



ENVIRONMENT AND NATURAL RESOURCES COMMITTEE

Inquiry into the : Establishment and  
: Effectiveness of Registered  
: Aboriginal Parties

: NOVEMBER 2012

PARLIAMENT



OF VICTORIA







# **ENVIRONMENT AND NATURAL RESOURCES COMMITTEE**

## **INQUIRY INTO THE ESTABLISHMENT AND EFFECTIVENESS OF REGISTERED ABORIGINAL PARTIES**

---

**NOVEMBER 2012**

---

**Ordered to be printed**

---

**Victorian Government Printer 2012**

**Parliamentary Paper No. 191  
Session 2010–2012**

Parliament of Victoria

Environment and Natural Resources Committee

Inquiry into the establishment and effectiveness of Registered Aboriginal Parties

ISBN 978-0-9807561-4-2

This report is printed on Revive Laser 90 gsm – 100 per cent recycled paper.



# Table of contents

<i>List of tables</i> .....	v
<i>Committee members</i> .....	vii
<i>Staff</i> .....	vii
<i>Terms of reference</i> .....	ix
<i>Chair’s foreword</i> .....	xi
<i>Executive summary</i> .....	xiii
<i>Recommendations</i> .....	xix
<i>Glossary</i> .....	xxvii
<i>Acronyms and abbreviations</i> .....	xxix

## **CHAPTER ONE ..... 1**

### **Introduction ..... 1**

1.1 Background to the inquiry.....	1
1.2 Review of the <i>Aboriginal Heritage Act 2006</i> (Vic).....	2
1.3 Inquiry process .....	2
1.4 Key issues raised during the inquiry.....	3
1.5 Inquiry report .....	4

## **CHAPTER TWO ..... 7**

### **Aboriginal heritage protection in Victoria ..... 7**

2.1 Introduction .....	7
2.2 Heritage in the Australian context .....	8
2.3 Indigenous heritage in Australia .....	9
2.4 Developing Aboriginal heritage legislation in Victoria .....	10
2.4.1 <i>Archaeological and Aboriginal Relics Preservation Act 1972</i> (Vic).....	10
2.4.2 <i>Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987</i> (Cth) – Part IIA .....	12
2.5 <i>Aboriginal Heritage Act 2006</i> (Vic).....	13
2.5.1 <i>Defining and protecting Aboriginal heritage under the Act</i> .....	14
2.5.2 <i>Victorian Aboriginal Heritage Council</i> .....	15
2.5.3 <i>Registered Aboriginal Parties</i> .....	15
2.5.4 <i>Cultural Heritage Management Plans</i> .....	17

2.6	Commonwealth protection for Aboriginal heritage .....	18
2.6.1	<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)</i> .....	18
2.6.2	<i>Other relevant Commonwealth acts</i> .....	19
2.6.3	<i>Indigenous Protected Areas</i> .....	19
2.7	Indigenous heritage protection in other Australian jurisdictions.....	20
2.7.1	<i>Australian Capital Territory</i> .....	20
2.7.2	<i>New South Wales</i> .....	21
2.7.3	<i>Northern Territory</i> .....	22
2.7.4	<i>Queensland</i> .....	22
2.7.5	<i>South Australia</i> .....	23
2.7.6	<i>Tasmania</i> .....	24
2.7.7	<i>Western Australia</i> .....	24
2.8	Indigenous heritage protection in New Zealand .....	24
2.8.1	<i>The Treaty of Waitangi</i> .....	25
2.8.2	<i>Historic Places Act 1993</i> .....	25
2.8.3	<i>Other New Zealand heritage legislation</i> .....	26
2.8.4	<i>Mandating iwi</i> .....	27
<b>CHAPTER THREE .....</b>		<b>29</b>
<b>Traditional ownership and Aboriginal Victorians .....</b>		<b>29</b>
3.1	Introduction .....	29
3.2	Victorian traditional owners .....	30
3.3	Aboriginal people and the settlement of Victoria .....	31
3.3.1	<i>Reserves and missions</i> .....	31
3.3.2	<i>Aboriginal communities in the twentieth century</i> .....	33
3.4	Defining traditional ownership .....	34
3.5	Native title in Victoria .....	36
3.6	Traditional ownership and the <i>Aboriginal Heritage Act 2006</i> (Vic).....	39
3.6.1	<i>Traditional owners and historical and contemporary people</i> .....	41
<b>CHAPTER FOUR .....</b>		<b>47</b>
<b>The membership and structure of the Victorian Aboriginal Heritage Council .....</b>		<b>47</b>
4.1	Introduction .....	47
4.2	Overview of the Victorian Aboriginal Heritage Council .....	48

4.3	Membership of the Victorian Aboriginal Heritage Council .....	49
4.3.1	<i>Council membership and conflicts of interest .....</i>	51
4.3.2	<i>Alternative criteria for Council membership .....</i>	54
4.3.3	<i>Option for an advisory committee to assist Council.....</i>	57
4.3.4	<i>Alternate or co-opted Council members .....</i>	58
4.4	Council structure .....	59
4.4.1	<i>Options for the future structure of the Council .....</i>	61
<b>CHAPTER FIVE.....</b>		<b>63</b>
<b>The appointment of Registered Aboriginal Parties.....</b>		<b>63</b>
5.1	Introduction .....	64
5.2	The Registered Aboriginal Party application and appointment process .....	64
5.3	Criteria used by the Council to determine Registered Aboriginal Party applications .....	66
5.3.1	<i>Evidence used to determine traditional ownership.....</i>	67
5.3.2	<i>Impact of Council decision-making on local communities .....</i>	70
5.3.3	<i>Capacity of Registered Aboriginal Party applicants to fulfil their legislative responsibilities if appointed.....</i>	71
5.4	Transparency of Council decision-making.....	72
5.5	Streamlining the Registered Aboriginal Party application and determination process .....	73
5.6	Council capacity and resourcing .....	76
5.6.1	<i>Council's capacity to inquire into matters relevant to Registered Aboriginal Party applications .....</i>	76
5.6.2	<i>Council's capacity to support Registered Aboriginal Party applicants during the application process.....</i>	77
5.7	Length of time the Registered Aboriginal Party determination process takes.....	79
5.8	Competing and overlapping Registered Aboriginal Party applications .....	81
5.8.1	<i>Mediation and the Right People for Country project .....</i>	84
5.9	Appeals processes for unsuccessful Registered Aboriginal Party applicants.....	87
<b>CHAPTER SIX .....</b>		<b>91</b>
<b>The effectiveness of established Registered Aboriginal Parties.....</b>		<b>91</b>
6.1	Introduction .....	91
6.2	Established Registered Aboriginal Parties.....	92

6.3	The statutory functions of Registered Aboriginal Parties.....	93
6.4	Opportunities associated with becoming a Registered Aboriginal Party .....	93
6.5	Cultural Heritage Management Plans.....	94
6.5.1	<i>Registered Aboriginal Parties and Cultural Heritage Management Plans .....</i>	<i>96</i>
6.5.2	<i>Relationships between Registered Aboriginal Parties and sponsors of Cultural Heritage Management Plans .....</i>	<i>97</i>
6.6	Protecting Aboriginal heritage beyond Cultural Heritage Management Plans .....	100
6.6.1	<i>Country mapping.....</i>	<i>101</i>
6.6.2	<i>Registered Aboriginal Parties and the repatriation of human remains .....</i>	<i>103</i>
6.6.3	<i>Enforcement of the Aboriginal Heritage Act 2006 (Vic) and Registered Aboriginal Parties.....</i>	<i>103</i>
6.7	Staffing and financial capacity of Registered Aboriginal Parties .....	105
6.7.1	<i>Fees charged by Registered Aboriginal Parties .....</i>	<i>106</i>
6.7.2	<i>Concerns relating to the consultation fees charged by Registered Aboriginal Parties .....</i>	<i>109</i>
6.8	Supporting Registered Aboriginal Parties into the future .....	111
6.8.1	<i>Industry support for Registered Aboriginal Parties .....</i>	<i>115</i>
6.8.2	<i>Opportunities for Registered Aboriginal Parties within the cultural heritage advisor industry.....</i>	<i>118</i>
6.9	Relationship between Registered Aboriginal Parties and the Victorian Aboriginal Heritage Council.....	121
<b>CHAPTER SEVEN.....</b>		<b>125</b>
<b>Traditional owners in areas without a Registered Aboriginal Party.....</b>		<b>125</b>
7.1	Introduction .....	125
7.2	Areas without an appointed Registered Aboriginal Party .....	126
7.2.1	<i>Experiences of traditional owners in areas without an appointed Registered Aboriginal Party .....</i>	<i>126</i>
7.3	Cultural Heritage Management Plans in areas without an appointed Registered Aboriginal Party .....	129
7.3.1	<i>Experiences of sponsors in areas without a Registered Aboriginal Party .....</i>	<i>130</i>
7.4	Guidelines for consulting with traditional owners in areas without an appointed Registered Aboriginal Party .....	131
7.5	Traditional owner groups that do not wish or are unable to become Registered Aboriginal Parties.....	134



<b>APPENDIX ONE .....</b>	<b>137</b>
List of submissions .....	137
<b>APPENDIX TWO .....</b>	<b>141</b>
List of public hearings .....	141
<b>APPENDIX THREE.....</b>	<b>145</b>
List of briefings and site inspections .....	145
<b>APPENDIX FOUR.....</b>	<b>147</b>
Map of Registered Aboriginal Parties in Victoria .....	147
<b>APPENDIX FIVE .....</b>	<b>149</b>
Extract from the minutes of proceedings – 22 October 2012 .....	149
<b>BIBLIOGRAPHY .....</b>	<b>151</b>

## *List of tables*

Table 3.1	Native Title Determinations – Victoria .....	37
Table 6.1	Established Registered Aboriginal Parties.....	92
Table 6.2	Fee guidelines for Registered Aboriginal Parties .....	108
Table 6.3	Cultural Heritage Management Plans evaluated by RAPs 2008-2011 .....	109



## ***Committee members***

This inquiry was conducted during the term of the 57th Parliament.

The Members of the Environment and Natural Resources Committee are:

Mr David Koch, MLC (Chair);

Hon. John Pandazopoulos, MP (Deputy Chair);

Mr Tim Bull, MP;

Ms Joanne Duncan, MP; and

Ms Lorraine Wreford, MP.

## ***Staff***

For this inquiry, the Committee was supported by a Secretariat comprising:

Executive Officer: Dr Gregory Gardiner

Office Manager: Ms Karen Taylor

Research Officer: Dr Kelly Butler



## ***Terms of reference***

That under s33 of the *Parliamentary Committees Act 2003* the following matters be referred to the joint investigatory committees specified:

To the **Environment and Natural Resources Committee** — for inquiry, consideration and report no later than 15 November 2012 on the establishment and effectiveness of Registered Aboriginal Parties and the Committee is asked to consider:

- (a) Victorian Aboriginal Heritage Council policies in relation to the appointment of Registered Aboriginal Parties including the factors that should be taken into account by the Council in making a decision such as:
  - (i) the degree to which traditional ownership is contested in the area the subject of an application;
  - (ii) the impact that decisions may have on the community;
  - (iii) the capacity of the applicant to fulfil legislative responsibilities if appointed;
  - (iv) the process used to determine and identify the successful Registered Aboriginal Party;
- (b) the support available to the Council in making decisions about the appointment of Registered Aboriginal Parties including:
  - (i) membership and structure of the Council;
  - (ii) council's capacity to inquire into matters relevant to applications, including supporting applicants to provide information needed to fully assess applications; and
- (c) the effectiveness of the established Registered Aboriginal Parties.

### **Votes and Proceedings of the Legislative Assembly of Victoria**

#### **No. 4 — Thursday 10 February 2011**





## Chair's foreword

The inquiry into the establishment and effectiveness of Registered Aboriginal Parties provided the Environment and Natural Resources Committee with a unique opportunity to contribute to enhancing the processes for the protection and administration of Aboriginal heritage in Victoria. Aboriginal heritage is an important and distinct component of Victoria's heritage. It has great value and meaning to Aboriginal Victorians, and is also of significance to all Victorians, and to our understanding of the history and cultures that have inhabited this part of Australia since early times.

The inquiry also took place in a context in which the *Aboriginal Heritage Act 2006* (Vic) underwent a review, mandated under the Act, and conducted by Aboriginal Affairs Victoria. While the Committee's terms of reference were distinct, and focused primarily on the roles of the Victorian Aboriginal Heritage Council (the 'Council') and Registered Aboriginal Parties (RAPs), the Committee has benefited from the findings of the review, released in August 2012.

Under its terms of reference the Committee examined the policies and practices of the Council in appointing RAPs, the structure and resourcing of the Council, and the effectiveness of appointed RAPs. The Committee heard evidence from a wide range of groups, both Aboriginal and non-Aboriginal, from across the state. It received a total of 70 submissions from Aboriginal organisations, individual Aboriginal community members, government agencies, heritage consultants, business groups, local councils and community organisations. The Committee travelled state wide, and held well-attended public hearings in Hamilton, Lakes Entrance, Shepparton and Melbourne, and conducted site inspections in Heywood, Lake Condah, Lancefield and Sunbury. The Committee also travelled to Wellington New Zealand, where it was briefed by Maori heritage officials and Maori community leaders on the heritage system in that country. I thank all those who made a contribution and assisted the Committee in reaching the report's recommendations.

The Committee believes that the implementation of the 38 recommendations in this report will substantially improve the operations and capacity of the Council, the process of appointing RAPs, and the effectiveness of RAPs. The Committee regards the introduction of an independent mediation process as central to the success of its proposals for change.

I wish to acknowledge and thank my parliamentary colleagues on the Committee for their excellent work throughout the inquiry process: Deputy Chair, Hon. John Pandazopoulos MP, Mr Tim Bull MP, Ms Joanne Duncan MP and Ms Lorraine Wreford MP. I would also like to acknowledge the work of the Committee Secretariat. My thanks to Dr Greg Gardiner, for his oversight of the inquiry process, and contributions in the role of Executive Officer. I particularly wish to thank the inquiry's Research Officer, Dr Kelly Butler, for her excellent work throughout the inquiry, and thanks also to Office Manager, Ms Karen Taylor, for her support and dedication in the production the final report.



**Mr David Koch, MLC**  
Chair



# **Executive summary**

## **Chapter one: Introduction**

Chapter one forms the introduction to the report, and provides a background to the inquiry including its terms of reference, and introductory information on the relevant legislation governing Aboriginal heritage protection in Victoria. Chapter one describes the review of the *Aboriginal Heritage Act 2006* (Vic) conducted by Aboriginal Affairs Victoria, which took place across 2011 and 2012. The introduction provides an overview of the inquiry process, detailing public hearings held, site inspections conducted, submissions received and the various groups consulted and heard from across the state. Key issues that arose during the inquiry are listed, and a short overview of each of the report's chapters is presented. The chapter emphasises the unique place of Aboriginal heritage in Australia, and the importance of traditional ownership to the management of heritage.

## **Chapter two: Aboriginal heritage protection in Victoria**

Chapter two provides an overview of the development of the legislative framework for the protection of Aboriginal cultural heritage in Victoria, describing the key features of the *Aboriginal Heritage Act 2006* (Vic), which established the Victorian Aboriginal Heritage Council and a system of Registered Aboriginal Parties as bodies with primary responsibility for the management of Aboriginal heritage. Indigenous heritage is considered a distinct part of Australia's heritage and specific legislation has been developed to manage the heritage of Aboriginal and Torres Strait Islander people. Up to 2006, Aboriginal heritage in Victoria was managed under a 'dual system' comprised of the Victorian *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) (the 'AARP Act') and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the 'Commonwealth Act') – Part IIA of which specifically applied to Victoria. Under these provisions it was often not clear when developers, land owners and local government needed to consider Aboriginal heritage issues.

The chapter describes how the introduction of the *Aboriginal Heritage Act 2006* (the 'Act') sought to respond to a range of issues that had been raised in relation to the 'dual system', and brought control of Aboriginal heritage back under the management of the state. The Act repealed the AARP Act and was enacted following the repeal of the Part IIA amendment to the Commonwealth Act. One of the Act's main objectives is to 'accord appropriate status to Aboriginal people with traditional or familial links with Aboriginal cultural heritage in protecting that heritage'. The Act establishes the Victorian Aboriginal Heritage Council (the 'Council'), which is a skills-based body comprised of up to eleven Aboriginal people with experience and knowledge of heritage issues who 'can demonstrate traditional or familial links to an area in Victoria'. While it has a number of roles under the Act, its current primary function is the appointment of Registered Aboriginal Parties.

The chapter provides an overview of Registered Aboriginal Parties (RAPs), which are incorporated bodies appointed by the Council to manage Aboriginal cultural heritage for a specific area. If a RAP applicant has been registered as a native title holder under the *Native Title Act 1993* (Cth), or

has entered into an agreement with the state under the *Traditional Owner Settlement Act 2010* (Vic), the Council must register the applicant as a RAP. In all other situations, the Act directs the Council to consider a range of issues in determining an application. The Council has appointed nine RAPs, which together cover 56 per cent of the area of Victoria. One of the key functions of RAPs is their involvement in the development and assessment of Cultural Heritage Management Plans. The chapter concludes with an overview of Aboriginal heritage legislation across Australia, and briefly describes the system of heritage protection in New Zealand.

### **Chapter three:    *Traditional ownership and Aboriginal Victorians***

Chapter three discusses the concept of traditional ownership and the impact that the native title process has had on Victoria's Aboriginal community, and considers how the development of native title has driven changes to Aboriginal heritage protection legislation. It provides a framework for a discussion of term of reference (a) (i), which directs the Committee to consider the policies of the Council in relation to 'the degree to which traditional ownership is contested' in areas covered by RAP applications.

