Victorian Traditional Owner Land Justice Group

SUBMISSION on the review of the *Aboriginal Heritage Act 2006* (Vic)

1. Introduction

The Victorian Traditional Owner Land Justice Group (the VTOLJG) is an initiative of traditional owners to develop a statewide body to promote the rights and interests of traditional owners. This submission represents the VTOLJG members' initial comments relating to the *Aboriginal Heritage Act 2006* (Vic) (AHA), with the expectation that this stage of the review represents the preliminary stage of an in-depth, objective review of the AHA that will thoroughly incorporate traditional owners' views and experiences.

The AHA is core business for traditional owners. The preservation and protection of Aboriginal cultural heritage is vital in order to protect our living culture, traditions and beliefs.

Our culture dictates that traditional owners are the custodians of cultural heritage in our traditional country and that we – as traditional owners – have sole responsibility for its preservation and protection. The VTOLJG is concerned that the Government understand that this responsibility falls uniquely upon us.

We want the Government to recognise that in managing and protecting Aboriginal cultural heritage within Victoria, we are providing an essential public service for all Victorians. If we are not adequately resourced and supported to conduct this core business as traditional owners, important heritage will be lost not only to us as traditional owners, but to all Victorians.

In the 2006 VTOLJG submission to the former Government on the *Aboriginal Heritage Bill 2006* (Vic), we noted that the legislation would fail if it did not accord proper status to traditional owners and our rights, and if it did not provide proper processes for the benefit of all parties. These concerns were not adequately addressed in the AHA and – as anticipated – there is currently significant uncertainty among and division between Aboriginal groups throughout Victoria.

At present, the only certainty under the current legislation appears to be that significant Aboriginal cultural heritage in Victoria is being lost. Serious problems have arisen largely due to the former Government providing insufficient time and resources for a proper consultation process and failing to introduce:

(i) strong and effective provisions for traditional owner recognition;
(ii) a well-resourced traditional-owner-controlled and deliberative Registered Aboriginal Party (RAP) appointment process; and
(iii) strong enforcement provisions that draw on the experience of other jurisdictions.

This review presents the current Government with an important opportunity to rectify the deficiencies in the AHA and resolve the outstanding issues relating to Aboriginal cultural heritage that have arisen in Victoria since the AHA came into effect.

The *Aboriginal Heritage Act 2006* (Vic)

The VTOLJG recognises that there have been some positive developments brought about as a result of the introduction of the AHA. However, there are many problems with the current legislation and its implementation.

The following issues are of particular concern to VTOLJG:

- the inherent conflict in Aboriginal Affairs Victoria's (AAV) role in both implementing and enforcing the AHA
- the process for determining membership of, and decision-making by, the Victorian Aboriginal Heritage Council (VAHC)
- AAV's lack of consultation with traditional owners and failure to support traditional owners in protecting, managing and preserving their cultural heritage in Victoria, particularly in areas where there are no RAPs
- the priority given to development in favour of the protection and preservation of cultural heritage in certain sections of the AHA
- the expensive, complex and ineffective cultural heritage management processes embedded within the AHA
- AAV's lack of willpower to enforce the AHA.

Absence of Data

There is an absence of core data available to traditional owners to be able to evaluate the effect of the AHA on cultural heritage sites. To review the AHA effectively, it is essential that we have access to information that can demonstrate what is happening to our cultural heritage under the current legislation.

To assess the effectiveness of the AHA, the VTOLJG submits that the following data and/or information be made available to VTOLJG members and traditional owner groups:

- **the number of cultural heritage sites that were destroyed under the former legislative regime (Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth))**
- **the number of Cultural Heritage Management Plans (CHMPs) that have been approved since the AHA came into effect**
- **the number of sites that have been interfered with under CHMPs since the AHA came into effect**
- **the decision making processes of the Victorian Aboriginal Heritage Council (VAHC) as evidenced in the minutes of VAHC determinations relating to RAP applications**
- **the evidence available on how sponsors are consulting with traditional owners**
- **the results of any monitoring or audit of consultation with traditional owners under the AHA.**

Given the utmost importance of this data/information to an effective review of the AHA, we submit that this information be provided to the VTOLJG for consideration and analysis by the end of January 2012 to assist with the development of further submissions relating to the AHA.

2. Implementation and administration of the *Aboriginal Heritage Act*

Given the key role that AAV plays in both implementing and enforcing the AHA, the Government review must also encompass AAV's policies, procedures and practice in relation to the AHA, including the CHMP guidelines, consultation with RAP policies and the AHA enforcement and prosecution policy.

No separation between implementation and enforcement

There are significant failings in the current policy and procedural framework used to implement, administer and enforce the AHA. In particular, the VTOLJG is concerned that there is no distinction made between those responsible for administering and implementing the AHA, and those responsible for enforcing and prosecuting breaches of the AHA: currently AAV as a whole is responsible for both policy implementation and enforcement. This creates a situation akin to 'the police policing themselves'.

The VTOLJG is also concerned that AAV has been given responsibility for conducting the review of the AHA. This means that AAV is effectively responsible for reviewing its own performance under the AHA. The Government review process appears to lack the requisite objectivity and transparency needed in reviewing this legislation.

The VTOLJG calls upon the Government to separate the role of AAV in implementation and administration of the AHA, from the role of enforcement and prosecution of the AHA. At the very least, there needs to be a structural separation within AAV so that there is a distinct unit separately responsible for enforcement and prosecution of breaches of the AHA.

We also call upon the Government to engage an external, independent and objective reviewer to properly evaluate the AHA's effectiveness in protecting, preserving and managing Aboriginal cultural heritage in Victoria.

Acting as de facto RAP: AAV's failure to consult with traditional owners

In terms of implementation, we draw particular attention to AAV's failure to consult – or to direct others to consult – with traditional owners in relation to cultural heritage matters. AAV must not have the power to take control of our cultural heritage without traditional owners' consent and without taking our views into consideration to the fullest extent possible.

This is particularly important in areas where there are no RAPs in place. At present in these areas, all power goes to the Secretary under the AHA with the result that AAV is effectively operating as a RAP by default in these areas. This clearly should not be the case.

Even where there is no RAP appointed in an area, traditional owners must still be responsible for decisions relating to their cultural heritage. The fact that there is no RAP for any particular area is *not* a consequence of traditional owners no longer being able to speak for country. The fact that RAPs have not yet been appointed for almost half of Victoria is a failing of the processes embedded in the AHA; in particular, it is a consequence of the passive, low resource, low cost RAP appointment process set out under the AHA.

The VTOLJG calls upon the Government to amend the AHA to make it mandatory to consult with traditional owners in relation to cultural heritage matters and to take our views into consideration to the fullest extent possible, whether or not a RAP exists for an area.

In areas where there are no RAPs appointed, AAV should adopt and implement a policy of acknowledging the traditional owners as having responsibility for cultural heritage in those areas, and direct all government departments, sponsors and other relevant parties to engage and consult directly with the traditional owners of those areas on all cultural heritage matters.

In areas where there are no RAPs appointed, AAV should not have the function of an on-ground cultural heritage service or de facto RAP, and should not be funded as such. At most, AAV should be considered only as a RAP of *last resort* after all efforts have been made to contact and consult with traditional owners for the relevant area. Funding and resources must instead be directed to enabling and supporting traditional owners to provide these services.

The VTOLJG calls on the Government to provide adequate resources to traditional owners as well as to RAPs for effective consultation on cultural heritage matters. This is in recognition of the costs involved to traditional owners in managing and protecting our cultural heritage, but also of the public service being provided to all Victorians in protecting this heritage.

Finally, we request the Government speed up the RAP appointment process to ensure that the remaining 44% of Victoria is covered by RAPs. Without a speedy RAP appointment process, the AHA gives unjustified power to the Secretary in cultural heritage matters in areas where there are no RAPs.

