

Victorian Traditional Owner Land Justice Group

Submission on the second stage of the review of the *Aboriginal Heritage Act 2006 (Vic)*

The Victorian Traditional Owner Land Justice Group (VTOLJG) welcomes the opportunity to submit further feedback in response to the Government's Issues and Options Paper (April 2012) on the review of the *Aboriginal Heritage Act 2006 (Vic)* (AHA). The VTOLJG is an initiative of traditional owners to develop a statewide body to promote the rights and interests of traditional owners. 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.

Whilst some areas of the legislative regime that applies to Aboriginal cultural heritage requires amendment and modification, the VTOLJG wants to emphasise that it considers the AHA to be a significant improvement to the position prior to 2007. In this context, the current review of the AHA represents an important opportunity to continue this development by building upon lessons learned since the AHA's introduction.

INTRODUCTION

The VTOLJG recognises that the Government's Issues and Options Paper has attempted to respond to many of the concerns highlighted by the VTOLJG in the first round of submissions on the review of the AHA. The VTOLJG wishes to continue this constructive approach in this submission by providing further practical and positive feedback on the issues and options put forward in the Government's Issues and Options Paper.

By working in partnership with traditional owners on proposed changes to the AHA, we believe that the Government will be able to alleviate the frustration currently experienced by traditional owner groups in our attempts to protect and preserve our cultural heritage in Victoria, whilst at the same time improving the effectiveness of the system for all relevant parties.

More specifically, the VTOLJG submits that the Government could improve the ability of traditional owners to protect, preserve and manage Aboriginal cultural heritage in Victoria for the benefit of all Victorians, by:

- establishing a traditional-owner-controlled statutory authority
- properly acknowledging traditional owners as the sole owners of cultural heritage
- amending certain sections of the AHA to establish an open, transparent and deliberative RAP recognition process
- ensuring that the process for protecting Aboriginal cultural heritage in Victoria is properly resourced and
- supporting the cultural heritage system with effective enforcement and other policies that promote traditional owner involvement in cultural heritage decisions.

The VTOLJG would welcome the opportunity to elaborate on our comments and to work collaboratively with the Government on proposed amendments to the AHA.

ESTABLISHING A STATUTORY AUTHORITY IN PLACE OF THE VAHC AND AAV

Support for establishing a statutory authority

1. In principle, the VTOLJG supports the establishment of an independent statutory authority controlled by traditional owners that will be the sole authority with respect to cultural heritage processes and management in Victoria. This support is provided, however, on the basis that the statutory authority is established in accordance with the following criteria:

Mandate of the statutory authority

2. The statutory authority should be established with the following clear mandates:

- Functions transferred: all current functions of the Secretary under the AHA should be transferred to the statutory authority, provided that those functions should only be exercised in consultation and/or partnership with the relevant Registered Aboriginal Party (RAP) or traditional owner group (this is discussed in further detail below). Further, the current role of Aboriginal Affairs Victoria (AAV) and the Victorian Aboriginal Heritage Council (VAHC) in cultural heritage processes and management should be fully transferred to the statutory authority (i.e. the statutory authority would become a 'one-stop-shop' for cultural heritage issues). The timing for transferring the Secretary's functions should be negotiated in consultation with traditional owner groups
- Collaboration with RAPs and traditional owners: the statutory authority should be required to work in partnership at all times with RAPs and traditional owner groups in relation to their relevant country. There should be a clear mandate introduced to this effect.
- Formalise broader links: the statutory authority should have a mandate to formalise links between cultural heritage processes and native title, land justice, and economic development issues.

Core principles of the statutory authority

3. The establishment and operation of the statutory authority should be based on the following core principles:

- Committed to customary law and native title rights and interests: the VTOLJG submits that the present system promotes corporate interests over traditional rights and interests. The statutory authority must be committed to the preservation and protection of Aboriginal cultural heritage, as understood by traditional owners in accordance with customary law.
- Controlled by traditional owners: traditional owner control should be the model for the new statutory authority, in order to ensure that the new structure has the requisite level of support from traditional owner groups.
- Democratic: the statutory authority's board membership and decision-making processes must be open and transparent. It must also be a requirement of the new structure that traditional owners give their free, prior and informed consent to those processes.¹