The chapter provides an overview of the contemporary Indigenous population of Victoria, before turning to a short history of Aboriginal people since white settlement, providing information on government policy. In particular the chapter outlines the movement of Aboriginal people around the state, under the influence of government policies, and the development in the nineteenth century of the reserve and mission system. Twentieth century developments are then described in brief, before the chapter turns to a consideration of 'traditional ownership' as a concept, and how it has developed in legislation, with a particular emphasis on native title. A list of native title determinations in Victoria is provided, and an analysis of the relationship between native title legislation and heritage law. The chapter then specifically considers traditional ownership in the context of the *Aboriginal Heritage Act 2006*, and describes the differences between Aboriginal groups defined as traditional owners, and those groups defined as 'historical or contemporary' people. The chapter concludes with recommendations that assert the primacy of traditional ownership in heritage management.

### **Chapter four:    *The membership and structure of the Victorian Aboriginal Heritage Council***

Chapter four examines the current membership and structure of the Victorian Aboriginal Heritage Council, and explores term of reference (b) (i) which requests that the Committee consider: 'the support available to the Council in making decisions about the appointment of Registered Aboriginal Parties including: (i) membership and structure of the Council.' The chapter also considers aspects of term of reference (b) (ii), the 'council's capacity to inquire into matters relevant to [RAP] applications'.

The chapter provides an overview of the Council, outlining its basis as an appointed, skills-based body; current structure and obligations under the Act; and, the secretariat support it receives. In the following sections, criticism from Aboriginal stakeholders of the Council is detailed. Critics claim that the Council is unrepresentative, lacks diversity, and is the subject of repeated conflicts



of interest. Aboriginal stakeholders argue for a range of changes to the Council, and various stakeholder-suggested models for reform are provided. Some witnesses to the inquiry argue for a fully democratic body representing traditional owners from across the state, while others call for the Council members to be appointed from different regions.

The chapter recommends changes to the Act, to provide for the Minister to ensure the diversity of the Council's membership, and to require that nominees for the Council have the demonstrated support of the relevant traditional owner group. The creation of an expert advisory board to assist the Council at the Minister's discretion is also called for. The chapter concludes by addressing the length of tenure of the Council's Chair, which is currently restricted to one year, and recommends that this period be doubled.

### ***Chapter five: The appointment of Registered Aboriginal Parties***

Chapter five investigates the process and policies used by the Victorian Aboriginal Heritage Council to appoint Registered Aboriginal Parties, and relates to term of reference (a) which directs the Committee to consider a range of matters, (a) (i to iv). The chapter also addresses term of reference (b) (ii): 'the council's capacity to inquire into matters relevant to [RAP] applications, including supporting applicants to provide information needed to fully assess applications'.

The chapter describes in some detail the RAP application process, and how this process is essentially paper-based. The Council is of the view that the information required to be furnished by applicants under the Act is of a limited nature. The Council has a process for creating a decision-making quorum, which excludes potentially conflicted members. The following section details the criteria used by the Council in determining the RAP applications themselves, and the fact that the Council has adopted a central policy that priority is given to applications made by organisations representing traditional owners. The evidence used by the Council to determine if a body represents traditional owners includes genealogical data, anthropological and historical materials, information from public notification, and the Council's own knowledge base. The Council also commissions research.

The chapter describes how the decision-making of the Council has been criticised by various Aboriginal stakeholder groups. Witnesses to the inquiry argued that the Council often ignored important records and maps, and asked for too much genealogical information (or not enough). Some witnesses called for more transparency in the Council's decision-making processes, and for face-to-face meetings to be held between the members of the Council and applicant groups, particularly with elders. Others were concerned that the standard of proof was pitched too high, and was more akin to that required for native title claims. The impact of decisions of the Council on local communities was also a concern expressed by some stakeholders, and the chapter outlines these complaints. The Council has also pointed to resourcing issues for appointed RAPs, and how the Act requires that appointment must take effect immediately a decision in the affirmative is made.

Chapter five then provides recommendations designed to streamline the application and determination process, including amendments to the Act, the development of policy guidelines and plain English materials for applicants. Importantly, the practice of face-to-face meetings between Council members and RAP applicants, during and after the determination process, is strongly recommended. On the subject of Council resourcing the Committee concludes that the Council requires further resourcing to support the recommended changes to Council activity. On the issue of the time frame required for RAP applications to be determined, the chapter demonstrates that the current 120 day time frame is unworkable, and recommends that it be scrapped in the Act, in favour of a policy guideline of a one year maximum.

The chapter then considers the role of independent mediation, which many contributors to the inquiry have stated is critical for an effective set of outcomes. The Council's lack of power to direct parties to mediate is addressed, and the Committee recommends that it be so empowered under the Act. The chapter recommends that resources need to be provided to support increased mediation.

On the issue of potential appeals, a subject raised by a number of unsuccessful applicants to the inquiry, the Committee concludes that an appeal mechanism is called for, but one that is cost-effective, meaningful and does not undermine the principle of traditional owners as decision-makers. Accordingly, the Committee recommends in chapter five a new process for the consideration of appeals, one that will involve the Minister determining, on application, if grounds for appeal exist, and if so, directing the Council to consider such an appeal. The Minister will also have in exceptional circumstances, the power to order a review of a RAP appointment.

## **Chapter six:        *The effectiveness of established Registered Aboriginal Parties***

Chapter six examines the effectiveness of the currently established Registered Aboriginal Parties and as such, addresses term of reference (c), which instructs the Committee to consider 'the effectiveness of the established Registered Aboriginal Parties'. The Committee received evidence from eight of the nine currently appointed RAPs, and received one joint submission from all nine RAPs, and in addition heard evidence from a number of industry representative groups, local government, statutory authorities, utility providers, and heritage advisors about their experiences working with RAPs.

The chapter provides a table outlining the RAPs appointed to date, with information on appointment date, region and location. The functions of RAPs as outlined in the Act are presented. The chapter continues by describing some of the benefits that have flowed from RAP appointment, including providing traditional owner groups with state recognition that they are the 'right people for country'. Appointment as a RAP has also entitled traditional owner groups to play a direct role in the management of heritage on their country through the assessment of Cultural Heritage Management Plans (CHMPs), and provided employment and training opportunities for local Aboriginal people.

Cultural Heritage Management Plans are designed to ensure that Aboriginal cultural heritage is managed in line with the requirements of the Act. The chapter provides details on how CHMPs are managed under the Act, the requirements and roles of RAPs in relation to them, and relations between RAPs and sponsors of CHMPs, which have been generally positive. Chapter six also raises the issue of heritage protection beyond the development of CHMPs, and makes recommendations to enhance the protection of key sites, and to develop further the process of country mapping. The matter of sponsors adhering to CHMPs is also discussed.

The financial capacity of RAPs was a central matter for many stakeholders. The chapter describes the assessment fees that RAPs receive for assessing CHMPs, the Department of Planning and Community Development's consultation fee guidelines for RAPs participating in the development of CHMPs, and the income generated for RAPs from both. The chapter makes recommendations in relation to reviewing the current fee structure and the role of the Council in monitoring consultation fees. The resourcing of RAPs outside income generated from CHMPs is a key issue for stakeholders, particularly in areas of low economic activity. The chapter makes several recommendations on the resourcing of RAPs, based on the principle that RAPs are engaged in heritage protection for all Victorians.

Finally, the chapter discusses the role of the Council and its relationship with RAPs. The role requires expansion so that the Council can have an ongoing function in overseeing RAPs and their performance of their statutory duties. The expansion of the role of the Council has resourcing implications.

### ***Chapter seven: Traditional owners in areas without a Registered Aboriginal Party***

Chapter seven provides discussion and recommendations on those areas of the state that are yet to have Registered Aboriginal Parties appointed to them. In particular, the chapter focuses on the role(s) of RAP applicants, and traditional owners who do not seek RAP status, and their concerns regarding the protection of heritage sites, and consultation, or lack thereof, by sponsors in the development of CHMPs. Industry is keen for RAPs to be appointed to these remaining areas as soon as is feasible.

The chapter provides accounts by Aboriginal stakeholders suggesting that heritage protection is not occurring in areas for which they are culturally, if not legislatively, responsible. The chapter recommends that Aboriginal Affairs Victoria (AAV) continue to manage heritage in areas without RAPs, ensuring that local traditional owner knowledge is utilised. Also, AAV should take a more proactive role in assisting sponsors in dealing with relevant traditional owners in such areas, continue to take into account their views in assessing CHMPs, and prepare guidelines to assist traditional owner groups to build partnerships with neighbouring groups with the aim of forming a viable RAP application. A future role for the Council is also discussed.



# Recommendations

## **Chapter three: Traditional ownership and Aboriginal Victorians**

### **RECOMMENDATION 3.1**

The *Aboriginal Heritage Act 2006* (Vic) be amended to allow for only incorporated bodies representing traditional owners to be appointed as Registered Aboriginal Parties. *Page 44*

### **RECOMMENDATION 3.2**

Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council develop policy guidelines to support Registered Aboriginal Parties to consult, where appropriate and relevant, Aboriginal people with historical or contemporary interests in heritage. *Page 45*

## **Chapter four: The membership and structure of the Victorian Aboriginal Heritage Council**

### **RECOMMENDATION 4.1**

The Minister appoints individuals to the Victorian Aboriginal Heritage Council who are recognised Victorian traditional owners, and who possess knowledge and experience of Aboriginal heritage. The Council will continue to comprise up to 11 individuals. *Page 56*

### **RECOMMENDATION 4.2**

The *Aboriginal Heritage Act 2006* (Vic) be amended to require the Minister to take into consideration the diversity of Victoria's traditional owner groups when appointing members to the Victorian Aboriginal Heritage Council. *Page 57*

### **RECOMMENDATION 4.3**

The *Aboriginal Heritage Act 2006* (Vic) be amended to require that individuals nominating for the Victorian Aboriginal Heritage Council:

- nominate the traditional owner group with which they primarily identify; and
- provide evidence, to the satisfaction of the Minister, that their self-nomination for membership of the Victorian Aboriginal Heritage Council is broadly supported by the relevant traditional owner group. *Page 57*



**RECOMMENDATION 4.4**

The *Aboriginal Heritage Act 2006* (Vic) be amended to provide for the creation of an independent advisory committee of no more than six individuals, appointed by the Minister, with demonstrated expertise in archaeology, cultural heritage, anthropology, history and/or relevant industries. The advisory committee would be called upon at the Minister's discretion to assist the Council and would have no voting role on Council decisions. The Council can also seek from the Minister a convening of the independent advisory committee. *Page 58*

**RECOMMENDATION 4.5**

The *Aboriginal Heritage Act 2006* (Vic) be amended to provide for the creation of a panel of no more than three alternate Council members who can be called upon, if required, by the Council to participate in RAP decision-making in situations where the Council is not able to convene a quorum. Members of this panel are to be appointed using the same criteria and processes as for ordinary members of the Council. *Page 59*

**RECOMMENDATION 4.6**

The *Aboriginal Heritage Act 2006* (Vic) be amended to allow the Chair of the Victorian Aboriginal Heritage Council to serve a term of two years, and to be eligible for re-election for a further two years, for a maximum of two terms. *Page 60*

**Chapter five: The appointment of Registered Aboriginal Parties****RECOMMENDATION 5.1**

Section 150 (1) of the *Aboriginal Heritage Act 2006* (Vic) be amended:

- to require that applications for Registered Aboriginal Party status be made on the Department of Planning and Community Development's approved form;
- to mandate that applications must include all the supporting documentation specified by the approved form in order to be considered valid; and
- to state that staff of the Victorian Aboriginal Heritage Council may determine whether a Registered Aboriginal Party application is valid. *Page 74*

**RECOMMENDATION 5.2**

Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council develop policy guidelines to streamline the appointment process for Registered Aboriginal Parties to include:

- the opportunity for face-to-face meetings between secretariat staff of the Victorian Aboriginal Heritage Council and prospective Registered Aboriginal Party applicants prior to the submission of an application; and

- the production of plain English written materials to assist Registered Aboriginal Party applicants to gather the evidence necessary to support their application. *Page 75*

### RECOMMENDATION 5.3

The Victorian Aboriginal Heritage Council re-shape the process used to determine RAP applications to include the provision for face-to-face meetings between the Victorian Aboriginal Heritage Council and Registered Aboriginal Party applicants. The determination process should include:

- the opportunity for Registered Aboriginal Party applicants to attend meetings with Victorian Aboriginal Heritage Council members while an application is under deliberation, especially for the purpose of conveying oral evidence about traditional ownership; and
- provisions for meetings between unsuccessful Registered Aboriginal Party applicants and Victorian Aboriginal Heritage Council members to ensure that applicants receive clear feedback on why their application was declined. *Page 75*

### RECOMMENDATION 5.4

Aboriginal Affairs Victoria and the Native Title Unit, Department of Justice, develop plain English information publications to clarify the relationship between the Registered Aboriginal Party appointment process – and the level of evidence required to demonstrate traditional ownership within the context of the *Aboriginal Heritage Act 2006* (Vic) – and the distinct requirements of the native title determination process. *Page 75*

### RECOMMENDATION 5.5

The Victorian Government and Aboriginal Affairs Victoria review the resources allocated to the Victorian Aboriginal Heritage Council, with a view to:

- increasing the capacity of the Victorian Aboriginal Heritage Council to provide support to Registered Aboriginal Party applicants to gather the evidence and documentation needed to accompany an appropriate application;
- extending the Victorian Aboriginal Heritage Council's capacity to commission research to assist its decision-making; and
- enhancing the ability of the Victorian Aboriginal Heritage Council to provide face-to-face support and to facilitate meetings with applicants during the Registered Aboriginal Party determination process. *Page 78*

### RECOMMENDATION 5.6

The *Aboriginal Heritage Act 2006* (Vic) be amended to remove section 151 (1), which requires the Victorian Aboriginal Heritage Council to determine applications for Registered Aboriginal Party status within 120 days of receiving an application. In its place, Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council are to develop policy guidelines to ensure that Registered Aboriginal Party applications are assessed within a maximum of one year with an extension of six months if required. *Page 81*

**RECOMMENDATION 5.7**

That *Aboriginal Heritage Act 2006* (Vic) be amended to provide for the Victorian Aboriginal Heritage Council to be empowered to compel both appointed Registered Aboriginal Parties and organisations applying to become Registered Aboriginal Parties to attend independent mediation.

Page 86

**RECOMMENDATION 5.8**

The Victorian Government provide funding:

- to continue the Right People for Country project beyond 2012, subject to the outcomes of the pilot phase; and
- to the Victorian Aboriginal Heritage Council to facilitate independent mediation within the context of the appointment of Registered Aboriginal Parties.

Page 87

**RECOMMENDATION 5.9**

The *Aboriginal Heritage Act 2006* (Vic) be amended:

- to provide for the Minister for Aboriginal Affairs to determine whether an unsuccessful Registered Aboriginal Party applicant has sufficient grounds to appeal the decision of the Victorian Aboriginal Heritage Council to decline their application;
- to require the Victorian Aboriginal Heritage Council, at the direction of the Minister for Aboriginal Affairs, to reconsider an unsuccessful Registered Aboriginal Party application; and
- to allow the Minister provision, in exceptional circumstances, to require a review of previous Registered Aboriginal Party appointments, when satisfied such a course of action is warranted.

Further, that Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council develop policy guidelines to support the development of the appeals process for unsuccessful RAP applicants.

Page 89

**Chapter six:      *The effectiveness of established Registered Aboriginal Parties*****RECOMMENDATION 6.1**

Aboriginal Affairs Victoria resource Registered Aboriginal Parties, on a project basis, to undertake works to preserve heritage sites that are identified as priority sites by the Registered Aboriginal Parties. Consultation for all works should take place with the respective landholder/land manager.

Page 101

**RECOMMENDATION 6.2**

The Victorian Government resource Aboriginal Affairs Victoria to develop a statewide program of country mapping to improve the available knowledge about areas of cultural heritage sensitivity. Country mapping should be undertaken in conjunction with local government, Registered Aboriginal Parties and land owners/managers. *Page 102*

**RECOMMENDATION 6.3**

Aboriginal Affairs Victoria, in conjunction with the Victorian Aboriginal Heritage Council, develop policy guidelines to monitor the adherence of sponsors to approved Cultural Heritage Management Plans, with the involvement of Registered Aboriginal Parties. *Page 105*

**RECOMMENDATION 6.4**

Aboriginal Affairs Victoria, in consultation with the Victorian Aboriginal Heritage Council, review the fee guidelines for the participation of Registered Aboriginal Parties in the development of Cultural Heritage Management Plans, and establish a fee structure that balances the needs of both sponsors and Registered Aboriginal Parties.

Following this review the hourly rates charged by Registered Aboriginal Parties to participate in the development of a Cultural Heritage Management Plan will be capped according to the new fee structure published on the Department of Planning and Community Development's website.

*Page 111*

**RECOMMENDATION 6.5**

The Victorian Aboriginal Heritage Council monitors the consultation fees charged by Registered Aboriginal Parties, as part of an expanded role for the Council in relation to overseeing the activities of appointed Registered Aboriginal Parties. *Page 111*

**RECOMMENDATION 6.6**

The Victorian Government and Aboriginal Affairs Victoria review the level of assistance provided to Registered Aboriginal Parties, to reflect the principle that Registered Aboriginal Parties undertake the management and protection of Aboriginal heritage on behalf of all Victorians. *Page 114*

**RECOMMENDATION 6.7**

Aboriginal Affairs Victoria identifies a structure that provides ongoing support to Registered Aboriginal Parties to ensure that every Registered Aboriginal Party is able to sustain a minimal level of staffing and infrastructure to support their operations. *Page 115*

**RECOMMENDATION 6.8**

Aboriginal Affairs Victoria reviews the resources currently available to its heritage branch, with a view to identifying those resources that may be redirected to support the operations of Registered Aboriginal Parties.

