement of native title claims across the State.

This submission is underpinned by the following core principles:

- Traditional Owners are the only appropriate people to manage and protect cultural heritage.
- It is essential that the whole state of Victoria is covered by RAPs to ensure comprehensive protection of Aboriginal cultural heritage. Expeditious resolution of RAP appointments must be a priority.
- All participants in the cultural heritage management system should be appropriately resourced and accountable for their decision making.
- The standard of protection given to Aboriginal cultural heritage in Victoria, needs to be maintained and improved.
- Victoria needs overarching and harmonious policy between cultural heritage, native title and settlements under the TOSA.
a) The importance of Victoria’s cultural heritage regime

‘The standard of protection given to Aboriginal cultural heritage in Victoria, needs to be maintained and improved’

Victoria’s cultural heritage regime has provided an important means by which Traditional Owners in Victoria are able to exercise some degree of control over third party activity on their traditional lands.

The Aboriginal Heritage Act 2006 (Vic) (‘AHA’) repealed the Archaeological and Aboriginal Relics Preservation Act 1972 (Vic) and replaced the provisions of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) specific to Victoria. The former Act was entirely inadequate because of its exclusion of Aboriginal people from any aspect of administration and its inadequate protection of Aboriginal cultural heritage. The 1987 amendments to the latter Act established a specific heritage protection regime for Victoria. However, this Act was regarded as lacking because of its failure to give Traditional Owners primacy in the administration of the Act. The AHA has provided the first opportunity for Victorian Traditional Owners to be properly involved in heritage protection.

The management and protection of cultural heritage is of vital importance to Traditional Owners in Victoria because it has the potential to:

- Restore some measure of Traditional Owner control over land in Victoria;
- Affirm cultural identity;
- Vindicate the human rights of Traditional Owners to protect and enhance their culture;
- Provide a livelihood via cultural tourism and cultural resource management;
- Generate appreciation and respect from the wider community;
- Forge successful partnerships between government and non-government stakeholders and Victorian Traditional Owners; and
- Unite the Victorian community in the common goal of protecting Aboriginal heritage.

b) According respect and status to Victoria’s Traditional Owners

‘Traditional Owners are the only appropriate people to manage and protect cultural heritage’

Current situation

1. The policies and practices of the Victorian Aboriginal Heritage Council (‘VAHC’) have clearly favoured Traditional Owners, but with an arguably insufficient legislative basis to support or encourage this in the AHA.

2. Whilst the current VAHC has generally operated so that only Traditional Owner corporations are appointed as RAPs, this is as much a function of the policies adopted by the VAHC and how its members have defined their role, as it is a function of the current legislation.

3. It is possible to find support in the AHA for recognising Traditional Owners as the primary managers and custodians of Aboriginal cultural heritage, but the AHA does not set this out as clearly as it could.

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1 Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987 (Cth). This Act inserted part 2A into the principal Act. Part 2A was repealed by the Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 2006 (Cth) on the same day as the AHA came into operation: 28 May 2007.
4. Sections 3(a)-(c) provide that the AHA’s objectives include:
   
a) to recognise, protect and conserve Aboriginal cultural heritage in Victoria in ways that are based on respect for Aboriginal knowledge and cultural and traditional practices;
   
b) to recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;
   
c) to accord appropriate status to Aboriginal people with traditional or familial links with Aboriginal cultural heritage in protecting that heritage;
   
5. However, NTSV believes that the AHA’s objects fail to distinguish between Traditional Owners and Aboriginal people in general, thereby failing to explicitly express the right of Traditional Owners to control and manage their cultural heritage.
   
6. The definition of ‘cultural heritage significance’, which includes ‘significance in accordance with Aboriginal tradition’, further suggests that the appropriate people to make decisions about the cultural heritage significance of a particular area are the Traditional Owners.

Support for Traditional Owners as the primary protectors of Aboriginal cultural heritage

7. Traditional Owner groups have the fundamental right to ‘maintain, control, protect and develop’ their Country and the cultural heritage of their Country. This includes areas, places, objects, and culture. Support for this right can be drawn from a number of sources.