¹ See Appendix 1: Free, prior and informed consent

- Accountability to traditional owners: the membership of the statutory authority must be determined by traditional owners in accordance with Art 33(2) of the DRIP, to ensure that the statutory authority has a representative basis in community.
- Representative: there must be a broad representative spread of traditional owner board members, to ensure that no more than one person from each nation is represented at any one time. Family members should not sit together.
- Regionalised/localised: the AHA must be administered by the statutory authority at the regional level, not through a centralised authority.
- Experienced members: board members of the statutory authority must be required to have a demonstrated, long-term commitment to and experience with Aboriginal cultural heritage.
- Conflict of interest provisions: the AHA should clarify that a statutory authority board member cannot determine applications when they are also a part of or have positive links to the applicant traditional owner group. The VTOLJG submits that a stronger conflict of interest provision be introduced in the AHA to this effect. Conflict of interest issues in relation to RAP applications would be raised by applicants and heard by the entire board membership.
- Adequately resourced: the statutory authority structure would require sufficient resourcing, in order for traditional owners to provide effective, efficient and appropriate protection, preservation and management of cultural heritage in accordance with the AHA. Resources must be reallocated from the current structure.

Statutory authority membership

4. Given the importance of traditional owner input and approval to the success or otherwise of the statutory authority, we submit that any Government decision regarding the precise details of board membership and structure should be made in consultation with the VTOLJG.

Membership criteria

5. Irrespective of the membership process ultimately agreed upon, we submit that the following criteria must be applied in appointing board members to the statutory authority:

- Number: a total of 15 traditional owner members should be represented on the board, with a strict limit imposed of only one representative per traditional owner group at any one time. This would allow for broad traditional owner representation whilst ensuring that decision-making is still efficient.
- Representation: guidelines should be developed to ensure that the 15 traditional owner members cover the State as broadly as possible. The guidelines would specify that there must be broad regional/geographical representation of traditional owner groups on the statutory authority at any one time.
- Knowledge and expertise: there must be a requirement for members to be able to demonstrate an appropriate level of skills, knowledge and expertise in the area of Aboriginal cultural heritage management.

- Term of appointment: the term for membership would be two years, on the basis that one year is insufficient for members to become familiar with all the issues. A member may re-nominate for membership after 2 years with the approval of the traditional owner group.

Membership process

6. The VTOLJG is currently in discussion as to how members would best be appointed to a statutory authority board. At present, there are two preferred options for a membership selection process.

7. Whilst by no means exhaustive, the following options are submitted as the preferred basis for appointment of traditional owner members to the statutory authority board.

Option 1: Members directly elected to the statutory authority board by traditional owner groups.

- Under this option, all Victorian traditional owner groups would nominate one individual for board membership.
- From the total nominations, Victorian traditional owner groups would come together to elect 15 members to the board.
- The Minister would be required to appoint the 15 elected members to the statutory authority board.

Option 2: Members nominated by traditional owner groups and appointed by the Minister in accordance with strict guidelines.

- Under this option, each Victorian traditional owner group would nominate one individual per group for appointment to the statutory authority board.
- The Minister would then appoint 15 members from the total nominations in accordance with strict criteria as outlined in 5. above.

Statutory authority structure

8. The VTOLJG would not support the Minister having the power to appoint non-traditional owners as board members of the statutory authority, as this would be in conflict with the core principle of the new structure being an independent, Indigenous controlled body.

9. Nonetheless, statutory authority board members would need to be properly supported by relevant government agencies and experts. To this end, we suggest that an Advisory Committee be established to support the statutory authority in carrying out its functions.

Advisory Committee

10. Individuals with specialist academic, industry or governance expertise could apply to be members of the Advisory Committee and would be appointed by the statutory authority board members to ensure that relevant expertise in specialised areas is available to the members should they require it.

11. The Advisory Committee could include representatives from relevant State government agencies, such as Department of Justice (DoJ), Department of Sustainability and Environment (DSE), Parks Victoria, and AAV. The purpose of having government agency representatives on the Advisory Committee would be to ensure that Aboriginal cultural heritage management is

considered and incorporated into land management and planning decisions at the earliest stages.

12. The Advisory Committee would also require members who are experts in certain fields, to advise statutory authority members in governance, administration and relevant cultural heritage issues. Relevant experts could include a lawyer, an accountant, a genealogist and/or an historian. The Minister (or representative) could also sit on the Advisory Committee.

Additional delegates

13. The new structure would also make additional delegates available to the statutory authority board to step in when members are conflicted out of making a RAP determination.

Statutory authority functions

Statutory authority functions in areas without RAPs

14. A key issue to address prior to establishing a cultural heritage statutory authority is the question of what a statutory authority would propose to do in areas where there are no RAPs.