3. Native title and cultural heritage

Indigenous culture regards cultural heritage, land management and native title processes as being intricately connected: these aspects of land and culture cannot be subdivided. Not only is it culturally appropriate, but it also makes good economic, legal and practical sense to have these issues dealt with on a holistic basis.

Native title and cultural heritage processes must be complementary

At present, the AHA is silent about native title issues unless and until there is a native title determination. All groups want efficient RAP and native title outcomes, but

native title claimants are frustrated because RAP and native title outcomes are fragmented. Whilst the native title and RAP processes should be complementary, in practice traditional owners are required to focus their efforts and resources on either one or the other. This means that rather than one facilitating the other, in reality one process is able to frustrate the other.

RAP applicants and native title applicants are particularly frustrated by the fact that information provided in relation to a RAP application cannot be accessed for a related native title claim, and vice versa. This means that there is an unnecessary duplication of effort in relation to the two processes. It also results in an artificial separation between native title and cultural heritage processes, which is antithesis to the reality of traditional Aboriginal cultural practice.

To provide greater status and recognition for registered native title claimants under section 151 of the AHA, the VTOLJG calls upon the Government to amend the AHA to ensure that a registered native title claimant can also be deemed a temporary RAP for that area. Registration as a RAP should also be automatic once a group is recognised as the traditional owner group for an area under the *Traditional Owner Settlement Act 2010* (Vic) (TOSA).

To reduce unnecessary duplication of efforts in the research and development of applications, we also submit that the Government introduce a provision to allow for the sharing of information between RAP and native title applications and processes.

Cultural heritage and native title to be harmonised within an overall State policy

To align native title and cultural heritage further, the Government needs to develop and implement a harmonised State policy with regards to the rights of traditional owners in land, including native title and cultural heritage matters. This would be a single Victorian Government policy in respect of traditional owners that recognises that cultural heritage is only one aspect of traditional owner rights. The development of such a policy would be consistent with Article 32(1) of the Declaration on the Rights of Indigenous Peoples (DRIP), which states that 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.

At present, there are no opportunities for traditional owner involvement in government decision-making regarding our traditional country: we have no voice. Ultimately, the VTOLJG want to see traditional owners recognised as custodians not just for cultural heritage, but for all purposes in their traditional lands. The Government should recognise traditional owners' decision-making role in land and resource management through the creation of a single body to promote traditional owner recognition of these matters, providing traditional owners with a focused voice.

The VTOLJG submits that section 3 of the AHA ('objectives') be amended to include an objective relating to the harmonisation and alignment of native title and RAP outcomes.

We also call upon the Government to undertake an extensive analysis of the TOSA and the AHA in order to develop and implement a single Victorian Government policy statement for traditional owners' rights in all aspects of land management, including cultural heritage management and protection, consistent with Art 32 of the DRIP.

As part of this harmonisation, there should be a single body established to promote recognition of traditional owners in respect of land and land management. Cultural heritage matters would be best dealt with by an alternative, traditional-owner-approved and controlled body set up to deal with native title, land justice, economic development and cultural heritage matters.

4. According respect and status to traditional owners

The AHA provides insufficient recognition of traditional owners as the sole custodians of cultural heritage in our traditional country.

Traditional owners are sole custodians of cultural heritage

One of the stated objectives under section 3(b) of the AHA is to 'recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage'. No distinction is made in the objectives of the AHA between the responsibilities of Aboriginal people generally, and traditional owners specifically, in relation to cultural heritage. The term 'primary' guardians also diminishes the rights traditional owners can be recognised as having over cultural heritage.

AHA equates historical/contemporary interests with traditional owner rights

Other sections of the AHA reinforce our view that traditional owners are not accorded appropriate respect and status as the sole custodians of cultural heritage. For example, under section 151(3)(d)(i) ('Determination of application for registration') in determining an application for registration as a RAP, the VAHC must consider whether the applicant is 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'.

Allowing parties with a historical or contemporary interest in Aboriginal cultural heritage to apply for registration as a RAP is disrespectful to traditional owners as the sole custodians of cultural heritage within our country. It has also had the effect of creating disharmony and division between traditional owners and local Aboriginal community groups who have been promoted under the AHA as having equal status with traditional owners as custodians of cultural heritage.

> *There are three different organisations putting in claims in our country, and they don't even belong there; they've knocked out [our group] all together. We tried to put in a RAP but got knocked back because other people put in a RAP application for*

> *our country. I created organisations to help with Aboriginal people, housing and other services, I helped set them up, not as traditional owners but as service providers, and then they've gone and put their own RAP in. […] So now we have four RAP applications in one area – I don't understand why the heritage system has let the other people put in their claims; within their research it should be recorded, all the paperwork should be recorded as to who are traditional owners of country.*[1]

This situation has arisen largely due to the defective consultative process in developing the AHA, whereby there was no special status provided to – and no specific consultation undertaken with – traditional owners. As a consequence, the AHA places traditional owners, local Aboriginal and historical community groups on equal footing in regards to cultural heritage determinations.

> *The 2006 legislation includes traditional owners, local Aboriginal and historical community groups, whereas they should've had traditional owners doing cultural heritage and land aspects, and local Aboriginal community groups doing education and social services. But the Government didn't listen, and so they started a big split and again another fight between my people. […] The AAV consultative process in determining who could apply for RAP status was flawed. During the consultation on the 2006 Heritage Act, […] there was only Aboriginal community consultation, no traditional owner consultation. And that's how local Aboriginal communities and historical communities can put in RAP applications and have status.*[2]

The VTOLJG accepts and supports that historical and contemporary Aboriginal groups often have familial or historical connections with some of the heritage within our traditional lands. Whilst it is important to acknowledge these historical and contemporary interests, equating these interests with those of traditional owners is in conflict with Aboriginal culture and practice.

> *… just because all my kids live in [another town] so does that give them a right to have a say in those issues? No, they have rights in [this area] but legally my kids could go and put a RAP application in [the town where they live] tomorrow.*[3]

Traditional owners do not want to exclude these groups from cultural heritage management. But the AHA needs to be clear that RAP status is only available to traditional owners. To ensure that historical and contemporary Aboriginal groups continue to have a say with respect to cultural heritage matters, the RAP functions need to be amended under the AHA to ensure that appropriate recognition is given to these groups. This issue needs to be addressed urgently and in accordance with traditional cultural practices.

To provide traditional owners with greater respect and recognition under the AHA, the VTOLJG submits that section 3 (the 'objectives' statement) of the AHA be amended to:

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- **recognise traditional owners as the *sole* custodians of cultural heritage within our traditional country**
- **establish traditional ownership as the key criteria for RAP appointments, and**
- **set out that it is the ultimate goal of the AHA for the whole of Victoria to be covered by RAPs within a reasonable timeframe.**

We also call upon the Government to amend section 150 of the AHA to ensure that applications for registration as a RAP can only be accepted from traditional owners – that is, groups with traditional links to the area. This section should be amended to clarify that local Aboriginal community or historical groups are unable to submit applications for registration as a RAP.

The functions of RAPs set out in the AHA should be amended to specify that traditional owners have a responsibility to historical and contemporary groups to consult with them on relevant cultural heritage matters.

The VTOLJG calls upon the Government to ensure that the RAP recognition process is better resourced and made more efficient so that traditional owners can be provided with the rights that are due by becoming a RAP.

Lack of resourcing to conduct in-depth research

One effect of allowing historical and community groups to apply for RAP status has been that the VAHC has been unable to resolve competing RAP applications, with the result that all power relating to those areas affected by unresolved applications is consequently given to the Secretary. Such power is unjustified, given that traditional owner groups exist who are able to and should speak for country.