8. This right is recognised at international law in instruments such as the International Covenant on Civil and Political Rights (‘ICCPR’), the International Covenant on Economic Social and Cultural Rights (‘ICESCR’) and the United Nations General Assembly Declaration on the Rights of Indigenous Peoples (‘DRIP’).

9. The most fundamental protection for the cultural rights of Indigenous peoples comes in the form of Article 27 of the ICCPR which provides that:

   ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’

10. Further, Article 31 of the DRIP provides that:

   1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual

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2 AHA s 4.
4 1999 UNTS 171 (entered into force 23 March 1976). See Arts 1 and 27 ICCPR.
5 1993 UNTS 3 (entered into force 3 January 1976). See Arts 1 and 15,
property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

11. The International Council on Monuments and Sites (ICOMOS) is a non-government professional organisation primarily concerned with the philosophy, terminology, methodology and techniques of cultural heritage conservation. It is closely linked to UNESCO, particularly in its role under the World Heritage Convention 1972 as UNESCO’s principal adviser on cultural matters related to World Heritage. According to Article 12 of the Australian ICOMOS’ 1991 Burra Charter:

‘Conservation, interpretation and management of a place should provide for the participation of people for whom the place has special associations and meanings, or who have social, spiritual or other cultural responsibilities for that place.’

12. Support for Traditional Owners as the primary custodians of cultural heritage is also found in the Native Title Act 1993 (Cth) (‘NTA’). Native title rights invariably include a dimension of custodianship for cultural heritage.

13. For example, native title determinations in Victoria have recognised the importance of cultural heritage protection. The Gunditjimara native title consent determination recognises the rights of the native title holders to protect places and areas of importance in accordance with their traditional laws and customs. The Gunaikurnai native title consent determination recognises, amongst other things, the rights of the native title holders ‘to protect and maintain places and areas on the land and waters which are of importance according to Gunai/Kurnai traditional laws and customs.’

14. The TOSA recognises Traditional Owners in Victoria. The purposes of the Act include to ‘recognise traditional owner groups based on their traditional and cultural associations to certain land in Victoria’

15. The Charter of Human Rights and Responsibilities Act 2006 (Vic) provides that Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community, to enjoy their identity and culture. This is significant because the identity and culture of Traditional Owners are closely connected to their Country and their right and responsibility to protect that Country. The Charter also recognises the rights of Victoria’s Aboriginal peoples 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.

c) Achieving consistency between cultural heritage, native title and TOSA processes

‘Victoria needs overarching and harmonious policy between cultural heritage, native title and settlements under the TOSA’

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7 Lovett on behalf of the Gunditjmara People v State of Victoria [2007] FCA 474
10 Ibid. s 19(2)(c).
There is currently a lack of clear State Government policy in relation governmental dealings with Traditional Owners in land and cultural heritage issues, and how cultural heritage is expected to work alongside native title and TOSA processes.

A government policy that acknowledges the importance of Aboriginal concepts of land and culture would seek to harmonise these processes and outcomes so as to offer a holistic approach to land and cultural heritage that is in line with the Aboriginal view of these concepts as being indivisible.

There is a need for a policy statement from the current government that reflects the government’s commitment to the protection of Aboriginal cultural heritage in Victoria and an acknowledgement that such protection is in the hands of the relevant Traditional Owners. Such a statement would empower the government to give effect to Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples (DRIP) which provides that:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Recommendation:
NTSV submits that the State Government should adopt and publicly support a clear policy about Traditional Owners, their land and cultural heritage issues that:
- acknowledges the importance of Aboriginal concepts of land and culture
- reflects the government’s commitment to the protection of Aboriginal cultural heritage in Victoria, and
- acknowledges that such protection is in the hands of the relevant Traditional Owners.

A. VAHC policies in relation to the appointment of RAPs

‘It is essential that the whole state of Victoria is covered by RAPs to ensure comprehensive protection of Aboriginal cultural heritage. Expeditious resolution of RAP appointments must be a priority.’