15. In addition to allowing for the appointment of interim RAPs and addressing the urgent need to speed up the RAP appointment process (discussed further below), the VTOLJG submits that:

- the AHA and accompanying policy be amended to make it mandatory that the statutory authority and all relevant parties are required to work in conjunction with the relevant traditional owner groups for areas where there are no RAPs.
- the statutory authority must be provided with the ability to assist sponsors and/or relevant parties to consult with traditional owner groups in areas where there are no RAPs², and
- mandatory guidelines must be developed for the statutory authority (and all government agencies/sponsors) as to *how* it must operate in relation to areas without RAPs. A model consultation process and mandatory guidelines would assist in ensuring effective consultation with traditional owners.

Statutory authority function to consult with RAPs and TOs

16. In addition to providing the new statutory authority with the power to facilitate consultation with traditional owner groups in areas where there are no RAPs, the VTOLJG supports a higher level of consultation with both RAPs and traditional owner groups in relation to cultural heritage matters.

17. A higher level of consultation would incorporate the following criteria:

- **Mandatory consultation:** consultation with traditional owners must be made mandatory in the CHMP guidelines and *Aboriginal Heritage Regulations 2007* (Vic), as well as in the AHA –

² For example, the statutory authority could develop a 'Traditional Owner Register' in partnership with Victorian traditional owner groups. This Register would include a list of traditional owner groups who have consented to providing contact details and a brief map and/or outline of boundaries as understood by the traditional owner group. By submitting details to the Register, the traditional owner group consents to the statutory authority referring sponsors to that group for projects or issues relating to that area.

particularly in non-RAP areas. Reference to consultation being 'desirable' would be deleted from all policy and legislation.

- Consistent approach: the level of consultation with traditional owners in areas without RAPs should be the same as for areas where there is a RAP. This is in recognition of the fact that cultural heritage exists whether or not a RAP has been determined for an area, and traditional owner responsibilities for that cultural heritage continue irrespective of the status of a RAP application. Whilst the VTOLJG accepts that the RAP system makes the consultation process for sponsors more straightforward, it does not follow that consultation with traditional owners is any less important in areas where a RAP has not yet been appointed.
- Resources and support: adequate resources must be provided 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.
- Guidelines for fees: the regulation of RAP fees for consulting on cultural heritage management plans (**CHMPs**) would not assist the consultation process, because regulations may not take into account all of the diverse factors affecting different RAPs' ability to consult (for example, RAPs consulting in relation to sites in remote locations will necessarily incur higher travel costs than in metropolitan locations). Nonetheless, guidelines for consultation fees could be developed with a view to assisting stakeholders in negotiating fees at the commencement of a project..
- AAV role: AAV would not have any role with respect to consultation in areas without RAPs under the statutory authority.
- Use of materials: 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 essential for government to reveal their evidence as to boundaries and group membership, and for traditional owner groups to be able to assess the accuracy or relevance of that information.

Statutory authority function to manage access to the ACHRIS

18. At present, the Aboriginal Cultural Heritage Register and Information System (ACHRIS) enables certain groups or individuals to access culturally sensitive information, as well as information that should be seen only by women (women's business) and other information that should only be seen by men (men's business).

19. The VTOLJG submits that the statutory authority should manage this information system in partnership with the Indigenous people to whom the information relates. Where a consultant seeks access to information in the ACHRIS, the consultant must be required to obtain consent to access that information from the relevant Indigenous owner of that information. If the Indigenous owners do not provide consent, the consultant would be unable to access the information.

20. In addition, the statutory authority must be required to manage the information in the ACHRIS in accordance with cultural law, taking particular account of laws relating to men's and women's business. Information relating to men's and women's business must be segregated, with an information access policy developed to ensure that this kind of information is treated in accordance with the requirements set out by the Indigenous people to whom the information relates. Such a policy would establish who may access men's or women's business, and set out

the requirements for ensuring that individuals who access such information will comply with cultural law (for example, only a woman approved by the relevant Indigenous group would be granted access to women's sites.)

Additional functions for a statutory authority

21. The VTOLJG supports the introduction of additional functions for the statutory authority to:

- publish high level policy guidelines relating to the protection of Aboriginal cultural heritage, and
- establish and maintain a system to support the effective performance of RAPs.

22. The VTOLJG would also support a broader advisory role for the statutory authority to:

- facilitate strategic research into the Aboriginal cultural heritage in Victoria, and
- report on the state of Aboriginal cultural heritage in Victoria.