*Page 115*

**RECOMMENDATION 6.9**

Aboriginal Affairs Victoria continues to make business planning advice available to Registered Aboriginal Parties, with a view to supporting all Registered Aboriginal Parties to maximise income generation opportunities outside the process of assessing Cultural Heritage Management Plans.

*Page 115*

**RECOMMENDATION 6.10**

Aboriginal Affairs Victoria develops a licensing and accreditation system for cultural heritage advisors, including the development of policy guidelines for the conduct of cultural heritage advisors. This licensing system, to be established by Aboriginal Affairs Victoria, should include an annual registration fee that is to be used by Registered Aboriginal Parties in the resourcing of Aboriginal cultural heritage activities, such as country mapping.

*Page 117*

**RECOMMENDATION 6.11**

Aboriginal Affairs Victoria develops an Aboriginal heritage protection levy to be paid by all Cultural Heritage Management Plan sponsors, to be used to fund heritage protection activities and Registered Aboriginal Parties, particularly those located in areas of low development. The levy would operate on a sliding scale based on the total cost of producing a Cultural Heritage Management Plan.

*Page 118*

**RECOMMENDATION 6.12**

The Minister review the current guidelines for cultural heritage advisors to address section 189 (b) of the *Aboriginal Heritage Act 2006* (Vic), which provides for the recognition of 'extensive experience or knowledge in relation to the management of Aboriginal cultural heritage'.

*Page 120*

**RECOMMENDATION 6.13**

Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council work with Registered Aboriginal Parties to identify further opportunities for participation in the cultural heritage advisor industry. This should include the development of a policy framework to support Registered Aboriginal Parties to produce Cultural Heritage Management Plans in-house.

*Page 120*

**RECOMMENDATION 6.14**

The *Aboriginal Heritage Act 2006* (Vic) be amended to empower the Victorian Aboriginal Heritage Council to have oversight of Registered Aboriginal Parties in relation to the performance of their statutory duties on an annual basis. In addition, the Act will also be amended to provide for the Victorian Aboriginal Heritage Council to attach conditions to both the initial appointment and ongoing registration of Registered Aboriginal Parties.

*Page 123*

**RECOMMENDATION 6.15**

Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council develop policy guidelines to support the Council to monitor the performance and activities of Registered Aboriginal Parties. The guidelines should provide direction on how to assess:

- whether a Registered Aboriginal Party has adequately fulfilled its legislative responsibilities;
- the conduct of a Registered Aboriginal Party in relation to the preparation and assessment of Cultural Heritage Management Plans, including the appropriateness of any fees charged;
- the inclusiveness of the membership rules and governance structure of a Registered Aboriginal Party; and
- whether any conditions imposed by the Victorian Aboriginal Heritage Council are being met.

*Page 123*

**RECOMMENDATION 6.16**

The Victorian Government and Aboriginal Affairs Victoria review the resources provided to the Victorian Aboriginal Heritage Council, with a view to ensuring that the Council can undertake all additional responsibilities.

*Page 123*

***Chapter seven: Traditional owners in areas without a Registered Aboriginal Party*****RECOMMENDATION 7.1**

Aboriginal Affairs Victoria, on behalf of the Secretary of the Department of Planning and Community Development, continue to manage Aboriginal heritage in those areas of the state without a Registered Aboriginal Party, ensuring that the concerns of traditional owners located in these areas in relation to the ongoing protection of known heritage sites are considered and where appropriate, acted on.

*Page 129*

## **RECOMMENDATION 7.2**

The Secretary of the Department of Planning and Community Development continue to be the authority responsible for the approval of Cultural Heritage Management Plans in areas without a Registered Aboriginal Party, and to consider the views of traditional owners in those areas. In addition, Aboriginal Affairs Victoria will ensure that the sponsors of Cultural Heritage Management Plans consult with relevant traditional owners in areas without appointed Registered Aboriginal Parties.

*Page 133*

## **RECOMMENDATION 7.3**

Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council examine options for the future role of the Council.

*Page 133*

## **RECOMMENDATION 7.4**

Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council develop policy guidelines to assist sponsors of Cultural Heritage Management Plans to consult with traditional owners in areas without an appointed Registered Aboriginal Party.

*Page 134*

## **RECOMMENDATION 7.5**

The Victorian Aboriginal Heritage Council develop policy guidelines to assist traditional owner groups to build partnerships with neighbouring groups, with a view to forming a single organisation able to apply for appointment as a Registered Aboriginal Party .

*Page 135*

## Glossary

Aboriginal heritage	A distinct part of Australian heritage, covering all manner of intangible and tangible heritage forms (including human remains) considered by Aboriginal people to be of significance and worthy of protection and preservation
Cultural Heritage Management Plans	Documents that identify the Aboriginal heritage located in a specific area and which set out the measures to be taken to protect and manage that heritage during a development. Appointed Registered Aboriginal Parties have a role in assessing their validity
Cultural heritage advisor	A person with qualifications in heritage management. Such an advisor must be engaged by the sponsor in the preparation of a Cultural Heritage Management Plan
Heritage	Includes places, objects, landscapes and other cultural matters, both tangible and intangible, considered of significance in the present and worthy of preservation into the future
Intangible heritage	Includes songs, folklore, oral poetry, stories, languages, and customs
Iwi	Maori tribal groups
Koori	Term used to describe Aboriginal peoples of the south-east of Australia, including Victoria
Mabo	Shorthand for the High Court's decision in <i>Mabo v Queensland (No. 2)</i> 1992, which recognised that the Meriam people of the Torres Strait held native title over Murray Island
Registered Aboriginal Parties	Incorporated Aboriginal bodies appointed by the Victorian Aboriginal Heritage Council to manage Aboriginal cultural heritage for a specific area in the State of Victoria
Right People For Country	Program piloted by Aboriginal Affairs Victoria which aims to provide a framework for traditional owner groups to reach agreements relating to membership and land boundaries; and the phrase often used to describe traditional ownership



Sponsor	The proponent of a development or activity who is responsible, under the <i>Aboriginal Heritage Act 2006</i> (Vic), for arranging the preparation of a Cultural Heritage Management Plan
Tangible heritage	Includes objects, sacred or ceremonial items, buildings, monuments, materials and landscapes
Traditional owners	Descendants of the Aboriginal groups that existed prior to white settlement, who claim an ongoing connection to their land. The phrase is rarely defined in legislation
Treaty of Waitangi	Treaty signed by approximately 540 Maori chief and the British Crown in 1840, designed to protect the interests of Maori from settler encroachment, and provide the framework for settlement
Victorian Aboriginal Heritage Council	The appointed skills-based Aboriginal heritage body mandated under the <i>Aboriginal Heritage Act 2006</i> (Vic) to appoint Registered Aboriginal Parties, and provide policy advice on heritage matters
Victorian Traditional Owners Land Justice Group	A group which represents, and advocates for, the interests of Victorian Aboriginal traditional owners

## ***Acronyms and abbreviations***

AAV	Aboriginal Affairs Victoria
AHA	<i>Aboriginal Heritage Act 2006</i> (Vic)
AARP Act	<i>Archaeological and Aboriginal Relics Act 1972</i> (Vic)
CHMPs	Cultural Heritage Management Plans
DPCD	Department of Planning and Community Development
RAPs	Registered Aboriginal Parties
TOS Act	<i>Traditional Owner Settlement Act 2010</i> (Vic)
UNESCO	United Nations Educational, Scientific and Cultural Organization
VAHC	Victorian Aboriginal Heritage Council
VCAT	Victorian Civil and Administrative Tribunal
VTOLJG	Victorian Traditional Owners Land Justice Group



# Chapter one

---

## Introduction

### 1.1 Background to the inquiry

On 10 February 2011, the Environment and Natural Resources Committee (ENRC) received a reference under section 33 of the *Parliamentary Committees Act 2003* for inquiry, consideration and report on the establishment and effectiveness of Registered Aboriginal Parties. The Committee was asked to consider:

- (a) Victorian Aboriginal Heritage Council policies in relation to the appointment of Registered Aboriginal Parties including the factors that should be taken into account by the council in making a decision such as:
  - (i) the degree to which traditional ownership is contested in the area the subject of an application;
  - (ii) the impact that decisions may have on the community;
  - (iii) the capacity of the applicant to fulfil legislative responsibilities if appointed;
  - (iv) the process used to determine and identify the successful Registered Aboriginal Party;
- (b) the support available to the Council in making decisions about the appointment of Registered Aboriginal Parties including:
  - (i) membership and structure of the Council;
  - (ii) council's capacity to inquire into matters relevant to applications, including supporting applicants to provide information needed to fully assess applications; and
- (c) the effectiveness of the established Registered Aboriginal Parties.

The Committee was originally instructed to report to Parliament no later than 28 September 2012. The reporting date was subsequently amended to 15 November 2012.

Aboriginal heritage is a unique part of the heritage of Australia. Aboriginal heritage in Victoria is managed by the *Aboriginal Heritage Act 2006* (Vic) (the 'Act'), which provides a framework for the recognition and protection of Aboriginal cultural heritage that recognises Aboriginal people as the primary guardians of their heritage. Under the Act, Aboriginal cultural heritage is defined as Aboriginal places, objects, and human remains. The Act is administered by Aboriginal Affairs Victoria (AAV) within the Department of Planning and Community Development (DPCD), and is managed by the Minister for Aboriginal Affairs.

Until 2006, Aboriginal heritage was dealt with under a ‘dual system’ comprised of the Victorian *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) and the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) – Part IIA of which specifically applied to Victoria. The *Aboriginal Heritage Act 2006* repealed the *Archaeological and Aboriginal Relics Preservation Act 1972* and was enacted following the repeal of the Part IIA amendment to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

The Act established the Victorian Aboriginal Heritage Council (the ‘Council’) to provide for Victorian Aboriginal people to play a role in the protection and management of their heritage. The Council consists of Aboriginal people with experience and knowledge of heritage issues who ‘can demonstrate traditional or familial links to an area in Victoria’.<sup>1</sup> The main role of the Council is to receive and determine applications for Registered Aboriginal Parties (RAPs).<sup>2</sup>

Registered Aboriginal Parties are incorporated bodies appointed by the Council to manage Aboriginal cultural heritage for a specific area within Victoria, and the Act has been designed to align the protection of cultural heritage with the native title process in Victoria. To date, the Council has appointed nine RAPs, which collectively cover 56 per cent of the area of Victoria. The notion of traditional ownership is central to the understanding of Aboriginal heritage in Victoria.

## **1.2 Review of the *Aboriginal Heritage Act 2006* (Vic)**

The Environment and Natural Resources Committee inquiry was undertaken in a context in which the *Aboriginal Heritage Act 2006* (Vic) underwent a review, conducted by Aboriginal Affairs Victoria, which was mandated under section 193 of the Act. The review of the *Aboriginal Heritage Act 2006* (the ‘review’), consulted widely with stakeholder groups and individuals across 2011 and 2012, received submissions, and produced a number of publications, including a discussion paper, an issues and options paper and a summary report, the latter of which was released in August 2012.

The review’s ambit was broad and entailed discussion and examination of the whole Act and its operations. By contrast, the Committee’s terms of reference were quite distinct, focusing primarily on the roles of the Victorian Aboriginal Heritage Council and Registered Aboriginal Parties. Nevertheless, the Committee has benefited highly from both the information provided to it during the course of the review and the summaries released at its conclusion. The Committee’s report makes reference to relevant matters raised by the review in the chapters that follow.

## **1.3 Inquiry process**

The inquiry’s public process began in September 2011 by advertising the inquiry and its terms of reference, and inviting submissions, in a number of state and regional newspapers, including on Indigenous community radio. The Committee’s website was also updated to announce that submissions were being accepted.

---

<sup>1</sup> *Aboriginal Heritage Act 2006* (Vic) s. 131(a).

<sup>2</sup> *ibid.*, s. 132(2).

In October 2011 the Committee sent letters inviting submissions to more than 350 stakeholders, including Registered Aboriginal Parties (RAPs), other Aboriginal groups, local government, development organisations, heritage organisations, and other relevant groups and individuals.

During the course of its inquiry, the Committee heard evidence from a wide range of groups, both Aboriginal and non-Aboriginal, from across Victoria. The Committee received a total of 70 written submissions to the inquiry from Aboriginal organisations, individual Aboriginal community members, government agencies, heritage consultants, business groups, local councils and community organisations (see appendix one).

The Committee travelled statewide, and held well-attended public hearings in Hamilton, Lakes Entrance, Shepparton and Melbourne. Details about the public hearings are presented in appendix two.

The Committee also conducted valuable site inspections, with briefings, in Heywood, Lake Condah, Lancefield and Sunbury. The Committee would like to thank all those groups and individuals who acted as hosts and guides on its site inspections. These site visits provided the Committee with a unique insight into the importance of Aboriginal heritage to Aboriginal people, the wider significance of such sites for Victorians, and the need for their preservation and protection. Details about the site inspections are presented in appendix three.

The Committee also travelled to Wellington, New Zealand, in order to compare the heritage protection systems in the two jurisdictions. The Committee was hosted and briefed by Maori heritage officials and Maori community leaders on the heritage system in that country. Information derived from this visit is presented in chapter two of the report, while details of site inspections are contained in appendix three.

In preparing this report, the Committee drew heavily on written submissions and the information provided by witnesses. The Committee would particularly like to thank all those witnesses who made themselves available to attend public hearings to speak directly to the Committee. Many Aboriginal witnesses in particular spoke eloquently and with passion of their heritage, and the issues surrounding heritage protection in Victoria. The Committee thanks all participants to the inquiry for generously sharing their expertise and time.

## **1.4 Key issues raised during the inquiry**

The key issues raised in submissions and by witnesses at public hearings during the inquiry include:

- Stakeholders to the inquiry, including groups dissatisfied with the Registered Aboriginal Party appointment process, state that only traditional owners should be the decision-makers in relation to their cultural heritage;
- While there was some strong criticism of the operations of the Victorian Aboriginal Heritage Council, stakeholders were united in their view that the appointment of Registered Aboriginal Parties should rest with a traditional owner body, which should reflect the diversity of Victoria's traditional owner groups;

- There were disparate views expressed on how a body of traditional owners should be composed, from direct election models to regionally-based appointment by the Minister, but the skills-based nature of such a body is critical;
- There is dissatisfaction and confusion amongst both current and former Registered Aboriginal Party applicants regarding the level of information and feedback available to organisations during the application process, and the kind of information that they should supply to the Victorian Aboriginal Heritage Council, while the decision-making of the Victorian Aboriginal Heritage Council was considered by some witnesses to lack transparency;
- The Victorian Aboriginal Heritage Council is routinely unable to determine applications for Registered Aboriginal Party status within the statutory time frame of 120 days;
- A number of unsuccessful applicants expressed a strong desire for a less costly and time consuming appeals option under the *Aboriginal Heritage Act 2006* (Vic);
- The Victorian Aboriginal Heritage Council faces capacity and resourcing constraints in the performance of its statutory duties, and lacks the power to compel contending groups to take up mediation;
- While not without its problems, the system of Registered Aboriginal Parties has provided clarity for government and landholders by identifying the appropriate traditional owners to be consulted, and according to stakeholders, their experiences with RAPs have been generally positive, despite some misgivings concerning fees;
- There is however concern about the financial sustainability of the Registered Aboriginal Party system, in which income generation is linked to the production of Cultural Heritage Management Plans, and concerns that this model limits the ability of RAPs to care for all known heritage sites, and that it was difficult for RAPs in areas of low development to generate funds to support their operations;
- There is a strong desire from industry for areas of the state that currently lack RAP appointments to have RAPs appointed as soon as possible; and
- The responsibility for traditional owners to care for their heritage persists whether or not a traditional owner group is associated with an established Registered Aboriginal Party, and many traditional owners, who are not associated with an appointed RAP, still wish to play a role in the consultation process for Cultural Heritage Management Plans.

## 1.5 Inquiry report

Chapter two presents information on heritage in the Australian context, prior to a discussion of the role and place of Indigenous heritage in Australia. The chapter provides an overview of the development of Aboriginal heritage legislation in Victoria, the *Aboriginal Heritage Act 2006* (Vic), legislation in other jurisdictions, and the heritage system in New Zealand.

In chapter three the focus is on notions of traditional ownership and how they have arisen in legislation, and a brief historical overview is provided of Aboriginal people in Victoria. Also included is a discussion of native title issues, and recommendations on the respective places of traditional owners and contemporary groups in legislation and policy.

Chapter four examines the Victorian Aboriginal Heritage Council; its operations, decision-making, structure, membership, resourcing and capacity. A number of recommendations are made to improve operations and enhance diversity. In chapter five the Committee examines the appointment

of Registered Aboriginal Parties, with discussion and analysis of the appointment process, evidence used to determine RAP status, local impacts of decisions, and Council transparency. Recommendations are made to streamline and improve the RAP appointment process and enhance the capacity of Council.

Chapter six closely examines the effectiveness of Registered Aboriginal Parties, which have been appointed. A number of recommendations are made to improve the operations and capacity of RAPs, and to expand the role of the Council in overseeing the functioning of RAPs.

In the final chapter, the report examines the issues concerning those areas of the state for which no RAP has yet to be appointed. Consideration is given to the clarification of the role of AAV, the position of traditional owners who lack RAP status, and a potential future role of the Council in managing non-RAP areas.