To avoid the Secretary gaining unwarranted power with respect to Aboriginal cultural heritage, the Government needs to speed up the RAP appointment process, to ensure that the entire State is covered with RAPs to protect and preserve cultural heritage across the State.

To successfully do this, the VAHC and participants must be adequately resourced to carry out the in-depth research required to resolve outstanding issues as to who speaks for country. There is a serious lack of resourcing provided for the VAHC to conduct in-depth research into the recognition of traditional owners. Given that this research could resolve many of the unresolved issues relating to RAP applications, this lack of funding represents a significant failure in the RAP appointment process.

The RAP recognition process must be urgently provided with increased resources and made more efficient so that traditional owners can be provided with the rights that are due by becoming a RAP. In particular, the VAHC should be supported to conduct in-depth research as to who the traditional owners are in relation to overlapping applications.

Lower threshold than native title for traditional owner status

To make the RAP process more efficient and less open to criticism, criteria need to be developed that set out a meaningful way of identifying the traditional owner group of that area.

A key element of this is identifying to what extent the VAHC needs to be satisfied as to the traditional links of any given traditional owner group to an area. Given that – unlike native title – cultural heritage is not a land ownership issue, the VTOLJG submits that the connection threshold should be lower for RAP determinations than for native title. We assert that the VAHC need only be 'reasonably satisfied' that the traditional owner group is able to speak for that country, rather than being exhaustively convinced that a particular group has a traditional connection with country.

An additional criterion that could be introduced would be to create the option of varying boundaries in the future, which would allow for flexibility and reduce the pressure on the VAHC to make sure a recognition decision is impossible to challenge. If different or more accurate information comes to hand at a later date, either from a RAP or from a later RAP applicant, the RAP boundaries could be altered upon consideration of the new information.

In recognition of the fact that cultural heritage is not a land ownership issue, but a question of land management, we call upon the Government to amend the criteria in section 151(3) of the AHA to lower the bar for traditional owners to become RAPs and to provide specific guidelines for the VAHC in determining RAP applications.

Time-limit on Secretary treating all Aboriginal groups as equal with regards to CH

The Secretary's policy of treating all Aboriginal people as having equal status with regards to areas where RAP applications are made over the same area but are not yet determined . Whilst it seems reasonable to accept a RAP application based on limited information, there must be a time limit by which the Secretary cannot continue to regard all people for the area as having equal prospects of demonstrating that they are traditional owners.

The VTOLJG submits that the AHA be amended to:

(i) impose a duty on the Secretary to be responsive to new information as it becomes available with regards to traditional owners' connection to country; and

(ii) set a time limit on how long the Secretary is able to treat all groups equally as regards to traditional owner status for an area. After a certain period, the Secretary should have to refer the issue to the VAHC for an inquiry. A reasonable time limit would be 12 months.

Disturbingly, in areas where there are no RAPs, AAV policy currently provides 'people with an interest' with the same right to be consulted on cultural heritage matters as

traditional owners in an area.

Equating the rights of local Aboriginal groups or 'people with an interest' with the cultural heritage rights of traditional owners fails to adequately recognise the rightful custodians of that heritage. It has also complicated the development of CHMPs. This approach has created deep divisions within communities and needs to be urgently addressed.

> *We've applied for RAP status on several occasions, we've never been passed. It's insulting really. Since RAP applications first started; we haven't done any good. They keep going on about boundaries, and people who have an interest – even people who don't come from our land, they even come from NSW, SA – and they put in a letter of interest about our claim, and they seem to be getting more respect than what the traditional owners do. There are people who are doing a lot of cultural heritage work who don't even come from the area. But if you've got an interest, you've got a say; the same say as the traditional owners. The Native Title Act and AHA supports people like that. It doesn't support traditional owners.*[4]

The VTOLJG calls on the AAV to adopt a cultural heritage policy that will ensure that 'people with an interest' cannot override traditional owners. In areas where there is no RAP, AAV policy and practice should ensure that traditional owners are recognised by requiring proper consultation with – and directing others to consult with – those traditional owners on cultural heritage matters.

Finally, there needs to be proper use of source material and traditional owner voices in deciding who speaks for country in areas where there are no RAPs. It is our view that AAV currently use source material selectively, to the detriment of traditional owners and to the detriment of cultural heritage preservation.

5. Traditional-owner-controlled RAP appointment process

The VTOLJG fully supports a traditional-owner-controlled RAP appointment process. Article 33(2) of the DRIP states that Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures. Traditional-owner-control must therefore be the model of the VAHC, in line with the DRIP and the expectation that Aboriginal people should be controlling and deciding their own future.

However, there are significant failings with the current model, and urgent reforms need to be made to the VAHC's current membership and decision-making processes. These failings are having the effect of undermining the authority of the VAHC – and the validity of its decisions – in the eyes of traditional owners.

It is important to note that the following criticisms are not related to individual members, but are criticisms of the legislation as it was enacted.

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Membership

The VTOLJG highlights the following concerns in relation to the membership processes of the VAHC:

- **Ministerial appointments**

The ministerial appointment of members to the VAHC takes ownership of cultural heritage and the cultural heritage process away from traditional owners. Traditional owners should be responsible for nominations for Ministerial appointment to the VAHC, with a reformed VAHC constituted by traditional owners.

At present there is no requirement under the AHA for members of the VAHC to be traditional owners. Our concerns that there must be a requirement for VAHC members to be traditional owners were clearly communicated to the previous Government during the development of the AHA. These concerns were ignored. This review presents the current Government with a crucial opportunity to rectify the former Government's failings.

- **Representation of traditional owner groups**

Traditional owner groups are not adequately represented in the membership of the VAHC. Where more than one member from the same traditional owner group sits on the Council, other traditional owner groups are less likely to be represented. Diversity of group representation is an important objective for appointments to the VAHC:

> *… The Council does not reflect Indigenous cultural practice in the old way. There are five people from one nation, none from another. And that's just on the Heritage Council. There are five regions in the whole system, which they fill up in government: Lodden, NE, NW, City and Gippsland area. There should be some wider view, with people on the Heritage Council from each of those regions. And if you're going to be culturally right, you don't have a brother and a sister sitting together, or an uncle and nephew. You can't have the whole family, it's not our cultural practice.*[5]

- **Perceived conflict of interest**

Whilst some members of the VAHC have been successful in their traditional owner group becoming RAPs, other traditional owner groups without a representative on the VAHC have not been successful. This has given rise to the perception that VAHC members have a conflict of interest in determining applications for registration as RAPs. Whether or not VAHC members have a conflict of interest in determining RAP applications is a divisive issue that is causing much anger and resentment within the Aboriginal community in Victoria:

> *The Heritage Council: we regard them as our enemies because certain members on the Council got RAP status above other tribes because they had members on the Council. They've really done a bad job over the years – they've asked us who our tribe is, who we were, what our ancestry was, we gave them the information. We've put in three-four*

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applications and they're still knocking us back. But someone on the Heritage Council got RAP status straight away.[6]

There is currently no conflict of interest rule for VAHC members that recognises the special nature of being a traditional owner in relation to a RAP application. Section 142 of the AHA specifies that a conflict of interest may arise where a member has a pecuniary or personal interest, and it also specifies a conflict of interest where a member is also a member of a particular RAP. The AHA does not deal, however, with the potential conflict of interest that may arise when a VAHC member is considering a RAP application from their own traditional owner group.

The VTOLJG recommends that the AHA be amended to include a conflict of interest provision for VAHC members that:
(i) recognises the special nature of being a member of a traditional owner group
(ii) requires positive disclosure of any connection –whether under Aboriginal tradition or ancestral – with the traditional owner group applying, and
(iii) establishes that a connection to a traditional owner group application is mandatory grounds for disclosure.

The AHA must be clear that a VAHC member cannot determine applications when they are also a part of or have connection to the applicant traditional owner group.