23. Additional powers for the statutory authority should also be created in accordance with VTOLJG recommendations proposed in the two submissions to the AHA review.

SUPPORT FOR AMENDMENTS TO THE RAP APPOINTMENT PROCESS

24. The primary task of the new statutory authority must be to ensure that RAPs are appointed over the whole of Victoria as a matter of urgency.

25. The VTOLJG has identified four key areas for amendments and/or modifications to the RAP appointment process:

- providing better recognition to traditional owners as the sole custodians of cultural heritage
- establishing an open, transparent and deliberative RAP appointment process
- recognising cultural heritage as a land management process, as opposed to a system of land ownership, and
- aligning native title and cultural heritage processes.

Acknowledge traditional owners

26. 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 does not fully understand that this responsibility falls uniquely upon us.

27. In this context, the VTOLJG submits that the following changes should be made to the RAP appointment process:

- Amend Section 3 (the 'objectives' statement) of the AHA: to ensure that the RAP appointment process is only available to traditional owners, this section must be amended to:
 - 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.

- Amend section 150 of the AHA: to ensure that only groups with traditional links to the area can submit RAP applications, this section must be amended to:
 - specify that application for registration as a RAP can only be accepted from traditional owners
 - ensure that local Aboriginal community or historical groups are not able to submit applications for registration³ and
 - specify that traditional owners have a responsibility to historical and contemporary groups to consult with them on certain cultural heritage matters.

Establish a deliberative, open and transparent RAP appointment process

28. The RAP appointment process must allow for meetings, conferences and hearings with RAP applicants and traditional owners. Such a process would enable statutory authority 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.

29. To ensure a deliberative, open and transparent RAP process, the following recommendations should also be incorporated:

- Research: the statutory authority must be provided with sufficient support and resources to conduct in-depth research as to who the traditional owners are in relation to overlapping RAP applications.

- Provision of reasons: if an application fails, traditional owners must be given guidance on how to succeed as part of a statement of reasons. Statutory authority members must be required to have face-to-face communication with applicants when providing reasons.

- Time limit on RAP appointment process: the AHA should also be amended to:
 - increase the statutory timeframe for the statutory authority to determine RAP applications from 120 days to 12 months
 - impose a duty on the statutory authority (and Secretary) to be responsive to new information as it becomes available with regards to traditional owners' connection to country and
 - set a time limit on how long the statutory authority (and Secretary) is able to treat all groups equally as regards to traditional owner status for an area. After 12 months, the Secretary should have to refer the issue to the statutory authority for an inquiry.

³ As described in the first VTOLJG submission on the AHA review, allowing these groups to submit RAP applications under the AHA has caused much confusion and frustration within the Aboriginal community.

- RAP appointment should be open to review: the AHA should be amended to permit the appointment of interim RAPs (discussed below) as well as allowing for the minor variation of RAP boundaries as better information comes to hand after the initial appointment of a RAP.
- Increase resources: it is essential for the RAP recognition process to be better resourced and made more efficient so that traditional owners can be provided with the full rights that are due to them by becoming a RAP.

Lower threshold for RAP applications

30. As currently defined by legislation, cultural heritage is not a land ownership issue, but a land management and planning issue. This is a crucial distinction that must inform any amendments to the RAP appointment processes.

31. In recognition of cultural heritage as a land management issue, the VTOLJG submits that the following amendments be made to the RAP appointment process:

- Lower threshold for traditional owner criteria: in accordance with the recognition of cultural heritage as a land management and planning issue, the VTOLJG submits that the connection threshold should be lower for RAP determinations than for native title. We assert that the statutory authority 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. The criteria in section 151(3) of the AHA should be amended to lower the bar for traditional owners to become RAPs. It should also be amended to provide specific guidelines for the statutory authority in determining RAP applications.
- Allow for the appointment of multiple RAPs: the statutory authority should be able to appoint RAPs for core (non-contested country) areas while areas that are contested may be subject to lengthier resolution. In addition, multiple Registered Aboriginal Parties should be appointed in areas where all or both parties agree to work together in the overlapping areas. Where there is more than one RAP for an area, consultation and other fees should be evenly divided for CHMPs, or divided as agreed to between the parties. The statutory authority should also develop a model agreement for multiple RAPs to adopt in setting out how they will work together in overlapping areas, and how they propose to make the process efficient for sponsors and other agencies.
- Introduce interim RAPs: to assist in more efficient resolution of RAP appointments, and to assist in consultation with traditional owner groups, the statutory authority must be able to appoint interim RAPs for an area once an application has been submitted, in accordance with the following criteria:
 - Only one interim RAP can be appointed per area.
 - If there is more than one RAP application for the same area (as opposed to just a shared boundary issue), then parties are required to come together and sort out their applications within a 30-day timeframe in order to gain interim RAP status.
 - If the issue remains unresolved after 30 days, both parties may submit applications but they will not have interim RAP status.
 - Provision as an interim RAP should only last as long as the RAP appointment process takes - the suggested timeframe is 12 months for the RAP appointment process.