# Chapter two

---

## *Aboriginal heritage protection in Victoria*

### KEY FINDINGS

---

- 2.1 The *Aboriginal Heritage Act 2006* (Vic) is part of a broader legislative shift towards acknowledging Indigenous peoples as the primary guardians and decision-makers in the management of their cultural heritage.
- 
- 2.2 The system of Registered Aboriginal Parties established by the *Aboriginal Heritage Act 2006* (Vic) is unique amongst Australian jurisdictions. However, other states and territories, including Queensland and the ACT, have established mechanisms for identifying which Indigenous groups and organisations should be consulted on heritage matters.
- 

#### **2.1 Introduction**

This chapter provides an overview of the development of the legislative framework for the protection of Aboriginal cultural heritage in Victoria. It describes the key features of the *Aboriginal Heritage Act 2006* (Vic), which established the Victorian Aboriginal Heritage Council and a system of Registered Aboriginal Parties as bodies with primary responsibility for the management of Aboriginal heritage.

The chapter outlines the system for Aboriginal heritage protection that preceded the *Aboriginal Heritage Act 2006*. It also includes an overview of the different approaches to Indigenous heritage protection in other Australian jurisdictions and in New Zealand.

Recent changes to Indigenous heritage laws in Australian states and territories have seen an increased emphasis on involving Indigenous people in the management of their heritage. These developments are in contrast to the provisions found in the earliest Aboriginal heritage legislation, drafted in the 1970s, which often did not involve Aboriginal people in decision-making and relied primarily on the expertise of archaeologists in deciding which areas and objects should receive protection.

## 2.2 Heritage in the Australian context

The concept of heritage can be broadly defined to include those places, objects and landscapes that are considered to have significance within the present and should be preserved for the future. Understandings of heritage generally encompass both cultural and natural or environmental elements. Heritage places can include buildings, archaeological sites, trees or natural areas such as rivers and mountains. Heritage objects can include furniture, pieces of clothing, ceremonial items, tools and machinery.<sup>3</sup> International understandings of heritage typically recognise both ‘tangible’ and ‘intangible’ heritage; where tangible heritage includes buildings, monuments and landscapes, intangible heritage can refer to the attitudes, songs or folklore of a particular culture.<sup>4</sup>

In its widest sense heritage is our cultural and natural ‘inheritance’ and has been described as ‘the things that you keep’ from the past.<sup>5</sup> Heritage is inextricably related to understandings of identity and to debates over what constitutes the most important or valuable aspects of a particular culture. As such, all heritage legislation makes both explicit and implicit value judgements about what is considered significant enough to warrant protection into the future.<sup>6</sup>

Australian heritage legislation is influenced by a range of policy frameworks on local, state, national and international levels. The first national legislation that recognised the need to protect heritage was the *Australian Heritage Commission Act 1975* (Cth), which was the outcome of a wider political discussion about the significance of Australian national culture. It defined heritage as:

places, being components of the natural or cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community.<sup>7</sup>

The *Australian Heritage Commission Act 1975* established a system of heritage protection based around the listing of significant heritage places and objects on a national register. This technique of ‘listing’ has become central to the way heritage is managed in Australia by all levels of government. For example, an Australian heritage place or object may be listed by UNESCO as a World Heritage site, on a federal list under a range of different cultural and environmental laws,

---

<sup>3</sup> Heritage Victoria, ‘Victorian Heritage Register’, Department of Planning and Community Development, Melbourne, 2010, accessed 31 October 2011, [www.dpcd.vic.gov.au/heritage/victorian-heritage-register](http://www.dpcd.vic.gov.au/heritage/victorian-heritage-register).

<sup>4</sup> B Boer and G Wiffen, *Heritage law in Australia*, Oxford University Press, Melbourne, 2006, pp. 22–23.

<sup>5</sup> Gough Whitlam cited in *ibid.*, p. 11.

<sup>6</sup> S Shearing, ‘Editorial: Australia’s National Heritage Law Framework under Review’, *Asia Pacific Journal of Environmental Law*, Vol. 13, No. 1, 2010, p. 1. See also G Davison, *The Use and Abuse of Australian History*, Allen & Unwin, Sydney, 2000, pp. 110–130.

<sup>7</sup> B Boer and G Wiffen, *Heritage law in Australia*, Oxford University Press, Melbourne, 2006, p. 94. The 1975 *Australian Heritage Commission Act* was heavily influenced by international developments in heritage policy, particularly the United Nations Educational, Scientific and Cultural Organization’s (UNESCO) 1972 *Convention Concerning the Protection of the World Cultural and Natural Heritage*, which defined heritage broadly to include elements of both the built and natural environments.

on a state or territory government heritage register, or on a local government heritage list or planning overlay.<sup>8</sup>

## 2.3 Indigenous heritage in Australia

Indigenous heritage is considered to be a distinct part of Australia's heritage and over the past forty years, specific legislation has been developed to manage the heritage of Aboriginal and Torres Strait Islander people. This situation of enacting tailored laws and regulations to manage the heritage of Indigenous peoples follows international practice.<sup>9</sup>

Broadly, there have been two different legislative approaches to the protection of Indigenous heritage in Australia. The first approach was taken by the earliest legislators who adopted an archaeological view of Aboriginal heritage, which focused on preserving sites and 'relics' as evidence of the past occupation of Australia by Indigenous peoples.

The second approach – evident in legislation developed from the late 1980s – recognised that Indigenous heritage is 'part of a living and still developing set of traditions, to which present day Aboriginal peoples and Torres Strait Islanders can directly relate'.<sup>10</sup> While the second approach is increasingly favoured by legislators, archaeological knowledge and expertise remain important within Australia's Indigenous heritage law and regulatory schemes.

Indigenous heritage law has developed alongside other legal provisions for Indigenous peoples, including land rights legislation and the native title process. Due to the importance of connection to land – or 'country' – to Indigenous peoples, it is impossible to entirely separate issues of cultural heritage from broader matters relating to identity and land ownership or management. Under the *Native Title Act 1993* (Cth) Indigenous groups can have their traditional connections to land recognised by the state, and can secure their right to protect and manage culturally significant areas through this process.

The native title framework intersects significantly with the heritage protection regime in Victoria and has reshaped legal understandings of Indigenous peoples' rights and relationships to land. Indigenous heritage is also protected by various cultural and environmental laws on both national and state or territory levels, although the level of recognition and control granted to Indigenous peoples 'is highly variable from one jurisdiction to another'.<sup>11</sup>

Non-Aboriginal heritage in the state of Victoria is managed by the government agency Heritage Victoria within the Department of Planning and Community Development, under the authority of the Minister for Planning. Heritage Victoria identifies and protects Victoria's cultural heritage and provides advice to land owners, local and state government, and the wider community. Heritage Victoria administers the *Heritage Act 1995* (Vic) and provides protection to significant heritage

<sup>8</sup> B Boer and G Wiffen, *Heritage law in Australia*, Oxford University Press, Melbourne, 2006, pp. 91–103.

<sup>9</sup> See, for example, the United Nations *Declaration on the Rights of Indigenous Peoples 2007*. Australia did not initially endorse the Declaration, but did so in 2009.

<sup>10</sup> B Boer and G Wiffen, *Heritage law in Australia*, Oxford University Press, Melbourne, 2006, p. 265.

<sup>11</sup> *ibid.*, p. 264.

places and objects through the Victorian Heritage Register.<sup>12</sup> Heritage is also managed by local governments through heritage overlays contained within council planning schemes that can set parameters for the preservation and alteration of heritage buildings and sites.<sup>13</sup>

Items of Aboriginal heritage do appear on the Victorian Heritage Register and may be covered by local government heritage overlays. This occurs when an Aboriginal heritage site or object is considered to be of broader historical, social or architectural significance to the state or to a local community. The *Heritage Act 1995*, however, specifically states that it does not apply to heritage items that gain significance ‘only’ from their association with ‘Aboriginal tradition’.<sup>14</sup>

## **2.4 Developing Aboriginal heritage legislation in Victoria**

Aboriginal heritage in Victoria is managed by the *Aboriginal Heritage Act 2006* (Vic) (the ‘Act’). The Act provides a framework for the recognition and protection of Aboriginal cultural heritage that recognises Aboriginal people as the primary guardians of their heritage. Under the Act, Aboriginal cultural heritage is defined as Aboriginal places, objects, and human remains.<sup>15</sup> The Act is administered by Aboriginal Affairs Victoria (AAV) within the Department of Planning and Community Development (DPCD) and is managed by the Minister for Aboriginal Affairs.

Until 2006, Aboriginal heritage was dealt with under a ‘dual system’ comprised of the Victorian *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) – Part IIA of which specifically applied to Victoria. Under these provisions it was often not clear when developers, land owners and local government needed to consider Aboriginal heritage issues.

### **2.4.1 Archaeological and Aboriginal Relics Preservation Act 1972 (Vic)**

The *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) (the ‘AARP Act’) was one of the first acts in Australia related to the protection of Aboriginal cultural heritage. The AARP Act was introduced by the Hamer government as part of a new program of heritage and environment legislation that included the *Victorian Conservation Trust Act 1972* (Vic) and the *Historic Buildings Act 1974* (Vic). The AARP Act was designed to preserve the physical evidence of the history of Aboriginal peoples’ occupation of Victoria. The AARP Act provided for the protection of Aboriginal relics which it defined as ‘... any Aboriginal deposit, carving, drawing, skeletal remains and

---

<sup>12</sup> Heritage Victoria, ‘Victorian Heritage Register’, Department of Planning and Community Development, Melbourne, 2010, accessed 31 October 2011, [www.dpcd.vic.gov.au/heritage/victorian-heritage-register](http://www.dpcd.vic.gov.au/heritage/victorian-heritage-register).

<sup>13</sup> Heritage Victoria, ‘Heritage Overlays’, Department of Planning and Community Development, Melbourne, accessed 4 January 2012, [www.dpcd.vic.gov.au/heritage/local-government/heritage-overlays-local-heritage-legislation](http://www.dpcd.vic.gov.au/heritage/local-government/heritage-overlays-local-heritage-legislation).

<sup>14</sup> *Heritage Act 1995* (Vic) s. 4.

<sup>15</sup> Aboriginal Affairs Victoria, ‘Aboriginal Heritage Act 2006’, Department of Planning and Community Development, Melbourne, accessed 31 October 2011, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/aboriginal-heritage-act-2006).

anything belonging to the total body of material relating to the past Aboriginal occupation of Australia'.<sup>16</sup>

The AARP Act established an Archaeological Relics Advisory Committee with twelve members appointed by the relevant Minister, of which three were required to be Aboriginal people.<sup>17</sup> The Committee played a role in the administration of the AARP Act by providing advice to the Minister 'on all matters it thinks necessary in relation to archaeological relics and the preservation of those relics'.<sup>18</sup> The primary mechanism for the preservation of relics under the AARP Act was the power of the Governor in Council to declare the reservation of 'archaeological areas'.<sup>19</sup> The AARP Act also allowed for the declaration of temporary archaeological areas for up to six months' duration.<sup>20</sup> Access to archaeological areas was controlled by the Minister or relevant land owner, and all relics within an archaeological area were deemed to be the property of the Crown.<sup>21</sup>

Under the AARP Act it was an offence to wilfully or neglectfully damage relics without the written consent of the Minister.<sup>22</sup> The excavation of land for the purpose of uncovering or disturbing relics was similarly restricted.<sup>23</sup> The AARP Act also declared it an offence to possess or display Aboriginal skeletal remains without the consent of the Secretary of the Archaeological Relics Advisory Committee.<sup>24</sup> The AARP Act was initially administered by the Archaeological and Aboriginal Relics Office, established for this purpose under the Chief Secretary's Department. The Relics Office later became the Victorian Archaeological Survey, a precursor to the Heritage Services Branch of Aboriginal Affairs Victoria.

In 1984 the Cain government convened the Relics Act Review Committee to examine the AARP Act and to draft new legislation for the protection and management of Aboriginal heritage in Victoria. The resultant Aboriginal Cultural Heritage Protection Bill 1986 failed to pass the Legislative Council where the government did not have a majority. The Relics Review is important, however, as it foreshadows many of the changes eventually implemented by the *Aboriginal Heritage Act 2006*.

The 'basic building blocks' of the Review Committee's proposed legislative changes were different to the AARP Act and began with the assertion that Aboriginal people 'should be recognised as the hereditary owners of their culture'.<sup>25</sup> Significantly, the Review Committee avoided the archaeological language of 'relics' used in the AARP Act. The Review Committee proposed a definition of 'Aboriginal place or area' as 'any place or area of special significance to Aborigines,

<sup>16</sup> *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) s. 2.

<sup>17</sup> *ibid.*, s. 5.

<sup>18</sup> *ibid.*, s. 7.

<sup>19</sup> *ibid.*, s. 15.

<sup>20</sup> *ibid.*, s. 16.

<sup>21</sup> *ibid.*, ss. 17, 20.

<sup>22</sup> *ibid.*, s. 21.

<sup>23</sup> *ibid.*, s. 22.

<sup>24</sup> *ibid.*, s. 26B.

<sup>25</sup> Relics Act Review Committee, *Aboriginal cultural heritage – Victoria: Discussion paper*, F D Atkinson Government Printer, Melbourne, 1985, p. 2.

including places and areas which are of cultural importance to them and those which may be important for broader scientific and education reasons as well'.<sup>26</sup>

#### **2.4.2      *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987 (Cth) – Part IIA***

Following the failure of the Aboriginal Cultural Heritage Protection Bill 1986, the Cain government requested that the Commonwealth Government amend the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (the 'Commonwealth Act') to include provisions that would apply only in Victoria. This amendment was made possible by the changes made to the Australian Constitution after the 1967 referendum that allowed the Commonwealth Government to enact legislation with respect to Aboriginal people.

The *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987 (Cth)* introduced Part IIA, which essentially replicated the provisions of the proposed Victorian heritage legislation and sought to give Aboriginal people greater control in heritage protection. Aboriginal input into the heritage decision-making process was achieved through the introduction of prescribed local Aboriginal communities listed in an accompanying schedule. Part IIA established a system where these communities could enter into Aboriginal Cultural Heritage Agreements with landholders to cover the preservation and maintenance of heritage places and objects.<sup>27</sup> Local Aboriginal communities were granted the authority to consent to interference to, or damage of heritage items, and to specify the terms under which such actions could take place.<sup>28</sup>

Part IIA also established a mechanism whereby Aboriginal people could apply to the Victorian Minister for Aboriginal Affairs for emergency, temporary or permanent declarations in order to protect objects and places if they were believed to be under threat. Part IIA also provided for the Minister to compulsorily acquire property of religious, cultural or historical significance if no other measures for its protection and maintenance could be arranged.<sup>29</sup> In addition, the amendment allowed for the Minister to appoint, on the advice of local Aboriginal communities, inspectors empowered to monitor the condition of Aboriginal heritage objects and places.<sup>30</sup>

Part IIA introduced a broader definition of what constituted Aboriginal cultural heritage than had been prescribed by the *Archaeological and Aboriginal Relics Preservation Act 1972 (Vic)*. Part IIA understood heritage as not only comprising physical objects and places but 'Aboriginal folklore' such as rituals, dances, songs and oral histories.<sup>31</sup> It also defined the significance of heritage by its relationship to Aboriginal tradition, rather than its status as archaeological evidence. In this way, Part IIA defined an 'Aboriginal object' as 'an object (including Aboriginal remains) that is in Victoria and is of particular significance to Aboriginals in accordance with Aboriginal tradition'.<sup>32</sup>

---

<sup>26</sup> *ibid.*, p. 5.

<sup>27</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* s. 21K.

<sup>28</sup> *ibid.*, s. 21U.

<sup>29</sup> *ibid.*, s. 21L.

<sup>30</sup> *ibid.*, s. 21R.

<sup>31</sup> *ibid.*, s. 21A.

<sup>32</sup> *ibid.*, s. 21A.

Similarly, an 'Aboriginal place' was defined as 'an area in Victoria that is of particular significance to Aboriginals in accordance with Aboriginal tradition'.<sup>33</sup>

Part IIA did not repeal the AARP Act, which continued to provide protection for archaeological relics. However, the operation of Part IIA took precedence over the requirements of the Victorian legislation. For example, a planned excavation for the purpose of unearthing Aboriginal objects required both a permit under the AARP Act and consent from a local Aboriginal community under Part IIA, but the issuing of a permit became conditional on consent being obtained.<sup>34</sup> Somewhat confusingly, the Australia-wide part of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) still applied in Victoria, but could only be used in the unlikely event that measures could not be taken under Part IIA.

## 2.5 *Aboriginal Heritage Act 2006 (Vic)*

In 2006 legislation was passed in Victoria to bring the control of Aboriginal heritage back under the management of the state. The introduction of the *Aboriginal Heritage Act 2006* sought to respond to a range of issues that had been raised in relation to Victoria's 'dual system' of heritage protection under the Victorian AARP Act and the Part IIA amendment to the Commonwealth Act. In 1996 the operation of the Victorian system was discussed as part of the Evatt Review of the Commonwealth Act. The then Kennett government submission to the Review noted that 'in their view the present dual regime is both administratively cumbersome and fraught with problems of interpretation'.<sup>35</sup> In particular, the previous legislative framework was considered to be unclear and ineffective by some developers, government and Aboriginal groups.<sup>36</sup>

<sup>33</sup> *ibid.*

<sup>34</sup> A Di Carlo and R Kennedy, *Comparative literature review – Indigenous cultural heritage protection*, Sir Zelman Cowen Centre, Faculty of Business and Law, Victoria University, Melbourne, 2010, pp. 4–5, accessed 7 January 2012, [www.achp.org.au/downloads.html](http://www.achp.org.au/downloads.html).