Decision making processes

It is taking too long for the VAHC to make decisions on unresolved issues in RAP applications – in particular on issues relating to who speaks for country and how boundary overlaps are dealt with. Section 151(1) of the AHA states that the VAHC is required to determine a RAP application within 120 days of receiving the application. However, there are examples within the VTOLJG of decisions taking anywhere from 12 months to four years:

Elders have died in four years. They could've told their stories and so on, but we're never getting anywhere. Elders are passing all the time – their dying wish is to get their RAPs through. And development continues to take place and destroy our cultural heritage because we don't have a RAP.[7]

The anxiety of RAP applicants who are still waiting for a decision is heightened by the fact that until they are recognised as a RAP, they have limited power and resources to protect, preserve and manage their cultural heritage under the AHA.

A major problem with the decision making process is that the VAHC is unable to hold public hearings and conduct conferences with RAP applicants. Members have a very limited role in being able to access information relevant to resolving disputes or boundary overlaps: they are unable to convene meetings with applicants or to facilitate alternative resolutions. For example, if there are two applications over one

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country, the only power the VAHC has is to refer the applications back to the applicants and ask them to try to resolve the overlap:

> *The Heritage Council has not made a decision over a disputed area in six years. They are never going to. This has upset some people because it's been left to fester too long. There are some sections of areas of overlay that could have been resolved. The decision makers have not had the strength to make a decision. The commission declined RAP applications rather than make the hard decision. They never made a decision over disputed area, so what's the use? The traditional owners have no say over the government appointed decision makers.*[8]

Because the VAHC has no deliberative power, and because there is no urgency to the RAP appointment process, a significant level of power is given to the Secretary in relation to non-RAP areas, with the Secretary being able to decide who speaks for country on cultural heritage matters until a RAP appointment is made.

It is clear that the VAHC needs to be more active, more open and research driven. It needs to have the ability to conduct meetings to seek out information and make decisions, including on-country consultations.

The VTOLJG calls upon the Government to urgently reform the RAP appointment process to become a deliberative process that allows for meetings, conferences and hearings with RAP applicants and traditional owners. Such a process would enable VAHC members to seek out additional information, specify the kinds of information required to assist in making a determination, provide feedback on applications and assist in the resolution of overlapping applications.

This is fundamentally a resource issue. Any reforms to the current VAHC structure and processes will fail if not adequately resourced. We therefore submit that increased resources be committed to the traditional-owner-controlled RAP appointment process.

Inadequate access to information

For traditional owners who have been unsuccessful with RAP applications or who are still waiting for a determination, the VAHC is not providing adequate feedback with respect to their applications. There is limited information available to traditional owner groups regarding VAHC determinations and the decision making process:

> *The Council is not open at all about why our RAP is taking so long; I've said to our board members – what do we do? The response is not adequate at all about why we're not a RAP; we're left in the dark, told we need to present more evidence. There's an area in between mid-country, where there's no family link, so we included a small boundary to look after that country, and they asked us, "Well, how come you put that bit in?" So we took that bit out, but they told us, "We'll review your application once you've reviewed your application."*[9]

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Who owns the records? Is it AAV? The Heritage Council? Or traditional owners? Traditional owners should own the records, and have access to them fairly regularly. A farmer can, but my people, they can't get it. Now we've just had a big battle trying to get access to [RAP] applications. The Heritage Council upheld it and only granted access the other day – this is 8 mths before the State wants everything tidied up and we were not allowed access to our records – if you've got a RAP application you can, but we are not in a position to be a RAP at the moment.[10]

Given that after four years there are only nine RAPs, we would like to be able to understand some of the difficulties that the VAHC is having in making decisions. For example, if there are problems with resources or regulations, we wish to be made aware of the issues.

The AHA should be amended so that, when making a determination, the VAHC is required to provide reasons to applicants. In providing these reasons, there needs to be an additional requirement for the VAHC to specify how groups can go from failure to success in their claims, and the VAHC should have face-to-face communication with applicants when providing those reasons.

The VTOLJG calls upon the Government to provide our members with access to the VAHC minutes of all meetings and determinations relating to RAP applications conducted to date.

We also resubmit that the Government amend the AHA to establish a deliberative process for the VAHC that involves holding meetings, conferences and hearings with traditional owners to discuss their applications. If the application fails, traditional owners must be given guidance on how to succeed as part of a statement of reasons. VAHC members must be required to have face-to-face communication with applicants when providing reasons.

Key criteria for a traditional-owner-controlled RAP appointment process

The VTOLJG notes the keen disappointment of many traditional owners in the failure of the VAHC to realise its statutory mandate in appointing RAPs for the whole of the State.

In light of the VAHC's failure over five years to appoint RAPs to all areas of Victoria, the VTOLJG recommends that the VAHC be replaced or reformed to become more deliberative, faster, more efficient, and more representative – to ultimately improve decision making.

The core principles around which the VAHC must be replaced or reformed are:

- **accountability to traditional owners – with members nominated by traditional owner groups to ensure that the VAHC has a representative basis in community**
- **proper resourcing – with resources reallocated from the current structure**
- **controlled by traditional owners**

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- **representative – there should be a larger representative spread of traditional owners, to ensure that no more than one or two from each nation are represented. Family members should not sit together.**
- **members should have a demonstrated, long-term commitment to Aboriginal cultural heritage.**

To put this recommendation into effect, the VTOLJG is developing further recommendations to submit to the Government as part of the next stage of this review.

6. Role and structure of RAPs

The key concern for all traditional owner groups is the protection and preservation of *all* Aboriginal cultural heritage across Victoria. Regardless of whether or not a RAP exists for any given area, we are unanimous in wanting to see Aboriginal cultural heritage protected and preserved across the board.

At present, whether cultural heritage is protected is dependent upon its location: that is, whether or not it is within a RAP area. Irrespective of its cultural, historical or spiritual significance, the protection and preservation of cultural heritage in RAP areas is being prioritised over the protection and preservation of cultural heritage in non-RAP areas.

Benefits in becoming a RAP

Traditional owners who have been successful in being registered as RAPs note definite improvements in their ability to protect, preserve and manage their cultural heritage. We recognise that – for the most part – where RAPs exist, they are the primary contact for parties dealing with cultural heritage matters, and traditional owners are able to have more of an input into decisions being made over their land than previously was the case.

> *We are happy to be the first contact and have an input into decisions that are being made over our land. The hardest group to get that message through to is the five councils in our area. Previously, they've just done the deal with AAV behind closed doors and we were getting second hand information. Now we say, "you come sit down with us, we want to know what your forward planning is, we want to know what's going to happen in the next 10 -20 yrs." We get to sit down at the table with them now.*[11]

> *We do an assessment of [a CHMP], and make it quite clear to the developer or archeologists that this is what we need to be done; identify if there's going to be any damage; they are working for us at the moment. We run an introductory course for developers and machine operators; it's all got to be monitored by our people. In past the archeologist would do a desktop study and then they'd let AAV tick it off. But it's a totally different ballgame today.*[12]

[11] TO7
[12] TO7

If you've got RAP status you can do the CHMP and have a big input into it. If you don't have RAP status, they'll still talk to you but not with the same respect or on the same level. Once they see a certificate, they're a bit more wary of you. It gives only a little bit more power, but it would still be good to have it. With the native title process, we get land back as part of a deal with the State Government - at least it's some sort of recognition. Like a RAP – it's something but it's a token gesture.[13]

It must be acknowledged, though, that it is an ongoing learning process, with some levels of government and government departments still coming to grips with the new way of doing business.

Insufficient resourcing for RAPs to protect and preserve cultural heritage

Despite the benefits of becoming a RAP, there is nonetheless a real risk of damage to sites in RAP areas, due to a lack of capacity and resources for the RAP to properly protect cultural heritage sites. RAPs do not have the resources available to be able to ensure adequate protection of all significant sites in RAP areas.