- The AHA could also be amended to allow for the appointment of RAPs to be reviewed by the statutory authority as better information on boundaries and so on becomes available.

Align native title and cultural heritage processes

32. The AHA should be amended to ensure that a registered native title claimant can also be deemed an interim RAP for that area. Registration as a RAP should also be automatic once a group is recognised as the traditional owners for an area under the *Traditional Owner Settlement Act 2010* (Vic) (**TOSA**).

33. The AHA and associated policy should be amended to allow for the sharing of information between RAP and native title applications and processes.

34. Section 3 of the AHA ('objectives') should be amended to include an objective relating to the harmonisation and alignment of native title and RAP outcomes.

35. Government should 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.

TIMELY AND EFFICIENT CULTURAL HERITAGE ASSESSMENT

36. The amount of development within a region should not dictate the level of protection afforded to Aboriginal cultural heritage. 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.

Support for a state-wide assessment of cultural heritage with a view to introducing minimum standards for protection

37. The preservation and protection of all cultural heritage right across the State must be the key priority of any new statutory authority. To this end, a statutory authority must play a proactive role in planning and land management decisions that impact on cultural heritage.

38. To support the statutory authority in this role, the VTOLJG would support the development of a more strategic, state-wide assessment (country mapping) of Aboriginal cultural heritage in Victoria, on the condition that such an assessment would be conducted in partnership with traditional owner groups.

39. The purpose of such an assessment must be two-fold:

- to reduce the cultural heritage assessment burden on individual CHMPs and
- to assist in the development of minimum uniform standards for the protection and preservation of Aboriginal cultural heritage across the board.

Introduce minimum standards for the protection of Aboriginal cultural heritage

40. Trigger points for CHMPs and cultural heritage permits are inadequate, with activities taking place on country with no notice to traditional owners. Minimum standards must therefore be set to protect and preserve Aboriginal cultural heritage across the board. This must be accepted as a public cost.

41. The VTOLJG submits that a minimum standard for protection of Aboriginal cultural heritage should be introduced in accordance with the following criteria:

- Recognise that cultural heritage is in the landscape: the AHA and supporting policy should be amended to clearly identify that 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, and irrespective of the level of development in an area.
- Introduce a duty of care provision: the Government must 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). To this end, the objectives statement in s3 of the AHA should 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.
- Prioritise prevention of damage and the preservation of heritage: the AHA should be amended to ensure that a uniform minimum standard prioritises the prevention of damage and the preservation of heritage, as opposed to the current approach of salvage and destroy under CHMPs. In accordance with this minimum standard, both the objectives of the AHA, and the assessment of CHMPs and CHPs, should reflect a hierarchy of protection⁴ efforts as follows:
 - protection, prevention of damage and avoidance
 - in-site preservation
 - salvage
 - damage or destruction.
- Establish uniform compliance procedures: uniform compliance procedures should be introduced outside CHMPs and Cultural Heritage Permits (CHPs) in order to protect Aboriginal cultural heritage across Victoria, whether or not development exists in these areas.
- Recognise cultural heritage protection as a public cost: similar to other non-Indigenous heritage protection regimes, setting minimum standards and ensuring compliance for the protection of Aboriginal cultural heritage must be recognised as a public cost. Resources should therefore be allocated to RAPs and traditional owner groups 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 through CHMPs. RAPs and traditional owners need increased resources to maintain and

⁴ 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.

preserve Aboriginal cultural heritage on an ongoing basis in their traditional lands, irrespective of development that occurs.