<sup>35</sup> E Evatt, 'Chapter 13: Part IIA: Victoria', in *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act, 1984*, Minister for Aboriginal and Torres Strait Islander Affairs, Canberra, p. 13.04, accessed 5 January 2012, [www.austlii.edu.au/au/other/IndigLRes/1996/1/19.html](http://www.austlii.edu.au/au/other/IndigLRes/1996/1/19.html). Evatt noted a range of issues relating to Part IIA that had been raised in submissions to the Review, including: the lack of appeal options for developers who could not gain the consent of local Aboriginal communities to disturb heritage; possible fee restrictions limiting the amount local Aboriginal communities could charge for their consent; the need for the establishment of a coordinated statewide Aboriginal heritage body rather than 'the general meeting of representatives of local Aboriginal communities'; and the necessity of maintaining a register of Aboriginal heritage sites and objects, see E Evatt, 'Chapter 13: Part IIA: Victoria', in *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act, 1984*, Minister for Aboriginal and Torres Strait Islander Affairs, Canberra, p. 13.05, accessed 5 January 2012, [www.austlii.edu.au/au/other/IndigLRes/1996/1/19.html](http://www.austlii.edu.au/au/other/IndigLRes/1996/1/19.html); A Di Carlo and R Kennedy, *Comparative literature review – Indigenous cultural heritage protection*, Sir Zelman Cowen Centre, Faculty of Business and Law, Victoria University, Melbourne, 2010, p. 5, accessed 7 January 2012, [www.achp.org.au/downloads.html](http://www.achp.org.au/downloads.html).

<sup>36</sup> Aboriginal Affairs Victoria, *Discussion paper for the review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2011, p. 7, accessed 2 July 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).



The *Aboriginal Heritage Act 2006* (Vic) repealed the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) and was enacted following the repeal of the Part IIA amendment to the Commonwealth Act. In his second reading speech the then Minister for Environment, Mr Thwaites, stated his view that the Act was part of a broader process of reconciliation between Indigenous and non-Indigenous Victorians. He argued that the Bill would address the concerns of Aboriginal Victorians, particularly ‘the need to recognise the role of traditional owners in managing their heritage’.<sup>37</sup> Accordingly, one of the Act’s main objectives is to ‘accord appropriate status to Aboriginal people with traditional or familial links with Aboriginal cultural heritage in protecting that heritage’.<sup>38</sup>

### **2.5.1 Defining and protecting Aboriginal heritage under the Act**

The Act defines Aboriginal cultural heritage to include places, objects and human remains. Aboriginal objects are those that are ‘of cultural heritage significance to the Aboriginal people of Victoria’, and includes objects whether or not they existed prior to the settlement of Australia.<sup>39</sup> This definition is much broader than that provided by the AARP Act, which understood heritage as evidence of the occupation of Australia by Aboriginal people prior to European settlement. The Act defines an Aboriginal place as an area (including within coastal waters) that is of ‘cultural heritage significance’ to Aboriginal people.<sup>40</sup> Such areas may include an area of land, a section of water, a natural feature or formation, an archaeological site, or a building. The Act does not include provisions for the protection of intangible heritage – such as dance, song or folklore – as defined in Part IIA of the Commonwealth Act.<sup>41</sup> Under the Act it is an offence to ‘knowingly’ harm Aboriginal cultural heritage, although damage to heritage is permitted in accordance with approved permits and management plans.<sup>42</sup> The Act also mandates the reporting of newly discovered Aboriginal places and objects.<sup>43</sup>

The Act establishes a number of mechanisms for the protection of Aboriginal heritage, chief among these being the appointment of Registered Aboriginal Parties (RAPs) with heritage management responsibilities for defined geographical areas. The Act provides for the creation of a number of heritage protection instruments including Cultural Heritage Management Plans, Cultural Heritage Management Agreements and Cultural Heritage Permits, which typically outline how development activities may be undertaken whilst protecting heritage objects and places.<sup>44</sup> The Act also creates an enforcement and monitoring system that allows the Minister to declare protected areas and issue stop orders in cases where an activity may be harming Aboriginal heritage.<sup>45</sup>

---

<sup>37</sup> Legislative Assembly (Victoria), ‘Aboriginal Heritage Bill Second Reading’, Hansard, 6 April 2006, p. 1033.

<sup>38</sup> *Aboriginal Heritage Act 2006* (Vic) s. 3(c).

<sup>39</sup> *ibid.*, s. 4.

<sup>40</sup> *ibid.*, s. 5.

<sup>41</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s. 21A.

<sup>42</sup> *Aboriginal Heritage Act 2006* (Vic) ss. 27-29.

<sup>43</sup> *ibid.*, s. 24.

<sup>44</sup> *ibid.*, parts 3, 4 and 5.

<sup>45</sup> *ibid.*, parts 6 and 7.

### 2.5.2 Victorian Aboriginal Heritage Council

The Act establishes the Victorian Aboriginal Heritage Council (the ‘Council’) to provide for Victorian Aboriginal people to play a role in the protection and management of their heritage. The Council consists of up to eleven Aboriginal people with experience and knowledge of heritage issues who ‘can demonstrate traditional or familial links to an area in Victoria’.<sup>46</sup> Members of the Council are appointed by the Minister for Aboriginal Affairs, hold office for terms of not more than three years, and are eligible for reappointment.<sup>47</sup> The Council is a body corporate that provides advice on Aboriginal heritage management to both the Secretary of the DPCD and the Minister for Aboriginal Affairs.<sup>48</sup> The Act also stipulates that the Council play an educative role in developing measures to ‘promote public awareness and understanding of Aboriginal cultural heritage in Victoria’.<sup>49</sup>

The central role of the Council is to receive and determine applications for RAPs.<sup>50</sup> The Council has a limited role in overseeing the function of RAPs and may only suspend or revoke RAP status under defined circumstances.<sup>51</sup> The work of the Council is supported by a small secretariat housed within AAV in the DPCD.

### 2.5.3 Registered Aboriginal Parties

Registered Aboriginal Parties are incorporated bodies appointed by the Council to manage Aboriginal cultural heritage for a specific area within Victoria. The Act has been designed to align the protection of cultural heritage with the native title process in Victoria. If a RAP applicant has been registered as a native title holder under the *Native Title Act 1993* (Cth), or has entered into a recognition and settlement agreement with the state under the *Traditional Owner Settlement Act 2010* (Vic), the Council **must** register the applicant as a RAP.<sup>52</sup> In all other situations the Act directs the Council to consider a range of issues in determining an application, including:

- whether the applicant is a body that represents Aboriginal people with traditional or familial links to a particular area;
- whether the applicant is a body that has ‘a historical or contemporary interest’ in the heritage of a particular area and has demonstrated expertise in managing and protecting cultural heritage in the area;
- the existence of any grant of land in fee simple by the state or Commonwealth Government to an Aboriginal body in the application area;

<sup>46</sup> *ibid.*, s. 131(a).

<sup>47</sup> *ibid.*, ss. 131(1), 131(4).

<sup>48</sup> Aboriginal Affairs Victoria, ‘Victorian Aboriginal Heritage Council’, Department of Planning and Community Development, Melbourne, 2010, accessed 31 October 2011, [www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council](http://www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council).

<sup>49</sup> *Aboriginal Heritage Act 2006* (Vic) s. 132(2)(c).

<sup>50</sup> *ibid.*, s. 132(2).

<sup>51</sup> *ibid.*, s. 156.

<sup>52</sup> *ibid.*, s. 151.

- whether the applicant has entered into any land or resource management agreement with the state in the application area; and
- any other matter the Council considers relevant.<sup>53</sup>

The Council has appointed nine RAPs, which collectively cover 56 per cent of the area of Victoria. At the time of writing there were 13 applications before the Council, although seven of these are from existing RAPs seeking an extension to their geographic area.<sup>54</sup> In total 25 applications for RAP status have been declined by the Council or withdrawn by an applicant.<sup>55</sup> A new RAP has not been appointed since 2009.

The following organisations have been registered by the Council as RAPs:

- Barengi Gadjin Land Council Aboriginal Corporation
- Dja Dja Wurrung Clans Aboriginal Corporation
- Gunaikurnai Land and Waters Aboriginal Corporation
- Gunditj Mirring Traditional Owners Aboriginal Corporation
- Martang Pty Ltd
- Taungurung Clans Aboriginal Corporation
- Wathaurung Aboriginal Corporation
- Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc.
- Yorta Yorta Nation Aboriginal Corporation

The RAP system is designed to provide for Aboriginal people to be involved in the management of cultural heritage at a local level. RAPs act as the primary source of advice and knowledge to the Minister, the Secretary of DPCD, and the Council in relation to Aboriginal places within and objects from their geographic areas.<sup>56</sup> RAPs also play a role in advising the Minister on the repatriation of Aboriginal cultural heritage. The RAPs consider and advise the Secretary on applications for cultural heritage permits, and may apply to the Minister for interim and ongoing protection declarations to protect cultural heritage.<sup>57</sup>

RAPs, and groups applying for RAP registration, are required to be incorporated bodies. RAPs can be registered under a range of incorporation acts including the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), the *Corporations Act 2001* (Cth) and the *Associations*

---

<sup>53</sup> *ibid.*

<sup>54</sup> The Council has adopted the practice of working to register organisations as RAPs for the bulk of their application areas – known as ‘core country’ – and deferring decisions on contested areas of an application to a later date. This has produced a situation where some appointed RAPs still have RAP applications pending. See Victorian Aboriginal Heritage Council, *General Principles – RAP decision-making*, accessed 2 July 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council](http://www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council).

<sup>55</sup> Victorian Aboriginal Heritage Council, *General principles – RAP decision-making*, Department of Planning and Community Development, Melbourne, 2010, accessed 29 May 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council/registered-aboriginal-parties](http://www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council/registered-aboriginal-parties).

<sup>56</sup> *Aboriginal Heritage Act 2006* (Vic) s. 148.

<sup>57</sup> *ibid.*, ss. 38, 96.

*Incorporation Reform Act 2012* (Vic). The majority of current RAPs are incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), which includes measures specific to the needs of Aboriginal organisations and is supported by the Office of the Registrar of Indigenous Corporations.<sup>58</sup>

#### 2.5.4 Cultural Heritage Management Plans

An important aspect of the RAPs' responsibilities is their involvement in the development and assessment of Cultural Heritage Management Plans (CHMPs).<sup>59</sup> CHMPs are designed to ensure that Aboriginal cultural heritage is managed in line with the requirements of the Act. CHMPs are documents that identify the heritage located within a particular area and set out the measures to be taken to ensure that the noted heritage is appropriately managed and protected during the conduct of an activity or development.<sup>60</sup> CHMPs are required for listed high impact activities within defined areas of cultural sensitivity as prescribed by the *Aboriginal Heritage Regulations 2007* (Vic). CHMPs are automatically required for activities that necessitate an Environmental Effects Statement.<sup>61</sup>

The *Aboriginal Heritage Regulations 2007* (Vic) designate a range of sites as areas of cultural heritage sensitivity, including places that have been registered on the Victorian Aboriginal Heritage Register. The Register was established by the Act and is designed to assist with determining whether an area contains places or objects of heritage value.<sup>62</sup> It is accessible to the proposer of an activity (including developers and local government) and to a person preparing a CHMP.<sup>63</sup> Other areas of cultural heritage sensitivity include land types or areas where Aboriginal cultural heritage can typically be found, such as waterways (and the immediate surrounding areas), ancient lakes, Ramsar wetlands, coastal Crown land, parks, high plains, greenstone outcrops and caves.<sup>64</sup> A CHMP is often not required if an area of cultural heritage sensitivity has already been impacted by significant ground disturbance.

The Regulations also list the kinds of high impact activities that may necessitate the preparation of a CHMP, including the construction of transport and telecommunications infrastructure, land subdivision (into three or more lots), activities requiring earth resource authorisations, extraction and removal of sandstone, and timber production (greater than 40 hectares).<sup>65</sup>

<sup>58</sup> See Office of the Registrar of Indigenous Corporations, Australian Government, Canberra, 2008, accessed 11 January 2012, [www.orac.gov.au/](http://www.orac.gov.au/). The *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) is also the required incorporation statute for native title body corporates.

<sup>59</sup> *Aboriginal Heritage Act 2006* (Vic) s. 148.

<sup>60</sup> *ibid.*, s. 42.

<sup>61</sup> *ibid.*, s. 49.

<sup>62</sup> This new register largely continues the work of the register of archaeological areas and relics maintained under the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic).

<sup>63</sup> Aboriginal Affairs Victoria, 'Cultural heritage management plans', Department of Planning and Community Development, Melbourne, 2010, accessed 31 October 2011, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/cultural-heritage-management-plans](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/cultural-heritage-management-plans).

<sup>64</sup> *Aboriginal Heritage Regulations 2007* (Vic) rr. 23–38.

<sup>65</sup> *ibid.*, rr. 7, 42–54.

The proposer of an activity must engage a cultural heritage advisor to assist with the preparation of a CHMP.<sup>66</sup> Where a RAP has been appointed for a given area it has a role in assessing the validity of a CHMP.<sup>67</sup> Moreover, RAPs are also usually involved in providing advice during the preparation stage of CHMPs. If there is no RAP for an area of proposed development then AAV, under the Secretary of the DPCD, is solely responsible for approving CHMPs. The decision of a RAP to refuse a CHMP may be appealed at the Victorian Civil and Administrative Tribunal.<sup>68</sup> The preparation of CHMPs is integrated into the state planning system so that local councils and other decision-making authorities are unable to grant approvals, such as planning permits, without checking whether a CHMP is needed.<sup>69</sup>

A minor amendment to the Act was made in 2011 to clarify that RAP employees are able to make decisions relating to CHMPs on behalf of the RAP.<sup>70</sup>

## **2.6 Commonwealth protection for Aboriginal heritage**

As discussed above, Victorian Aboriginal heritage is now primarily managed by the *Aboriginal Heritage Act 2006* (Vic). Beyond this, there are a range of Commonwealth heritage and environmental laws that also continue to apply to aspects of Aboriginal heritage in Victoria.

### **2.6.1 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)**

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) was designed as an interim measure pending the introduction of national land rights legislation. It was subsequently amended and made permanent in 1986, and remains the primary federal legislation covering Aboriginal heritage. The guiding purpose of the Commonwealth Act is 'the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition'.<sup>71</sup> The concept of 'Aboriginal tradition' employed is broad and covers 'the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships'.<sup>72</sup>

---

<sup>66</sup> *Aboriginal Heritage Act 2006* (Vic) s. 58.

<sup>67</sup> *ibid.*, s. 62.

<sup>68</sup> *ibid.*, s. 116.

<sup>69</sup> Department of Planning and Community Development, *General practice note: The Aboriginal Heritage Act 2006 and the planning permit process*, Department of Planning and Community Development, Melbourne, 2007, p. 2, accessed 20 January 2012, [www.dpcd.vic.gov.au/planning/publicationsandresearch/practicenotes/planning-permit-process](http://www.dpcd.vic.gov.au/planning/publicationsandresearch/practicenotes/planning-permit-process).

<sup>70</sup> *Aboriginal Heritage Amendment Act 2011* (Vic).

<sup>71</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s. 4.

<sup>72</sup> *ibid.*, s. 3.

The Commonwealth Act is not designed to over-ride state or territory heritage legislation capable of operating concurrently with its provisions.<sup>73</sup> Instead, it is intended to operate as an act of ‘last resort’ to protect heritage where this has not been achieved under state or territory law.

As discussed above, Part IIA of the Commonwealth Act applied specifically to Victoria, and was repealed by the Commonwealth Government at the request of the Victorian Government in preparation for the introduction of the current *Aboriginal Heritage Act 2006* (Vic). However, the remainder of the Commonwealth Act still applies to Victoria. The Commonwealth Act empowers the Minister to make protection declarations over areas of land or water, on the receipt of a request to do so from an Aboriginal individual or group.<sup>74</sup> Provision is also made for the use of emergency declarations of thirty days, extendable up to sixty days. The Minister may also make similar protection declarations over objects.<sup>75</sup> In 2009 a review of the Commonwealth Act was undertaken and a discussion paper released by the government commented on the need for reform of heritage legislation. It argued that the Commonwealth Act had not proven to be an effective means of protecting traditional areas and objects, given that few declarations had been made, and that Federal Court decisions had overturned two of five long-term declarations.<sup>76</sup>

### 2.6.2 Other relevant Commonwealth acts

Although the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is the primary federal act dealing with Aboriginal heritage other relevant legislation includes the *Protection of Movable Cultural Heritage Act 1986* (Cth), and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The *Native Title Act 1993* (Cth) also has some relevance to the protection of Aboriginal cultural heritage, particularly through its provisions for Indigenous Land Use Agreements.

A recent independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) has raised the possibility of merging the heritage provisions of the Commonwealth Act into a consolidated federal environment act.<sup>77</sup>

### 2.6.3 Indigenous Protected Areas

Aspects of Indigenous peoples’ heritage – particularly their natural heritage – can also be protected under various environment, land and natural resource management agreements at local, state and territory or federal government levels. An example of this approach is the

<sup>73</sup> *ibid.*, s. 7.

<sup>74</sup> *ibid.*, ss. 9, 10.

<sup>75</sup> *ibid.*, s. 12.

<sup>76</sup> Department of Environment, Water, Heritage and the Arts, *Indigenous heritage law reform – For discussion, August 2009*, Australian Government, Canberra, 2009, p. 4, accessed 23 November 2011, [www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/discussion-paper/index.html](http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/discussion-paper/index.html).