There needs to be sufficient capacity for some RAPs to protect and preserve cultural heritage sites. I'd like to see more resources to RAPs to do that better. We don't have the resources; for example, some areas have quite a number of registered sites but in our area there are just as many unregistered sites. We are reluctant to make the unregistered sites known to the public because we can't protect them all. We have to work on this to ensure adequate protection of registered and unregistered. There's a risk of desecration and damage to unregistered sites. It's a known fact that a number of sites are damaged deliberately sometimes.[14]

In areas where there is little or no development, RAPs find it particularly difficult to maintain sufficient resources to properly protect their cultural heritage. Under the RAP structure, a small budget is provided to kick-start the RAP, after which it is necessary for the RAP to generate its own income. However, this incorrectly assumes that all regions within Victoria will have the same capacity to raise funds from CHMPs required for development applications and neglects important differences between regional and metropolitan areas: for example, the cost of protecting sites is much greater in remote areas with large areas to protect and preserve; and, due to limited development in regional areas, RAPs in regional areas are limited in their ability to raise funds from development to fund cultural heritage protection.

In some RAP areas, development is occurring but at an insufficient rate for the relevant RAPs to finance a coordinator's salary on an ongoing basis or to pay for maintenance work on sites that have been eroded:

Under the RAP structure, they gave a small budget to kick-start it, but no money to follow up in terms of funding for a coordinator; you have to generate income out of your own work projects and so on. Well we up here got a big area, but those metro areas

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[13] TO6
[14] TO8

around Geelong and Melbourne have got enormous projects going on, with big benefits to those traditional owners. Up here, development is happening but we're never going to be able to pay a salary for a coordinator. And there's no budget whatsoever for maintenance work on sites that have been eroded; AAV got a $500k budget, and they employed three people up here under AAV structure. Well, that money should come to traditional owners. It should be a budget for traditional owners instead, to cover the maintenance of our sites, a coordinator and on an ongoing basis. They've been giving that money to themselves.[15]

The amount of development within a region should not dictate the level of protection afforded to Aboriginal cultural heritage. At present, however, the AHA erroneously ties development and cultural heritage together, so that development in a culturally important area provides both the trigger and the funding necessary for protection or management under the AHA. This approach makes the AHA an anomaly in heritage legislation: it makes Aboriginal cultural heritage dependent upon development for its protection. This is completely inconsistent with the policy underlying other areas of heritage protection, and is fundamentally unjust.

We only know of RAPs where there's a large corporation behind that RAP. That's all there is at this point - there's no smaller RAPs, it's a very closed shop for us. In areas where there are not going to be a lot of CHMPs [because there's not a lot of development], there won't be a great income stream for a RAP. There needs to be an alternative; I don't know whether it could be some sort of formal agreement between AAV and TOs of that area; whether TOs could still do their business about country but AAV take care of all legalities for them, I don't know[16].

It's not the same experience for everyone – it's only based around subdivision/development, but up here we have a different landscape. There's hardly any work up here; but there's probably more burial sites than anywhere in the southern hemisphere. They're fenced off, getting looked after, but no-one really manages them because there are no RAPs. In urban development, some of them have done 80 CHMPs in a year; we do one every 2 yrs here – how can you set up a RAP application to do that? You can't viably do that. So our RAP application is not viable at the moment: it's 5 years down the track but we're still not a RAP in that sense. You've got to set up a business that has an arm off it. We need to look at economical things, tourism and so on; need to sit down and talk to Parks about doing all their cross cultural training. First you got to set up a business that can support the RAP application, but then what about insurance? You need to have public liability of $20m – we couldn't do that. On $20k where would you run it from? You can't set up a corporation that you know is going to fail.[17]

The VTOLJG asserts that there should be minimum standards for protection and preservation of cultural heritage across the board. Similar to other non-Indigenous heritage protection regimes, setting minimum standards for the protection of Aboriginal cultural heritage must be recognised as a public cost.

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[15] TO7
[16] TO3
[17] TO3

The VTOLJG calls upon the Government to amend the AHA to set minimum standards for the protection and preservation of cultural heritage across the board. This must be recognised as a public cost, and it must be covered in the same way that mainstream heritage protection is accepted as a necessary public cost.
In light of the differences between regions in terms of development, the VTOLJG submits that increased resources be made available to RAPs, particularly in regional areas, to ensure that they have the requisite capacity to carry out their core duties in protecting and preserving cultural heritage at the local level.

No resourcing for traditional owners to protect cultural heritage in non-RAP areas

There are currently no resources allocated to traditional owners to protect cultural heritage in areas where there are no RAPs. Given that, to date, only 9 RAPs have been registered to cover 56% of the State, this means that cultural heritage within the remaining 44% of Victoria is currently either unprotected or that traditional owners for those areas are seriously under-resourced in carrying out their core responsibilities as traditional owners:

> *There is* no *money to protect cultural heritage in areas where there is no RAP. There has to be a change in the legislation: it needs to identify quite clearly that – especially for some who don't have RAP status – for Parks, Environment, Water, DPI, DSE, whatever it may be - our cultural heritage is in the landscape and it needs to be preserved and protected and we need the resources to do it.*[18]

> *Gippsland has the most national parks in the State of Victoria, and where there are no RAPs in neighbouring areas, we try to work with our neighbours and support each other, but they don't have any resources from AAV or anyone to protect our sites. To me, that makes a hypocrite of the legislation.*[19]

Section 3(a) of the AHA states that one objective of the AHA is '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'. By failing to support traditional owners to protect and conserve Aboriginal cultural heritage in almost half of Victoria, current practice clearly contradicts the first listed objective of the AHA.

Lack of resourcing for traditional owners is a significant failing of the current cultural heritage regime. It is creating a sense of inequity for traditional owners who are not RAPs, and prioritises the protection of cultural heritage in areas covered by RAPs over cultural heritage in areas for which no RAP exists.

Whether or not a RAP exists for a particular area, we submit that for the objective set out in section 3(a) of the AHA to be realised, resources and support must be made available to traditional owner groups for cultural heritage protection right across Victoria. Traditional owners must be provided with control over some part of the CHMP process, even if there is no RAP appointed to an area.

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[18] TO2
[19] TO7

Regulations/Guidelines do not require consultation with traditional owners in non-RAP areas

Where no RAP is in place, it is largely up to the developers and government departments to consult with traditional owners in areas where there is no RAP, but consultation with traditional owners in these areas – even with RAP applicants – has been ad hoc and sporadic. The result is that sensitive areas are being disturbed and destroyed without the relevant parties undertaking any consultation with traditional owners.

At present, traditional owners who are not RAPs are not funded to be involved in the CHMP process. The *Aboriginal Heritage Regulations 2007* (Vic) do not currently specify how extensive consultation with traditional owners is to occur in areas where there are no RAPs. Further, the CHMP guidelines (and the AHA) are ambivalent about consulting with traditional owners: consultation with traditional owners is 'desirable but not mandatory'. This therefore privileges cultural heritage advisors.

Cultural heritage advisors control the process in non-RAP areas

In the absence of recognition and financial support for traditional owners in areas where there are no RAPs, cultural heritage advisors are able to assess the cultural heritage within that area without considering traditional owner views. This is problematic for several reasons, not least because:

- the advisors charge excessive rates to conduct their assessments for the purpose of developing CHMPs; no funds are provided to traditional owners in these areas for providing their input.
- the advisors are not required to talk with the traditional owners for the area; if they do seek out traditional owner expertise, they are not required to financially compensate the traditional owners for any information provided.
- the advisor is paid by the sponsor of the proposed development; this link between advisor and sponsor is not open to scrutiny by the traditional owners for the area.
- by virtue of not being a traditional owner for the area, a cultural heritage advisor is manifestly unqualified to assess Aboriginal cultural heritage. Whilst an advisor may be able to identify certain physical aspects of a heritage site, such as a midden or human remains, it is impossible for an advisor whom is not also a traditional owner to be able to interpret such a site within the overall cultural, spiritual and historical context.