- Formalise the role of RAPs and traditional owner groups to conduct cultural training: RAPs and traditional owner groups should be mandated to provide – and to be able to charge for – cultural training for government agencies and developers, to ensure that cultural heritage is incorporated into all planning and land management decisions involving cultural heritage.
- Incorporate cultural heritage into land management and planning: Aboriginal cultural heritage must be incorporated into all Government land management and environmental planning, with the statutory authority having a seat at the table with relevant agencies (for example, planning relating to burn-offs, national park management, etc). The statutory authority should develop guidelines for strategic planning, to assist state and local government and larger land developers to assess and manage Aboriginal cultural heritage.

Simplify CHMPs under a statutory authority

42. Many problems affecting CHMPs could be bypassed if sponsors included traditional owners in the process from the earliest planning stages. It is the VTOLJG view that the complexity and cost of CHMPs could be reduced by simply directing developers to sit down and talk with traditional owners at the commencement of a project, with a view to working out a collaborative solution. Whilst there will be some areas that require more complex management plans, other areas would only require an agreed solution to be reached with the traditional owner groups.

Sponsors required to first consult with RAPs/TO groups

43. The VTOLJG submits that developers should be required to deal directly with RAPs and traditional owner groups on cultural heritage issues from the outset, as opposed to a later stage in the process. This would involve approaching the RAP or traditional owner group for the relevant area (with the assistance of the statutory authority) and determining whether or not a CHMP is required for a particular project or area.

44. After consulting with the relevant RAP or traditional owner group as to whether a CHMP is actually required, sponsors could then obtain final approval from the statutory authority in regards to the approach agreed to between the sponsor and relevant RAP or traditional owner group. The statutory authority would be required check as to whether the RAP or traditional owner group have been consulted and have approved the proposed course of action, and if so, would provide final sign-off.

Simplify CHMPs to assist sponsors and RAPs

45. The VTOLJG submits that the CHMP should be a very small document: it must be a tool for sponsors and other parties, not an obstacle for them.

46. Once a cultural assessment has been conducted, all that should be required is:

- a map to show the location of the activity area
- a contingency plan if developers come across something in construction or pre-works
- a guideline as to what happens if human remains are found and

- evidence that cross cultural training has been completed specific to that landscape, by way of an ‘Ochre Card’ (see discussion under 73. below relating to Ochre Cards).

47. The simplified CHMP as described above must be uniform across Victoria.

48. In addition, a new provision should be inserted into the AHA 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 an amendment.

49. An alternative option to assist in simplifying the cultural heritage management system under the AHA would be to abolish CHMPs and replace them with a state-wide uniform legal protection for cultural heritage. Under this option, CHMPs would be replaced 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)*).

Simplify evaluation of CHMPs

50. By ensuring that CHMPs are prepared in partnership with the RAP or traditional owner group for the relevant area, the evaluation process of CHMPs can be simplified. The involvement of the traditional owner group or RAP from the beginning of the project would mean that their involvement at the evaluation stage is less intensive.

51. Once both the sponsor and RAP (or traditional owner group) have signed off on a CHMP, there would be no need for the CHMP to subsequently go through an evaluation process with the statutory authority. The RAP (or traditional owner group) would raise fees through its involvement from the commencement of the project, as opposed to its involvement in the evaluation stage.

52. If a RAP (or relevant traditional owner group) and sponsor have together signed off on a CHMP, then it can be submitted to the statutory authority for approval. The statutory authority would have a simple, procedural checklist to follow in order to provide final sign-off within 7 days.

53. If the CHMP has not followed correct procedure or does not have RAP (or traditional owner group) approval, then it would not be able to obtain final approval from the statutory authority.

54. The VTOLJG would also support the CHMP checklist being revised to reflect the focus on cultural significance. The statutory authority should partner with traditional owners to develop a framework for assessing cultural significance. As suggested by the Government’s Issues and Options Paper, the key criteria for cultural heritage management plan decisions might be:

- does the cultural heritage management plan accurately represent the Registered Aboriginal Party’s cultural heritage priorities?
- is the Registered Aboriginal Party satisfied with how the cultural heritage is proposed to be managed?

55. If the requirements set out in the checklist can be satisfied, the CHMP would be granted final approval by the statutory authority and it could proceed in line with the agreed project proposal.

56. A CHMP would only need to be evaluated where a dispute arose between sponsors and the relevant RAP, or if it has not followed the correct procedure.

Support for additional options

57. THE VTOLJG submits that the requirement for a complex assessment for isolated artefacts and low density artefact scatters should only be removed if

- a desktop or standard assessment arrives at the conclusion that a complex assessment is not required and
- the desktop or standard assessment is carried out in consultation with the traditional owners for the area.