<sup>77</sup> Department of Environment, Water, Heritage and the Arts, *The Australian Environment Act – Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, Australian Government, Canberra, 2009, recommendation 64, p. 43, accessed 6 January 2012, [www.environment.gov.au/epbc/review/publications/final-report.html](http://www.environment.gov.au/epbc/review/publications/final-report.html).

Indigenous Protected Areas program, administered by the Commonwealth Department of Sustainability, Environment, Water, Population and Communities, which allows for Indigenous land holders to enter into voluntary partnerships with the government in order to manage the biodiversity of a particular land or sea area.<sup>78</sup> In March 2012 the Committee visited the Tyrendarra Indigenous Protected Area near Heywood, which is managed by the Gunditjmara people.

## **2.7 Indigenous heritage protection in other Australian jurisdictions**

This section briefly discusses heritage legislation in other Australian jurisdictions. The Victorian *Aboriginal Heritage Act 2006* is the most recently enacted legislation for Indigenous heritage at a state or territory level.<sup>79</sup> Some jurisdictions continue to manage Aboriginal heritage under ‘relics’ acts similar to Victoria’s previous act, while others do so under broader environment legislation or alongside non-Aboriginal heritage. As such there are large areas of divergence between jurisdictions with respect to the level of involvement that Indigenous people have in the management of their heritage.<sup>80</sup> The Committee notes that Indigenous heritage legislation is currently under review in a number of Australian jurisdictions.

### **2.7.1 Australian Capital Territory**

In the ACT Aboriginal heritage is managed alongside non-Aboriginal heritage under the *Heritage Act 2004* (ACT) (the ‘ACT Act’). The ACT Act establishes a heritage register and the ACT Heritage Council, which must include an expert in Aboriginal history and culture. Under the ACT Act Aboriginal people are consulted about their heritage via Representative Aboriginal Organisations recognised by the Minister.<sup>81</sup> The ACT Act also creates a process for the preparation and use of conservation management plans to protect heritage values during development activities.<sup>82</sup> The ACT Act is in the process of a mandatory five year review.<sup>83</sup>

---

<sup>78</sup> Department of Sustainability, Environment, Water, Population and Communities, ‘Indigenous protected areas’, Department of Sustainability, Environment, Water, Population and Communities, Canberra, 2012, accessed 17 July 2012, [www.environment.gov.au/indigenous/ipa/index.html](http://www.environment.gov.au/indigenous/ipa/index.html).

<sup>79</sup> Along with new legislation in Queensland, it has been described as a ‘new generation of indigenous cultural heritage laws’, see S Shearing, ‘One Step Forward? Recent Developments in Australian State and Territory Indigenous Cultural Heritage Laws’, *Macquarie Journal of International and Comparative Environmental Law*, Vol. 3, No. 1, 2006, p. 35.

<sup>80</sup> See summaries of other Australian jurisdictions in G Gardiner, ‘The Aboriginal Heritage Bill 2006’, *D-Brief No. 2*, Parliamentary Library Research Service, Melbourne, 2006.

<sup>81</sup> *Heritage Act 2004* (ACT) s. 14.

<sup>82</sup> *ibid.*, s. 110.

<sup>83</sup> Environment and Sustainable Development, ‘Review of the Heritage Act 2004’, ACT Government, Canberra, 2012, accessed 2 July 2012, [www.environment.act.gov.au/heritage/review\\_of\\_the\\_heritage\\_act\\_2004](http://www.environment.act.gov.au/heritage/review_of_the_heritage_act_2004).

### 2.7.2 New South Wales

Aboriginal heritage is primarily covered by the *National Parks and Wildlife Act 1974* (NSW) (the 'NSW Act') – most recently amended in 2010 – making New South Wales the only state to manage Aboriginal heritage alongside flora and fauna. The NSW Act allows the Minister to specify Aboriginal areas for the purpose of protecting significant sites and objects.<sup>84</sup> It also establishes Aboriginal Heritage Impact Permits, issued by the Chief Executive of the Office of Environment and Heritage, as instruments designed to manage Aboriginal heritage during development.<sup>85</sup> There is scope for Aboriginal groups – particularly native title holders – to be consulted in the preparation of Aboriginal Heritage Impact Permits.<sup>86</sup> In situations not affected by the native title process, development proponents are required to attempt to contact Aboriginal people who may have knowledge of heritage within the area of a planned activity. This requirement is usually satisfied by the placement of a public notice about the activity, to which Aboriginal people may respond by registering their interest in participating in the consultation process.<sup>87</sup> Groups who register an interest become known as 'registered Aboriginal parties' (not to be confused with Victoria's Registered Aboriginal Parties).<sup>88</sup>

Appeals against the decisions of the Chief Executive can be brought to the Land and Environment Court.<sup>89</sup> The NSW Act also establishes an Aboriginal Cultural Heritage Advisory Committee of thirteen Aboriginal people appointed by the Minister to assist both the Minister and the Chief Executive of the Office of Environment and Heritage in matters relating to the identification, assessment and management of Aboriginal cultural heritage.<sup>90</sup>

Aspects of Aboriginal heritage in NSW are also managed by the *Environment Planning and Assessment Act 1979* (NSW), which provides for Aboriginal heritage issues to be considered as part of environment impact statements.<sup>91</sup> Under the *Heritage Act 1977* (NSW) Aboriginal heritage objects and places can receive protection through inclusion on the state heritage register.<sup>92</sup>

<sup>84</sup> B Boer and G Wiffen, *Heritage law in Australia*, Oxford University Press, Melbourne, 2006, p. 284.

<sup>85</sup> Office of Environment and Heritage, 'Information on Aboriginal heritage impact permits (AHIPs)', NSW Government, Sydney, 2011, accessed 12 January 2012, [www.environment.nsw.gov.au/licences/Section87Section90.htm](http://www.environment.nsw.gov.au/licences/Section87Section90.htm).

<sup>86</sup> *National Parks and Wildlife Regulation 2009* (NSW) part 8A.

<sup>87</sup> National Native Title Tribunal, *Commonwealth, state and territory heritage regimes: Summary of provisions for Aboriginal consultation: A report prepared for the New South Wales Aboriginal Land Council*, Commonwealth of Australia, Canberra, 2010, p. 75.

<sup>88</sup> Department of Environment, Climate Change and Water, *Aboriginal cultural heritage consultation requirements for proponents 2010*, State of NSW and Department of Environment, Climate Change and Water, 2010, pp. vi, 11–12.

<sup>89</sup> *National Parks and Wildlife Act 1974* (NSW) s. 90L.

<sup>90</sup> *ibid.*, s. 28 and schedule 9.

<sup>91</sup> B Boer and G Wiffen, *Heritage law in Australia*, Oxford University Press, Melbourne, 2006, p. 286.

<sup>92</sup> Office of Environment and Heritage, 'Aboriginal heritage', NSW Government, Sydney, 2012, accessed 2 July 2012, [www.heritage.nsw.gov.au/06\\_subnav\\_01.htm](http://www.heritage.nsw.gov.au/06_subnav_01.htm).



### 2.7.3 Northern Territory

In the Northern Territory Aboriginal heritage is protected by the *Northern Territory Aboriginal Sacred Sites Act 1989*, (the 'NT Act') which was most recently amended in 2005. The NT Act establishes the Aboriginal Areas Protection Authority as a statutory authority managed by a board of twelve members appointed by the Administrator of the Northern Territory. Ten board members are appointed from nominations from the Northern Territory Land Councils, and must include an equal number of male and female Indigenous custodians; two members are government appointees.<sup>93</sup> The Authority manages a register of sacred sites and is empowered to issue or refuse heritage permits (known as Authority Certificates) to allow development within sacred areas. The Authority is mandated to bring together the custodians of sacred sites and developers to discuss possible impacts on heritage and negotiate ways to proceed.<sup>94</sup> The Minister has the authority to review or veto Authority Certificates.<sup>95</sup>

Aspects of Aboriginal heritage in the Northern Territory are also covered by the general *Heritage Conservation Act 1991*, which provides for the identification and assessment of both Aboriginal and non-Aboriginal heritage objects and places.<sup>96</sup>

### 2.7.4 Queensland

Aboriginal heritage in Queensland is managed by the *Aboriginal Cultural Heritage Act 2003* (Qld) (the 'QLD Act').<sup>97</sup> The QLD Act articulates a range of principles guiding the protection of Aboriginal heritage and establishes a number of heritage management instruments, including a heritage register, cultural heritage management plans and stop orders. Under the QLD Act the protection of heritage is primarily achieved through the imposition of a statutory cultural heritage duty of care on developers, with penalties for failure to comply.<sup>98</sup> There are several ways in which someone can demonstrate their fulfilment of this duty of care including consulting with Aboriginal parties, undertaking heritage surveys, and acting in accordance with an approved cultural heritage management plan.

The QLD Act adopts a de-centralised process for consultation with Aboriginal people in relation to their heritage. Aboriginal groups may apply to the Minister for appointment as Aboriginal cultural heritage bodies. Cultural heritage bodies serve as the first point of contact for developers and land owners seeking to comply with the duty of care provisions, and assist in identifying the relevant Aboriginal party to be involved in the heritage management process for a specific area.<sup>99</sup>

---

<sup>93</sup> *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s. 6.

<sup>94</sup> *ibid.*, part 3.

<sup>95</sup> *ibid.*, s. 30.

<sup>96</sup> B Boer and G Wiffen, *Heritage law in Australia*, Oxford University Press, Melbourne, 2006, p. 289.

<sup>97</sup> The heritage of Torres Strait Islander people is managed by an almost identical separate act - the *Torres Strait Islander Cultural Heritage Act 2003*.

<sup>98</sup> *Aboriginal Cultural Heritage Act 2003* (Qld) s. 23.

<sup>99</sup> Department of Environment and Resource Management, 'Role of cultural heritage bodies', Department of Environment and Resource Management, Brisbane, 2010, accessed 9 January 2012, [www.derm.qld.gov.au/cultural\\_heritage/legislation/cultural\\_heritage\\_bodies.html](http://www.derm.qld.gov.au/cultural_heritage/legislation/cultural_heritage_bodies.html).

Like the Victorian Act, the QLD Act is aligned with the native title process and prioritises traditional owners as the most appropriate groups to be consulted in relation to cultural heritage.

The QLD Act defines an Aboriginal party as a registered native title holder, a registered native title claimant, or a failed native title claimant where no new claim has been made over an area.<sup>100</sup> In areas not impacted by the native title process, the QLD Act broadly provides that traditional owners be considered Aboriginal parties.<sup>101</sup> Aboriginal parties play a consultative role, as the power to authorise cultural heritage management plans rests with the Minister, and any disagreement between Aboriginal parties and the proponents of an activity are referred to the Queensland Land Court.

In 2008 the Queensland government began the process of reviewing the QLD Act.<sup>102</sup> Proposed amendments to the QLD Act lapsed in 2012 following a change of government.<sup>103</sup>

### 2.7.5 South Australia

Aboriginal heritage in South Australia is covered by the *Aboriginal Heritage Act 1988* (SA) (the 'SA Act'). The SA Act provides for the Minister to declare significant sites and objects on a heritage register, and makes it an offence for any person to damage or disturb Aboriginal heritage without authorisation from the Minister.<sup>104</sup> The SA Act also allows the Minister to enter into Aboriginal Heritage Agreements – binding agreements attached to land title – with landholders to manage heritage sites, objects and human remains located on their land, often including the input of traditional owners.<sup>105</sup>

The SA Act establishes the Aboriginal Heritage Committee of equal numbers of Aboriginal men and women from throughout the state.<sup>106</sup> Under the SA Act the Minister is required to consult with the Committee, traditional owners, and any Aboriginal organisation with an interest in heritage prior to issuing authorisations or declaring protected objects and areas.<sup>107</sup> In particular, the SA Act compels the Minister to accept the views of the traditional owners with respect to whether or not an area or object is important according to Aboriginal tradition.<sup>108</sup>

<sup>100</sup> *Aboriginal Cultural Heritage Act 2003* (Qld) s. 34.

<sup>101</sup> In a comparative review of heritage legislation in Australia, the New South Wales Aboriginal Land Council reported that in the Queensland situation 'it can be quite complex finding the Aboriginal Party where there is no Native Title Claim'. New South Wales Aboriginal Land Council, *Caring for culture: Perspectives on the effectiveness of Aboriginal cultural heritage legislation in Victoria, Queensland and South Australia*, New South Wales Aboriginal Land Council, Parramatta, 2010, p. 34.

<sup>102</sup> Department of Environment and Resource Management, *Indigenous cultural heritage acts review: Key issues and draft recommendations*, Department of Environment and Resource Management, Brisbane, 2009, p. 6, accessed on 10 January 2012, [www.derm.qld.gov.au/cultural\\_heritage/legislation/index.html](http://www.derm.qld.gov.au/cultural_heritage/legislation/index.html).

<sup>103</sup> The lapsed Aboriginal and Torres Strait Islander Land Holding Bill 2011 contained amendments to the *Aboriginal Heritage Act 2003*.

<sup>104</sup> *Aboriginal Heritage Act 1988* (SA) ss. 12, 23.

<sup>105</sup> *ibid.*, s. 37.

<sup>106</sup> *ibid.*, s. 7.

<sup>107</sup> *ibid.*, s. 13.

<sup>108</sup> *ibid.*, s. 13.2.

### 2.7.6 *Tasmania*

Aboriginal cultural heritage in Tasmania is managed by the *Aboriginal Relics Act 1975* (Tas), (the 'TAS Act') and administered by Aboriginal Heritage Tasmania, a division within the Department of Primary Industries, Parks, Water and Environment. The TAS Act establishes an Aboriginal Relics Advisory Council of five members, appointed by the Minister. One member of the Council must be drawn from nominations by a body that, in the opinion of the Minister, represents people of 'Aboriginal descent'.<sup>109</sup> The TAS Act provides for the Minister to declare protected sites with the agreement of the relevant land owner and details restrictions on the destruction, sale and export of relics.<sup>110</sup> The TAS Act is currently under review and it is expected that a new bill will be introduced to parliament in 2013.<sup>111</sup>

### 2.7.7 *Western Australia*

The *Aboriginal Heritage Act 1972* (WA) (the 'WA Act') provides for the protection of Aboriginal heritage sites and objects through both temporary and ongoing declarations.<sup>112</sup> Under the WA Act it is illegal to destroy or damage an Aboriginal site without the consent of the Minister.<sup>113</sup> The WA Act establishes the advisory Aboriginal Cultural Material Committee, which plays a role in nominating and evaluating objects and sites for protection.<sup>114</sup> Committee members are appointed by the Minister without a requirement that members should be Aboriginal.<sup>115</sup> Landholders and other parties aggrieved by the suggestion that an area should be protected are empowered to make representations to the Minister, who may direct the Committee to consider the objections and provide advice.<sup>116</sup> The WA Act is currently under review.<sup>117</sup>

## 2.8 **Indigenous heritage protection in New Zealand**

This section discusses the provisions for Indigenous heritage protection available in New Zealand. The Committee investigated the New Zealand heritage system as a point of comparison with heritage frameworks available in Australia. Although New Zealand shares with Australia a history of British settlement, it also has a very distinct history of agreement-making between the government and Maori peoples. In particular, aspects of Indigenous heritage in New Zealand are managed as part of broader land treaties, claims and settlement processes.

---

<sup>109</sup> *Aboriginal Relics Act 1975* (TAS) s. 4.

<sup>110</sup> B Boer and G Wiffen, *Heritage law in Australia*, Oxford University Press, Melbourne, 2006, pp. 296–297.

<sup>111</sup> Department of Primary Industries, Parks, Water and Environment, *Review of Aboriginal Heritage Legislation*, Tasmanian Government, Hobart, 2012, accessed 2 July 2012, [www.dpiw.tas.gov.au/inter.nsf/WebPages/LBUN-8G4VUM?OpenDocument](http://www.dpiw.tas.gov.au/inter.nsf/WebPages/LBUN-8G4VUM?OpenDocument);

<sup>112</sup> *Aboriginal Heritage Act 1972* (WA) ss. 19, 20.

<sup>113</sup> *ibid.*, s. 17.

<sup>114</sup> *ibid.*, part v.

<sup>115</sup> *ibid.*, s. 28.

<sup>116</sup> *ibid.*, s. 19.

<sup>117</sup> Department of Indigenous Affairs, 'Aboriginal Heritage Act', Government of Western Australia, Perth, 2012, accessed 3 July 2012, [www.dia.wa.gov.au/en/Heritage-and-Culture/Heritage-Act-Reform/](http://www.dia.wa.gov.au/en/Heritage-and-Culture/Heritage-Act-Reform/).