RAP appointment criteria must be more focussed on Traditional Owners

Amendments to the Aboriginal Heritage Act are necessary to empower the VAHC to have, as its priority consideration, the Traditional Owner status of the applicant group.

There is currently no definition of ‘Traditional Owner’ in the AHA.

NTSV submits that such a definition is necessary in order to provide clearer guidelines for meaningful identification of both Traditional Owners and Traditional Owner group entities.
This needs to be a broad based definition that is supported by a policy that the Secretary will refer to the VAHC for a determination when there is uncertainty surrounding the status of a group as Traditional Owners. Section 7 of the AHA should be amended to be confined to ‘traditional links’ and relate only to entitlement under Aboriginal tradition.

23. The AHA provides clear direction on what an application for registration as a Registered Aboriginal Party must include. Section 150 (1)(c) states that the application must include a statement from the applicant outlining the nature of-

i. the relationship or links of the applicant to the area for which the application is made; or

ii. the applicant’s historical or contemporary interest in Aboriginal cultural heritage relating to the area and expertise in managing and protecting Aboriginal cultural heritage in that area.

24. The AHA provides a list of factors that must be considered by the Council when determining an application for registration as a RAP (s 151(3)). Included in this criteria is:

(d)(i) ‘a body representing Aboriginal people that has a historical or contemporary interest in the Aboriginal cultural heritage relating to the area to which the application relates’.

25. In order to ensure Traditional Owner involvement in cultural heritage, the considerations in s 151(3) need to acknowledge that it is the involvement of Traditional Owners that is the main consideration in determining an application for registration. As s151(3)(d)(i) indicates, these factors are currently broad enough to include organisations that do not represent Traditional Owners.

26. Recommendation:

NTSV submits that a clear definition of ‘Traditional Owner’ be inserted into the AHA.

27. Recommendation:

Section 7 of the AHA should be amended to be confined to ‘traditional links’ and relate only to entitlement under Aboriginal tradition.

28. Recommendation:

NTSV submits that s 150(1)(c) should be confined to a statement outlining the applicant’s traditional links to the area and s 150(1)(c)(ii) be deleted as it is broad enough to include applicants who are not representative of Traditional Owners.

29. Recommendation:

NTSV submits that s 151(3) should be amended to privilege the criterion of an applicant’s Traditional Owners status over the RAP area. The following amendments can be adopted to achieve this:
- s 151(3)(c) should be amended to delete the words ‘or familial’. That an applicant is a Traditional Owner group entity should be sufficient for registration as a RAP.
- s 151(3)(d) should be repealed as it is inconsistent with the recognition of Traditional Owners as the only group responsible for protecting Aboriginal cultural heritage for an area.
**Determination of application for registration – standard of satisfaction**

30. NTSV submits that the underlying objectives of Victoria’s cultural heritage regime should be firstly, to ensure Traditional Owner involvement in all dealings with cultural heritage and secondly, to develop processes that result in the expedient registration of RAPs over the entirety of Victoria. Expedient registration of RAPs is necessary to ensure Aboriginal cultural heritage is being comprehensively protected.

31. The practices that are currently being adopted by the VAHC in considering applications for registration resemble a quasi-native title approach to proving connection under s 223(1) of the NTA. This is too high a standard and conflicts with the object of expedient registration.

32. NTSV submits that the standard that should be adopted by VAHC in considering traditional links and ownership and the considerations in s 151(3) should be no more than a standard of ‘reasonable satisfaction’. NTSV submits that it is more important to ensure that proper processes are taken in registering a RAP rather than ensuring that traditional ownership has been proved to a native title standard.

33. In adopting this approach it is also submitted that the Act be amended to allow for VAHC review of RAPs where new evidence arises that questions the Traditional Owner status of the RAP group or where an alternate group claims traditional ownership over the land and this claim is supported by substantial evidence.