Therefore, in areas where there are no RAPs, cultural heritage advisors are being financially rewarded for interpreting the cultural significance of areas in relation to which they have no cultural expertise. This interpretation then forms the basis for the CHMP for these areas – thereby taking control of the CHMP process away from the rightful custodians of that country.

There needs to be improved partnerships between AAV and traditional owners who have not yet been afforded RAP status, so that traditional owners still have a strong say in country and in relation to CHMPs. AAV should be required to instruct all

developers and government departments to deal directly with traditional owners in regards to cultural heritage matters.

The VTOLJG calls upon the Government to improve consultation to ensure transparency: where there is no RAP, cultural heritage advisors appointed by sponsors coming to inspect sites *must* have traditional owner approval and be accompanied by a representative from the traditional owner group. Schedule 2 of the *Aboriginal Heritage Regulations 2007* (Vic) should be amended accordingly.

We submit that consultation with traditional owners be made mandatory in the CHMP guidelines and *Aboriginal Heritage Regulations 2007* (Vic), as well as in the AHA – particularly in non-RAP areas – and that reference to consultation being 'desirable' be deleted.

Minimum standards required for protection of Aboriginal cultural heritage

Aboriginal cultural heritage is in the landscape. Its existence – and the need to preserve and protect it – does not depend upon the success or otherwise of RAP applications. Irrespective of whether a traditional owner group has been registered as a RAP, cultural heritage will continue to exist in our traditional lands and will continue to require preservation, maintenance and protection. By only mandating that traditional owner groups who are also RAPs need to be consulted on cultural heritage matters, traditional owners who are not yet RAPs are being excluded from important cultural heritage management decisions affecting their traditional lands.

> *For example, I asked for a copy of the [mapping] system; I asked for a copy of the manual at a training. She said, "You can't have a copy of this because you haven't got a RAP group". If you've got your RAP then you can learn all about what you're doing; if you haven't got a RAP, you haven't got access to the mapping system. We're talking about protecting country, who cares about the RAP?*[20]

Current practice is therefore fundamentally at odds with the way cultural heritage is understood through Aboriginal knowledge and cultural and traditional practices. There needs to be a fundamental shift in Government and other parties' understanding of traditional owners and their responsibilities with respect to cultural heritage.

We also recommend that the objectives statement in s3 of the AHA be amended to include:

- **an objective to ensure the involvement of traditional owners in the processes of the AHA, and**
- **an objective to create a duty of care for all activities that may cause harm to Aboriginal heritage.**

The VTOLJG calls on the Government to amend the legislation and supporting policy to clearly identify that for all relevant parties – Parks Victoria, Department of Primary Industries (DPI), Department of Sustainability and Environment (DSE),

[20] TO1

environment and water agencies – Aboriginal cultural heritage is in the landscape and needs to be preserved and protected irrespective of whether or not there is a RAP for the area.

Finally, the proposed transition to a traditional-owner-controlled RAP appointment process must incorporate all traditional owner groups to ensure blanket protection of cultural heritage across Victoria.

7. Recognising, protecting and conserving Aboriginal cultural heritage in practice

In practice, the AHA promotes an archaeological view of cultural heritage

In practice, the AHA is largely about Aboriginal archaeology. It records Aboriginal places and objects of the past, but it does not protect the full extent of Aboriginal cultural heritage. For example, s12(a) of the AHA states that only Aboriginal people with traditional or familial links should own Aboriginal cultural heritage if it is: (i) human remains; or (ii) secret or sacred Aboriginal objects. However, it does not recognise that traditional owners also own the cultural heritage that is linked to places. The archaeological focus on physical things in the AHA ignores the incorporeal aspects of our cultural heritage.

For traditional owners, cultural heritage is not just about archaeological sites, but also takes in important cultural places and environmental management: the country is part of our cultural heritage. This broader setting of culture is a vital part of our cultural heritage. By creating a system that focuses on archaeological sites, the purpose of the AHA to protect and preserve Aboriginal cultural heritage 'based on respect for Aboriginal knowledge and cultural and traditional practices' is undermined.

Focusing on archaeological sites also allows cultural heritage advisors to be promoted as having greater expertise with respect to Aboriginal cultural heritage than traditional owners. The definition of a cultural heritage advisor is twofold. Under section 189(1) of the AHA, a person may only be engaged as a cultural heritage advisor if they either: (a) are appropriately qualified in a relevant discipline (such as archaeology, anthropology or history); or (b) have extensive experience or knowledge. Yet there are many aspects of cultural heritage that cultural advisors are not qualified to assess. Cultural heritage advisors are inevitably not qualified in the intangible aspects of our culture and our heritage, with their level of knowledge about the existence of cultural heritage values often limited. Because heritage assessments focus on the archaeological sites, the assessment becomes about the site itself as opposed to the hearts and minds of the traditional owners.

Currently, there are no guidelines as to what constitutes 'extensive experience or knowledge' under section 189(1)(b) of the AHA. However, due to the fact that AAV has compiled a list of experts that falls within this category, it seems that AAV has effectively developed its own guidelines, thereby taking de facto control over who can qualify as a cultural heritage assessor and the way in which cultural heritage must be interpreted.

The AHA does not properly protect cultural heritage as defined by traditional owners. The VTOLJG therefore calls upon the Government to fulfil the promise of the AHA to protect cultural heritage in practice 'based on respect for Aboriginal knowledge and cultural and traditional practices', by considering how best to protect and preserve the incorporeal aspects of our cultural heritage.

Guidelines should be established for the application of section 189(1)(b) of the AHA – the second category of qualifications required in order to be engaged as a cultural heritage advisor. These guidelines should emphasise the non-technical, social and historical experience and knowledge of traditional owners, to ensure that traditional owners are able to be provided with status as cultural heritage advisors. Traditional knowledge – as belonging to traditional owners – must be recognised as a form of expertise on its own.

We also resubmit that cultural heritage matters would be best dealt with by an alternative, traditional-owner-approved and controlled body set up to deal with native title, land justice, economic development and cultural heritage matters, as recommended in Section 2: Implementation and Administration of the AHA above.

In practice, the Act is geared toward development

Whilst the objectives and principles of the AHA set out that the AHA preserves and protects Aboriginal cultural heritage, in practice, it appears to prioritise development over cultural heritage protection. The AHA ensures that development will occur and requires that in some areas, it must be undertaken with regard to some form of cultural heritage management. But 'protection' and 'management' are two very different things.

It is the experience of the VTOLJG members that developers will only do the minimum required by the AHA, with traditional owners only becoming part of the process when deemed necessary. In many cases, the link between the developer and the cultural heritage advisor is not accountable to traditional owners, because traditional owners are not part of the process.

The VTOLJG therefore recommends that the AHA be amended to prioritise the prevention of damage and the preservation of heritage, as opposed to the current approach of salvage and destroy under CHMPs.

Both the objectives of the AHA, and the assessment of CHMPs and Cultural Heritage Permits (CHPs), should reflect a hierarchy of protection efforts as follows:

1. **Protection, prevention of damage and avoidance**
2. **In-site preservation**
3. **Salvage**
4. **Damage or destruction.**

Under such a hierarchy, a CHMP would be required to document and justify why the application of a principle higher in the hierarchy than the one proposed to be adopted (for example, avoidance) is not possible. That explanation would then be

evaluated as part of the CHMP. This principle would operate similarly to the waste hierarchy in s1I of the *Environmental Protection Act 1970* (Vic), as relevant to any cultural heritage management decision under the AHA.