58. Sponsors must first consult with traditional owners in relation to isolated artefacts or low density scatters; at that point and through discussion with traditional owners, it can be determined whether or not a more complex CHMP is required.

59. The VTOLJG would also support a new type of agreement to be introduced for public land management to enable a public land manager and a RAP (or traditional owner group) to agree on cultural heritage management conditions for a range of standard works and maintenance activities for an area of land that would apply for an agreed period, for example in a National Park.

Role of RAPs and consultants with regards to cultural heritage assessments

60. The RAP for the relevant area (or traditional owner group) must be the first port-of-call for sponsors, not the consultants. Any statutory authority must be required to direct sponsors and government agencies to the RAP (or traditional owner group) for the relevant area at first instance.

61. 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.

62. Guidelines should therefore 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. Traditional knowledge – as belonging to traditional owners – must be recognised as a form of expertise on its own.

63. The following guidelines should be introduced for conducting cultural heritage assessments:

- Cultural heritage advisors must be accompanied by a traditional owner or RAP representative from the relevant area for all cultural heritage assessments.
- Where a relevant traditional owner representative is unable to accompany the assessment, an advisor approved by the traditional owner group or RAP and with a minimum Certificate

IV in Aboriginal Cultural Heritage Management or demonstrable long term experience should accompany the advisor instead.

- 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.

64. The VTOLJG proposes two different options for the way RAPs and consultants should work together:

Option 1: Sponsors work with consultants selected from the statutory authority consultants' register

- Under this option, sponsors would retain the right to choose the cultural heritage consultants and/or advisors that they use on projects, but the statutory authority will maintain a consultants register for sponsors' reference.
- The statutory authority would advise a sponsor to request advice from the traditional owner group or RAP for an area when choosing consultants. This is in recognition of the fact that – in order to ensure the RAP or traditional owner group is satisfied with the process – most sponsors who want to ensure the approval of a CHMP will prefer to use a consultant or advisor who also has the approval of the traditional owner group or RAP for the area.

Option 2: RAPs/traditional owners propose preferred consultants and contract consultants directly

- Under this option, sponsors would be required to first make contact with the relevant RAP or traditional owner group, and the sponsor and RAP (or relevant traditional owner group) would then agree on which advisors and/or consultants to work with.
- If traditional owner groups and RAPs are provided with direct control over the development of CHMPs so that they become 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.

ENFORCEMENT

65. The VTOLJG submits that Government must develop a public prosecution policy in relation to the enforcement provisions of the AHA. This should be developed in partnership with any proposed statutory authority and RAPs/traditional owner groups. This policy must provide for a structural separation of the functions relating to administration and enforcement under the AHA.

66. In addition, the VTOLJG supports the following changes to the current enforcement regime:

- Introduce strict liability: the AHA must be amended 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. The word 'knowingly' should be removed from harm offences in ss27(1)(a), 27(3)(a), 27(5)(a) and 28(1)(a).
- Appoint Aboriginal inspectors/enforcement officers: Aboriginal inspectors/enforcement officers need to be made available to follow up on complaints and/or investigations relating

to breaches under the AHA. These inspectors also need to be made available in order to police the conditions of a CHMP after the CHMP is complete. The statutory authority should be able to appoint inspectors once they have completed the appropriate training.

- Introduce new offences: the VTOLJG would also support the introduction of the following new offences:
 - not preparing a cultural heritage management plan when one is required
 - not complying with cultural heritage management plan recommendations/ conditions.
- Involve RAPS in CHMP monitoring and compliance: RAPS should be encouraged to include standard compliance checks (during construction and operation phases of a development) in the CHMP recommendations. The VTOLJG would support the introduction of a prescribed fee for CHMP compliance checks.

Support for a stronger role for RAPS in relation to enforcement

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

68. In addition to being able to issue on-the-spot fines, RAPS must be provided with enforcement powers in relation to Stop Orders, similar to those that were previously held under the former Part IIA of the *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.

69. 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.

70. RAPS must also be provided with standing to seek – and give VCAT 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).

71. 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.

SUPPORT FOR ADDITIONAL RAP FUNCTIONS

72. In order to fulfil their role in protecting and preserving Aboriginal cultural heritage, RAPS need to be involved in land management and planning decisions affecting their appointed areas. The VTOLJG submits that RAPS should therefore be involved in 6-monthly planning meetings with the statutory authority and relevant government agencies in relation to their relevant areas.