34. **Recommendation:**

   **Section 151 AHA should be amended to insert a specific standard of ‘reasonable satisfaction’ for the determination of RAP applications. This standard should encourage the VAHC to more readily appoint RAPs on the basis of reasonably available (as opposed to comprehensively researched) evidence. The proposal below for RAP boundary variation should give confidence that, as better information comes to hand, RAP boundaries can be varied within limits.**

**Automatic appointment of registered native title holders as RAPs**

35. If an applicant for RAP registration is a registered native title holder for an area in respect of which a determination that native title exists has been made, the VAHC must register that applicant as the RAP for that area (s 151(2)(a) AHA). In such circumstances, the VAHC has no discretion to not appoint a registered native title holder; s 151(2)(b) provides that no other applicant can be registered in respect of that area.

36. However, the way in which s 151(2) is drafted suggests that a registered native title holder must be appointed only over the areas subject to a positive determination of native title. This is problematic because laws relating to the extinguishment of native title mean that the area in which native title actually exists may be an arbitrary network of lands rather than a convenient block of country. It is unlikely to be the whole of the country of a native title claim. It would, for instance, exclude freehold, residential leasehold and areas covered by public works.
37. **Recommendation:**

The AHA should be amended to ensure that the area to be covered by the RAP is the whole area of the land and waters within the external boundaries of the native title determination, regardless of whether native title exists or not.

**Appointment of more than one registered native title holder RAP over a single area**

38. As the recent Gunditjmara and Eastern Maar consent determination indicates, two registered native title bodies corporate may be determined to hold native title with respect to a single determination area, making each of the two bodies corporate a ‘registered native title holder’ for the purposes of the AHA.

39. In response to the Eastern Maar Aboriginal Corporation application to be registered as a RAP for the area, the VAHC has requested that Eastern Maar Aboriginal Corporation provide the Council with information about collaboration between Eastern Maar and Gunditjmara. Without commenting on the actual case, this query sheds light on the operation of the AHA where two native title corporations flow from one native title determination application.

40. **Recommendation:**

In order for the VAHC to be able to respond flexibly to such a situation, s 151(2) AHA should be amended to explicitly provide that, where there are two or more registered native title holders that have made valid applications to be appointed as RAPs in a particular area, each must be appointed as RAPs for that part of the determination area for which the native title corporation operates. If the determination has discrete boundaries for each corporation, this would be reflected in RAP boundaries. If the determination has overlapping native title rights, this too should be reflected in the RAP boundaries.

**Appointment of TOSA Traditional Owner corporations as RAPS**

41. If an applicant for RAP registration is a Traditional Owner group who has entered into a TOSA agreement for the area, the VAHC must register the applicant as the RAP for that area (s 151(2A) AHA). NTSV supports the retention of this provision.

**Alignment with native title and TOSA**

42. Currently, registered native title body corporates (‘RNTBC’s) and TOSA corporations must be appointed RAPs upon application. This procedure for aligning the AHA with native title and TOSA outcomes should be maintained. However, three issues must be addressed in order to ensure that the process for appointing RAPS is consistent with native title and TOSA processes and outcomes.

**Time period for determining applications**

43. The VAHC must determine an application for registration as a RAP within 120 days after receiving the application (s 151(1) AHA). However, in practice the VAHC has not been complying with this time stipulation.

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11 Lovett on behalf of the Gunditjmara People v State of Victoria (No 5) [2011] FCA 93

12 See definition of ‘Registered Native Title Holder’ in s.3, AHA.
Recommendation:
NTSV submits that the VAHC be empowered to extend the time period in which a decision for application can be made. NTSV recommends that the AHA be amended to provide the following criteria for extending the time period:
- To avoid interference with NTA/TOSA processes
- Following a request from a native title claim group
- Following a request from a native title party (as defined by NTA)
- Where a current mediation, such as Right People for Country, is underway

RAP applicants with no native title claim

45. At present the Act does not require RAP applicants to have made a native title determination application, although the VAHC does have regard to the status of native title determination applications in its deliberations. Given the potential for substantial variations between claims as made and their final disposition, it would be a concern if the VAHC drew adverse conclusions from a RAP applicant’s failure to make a claim or the configuration of an unfinalised claim.

Recommendation:
Criteria for appointment of a RAP should expressly preclude the VAHC from drawing adverse conclusions from a RAP applicant’s failure to make a claim or the configuration of an unfinalised claim.