8. Timely and efficient cultural heritage assessment

CHMPs are costing developers time and money, and costing traditional owners our cultural heritage. Not only are they expensive and time consuming, they are also limited in the protection they offer to Aboriginal cultural heritage.

CHMPs only offer limited protection to cultural heritage

CHMPs are only effective as they relate to the development or project, not to the cultural landscape as a whole. Because a CHMP covers a defined survey area, it will only look at a site in isolation from its surroundings. In this way, it has the ability to cut an important cultural site in two, thereby not allowing for a cultural landscape perspective on the site.

For example, a campground with hearths and middens may be inside a project area, with a burial site located just outside of the project area. In a complex site such as this, it is culturally impossible to separate the different components – they are all part of the one cultural landscape. Despite the fact that the burial site lying outside the project area is connected and key to understanding the other sites, a CHMP would only deal with the hearths and middens that fall within the project area.

There is also a weakness in CHMP methodology, which is based on model predictions. For example, predictive modelling says that significant sites are only located a certain distance from a waterway when it is actually impossible to predict how close sites may be to waterways. The use of predictive modelling means that archaeologists are not taking other things into account when determining where significant sites may be located.

Further, CHMPs are only activated by certain triggers in response to development projects, which means lots of activity that does not require a CHMP can occur in culturally sensitive areas. Because development projects are effectively the trigger for CHMPs, activities for which no planning permits are required may not require a CHMP even if there is significant potential for harm to cultural heritage. But the very existence of Aboriginal cultural heritage in any given area should be sufficient to trigger the protection and operation of the AHA, irrespective of development projects that occur.

Finally, where management plans do exist, there is no ongoing protection of the cultural heritage site after the development is complete.

The VTOLJG calls upon the Government to allocate resources to RAPs and traditional owners to maintain and preserve Aboriginal cultural heritage on an ongoing basis in their traditional lands. This is in contrast to the current approach of RAPs managing discrete development projects in relation to Aboriginal archaeological sites.

The VTOLJG also submits that the trigger points for CHMPs are not adequate, with activities taking place on country with no notice to traditional owners. We therefore call upon the Government to amend the AHA to ensure that CHMPs are required for activities that may impact cultural heritage regardless of the planning control status of the activity.

In some instances, CHMPs offer no protection to areas with RAPs

The functions of a RAP in protecting cultural heritage under a CHMP, and in enforcing CHMPs or CHPs to ensure the protection or preservation of important sites, are extremely limited. Even if a RAP decides not to approve a CHMP, VCAT can overturn that decision and provide consent to the plan: section 116(1) of the AHA. Furthermore, deviations from a CHMP that cause, or threaten to cause, damage to heritage values are a matter of enforcement by AAV; a RAP has no role other than to bring the matter to the attention of AAV.

> *Even people who have RAPs through, there's still development that goes on because AAV do not enforce the Act. For example, Spring Creek, Torquay – Wauthurong RAP tried to halt development but they couldn't get it halted; had no say in it even though they have RAP status.*[21]

> *When you've got RAP status, it just means you've got a say and can be involved in CHMPs, but at the end of the day the Act will still go against you. RAP status is just a little certificate that gives you just a little bit more say than what I've got right now.*[22]

A RAP can request a 'Stop Order' under Division 2 of the AHA where activity is harming or likely to harm Aboriginal cultural heritage. However, in practice, Stop Orders are unlikely to be issued because the inspector conducting the cultural heritage audit is engaged by AAV. Based on past evidence of AAV enforcement decisions, it seems very unlikely that AAV would ever prosecute.

The inability of a RAP to enforce breaches and the absence of a public enforcement policy for AAV is a major weakness in the enforcement of the AHA.

> *If the Act is for Aboriginal people, then it should not allow for destruction of our sites. Why have a clause that says it's OK for developers to knock over Aboriginal sites if they're so far away from a waterway? We had a 15,000 yr old midden along a pipeline. ... An archaeologist come along, said it was 15000 yrs old, didn't matter. We protested, stopped work for a while and then they kept it going. Aboriginal people can't stop anything under the Act – virtually powerless. Can't think of any powers it gives us. Even as a RAP, you get a little bit more say but we still couldn't have stopped the destruction of a 15000 year old midden site.*[23]

We submit that RAPs be provided with enforcement powers in relation to Stop Orders, similar to those that were previously held under the former Part IIA of the

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[21] TO6
[22] TO6
[23] TO6

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 **(Cth)). For example, RAPs could be given at least temporary Stop Order powers, with appropriately trained RAP employees provided with the option of becoming enforcement officers. There should be an option for RAP representatives to complete the same training as provided to officers with Parks Victoria in respect of DSE enforcement.**

We also call upon the Government to implement a policy to ensure that AAV Secretary decisions are open to increased accountability and review by traditional owners, in order to ensure that the Secretary takes traditional owner views into account in regards to their cultural heritage. Traditional owners should be entitled to review the Secretary's CHMP decisions for areas where no RAP is in place.

CHMPs are costly and complex

At present, CHMPs take a long time to prepare, are costly and the end product is generally a complex and extensive report that can be very difficult to use.

The complexity and cost of CHMPs could be reduced by directing developers to sit down and talk with traditional owners at the start of a project, with a view to working out a collaborative solution. Some areas may require more complex management plans, but other areas would only require an agreed solution to be reached with the traditional owner groups. Many problems affecting CHMPs could be bypassed if developers and sponsors included traditional owners in the process from the very first planning stages.

The VTOLJG therefore calls upon the Government to simplify CHMPs in line with the following recommendations:

1. **The CHMP should be a very small document: it must be a tool for sponsors and other parties, not an obstacle for them.**
2. **Once a cultural assessment has been conducted, all that should be required is:**
   - **a map to show the location of sites**
   - **a contingency plan if developers come across something in construction or pre-works, and**
   - **a guideline as to what happens if human remains are found.**
3. **The simplified CHMPs as described above must be uniform across Victoria.**

Alternatively, CHMPs should be abolished and replaced with a statewide uniform legal protection for cultural heritage. A CHMP is only a management plan, which offers a low threshold of protection. A stronger proposition would be to replace CHMPs with a clearance procedure conducted by an independent statutory authority composed of a majority of Victorian traditional owners, similar to the Aboriginal Areas Protection Authority in the Northern Territory (see ***Northern Territory Aboriginal Sacred Sites Act 1989*** **(NT)).**

CHMPs are too inflexible

Presently, once a CHMP has been approved, it is extremely difficult to amend the plan, even in instances where changing the plan would make it possible to minimise harm to a site.

The VTOLJG submits that CHMP provisions need to be more flexible. A new Division 5A in Part 4 of the AHA should be inserted to enable a CHMP to be amended post-approval, in situations where changes to a CHMP can be made in order to minimise harm to cultural heritage sites: that is, 'under these circumstances we found that we no longer need to destroy this site, and we request permission not to'. It should be mandatory to have the traditional owner group or RAP approval for such a post-approval amendment.

Cultural heritage advisors profiting from and being in control of CHMPs

Under section 58 of the AHA, cultural heritage advisors must be appointed by a sponsor to assist in the preparation of a CHMP. It is the view of the VTOLJG that cultural heritage advisors, as defined under the AHA, are profiting from and in control of the CHMP process.

Most of the AHA appears to be drafted in favour of consultants, such as archaeologists and cultural heritage advisors. These consultants are extremely expensive and – although employed by the sponsor – ultimately, they are in control of the end product that will be used to manage our cultural heritage.

Of particular concern to the VTOLJG is that whilst cultural heritage advisors are required to have certain qualifications, it is impossible for them to have the same kind of knowledge and understanding of cultural heritage as traditional owners. For example, whilst they may be able to identify certain archaeological sites, they are unable to recognise all intangible evidence surrounding cultural heritage sites.