### 2.8.1 *The Treaty of Waitangi*

The relationship between Maori and the state has been profoundly shaped by the 1840 Treaty of Waitangi, which is widely considered to be New Zealand's founding document. The Treaty is an agreement that was signed by around 540 Maori chiefs and Lieutenant-Governor William Hobson on behalf of the British Crown. The Treaty was designed to protect Maori interests from the encroachment of British settlers and sets out the framework on which the settlement of New Zealand would proceed. The Treaty has three articles and exists in two versions – in both Maori and English. However, the two versions are not identical and most Maori chiefs signed the Maori language version.<sup>118</sup>

In terms of heritage, the Maori version of the second article of the treaty guarantees Maori 'tino rangatiratanga' (full chieftainship) over their 'taonga' (lands and treasures), emphasising the traditional status and authority of Maori. This article was designed to ensure that Maori would retain sufficient land and retain ownership of their 'treasures', a different concept to the English version's focus on property ownership.<sup>119</sup>

Until the 1970s the Treaty had an ambiguous relationship to New Zealand law and despite Maori protest, was largely ignored by both the courts and parliament. In 1975 the *Treaty of Waitangi Act* was passed, giving the Treaty recognition in New Zealand law for the first time. Crucially, the *Treaty of Waitangi Act* established the Waitangi Tribunal in order to investigate possible breaches of the Treaty. Initially the Treaty was only empowered to investigate claims occurring after 1975, but a 1985 amendment to the *Treaty of Waitangi Act* extended the purview of the Tribunal to all possible breaches since the Treaty's signing in 1840. The Tribunal is a permanent commission of inquiry and only has the authority to make recommendations to the Crown. It has nevertheless played an important role in settling Maori grievances and ensuring that the intention of the Treaty is upheld.<sup>120</sup> The Tribunal has investigated a number of issues relating to Maori heritage areas, cultural and intellectual property rights, and language.<sup>121</sup>

### 2.8.2 *Historic Places Act 1993*

In New Zealand Maori heritage places and objects are managed alongside non-Indigenous heritage by the *Historic Places Act 1993*. The *Historic Places Act* is administered by the New Zealand Historic Places Trust (Pouhere Taonga) (the 'Trust'), the nation's leading heritage agency. The Trust was established in 1955 and became an autonomous Crown entity in 2005. It is

<sup>118</sup> Ministry for Culture and Heritage, 'The Treaty in brief', *New Zealand History online*, Ministry for Culture and Heritage, Wellington, 2011, accessed 12 January 2012, [www.nzhistory.net.nz/politics/treaty/the-treaty-in-brief](http://www.nzhistory.net.nz/politics/treaty/the-treaty-in-brief).

<sup>119</sup> Treaty2U, 'The content of the Treaty', Museum of New Zealand Te Papa Tongarewa, Wellington, 2012, accessed 12 January 2012, [www.treaty2u.govt.nz/the-treaty-up-close/the-content-of-the-treaty/index.htm](http://www.treaty2u.govt.nz/the-treaty-up-close/the-content-of-the-treaty/index.htm). See also, Waitangi Tribunal, 'Treaty of Waitangi', Waitangi Tribunal, Wellington, 2012, accessed 13 January 2012, [www.waitangi-tribunal.govt.nz/treaty/meaning.asp](http://www.waitangi-tribunal.govt.nz/treaty/meaning.asp).

<sup>120</sup> Waitangi Tribunal, 'About the Tribunal', Waitangi Tribunal, Wellington, 2012, accessed 13 January 2012, [www.waitangi-tribunal.govt.nz/about/established.asp](http://www.waitangi-tribunal.govt.nz/about/established.asp).

<sup>121</sup> A Di Carlo and R Kennedy, *Comparative literature review – Indigenous cultural heritage protection*, Sir Zelman Cowen Centre, Faculty of Business and Law, Victoria University, Melbourne, 2010, pp. 45–48, accessed 7 January 2012, [www.achp.org.au/downloads.html](http://www.achp.org.au/downloads.html).

managed by a Board of nine members, six of whom are appointed by the Minister for Arts, Culture and Heritage. The remaining three Board members are elected by 'ordinary members' of the Trust. The Trust oversees a system of heritage protection that includes a register, land covenants, and a process of granting authority to proponents of activities that may harm heritage sites.<sup>122</sup>

The *Historic Places Act* requires the New Zealand Historic Places Trust to give effect to the principles of the Treaty of Waitangi.<sup>123</sup> The *Historic Places Act* also established the Maori Heritage Council with a particular role in overseeing the management of Maori heritage. The Council has eight members (four of whom must also be members of the Trust's Board). Council members are appointed on the basis of their expertise and knowledge of Maori culture and heritage.<sup>124</sup> One of the most important tasks of the Maori Heritage Council is the identification and registration of sacred sites or wahi tapu/wahi tapu areas. Wahi tapu include raised and fortified villages, burial grounds, canoe landing sites, springs, rocks, caves, mountains, and sacred trees. A wahi tapu site derives its significance from its relationship to Maori ancestors. Other historic places and areas can also have heritage value to Maori, including churches, schoolhouses, fishing villages, quarries and other sites.<sup>125</sup>

The *Historic Places Act 1993* is currently under review.<sup>126</sup>

### **2.8.3 Other New Zealand heritage legislation**

The export of Maori heritage objects is controlled by a separate act – the *Protected Objects Act 1975* – which manages the sale, trade and ownership of declared New Zealand heritage objects. Other aspects of Maori heritage are protected by the *Resource Management Act 1991*, which stipulates that heritage should be a consideration in the regulation of land use and management by local government authorities.<sup>127</sup>

---

<sup>122</sup> For further detail see New Zealand Historic Places Trust, *Heritage management guidelines for resource management practitioners*, New Zealand Historic Places Trust, Wellington, 2004.

<sup>123</sup> *Historic Places Act 1993* (NZ) s. 115(2).

<sup>124</sup> New Zealand Historic Places Trust, 'Maori Heritage Council', New Zealand Historic Places Trust, Wellington, 2008, accessed 3 July 2012, [www.historic.org.nz/AboutUs/MaoriHeritageCouncil.aspx](http://www.historic.org.nz/AboutUs/MaoriHeritageCouncil.aspx).

<sup>125</sup> New Zealand Historic Places Trust, 'Maori heritage', New Zealand Historic Places Trust, Wellington, 2008, accessed 3 July 2012, [www.historic.org.nz/en/ProtectingOurHeritage/MaoriHeritage.aspx](http://www.historic.org.nz/en/ProtectingOurHeritage/MaoriHeritage.aspx).

<sup>126</sup> New Zealand Historic Places Trust, 'Review of the Historic Places Act 1993', New Zealand Historic Places Trust, Wellington, 2008, accessed 4 July 2012, [www.historic.org.nz/en/AboutUs/HPARReview.aspx](http://www.historic.org.nz/en/AboutUs/HPARReview.aspx).

<sup>127</sup> A Di Carlo and R Kennedy, *Comparative literature review – Indigenous cultural heritage protection*, Sir Zelman Cowen Centre, Faculty of Business and Law, Victoria University, Melbourne, 2010, pp. 49–51, accessed 7 January 2012, [www.achp.org.au/downloads.html](http://www.achp.org.au/downloads.html); New Zealand Historic Places Trust, *Heritage management guidelines for resource management practitioners*, New Zealand Historic Places Trust, Wellington, 2004, p. 3.

#### 2.8.4 **Mandating iwi**

The New Zealand government has developed a system for identifying Maori tribal groups or iwi, which serves as a point of comparison to Australian processes for identifying traditional owners under both heritage and native title legislation. As part of the Treaty of Waitangi settlement process, the Crown requires Maori groups or organisations seeking to negotiate a treaty settlement to have a 'mandate' from their broader iwi group. The Crown requires iwi groups to undertake internal discussion and agreement-making regarding the membership and geographical area of the tribal group, and to formally produce a deed of mandate outlining that a particular organisation or group is empowered to negotiate on behalf of the broader tribe. The Crown can then recognise the mandate and proceed with treaty settlement negotiations. The mandating process is designed to ensure both that iwi representative organisations have sufficient support from their members, and that 'the Crown is dealing with the right claimant group representatives'.<sup>128</sup> Although the process of mandating iwi only relates to the Treaty of Waitangi settlement process, mandated iwi organisations are understood to broadly represent their iwi in other contexts, such as for cultural heritage matters.

---

<sup>128</sup> Office of Treaty Settlements, *Healing the past, building a future: A guide to Treaty of Waitangi claims and negotiations with the Crown – Summary edition*, Office of Treaty Settlements, Wellington, 2004, p. 23.



# Chapter three

---

## *Traditional ownership and Aboriginal Victorians*

### KEY FINDINGS

---

- 3.1 The evidence received by the Committee – including from groups dissatisfied with the Registered Aboriginal Party appointment process – is that only traditional owners should be the decision-makers in relation to their cultural heritage.
- 
- 3.2 While the *Aboriginal Heritage Act 2006* (Vic) aligns the protection of heritage with the recognition of traditional owners under the native title process, it does not mandate that only organisations representing traditional owners be appointed as Registered Aboriginal Parties.
- 

### 3.1 Introduction

This chapter discusses the concept of traditional ownership and the impact that the native title process has had on Victoria's Aboriginal community. In particular, the chapter considers how the development of native title has driven changes to Aboriginal heritage protection legislation.

This chapter also provides a framework for a discussion of term of reference (a) (i), which directs the Committee to consider the policies of the Council in relation to 'the degree to which traditional ownership is contested' in areas covered by RAP applications. In doing so, the chapter provides an overview of the historical experiences of Aboriginal Victorians – particularly the movement of Aboriginal groups to reserves and missions – which have contributed to difficulties in identifying the location, boundaries and composition of some traditional owner groups. The issue of contestation over traditional ownership is discussed in detail in chapter five.

The *Aboriginal Heritage Act 2006* (Vic) (the 'Act') replaces a system of heritage protection that pre-dated the development of the native title process and as a result did not provide for traditional owners to be involved in decision-making about their heritage. With the advent of the native title process in the 1990s, traditional ownership took on a renewed importance for Aboriginal people throughout Australia. Although Aboriginal peoples have always acknowledged traditional connections to specific geographical areas, it was not until the 1992 *Mabo* decision and the development of the native title process that Aboriginal groups could gain legal recognition of their rights as the traditional owners of their country. The Act responds to these developments by broadly aligning the protection of heritage with the increased recognition of traditional owners via native title processes.



### 3.2 Victorian traditional owners

The Indigenous population of Victoria currently numbers approximately 38,000 with particularly significant communities located in and around Melbourne, Shepparton, Geelong, Heywood/Condah, Mildura and East Gippsland.<sup>129</sup> Small communities live on Aboriginal-owned land at Lake Tyres and Framlingham.<sup>130</sup> The Indigenous community of Victoria includes Aboriginal and Torres Strait Islander people from all over Australia. The population has experienced steady growth throughout the twentieth century, partly as a result of the increased willingness of Aboriginal people of mixed descent to identify as Indigenous.<sup>131</sup> Aboriginal and Torres Strait Islander people currently constitute almost 0.7 per cent of the total population of Victoria.<sup>132</sup>

The Aboriginal population of Victoria includes a significant group of people who identify themselves as traditional owners. Traditional owners can be broadly described as the descendants of the Aboriginal groups that existed prior to European settlement who claim an ongoing 'connection to their land as the basis of their existence and identity'.<sup>133</sup> Traditional owners typically identify themselves as part of one of the distinct language-based groups who lived prior to the settlement of Victoria, for example, Wurundjeri or Gunditjmara. Many traditional owners also identify with smaller clan or family groupings within these larger 'nation' or language groups. Some Aboriginal people declare a genealogical connection to several different traditional owner groups, while others identify broadly as 'multi-clanned' traditional owners.<sup>134</sup> Not all Aboriginal Victorians identify as traditional owners, for a range of reasons.

Today, many traditional owner groups assert their relationship to country and some have had this connection formally recognised by the state through land rights legislation, the native title process, or other recognition frameworks such as land and resource management agreements. At the same time some traditional owner groups have found it difficult to have their connections to land recognised, particularly under Commonwealth native title legislation that requires traditional owners to provide an extensive amount of genealogical and documentary evidence to prove their relationship to country.

<sup>129</sup> Australian Bureau of Statistics, '2075.0: Census of population and housing – Counts of Aboriginal and Torres Strait Islander Australians, 2011', Australian Bureau of Statistics, Canberra, accessed 16 July 2012, [www.abs.gov.au](http://www.abs.gov.au).

<sup>130</sup> Native Title Unit, 'Fact Sheet: When to engage with Victoria's Traditional Owners', Department of Justice, Melbourne, 2011, accessed 1 August 2012, [www.justice.vic.gov.au/home/about+us/when+to+engage+with+victorias+traditional+owners+fact+sheet](http://www.justice.vic.gov.au/home/about+us/when+to+engage+with+victorias+traditional+owners+fact+sheet).

<sup>131</sup> L Smith, J McCalman, I Anderson, S Smith, J Evans, G McCarthy, and J Beer, 'Fractional Identities: The Political Arithmetic of Aboriginal Victorians', *Journal of Interdisciplinary History*, Vol. XXXVIII, No. 4, Spring 2008, pp. 533–551.

<sup>132</sup> Australian Bureau of Statistics, '2075.0: Census of population and housing – Counts of Aboriginal and Torres Strait Islander Australians, 2011', Australian Bureau of Statistics, Canberra, accessed 16 July 2012, [www.abs.gov.au](http://www.abs.gov.au).

<sup>133</sup> Native Title Unit, 'Fact Sheet: When to engage with Victoria's Traditional Owners', Department of Justice, Melbourne, accessed 1 August 2012, [www.justice.vic.gov.au/home/about+us/when+to+engage+with+victorias+traditional+owners+fact+sheet](http://www.justice.vic.gov.au/home/about+us/when+to+engage+with+victorias+traditional+owners+fact+sheet).

<sup>134</sup> See, for example, Mr Gary Murray, Dhudhuroa Native Title Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 191.

Aboriginal Affairs Victoria (AAV) estimates that prior to European settlement in Victoria ‘over thirty different dialect or sub-language groups (or tribes) spoke about eleven distinct languages. Each dialect group contained half a dozen or more clans’.<sup>135</sup> During the twentieth century a number of maps representing the different tribal and language groups of Victoria were prepared by anthropologists, linguists and historians, however these maps are often considerably different. For example, groups that are identified by one map can disappear completely in another.<sup>136</sup> In Victoria today the Victorian Traditional Owners Land Justice Group – a group developed by traditional owners to promote their interests – currently has representatives appointed from 20 traditional owner groups.<sup>137</sup>

### 3.3 Aboriginal people and the settlement of Victoria

In Victoria, uncertainties and disagreements around the geographic location and membership of traditional owner groups frequently stem from the rapid settlement of the colony and the policies of successive governments that led many Aboriginal people to move away from their traditional country. This section briefly outlines some of the key moments in the history of Victorian Aboriginal people and their relationship to both government policy-making and traditional country.

Aboriginal people of the south-east had sporadic contact with European explorers, whalers and sealers in the early 1800s and encountered the short-lived British convict settlement near Sorrento in 1803. The first permanent European settlement was established in Portland by the Henty family in 1834 which led to pastoral expansion in the Western District.<sup>138</sup> John Batman encountered the Wurundjeri people when he surveyed Melbourne in 1835 on behalf of landowners from Van Diemen’s Land, and the fledgling settlement was rapidly developed following British sanction in 1837.<sup>139</sup> This was a period marked by competition between Europeans and Aboriginal people over land and access to food and natural resources, which continued as settlement advanced rapidly with the arrival of immigrant ships in the late 1830s.

#### 3.3.1 Reserves and missions

Colonial policy-making in relation to Aboriginal people began in the late 1830s following the British Government’s appointment of a House of Commons Select Committee (1837) to examine the treatment of all Indigenous peoples throughout the British Empire. Influenced by humanitarian and philanthropic ideas, the Committee recommended the appointment of protectors who would learn Aboriginal languages, and oversee the place of Aboriginal peoples in the colonies. In the Port Phillip District (Victoria) this led to the appointment of George Augustus Robinson as Chief Protector of Aborigines in 1839. Robinson introduced early attempts at

<sup>135</sup> Department of Planning and Community Development (Aboriginal Affairs Victoria) submission no. 57, p. 16.

<sup>136</sup> *ibid.*, p. 16.

<sup>137</sup> Victorian Traditional Owners Land Justice Group, ‘Current members of Land Justice Group’, Victorian Traditional Owners Land Justice Group, Melbourne, 2012, accessed 5 June 2012, [www.landjustice.com.au/?t=6](http://www.landjustice.com.au/?t=6).

<sup>138</sup> R Broome, *Aboriginal Victorians: A history since 1800*, Allen & Unwin, Crows Nest, 2005, pp. xvii–34.

<sup>139</sup> B Attwood, *Possession: Batman’s treaty and the matter of history*, The Miegunyah Press, Melbourne, 2009.

ameliorating the effects of settlement on Aboriginal people through the development of a number of schools and a system of rationing.<sup>140</sup>

This period resulted in the formation of new communities of Aboriginal people as many families left their traditional lands and moved to government-sponsored reserves. In 1860, in response to ongoing concerns over the welfare of Aboriginal people, a Central Board was founded to oversee Aboriginal peoples comprising government officials, clergymen, philanthropists and pastoralists. The Board established a system of government assistance and rationing for Aboriginal people and allocated small parcels of land where Aboriginal people could live under the management of Board representatives. By 1863 there were seven reserves in Victoria. Five were Christian missions (with partial government funding): the Anglican Yelta Mission near Mildura (1855); the Moravian Ebenezer Mission at Lake Hindmarsh near Dimboola (1859); the Anglican Framlingham Mission on the Hopkins River near Warrnambool (1861); the Anglican Lake Tyres Mission near Lakes Entrance (1861); and the Presbyterian and Moravian Ramahyuck Mission near Sale (1863). The two government-managed reserves were Coranderrk near Healesville (1863) and Lake Condah outside Portland (1867).<sup>141</sup>

Due to government policy and the prevailing Christian attitudes of station managers, life on the missions and reserves was similar whether run by the government or missionary organisations.<sup>142</sup> The reserves operated as self-contained communities where Aboriginal people typically undertook farm work, received religious instruction, and children attended school. Although there is considerable debate over the impact of the reserve system on Aboriginal people, the reserves undoubtedly created new communities and became central to understandings of Aboriginal identity well into the twentieth century. Many Aboriginal people today consider the former reserve sites places of cultural significance and some of these sites (particularly mission cemeteries) have been formally returned to Aboriginal communities by state and Commonwealth legislation.<sup>143</sup>

With the passing of the *Aborigines' Protection Act* (Vic) in 1869 Victoria became the first Australian colony to introduce a comprehensive system of regulations that sought to manage Aboriginal people. The *Aborigines' Protection Act* established the Aboriginal Protection Board which oversaw the reserve system and was granted powers to manage Aboriginal peoples' lives and determine where they could live and work, and who they could marry. It also empowered the Board to remove Aboriginal children they deemed to be neglected. In 1886 the *Aborigines' Protection Act* was amended to extend legislative control over Aboriginal people and introduced measures to break-up the reserve system. Importantly, the amendments introduced a new definition of Aboriginality which excluded people of mixed European and Aboriginal descent –

---

<sup>140</sup> R Broome, *Aboriginal Victorians: A history since 1800*, Allen & Unwin, Crows Nest, 2005, pp. 40–41. See also M F Christie, 'Port Phillip Protectorate', *eMelbourne: the city past & present*, School of Historical Studies, University of Melbourne, Melbourne, 2008, accessed 14 December 2011, [www.emelbourne.net.au/biogs/EM01169b.htm](http://www.emelbourne.net.au/biogs/EM01169b.htm).