Allow for temporary appointment & review of appointment

47. Currently, decisions to appoint a RAP are final, in the sense that suspension or revocation of registration under AHA s 156 is the only means to vary the boundaries of a RAP.

48. NTSV submits that the VAHC be empowered to temporarily appoint a body or a person as a RAP when there is a native title process or TOSA agreement negotiation on foot. An amendment to the AHA along these lines would promote increased harmony between the NTA, TOSA and AHA processes and ultimately further the AHA objective of ensuring Traditional Owners are controlling cultural heritage protection.

49. In terms of NTA processes, the VAHC could be empowered to appoint a registered native title claimant as the temporary RAP for the claim area. This would be analogous with the right to negotiate that arises upon registration of a claim under the NTA.

50. In terms of TOSA processes, the VAHC could be empowered to appoint a Traditional Owner group as the temporary RAP for the area where a Threshold Statement has been accepted by the State Government and TOSA agreement negotiations are on foot.

Recommendation:
NTSV submits that the AHA should be amended to provide the VAHC with the power to temporarily appoint a body or a person as a RAP when there is a native title process or TOSA agreement negotiation on foot.
52. **Recommendation:**
Temporary appointment would require an amendment to s 150(3) to provide that: ‘Except in the case of an application for temporary registration, a registered Aboriginal party must be a body corporate.’

53. **Recommendation:**
Further, or alternatively, the AHA should be amended to allow for the appointment of RAPs to be reviewed by VAHC.

54. **Recommendation:**
The AHA should be amended to permit the minor variation of RAP boundaries as better information comes to hand after the initial appointment of a RAP.

**Provision of reasons for RAP decisions**

55. The VAHC is not currently required by the AHA to provide reasons for a decision to accept or deny a body’s RAP application. However it is noted that although not required by the AHA, the VAHC does provide a statement of reasons with its decision. The AHA does not provide any right for a body which has applied to be a RAP to request the reasons for the decision of the VAHC to refuse its RAP application.

56. A lack of a right of review, and the absence of a requirement for the VAHC to provide reasons, may allow decisions to not recognise organisations as RAPs to become arbitrary.

57. **Recommendation:**
NTSV submits that the AHA should be amended to require the VAHC to provide reasons for its decisions to deny a RAP application.

**B. Effectiveness of support available to the Council**

“All participants in the cultural heritage management system should be appropriately resourced and accountable for their decision making.”

(i) **Membership and structure of the Council**

**Traditional Owners should be appointed to the VAHC**

58. While the current members of VAHC are Traditional Owners, this is a result of AAV ministerial decision making rather than any specific provision in the AHA.

59. Section 131(3) AHA states that ... Each member of the Council must be an Aboriginal person who— (a) has, and can demonstrate, traditional or familial links to an area in Victoria; and (b) is resident in Victoria; and (c) in the opinion of the Minister, has relevant experience or knowledge of Aboriginal cultural heritage in Victoria.
60. **Recommendation:**
In keeping with the principle that Traditional Owners are the only appropriate people to manage and protect cultural heritage, NTSV submits that VAHC members must be Traditional Owners. The words ‘or familial’ need to be removed from s 131(3)(a) AHA.

(ii) **Council’s capacity to inquire**

61. In order for RAP applications to succeed there needs to be greater consultation between VAHC and RAP applicants. This would involve meetings, conferences and hearings between Traditional Owner groups and VAHC. This will not be possible unless there is a greater allocation of resources to both VAHC and Traditional Owner Corporations.

62. **Recommendation:**
NTSV submits that there needs to be greater allocation of resources to VAHC in order to enable consultation between VAHC and RAP applicants concerning the application process.

C. **Effectiveness of the established Registered Aboriginal Parties**

63. In areas where RAPs have been appointed, Traditional Owners have been able to provide a greater level of protection to cultural heritage. RAPs provide Traditional Owners with increased opportunities to participate in decision making over their traditional lands and strengthened capacity to protect and manage their cultural heritage.