We believe that RAPs and traditional owner groups should have more control over the CHMP process, with developers in direct contact with them. If traditional owner groups or RAPs were provided with direct control over the development of CHMPs so that they were the primary reference point for sponsors in relation to Aboriginal cultural heritage, these groups could then limit the role of archaeologists or other advisors to an *as needed basis*.

The AHA should empower traditional owners to look after our cultural heritage: the VTOLJG submits that sponsors pay traditional owners and RAPs first and *we* will subcontract to the relevant advisors and pay them for the work that is actually required of them.

AAV is not qualified to conduct cultural heritage assessments without assistance from approved traditional owner representatives for the relevant area. It is impossible for anyone who is not a traditional owner to assess intangible evidence for a site.

Therefore, the VTOLJG submits that AAV introduce and abide by the following guidelines when conducting cultural assessments:

1. **It must be mandatory for AAV to be accompanied by a traditional owner representative from the relevant area for all cultural heritage assessments.**
2. **Where a relevant traditional owner representative is unable to accompany AAV in conducting the assessment, an advisor approved by the traditional owner group or RAP and with a minimum Certificate IV in Aboriginal Cultural Heritage Management should accompany AAV instead.**

Cultural Heritage Permits

It is the view of the VTOLJG that the current operation of CHPs is to provide an open licence to destroy sites. The power to issue a permit is centralised under AAV: AAV has complete authority to sign off on a CHP, and if there is no RAP for the area, traditional owners have no say. Traditional owners may be consulted, but ultimately the Secretary has control.

In order to subject CHPs to greater scrutiny by traditional owners, where a RAP has been appointed for an area, the VTOLJG submits that RAPs should be provided with the power to grant a CHP.

The following amendments therefore should be made to the CHP processes:

- **RAPs should be provided with a power to grant CHPs.**
- **RAPs should also be provided with a veto over the CHP process.**
- **In granting a CHP, a RAP should have the power to impose certain terms and conditions.**
- **In situations where a RAP has granted a CHP or used a veto over the CHP process, an option to appeal a RAP decision could be made available to the Secretary in certain circumstances.**

Significance applied to certain types of cultural heritage

CHMP guidelines should respect traditional law. At present, there are a number of important cultural practices that have not been taken into consideration under the AHA.

For example, with respect to human remains (section 18 of the AHA) the VTOLJG submits the following amendments:

1. **Human remains should be recognised as more than just physical objects to research without permission. Traditional owners must provide their permission prior to any investigation, removal or other interference with human remains.**

2. **Where human remains have been found, the AHA should require AAV staff to investigate and report on those areas *within seven days*. Such a report would require traditional owner approval and would include a cultural assessment of the land itself: where the human remains point to; the tangible and intangible cultural heritage of the site.**

3. **Where further study is required, it can be carried out by qualified heritage advisors with the assistance and approval of traditional owners.**

4. **If human remains are found to have no known origin, it should be mandatory to conduct further research into the remains.**

5. **In conducting further research, due consideration must be given to the fact that female identification can be of great significance to matrilineal/patrilineal links between lands and mobs, giving greater connection between people and country.**

6. **A qualified VAHC member must be appointed to draft a report, conduct meetings, and consult with traditional owners to ascertain how long it should take for repatriation of remains to occur.**

7. **Confidentiality must be observed at all times when monitoring, and there must be consultation with key stakeholders.**

The Coroner should act faster on dealing with human remains and further funding should be made available directly for researching human remains. Adequate funding must be made available so that the Coroner is able to efficiently and effectively undertake DNA and other relevant testing for ancient skeletal remains.

9. Penalties and enforcement

The penalties provisions embedded in the AHA appear to provide a reasonable base for prosecuting offences against cultural heritage. However, in reality, the enforcement provisions have no teeth: there are insufficient resources provided for enforcement under the AHA, and there is a lack of willingness on the part of the authorities to prosecute offences. AAV has demonstrated a serious lack of commitment to enforcing the AHA, with not a single case prosecuted to date. The result is that we still do not know how the AHA enforcement provisions actually work in practice.

Increase RAP powers and introduce duty of care provisions under the AHA

The VTOLJG regards the role of inspectors as crucial to the successful enforcement of the AHA. However, with only a limited number of inspectors operating in the whole of Victoria, enforcement is an issue of inadequate capacity and resourcing.

Traditional owners are extremely concerned about the lack of resources and capacity provided to enforce breaches under the AHA. Enforcements are not being carried out, and important cultural heritage is being lost as a result.

We call on the Government to develop a public prosecution policy in relation to the enforcement provisions of the AHA.

We reiterate our submission in Section 2 for a structural separation of the functions relating to administration and enforcement under the AHA.

The VTOLJG also submits that the Government amend the level of protection provided to cultural heritage under the AHA by introducing a duty of care provision, equivalent to the duty of care provision in the *Aboriginal Cultural Heritage Act 2003* (Qld).

Traditional owners need to be provided with the power to follow up on enforcement issues to be able to protect and preserve cultural heritage. We therefore call on the Government to amend the AHA to include a strict liability offence for damage to cultural heritage, with the functions of RAPs amended to include the power to issue on-the-spot fines.

We further submit that the AHA be amended so that RAPs are provided with standing to seek – and VCAT is given the power to grant – injunctions to prevent unlawful harm to Aboriginal cultural heritage, or to prevent a breach of a CHMP or CHP (or to request a declaration about those matters).

Increase resources and appoint Aboriginal inspectors to improve enforcement

Resourcing urgently needs to be made available so that RAPs are able to pursue these options. In providing resources for enforcement under the AHA, the Government needs to recognise that, in protecting Aboriginal cultural heritage, RAPs and traditional owner groups are providing a public service in protecting Aboriginal cultural heritage and must be provided with adequate funding to carry out this service.

It is a significant failing of the AHA that there are currently no Aboriginal inspectors operating in Victoria to follow up on complaints or investigations relating to the interference with or destruction of cultural heritage. The VTOLJG asserts that Aboriginal inspectors/enforcement officers need to be appointed to assist with enforcement under the AHA. Aboriginal enforcement officers would have to be: (i) employed by traditional owner groups, and (ii) a traditional owner of the country for which they are appointed. Employing Aboriginal inspectors/enforcement officers would greatly improve our ability as traditional owners to protect and preserve cultural heritage in Victoria, and to pursue breaches of the AHA.

The VTOLJG insists that adequate resourcing be provided to enable the AHA to be properly implemented and enforced. In particular, Aboriginal inspectors/enforcement officers need to be made available to follow up on complaints and/or investigations relating to breaches under the AHA.

10. Public awareness of Aboriginal cultural heritage

Cultural heritage protection, management and preservation can be assisted by promoting awareness among sponsors, government departments, and the public. The VTOLJG believe that there is currently insufficient work being done to promote public awareness of cultural heritage matters.

Traditional owner groups and RAPs require assistance and support from AAV to promote the protection and management of Aboriginal cultural heritage in the wider community, by developing information and awareness packages to deliver in conjunction with traditional owners.

Further, it is our view that every CHMP should incorporate induction training. For example, contractors could be provided with an 'Ochre Card', to indicate that the contractor has completed relevant cultural heritage awareness induction training. Such training could cover all aspects of development, including the basics of cultural heritage awareness and recognition.

We submit that additional resources be made available to RAPs and traditional owner groups to promote awareness of cultural heritage issues within the general public, to dispel the misinformation and myths that persist about Aboriginal cultural heritage.

The VTOLJG calls upon the Government to make it mandatory for all contractors to apply for an 'Ochre Card' as part of a CHMP, to demonstrate that they have completed relevant cultural heritage awareness training.

Most importantly, there should be recognition that the use of traditional owner knowledge is not a free resource. The VTOLJG calls upon the Government to ensure that traditional owners are appropriately compensated for any training and use of our cultural knowledge by Government and experts.