Cultural heritage training and awareness

73. The VTOLJG also submits that RAPS' role in cultural heritage training must be formalised in accordance with the following recommendations:

- Promote awareness: Additional resources must be made available to RAPs and traditional owner groups to promote awareness of cultural heritage issues with the general public, to dispel the misinformation and myths that persist about Aboriginal cultural heritage.

Conduct cultural heritage training: All agencies and/or sponsors working in areas that may affect cultural heritage should be required to participate in cultural heritage training conducted by the relevant RAP. Further, it must be 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 as conducted by the RAP.

- Compensate RAPs for training: RAPs must be compensated appropriately for training provided. There should be recognition that the use of traditional owner knowledge is not a free resource. Traditional owners must be appropriately compensated for any training and use of our cultural knowledge by government agencies and experts.

Cultural heritage permits (CHPs)

74. The VTOLJG submits that following amendments should also be made to the CHP processes:

- RAPs should be provided with a power to grant – and amend – 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.

Support for additional RAP functions

75. Finally, the VTOLJG supports the Government's options to provide RAPs with the following functions relating to raising awareness and understanding of Aboriginal cultural heritage:

- a broader advisory role relevant to the RAP's cultural heritage expertise relating to their area
- participating in country mapping and preparing statements of cultural significance for places within their registered area
- facilitating strategic research into the Aboriginal cultural heritage for their registered area
- a role to consult more broadly with traditional owners not affiliated with the RAP.

SUPPORT FOR SIGNIFICANCE APPLIED TO CERTAIN TYPES OF CULTURAL HERITAGE

76. The VTOLJG reiterates its support for the broadening of the definition of Aboriginal cultural heritage under the AHA.

77. 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.

78. The Government needs 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.

79. The AHA also needs to clarify how the repatriation of sacred remains to Indigenous people will occur. The VTOLJG submits that current provisions relating to repatriations are completely ineffective: holding onto remains that have been ordered to be returned to Indigenous people is not only disrespectful of our ancestors, but is considered an act of spiritual and cultural desecration. To ensure that repatriations are made in an appropriate, timely and culturally sensitive manner, there must be:

- a set time limit introduced, in accordance with which remains must be returned after an order or agreement has been made, and
- stronger enforcement provisions to ensure that there is compliance with such a time limit. These provisions must cover the timely repatriation of remains from museums, institutions and private individuals, to ensure that remains can be reburied as soon as practical and not allow those who hold them to keep them in limbo.

80. In addition, with respect to human remains (section 18 of the AHA) the VTOLJG resubmits the following amendments:

- 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.
- Where human remains have been found, the AHA should require the statutory authority 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.
- Where further study is required, it can be carried out by qualified heritage advisors with the assistance and approval of traditional owners.
- If human remains are found to have no known origin, it should be mandatory to conduct further research into the remains.
- 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.
- A qualified statutory authority board member must be appointed to draft a report of the CHMP, conduct meetings, and consult with traditional owners to ascertain how long it should take for repatriation of remains to occur.
- 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.

ISSUES NOT ADDRESSED BY GOVERNMENT ISSUES AND OPTIONS PAPER

Absence of Data

81. 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.

82. To assess the effectiveness of the AHA, the VTOLJG resubmits 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.

83. 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 to assist with the development of proposed changes relating to the AHA.

84. The VTOLJG reiterates its request to the Government to provide our members with access to the VAHC minutes of all meetings and determinations relating to RAP applications conducted to date.

Appendix 1

Free, prior and informed consent:

The UN Declaration on the Rights of Indigenous Peoples (2007) provides that States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing any legislative or administrative measures that may affect them.

Free, prior and informed consent is a methodology underpinning more durable and equitable agreements. The Permanent Forum on Indigenous Issues (2005) identified common elements of free, prior and informed consent:

- **free** refers to consent obtained without coercion or manipulation
- **prior** refers to consent sought sufficiently in advance to allow for Indigenous consultation and decision-making processes
- **informed** refers to having accurate, accessible and understandable information that covers key aspects of the proposal
- **consent** refers to a process that involves good faith consultation with and full participation by Indigenous people in accordance with their own decision making structures.

Free, prior and informed consent requires the assessment of timeframes to ensure sufficient time for Indigenous consultation and decision making. Pressure placed on Indigenous parties to work to 'whitefella' timelines results in unsustainable agreements.

Comprehensive information about decision making processes and substantive issues must be provided to the parties.⁵

⁵ Section from the *Report of the Right People for Country Project Committee*, AAV, March 2011