**Resourcing for RAP applicants**

64. There is currently a lack of funding for assistance to Traditional Owner groups in making RAP applications. NTSV submits that there needs to be an avenue for Traditional Owner groups seeking to incorporate for the purpose of making a RAP application to seek funding from Aboriginal Affairs Victoria (‘AAV’) in order to assist in this process. This will require an increase in resource allocation to AAV.

**Adequate resourcing for RAPs and Traditional Owner Corporations**

65. The biggest restriction on RAP effectiveness is insufficient funding allocated to RAPs. Greater resourcing of RAPs and RAP applicants is needed in order to ensure that Traditional Owners and RAPs are able to effectively protect Aboriginal cultural heritage. The provision of adequate resources to enable Traditional Owners to protect cultural heritage promotes recognition of the importance of Aboriginal cultural heritage for all Victorians.

66. While there is a small budget provided to RAPs to assist in the initial start-up costs of the organisation, it is then expected that RAPs will generate income through the provision of consultation services. This fails to note the reality that not all RAP areas are areas of high development and therefore there are insufficient means for RAPs to generate income. The consequence of this being that RAPs are under resourced, underfunded and unable to adequately protect cultural heritage.

67. NTSV submits that there be a minimum standard of RAP funding regardless of the amount of development in the RAP area. A minimum standard would recognise that protection of
cultural heritage should not be dependent on development as this dependency contradicts the objects of the AHA.

68. NTSV submits that a legislative mandate be inserted into the AHA allowing RAPs to charge fees for services related to cultural heritage protection. This will ensure that RAPs are able to generate income from the provision of services in relation to cultural heritage.

69. Currently, 44% of the State is not covered by RAPs. While greater funding for RAPs is needed, this figure shows that there is also a large portion of the cultural heritage in Victoria that is not being protected. In order for Traditional Owners to protect such areas, funding needs to be allocated to Traditional Owner corporations for the purpose of cultural heritage maintenance and protection. The allocation of such funding will give effect to section 3(a) of the AHA and will promote recognition of Traditional Owners as the appropriate people to manage and protect cultural heritage.

70. **Recommendation:**

NTSV submits that there be a minimum standard of RAP funding regardless of the amount of development in the RAP area.

71. **Recommendation**

NTSV submits that a legislative mandate be inserted into the AHA allowing RAPs to charge fees for services related to cultural heritage protection.

### Duty to Consult

**Duty to consult with Traditional Owners**

72. The functions and duties of RAPs should be amended to include a duty to consult with Traditional Owners for an area. Obviously, placing this duty on RAPs would require a sufficient allocation of resources to enable RAPS to comply with this duty.

73. Regulation 8 of the Native Title (Prescribed Bodies Corporate) Regulations 1999 may provide guidance on how this duty to consult might be drafted.

8 **Consultation with, and consent of, common law holders**

(2) A prescribed body corporate acting as trustee for, or agent or representative of, common law holders of native title rights and interests must consult with, and obtain the consent of, the common law holders in accordance with this regulation before making a native title decision.

(3) The prescribed body corporate must ensure that the common law holders understand the purpose and nature of a proposed native title decision by:

(a) consulting, and considering the views of, a representative body for the area that includes the land or waters to which the proposed decision relates; and

(b) if the prescribed body corporate considers it to be appropriate and practicable — giving notice of those views to the common law holders.
(4) If there is a particular process of decision-making that, under the Aboriginal or Torres Strait Islander traditional laws and customs of the common law holders, must be followed in relation to the giving of the consent mentioned in subregulation (2), the consent must be given in accordance with that process.

(5) If subregulation (4) does not apply, the consent must be given by the common law holders in accordance with the process of decision-making agreed to, or adopted, by them for the proposed native title decision, or for decisions of the same kind as that decision.

(6) If the prescribed body corporate acts as trustee for, or agent or representative of, more than 1 group of common law holders, the body corporate must consult with, and obtain the consent of, only those groups of common law holders whose native title rights or interests would be affected by the proposed native title decision.

(7) An agreement that gives effect to a native title decision of a prescribed body corporate has no effect to the extent that it applies to the decision, if the body corporate does not comply with this regulation.

74. Under the Queensland Aboriginal Cultural Heritage Act 2003 the ‘extent’ and ‘results’ of consultation with Traditional Owners and other Aboriginal parties are key aspects of fulfilling a ‘cultural heritage duty of care’ (s.23). This provision may also provide a useful guide for the wording of the obligation to consult.

75. **Recommendation:**

   The functions and duties of RAPs under s 148 AHA should be amended to include a duty to consult with Traditional Owners for an area.

**Victorian Aboriginal people who are not Traditional Owners**

76. Victorian Aboriginal people who are not Traditional Owners often have familial or historical connections with cultural heritage. While NTSV submits that the AHA needs to be clear that Traditional Owners are responsible for the management and protection of their cultural heritage, it is our strong perception that Traditional Owner groups across the state are not unwilling to consult with, and at times include members of the broader Victorian Aboriginal community in cultural heritage management matters.

**Strengthening cultural heritage protection**

77. Victoria’s cultural heritage regime in practice, appears to prioritise development over cultural heritage protection. This is despite a clear objective in the AHA to preserve and protect Aboriginal cultural heritage.

78. The introduction of a hierarchy of protection into the AHA would require any cultural heritage management decision made under the AHA to document and justify why a higher principle is not possible.

79. **Recommendation:**

   NTSV supports the creation of a hierarchy of protection efforts. The hierarchy would be as follows:
   
   (a) Protection, prevention of damage and avoidance;
   
   (b) in-site preservation;
   
   (c) salvage;
   
   (d) damage or destruction.
Strengthening RAP involvement in cultural heritage protection

80. NTSV is concerned that various State agencies have interpreted the AHA to restrict RAP involvement in cultural heritage protection contrary to the objectives and provisions of the AHA.

81. AAV has produced a range of interpretive material about CHMPs which puts forward a narrow interpretation of various provisions of the AHA, the content of CHMPs and the role of RAPs that is not found in the AHA itself.

82. For instance, section 61(c) of the AHA provides that among the matters to be considered in assessing whether a CHMP relating to an activity is to be approved are ‘any specific measures required for the management of Aboriginal cultural heritage likely to be affected by the activity, both during and after the activity’. It is common practice for native title claimant groups to require cultural heritage site workers to be present during activities likely to uncover Aboriginal cultural heritage so that the cultural heritage can be identified and dealt with in a culturally appropriate manner (a practice sometimes referred to as ‘monitoring’). However, AAV in its Guide to preparing a Cultural Heritage Management Plan states that ‘[t]he monitoring of construction work, as has previously been practised, is an activity that has little or no cultural heritage management … and does not adequately address the requirement of section 61(c)’. AAV’s assertion that monitoring is of little value in protecting cultural heritage protection is contrary to the practice, priorities and experience of native title groups, many of whom have now been recognised as RAPs. This experience and practice needs to be expressly protected in the AHA.

83. **Recommendation:**

To ensure that RAP involvement in cultural heritage protection is not restricted contrary to the objects and provisions of the AHA, NTSV submits that section 61(c) AHA be amended to insert the words ‘including monitoring’ after the words ‘any specific measure’ in order to reflect the importance of monitoring to the protection of Aboriginal cultural heritage.

Protecting RAP decisions regarding CHMPs

84. One function of RAPs is to consider and advise on applications for cultural heritage permits (s 148 AHA). It is important that RAP decisions are respected and protected. Section 61 of the AHA sets out the matters to be considered when assessing whether a CHMP is to be approved:

(a) whether the activity will be conducted in a way that avoids harm to Aboriginal cultural heritage;
(b) if it does not appear to be possible to conduct the activity in a way that avoids harm to Aboriginal cultural heritage, whether the activity will be conducted in a way that minimises harm to Aboriginal cultural heritage;
(c) any specific measures required for the management of Aboriginal cultural heritage likely to be affected by the activity, both during and after the activity;
(d) any contingency plans required in relation to disputes, delays and other obstacles that may affect the conduct of the activity;
(e) requirements relating to the custody and management of Aboriginal cultural heritage during the course of the activity.

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These criteria are important as they effectively limit the range of matters the RAP can take into consideration when deciding whether to approve a CHMP. Under s 63(4) a RAP can only refuse to approve a CHMP if they are ‘not satisfied that the plan adequately addresses the matters’ listed above. Furthermore, if a RAP decides not to approve a CHMP and it is appealed to VCAT, then VCAT is also required to consider these criteria in reaching its decision.

It is important to recognise, therefore, that these criteria do not recognise the possibility that a RAP may decide not to approve a CHMP due to the fact that the Aboriginal cultural heritage threatened by the activity is so significant that the activity should not be permitted to take place at all. The fact that this possibility is not accounted for in these criteria undermines the objectives of the AHA to ‘recognise, protect and conserve Aboriginal cultural heritage’ (s 3(a)).

Recommendation:

NTSV supports the introduction of a criterion to allow RAPs to disapprove of a CHMP if it threatens a significant site of Aboriginal cultural heritage. This in turn would allow VCAT to take this criterion into account in an appeal decision.

Funding of RAPs for CHMP appeals process

It is crucial that RAPs receive adequate funding in order to participate fully in any appeals or reviews of their decisions that occur. This is necessary for them to fulfil their role in protecting Aboriginal cultural heritage. While the AHA currently states that one of the roles of the VAHC is to advise the Secretary on appropriate guidelines for payment of fees to RAPs for undertaking any of the activities outlined in s 60, it is unclear as to whether this extends to funding for the appeals process.

Under the AHA either party is able to refer a dispute over a CHMP to the Chairperson of the Council for alternative dispute resolution. Section 114 states that the costs for this process are to be paid in either the proportions that the parties decide between themselves, or in equal shares. Furthermore, if the dispute comes before VCAT, the RAP will be a party (s 117(1) AHA). This will expose the RAP to its own costs of participating in the appeals process and also to potential liability for costs orders made against them.14

Recommendation:

NTSV submits that a provision should be inserted into the AHA guaranteeing adequate funding for RAPs to participate fairly in any appeals processes.

Enforcement

RAPs are currently severely limited in their ability to enforce compliance and address breaches of cultural heritage protection. NTSV submits that RAPs require greater enforcement powers to assist in the adequate protection of cultural heritage.

There has not been a single case prosecuted under the offence provisions of the AHA, indicating a lack of public enforcement policy within AAV. While Part 11 of the AHA deals

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14 Victorian Civil and Administrative Tribunal Act 1998, s 109(2).
with enforcement of the Act, it appears that there has been inadequate utilisation of these powers by AAV.

93. **Recommendation:**
NTSV submits that there needs to be the creation of a distinct unit within AAV separately responsible for enforcement and prosecution of breaches of the AHA.

94. **Recommendation:**
NTSV submits that adequate resources be provided to AAV in order to ensure that the enforcement provisions of the AHA are given full effect. Further, NTSV submits that the Victorian Government establish a prosecution policy for the AHA which includes a statement that prosecution of offences under the AHA is a priority for the AAV.

**Stop Orders**

95. Stop orders can be issued by the Minister or an inspector if the Minister or inspector is satisfied that the carrying out of an activity may harm or is harming cultural heritage and cultural heritage could not properly be protected without issuing a stop order (Division 2 of Part 6 of the AHA).

96. In theory Division 2 protects harm to cultural heritage. However, in practice this power has not been effectively utilised by inspectors – with those inspectors being employed by AAV.

97. To provide greater enforcement powers to RAPs and greatly assist in the adequate protection of cultural heritage, appropriately trained members of RAPs could be appointed as enforcement officers with the power to issue stop orders.

98. **Recommendation:**
NTSV submits that appropriately trained members of RAPs should be eligible to be appointed as enforcement officers, with the power to issue stop orders. This power could be limited to a power to issue temporary stop orders.

**Contact for this submission:**

Jill Webb  
Policy Officer  
Native Title Services Victoria  
Ph: 9321 5319  
jwebb@ntsv.com.au