<sup>141</sup> R Broome, *Aboriginal Victorians: A history since 1800*, Allen & Unwin, Crows Nest, 2005, pp. 125–126.

<sup>142</sup> Koori Heritage Trust, Australian Broadcasting Commission & the State Library of Victoria, *Mission Voices*, Australian Broadcasting Commission, Melbourne, 2004, accessed 22 December 2011, [www.abc.net.au/missionvoices/](http://www.abc.net.au/missionvoices/).

<sup>143</sup> R Broome, *Aboriginal Victorians: A history since 1800*, Allen & Unwin, Crows Nest, 2005, pp. 119–145.

often referred to as ‘half-castes’ – and as a result this legislation has become known as the ‘Half-Caste Act’.<sup>144</sup> The amendments were passed in response to the fear that the reserves, which struggled with funding, had created poor living conditions and encouraged the creation of permanent Aboriginal lands. The ‘Half-Caste Act’ allowed only those considered ‘full-blood’ Aboriginal people to remain on the reserves and introduced a policy of removing Aboriginal people of mixed descent, who were encouraged to assimilate into broader society and were to receive limited government assistance. The policy had the effect of moving many Aboriginal families from the reserves and dividing the communities that had developed around these places. The break-up of the reserves heralded a broader policy shift away from a philosophy of protectionism towards assimilation, which promoted the gradual incorporation of former reserve residents into the broader community.<sup>145</sup>

The dismantling of the reserve system took over forty years, in part because Aboriginal people resisted the closure of what many had come to consider their home. As the new policy was implemented the reserves were impacted by population decline, and many struggled to support themselves with the lack of residents for farm labour. However, many of those who left the reserves remained close to their communities and sought work nearby and continued to identify as Aboriginal. Much of the remaining reserve population was slowly transferred to Lake Tyres, which the Board nominated as a consolidation site in 1917. The reserve closures were gradual: Ebenezer closed in 1904; Ramahyuck closed in 1908; Lake Condah closed in 1917, and Coranderrk in 1924.

### 3.3.2 *Aboriginal communities in the twentieth century*

By the inter-war period Melbourne, especially the inner-city suburb of Fitzroy, had become the focal point for the Aboriginal community in Victoria. Melbourne also attracted a significant population of Yorta Yorta people from the Cummeragunja reserve located on the New South Wales side of the Murray River near Barmah. Although Melbourne became a key site of work and residence, and facilitated the increased inter-marriage of people from different Aboriginal groups, as historian Richard Broome notes, ‘people’s first loyalty was to their regional grouping’.<sup>146</sup> It was not until the early 1960s that the word ‘Koori’ (also ‘Koorie’ or ‘Kuri’), borrowed from New South Wales, emerged as one way of describing Aboriginal Victorians as a whole, and notions of pan-Aboriginality began to develop.<sup>147</sup>

Government control of Aboriginal people’s lives began to wane in the late 1960s with the abolition of the Board, the passing of the *Aboriginal Affairs Act 1967* (Vic) by the Bolte government, and the extension of voting rights. This period of increased autonomy was marked by the development of Aboriginal-run community organisations – often known as cooperatives or ‘co-ops’ – which typically received government assistance and provided housing, health care,

<sup>144</sup> *ibid.*, pp. 185–187.

<sup>145</sup> *ibid.*, pp. 185–193; xxiv.

<sup>146</sup> *ibid.*, p. 288.

<sup>147</sup> It should be noted that although the term Koori has become a popular self-designation, it is not universally accepted by Victorian Aboriginal people.

education, and legal services to Aboriginal people. The first cooperatives were established in Fitzroy in the early 1970s and developed in regional Victoria during the 1980s. Cooperatives often developed language and cultural programs, served as a source of employment opportunities, and grew to provide a focal point for Aboriginal communities throughout the state. Many cooperatives continue to operate today.<sup>148</sup>

Throughout Australia the 1970s brought efforts by Indigenous people to regain access to the lands they had lost through settlement. In 1970 the Bolte government passed the *Aboriginal Lands Act* (Vic) that transferred former reserve land at Framlingham and Lake Tyres to Aboriginal communities to be held in trust. It was the first Victorian act to return land to Aboriginal people and was followed in 1987 by the *Aboriginal Lands Act (Lake Condah and Framlingham Forest)* (Cth) passed by the Commonwealth at the request of the Victorian Government. In 1991 the *Aboriginal Lands Act* (Vic) returned Coranderrk, Ramahyuck and Ebenezer mission cemeteries to Aboriginal communities.

The *Aboriginal Lands Act (Lake Condah and Framlingham Forest) 1987* (Cth) was particularly significant in that it formally recognised the Kerrup-Jmara clan of the Gunditjmara people and the Kirrae Whurrong as traditional owners of their lands at Lake Condah and Framlingham respectively. The preamble to the *Aboriginal Lands Act (Lake Condah and Framlingham Forest)* employs the concept of traditional ownership and states that, 'Condah land was traditionally owned, occupied, used and enjoyed by Aboriginals in accordance with Aboriginal laws, customs, traditions and practices'.<sup>149</sup> This recognition is significant to the Victorian context as it illustrates the emergence of legal understandings of traditional ownership prior to the High Court's *Mabo* decision.<sup>150</sup>

The 1990s also saw the rise in Victoria (and in Australia generally) of the process known as 'reconciliation', between Indigenous people and other Australians. It was in this context that the then Premier, Mr Kennett, made his 1997 apology on behalf of the government to the Aboriginal people of Victoria who had been affected by Victorian Government policies of the past.<sup>151</sup>

### 3.4 Defining traditional ownership

The legislative origins of the term 'traditional owner' pre-date *Mabo* and can be traced to the *Aboriginal Land Rights (Northern Territory) Act 1976*, which established a system through which Aboriginal people in the Northern Territory could claim Crown land on the basis that they were 'traditional Aboriginal owners' of the land. The *Aboriginal Land Rights (Northern Territory) Act 1976* defined 'traditional Aboriginal owners' as:

---

<sup>148</sup> R Broome, *Aboriginal Victorians: A history since 1800*, Allen & Unwin, Crows Nest, 2005, pp. 351–353.

<sup>149</sup> *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) clause (a)(ii).

<sup>150</sup> J K Weir, *The Gunditjmara land justice story*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2009, p. 13.

<sup>151</sup> Legislative Assembly (Victoria), 'Apology to Aboriginal People', Hansard, 17 September 1997, p. 107.

a local descent group of Aboriginals who:

- (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
- (b) are entitled by Aboriginal tradition to forage as of right over that land.<sup>152</sup>

This understanding of traditional ownership emphasised that legal recognition of ownership should be based not only on genealogical descent, but on the rights that are granted to specific groups through their own traditions and ‘spiritual affiliations’ with the land. Variants of this definition have been adopted by a range of state and federal acts.<sup>153</sup>

Although the *Aboriginal Land Rights (Northern Territory) Act 1976* provided a legal definition of traditional ownership in the 1970s, Indigenous identity in Australia at that time was mainly understood through contemporary place of residence and community cooperative organisations played a central role. This is not to suggest that ideas of traditional ownership or custodianship had no relevance during this time (see especially the *Aboriginal Lands Act (Lake Condah and Framlingham Forest) 1987* discussed above). Rather, that prior to the 1992 *Mabo* decision and the introduction of a nation-wide native title system, the concept of traditional ownership had scant legal and political status within Australian society, and as a result was rarely a point of contention within Aboriginal communities themselves.

The native title framework has impacted significantly on understandings of Aboriginal identity by providing for the legal recognition of particular rights based on traditional relationships and customs. The *Native Title Act 1993* (Cth) was passed following the High Court’s decision in *Mabo v Queensland (No. 2)* 1992. In the *Mabo* decision the Court found that the Meriam people of the Torres Strait held native title over Mer (Murray Island) because they had continued to occupy and use the land according to their traditional customs. The Court determined that native title could still exist if:

- Indigenous groups had maintained a continuous connection to their traditional lands; and
- the Crown had not extinguished native title through its actions, such as the granting of freehold title.<sup>154</sup>

The *Native Title Act 1993* expanded the principles of the *Mabo* decision to apply to Indigenous groups throughout the whole of Australia. The system it established provided traditional owners with the opportunity to have their connections to country legally recognised. While the term ‘traditional ownership’ is not defined by the *Native Title Act 1993*, recognition of native title is underpinned by the notion that specific rights and interests may flow from Indigenous peoples’

<sup>152</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (NT) s. 3.

<sup>153</sup> D Edelman, ‘Broader native title settlements and the meaning of the term ‘traditional owners’’, conference paper, *AIATSIS native title conference, Melbourne, 4 June 2009*, Native Title Tribunal, Canberra, 2009, pp. 4–5.

<sup>154</sup> C Ross and B Merner, ‘Traditional Owner Settlement Bill 2010’, *Research Brief Number 13*, Parliamentary Library Research Service, Melbourne, 2010, pp. 3–4.

traditional relationships to their lands.<sup>155</sup> Today the concept of ‘traditional ownership’ has become much more central to how Aboriginal identity is understood both by government and within Indigenous communities themselves.

The *Native Title Act 1993* does not automatically confer native title recognition on traditional owner groups. Under the framework established by the act, traditional owner groups are required to apply to have their native title rights recognised, and must provide sufficient evidence to the state to prove an ongoing relationship to their traditional country. In this way, traditional owners are not necessarily synonymous with native title holders.

Traditional owner groups can be considered as such by both the state and other Indigenous peoples, without the group having formal recognition of native title. This can occur for a number of reasons, including: that a particular Indigenous group is not able to meet the standard of proof required to gain recognition of native title; or, because an Indigenous group has not entered into the native title process, yet are nevertheless widely accepted as having a traditional relationship to a particular area.

The process of seeking recognition of native title from the state has, for some traditional owner groups, been a source of conflict and disagreement. The need to gather evidence to prove connections to country can draw attention to questions of authority and identity within and between different traditional owner communities, and those claiming traditional ownership.<sup>156</sup>

In Victoria, the post-settlement movement of Aboriginal people throughout the state, as described above, has contributed to difficulties in determining the location, boundaries and membership of traditional owner groups. In particular, the movement of Aboriginal people contributed to the disruption of both family relationships and links to country. The issue of conflict over traditional ownership has therefore impacted not only on native title processes, but on non-native title processes as well, such as heritage protection and land management agreements. Through this inquiry, the Committee has gained an understanding of the character and extent of these conflicts in Victoria, and the depth of feeling involved. The impact that this has had on the RAP appointment process will be discussed in detail in chapter five.

### 3.5 Native title in Victoria

In Victoria traditional owner groups have been legally recognised under the framework established by the Commonwealth *Native Title Act 1993*. In addition, in 2010 the Victorian *Traditional Owner Settlement Act* was passed, establishing a state-based system for the

---

<sup>155</sup> D Edelman, ‘Broader native title settlements and the meaning of the term ‘traditional owners’’, conference paper, *AIATSIS native title conference, Melbourne, 4 June 2009*, Native Title Tribunal, Canberra, 2009, p. 3.

<sup>156</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native title report 2011*, Australian Human Rights Commission, Canberra, 2011, pp. 78–80, accessed 6 January 2012, [www.hreoc.gov.au/social\\_justice/nt\\_report/ntreport11/index.html](http://www.hreoc.gov.au/social_justice/nt_report/ntreport11/index.html).

resolution of native title via out-of-court negotiation. The *Traditional Owner Settlement Act* will be discussed in some detail below.<sup>157</sup>

Since the passing of the *Native Title Act* there have been five determinations by the Federal Court regarding native title in Victoria. In four cases the determinations were reached through a process of negotiation between Aboriginal groups and the state, and in these it was recorded that native title rights did exist.<sup>158</sup> Table 3.1 below, shows these four determinations, made between 2005 and 2011, including the names of traditional owner groups recognised and the location within which the title was accepted to exist.

**Table 3.1 Native Title Determinations – Victoria**

Date	Traditional owner group/s	Location
2005	Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk	Wimmera
2007	Gunditjmara	South-west Victoria
2010	Gunaikurnai <sup>(a)</sup>	Gippsland
2011	Gunditjmara and Eastern Maar	South-west Victoria (including Deen Maar/Lady Julia Percy Island)

*Note:* (a) The Gunaikurnai people simultaneously entered into an agreement with the State of Victoria under the *Traditional Owner Settlement Act 2010* (Vic).

*Source:* Department of Justice, 'Native title in Victoria', State Government of Victoria, Melbourne, 2010, accessed 22 December 2011, [www.justice.vic.gov.au/home/your+rights/indigenous+victorians/native+title/justice+-+d+native+title+in+victoria](http://www.justice.vic.gov.au/home/your+rights/indigenous+victorians/native+title/justice+-+d+native+title+in+victoria).

However, the first determined case in Victoria was the one that involved a claim by the Yorta Yorta people. The Yorta Yorta decision was contested through the courts and resulted in a negative finding that their native title rights had been extinguished. In 1994 the Yorta Yorta people from north-central Victoria and southern New South Wales lodged their native title claim, which was the first case to be heard by the Federal Court under the *Native Title Act*. The Yorta Yorta determination is considered a landmark case in the development of native title, particularly as it relates to the more settled areas of Australia.

In 1998 Justice Howard Olney of the Federal Court found that the Yorta Yorta claimants did not hold native title as they could not demonstrate an ongoing connection to country through the observance of traditional customs and practices. Although it was agreed that members of the claimant group could demonstrate their genealogical descent from Yorta Yorta people who lived at the time of first contact, Olney found that as early as the 1880s the Yorta Yorta had begun to

<sup>157</sup> The specific cultural rights of Aboriginal people, including the right to maintain traditional relationships to land, are also recognised by Victoria's 2006 Charter of Human Rights and Responsibilities. See *Charter of Human Rights and Responsibilities Act 2006* s. 19.2(d).

<sup>158</sup> Department of Justice, 'Native title in Victoria', State Government of Victoria, Melbourne, 2010, accessed 22 December 2011, [www.justice.vic.gov.au/home/your+rights/indigenous+victorians/native+title/justice+-+d+native+title+in+victoria](http://www.justice.vic.gov.au/home/your+rights/indigenous+victorians/native+title/justice+-+d+native+title+in+victoria).



alter or abandon their traditional customs and practices. He argued that Yorta Yorta society had been adversely impacted by European colonisation and that, as a consequence, 'the tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs'.<sup>159</sup> Although Olney's decision was contested by the Yorta Yorta, it was upheld on appeal in 2001 by the Federal Court and again by the High Court in 2002.

In 2004 the state of Victoria voluntarily entered into a Co-operative Management Agreement with the Yorta Yorta. The agreement exists outside the native title process and provides for a framework whereby the Yorta Yorta are involved in the formal protection and management of land and waters within a designated area, which includes the Barmah State Park, the Barmah State Forest, the Kow Swamp, as well as other areas along the Murray and Goulburn Rivers.<sup>160</sup>

With the development of the native title process there has been increasing acknowledgement that for many Aboriginal groups the possibility of achieving recognition of native title is limited and where possible, is exceedingly time-consuming and expensive for the parties involved. In the wake of the Yorta Yorta decision a group of Victorian traditional owners – represented by the Victorian Traditional Owner Land Justice Group – entered into discussion with the Victorian Government to improve the native title system. Following the report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework, the *Traditional Owner Settlement Act 2010* (Vic) (the 'TOS Act') was passed by the Brumby government.

The TOS Act is designed to achieve 'a streamlined and expedited approach to settling native title'.<sup>161</sup> The TOS Act enacts a state-based system for the out-of-court resolution of native title claims. Under the TOS Act the state may enter into 'recognition and settlement agreements' with traditional owner groups to recognise their relationship to land and to confer certain rights in relation to areas of land, such as rights of access.<sup>162</sup>

In return for entering into a settlement agreement traditional owner groups must withdraw any native title claims they have and agree not to lodge any claims into the future. To date, only one agreement has been reached under the TOS Act – the 2010 agreement with the Gunaikurnai people over an area of Gippsland. The Dja Dja Wurrung people are currently in negotiation with the state under the TOS Act.<sup>163</sup>

---

<sup>159</sup> Justice Olney, *Members of the Yorta Yorta Aboriginal Community v Victoria & Ors* [1998] FCA 1606, accessed 22 December 2011, [www.austlii.edu.au/au/cases/cth/federal\\_ct/1998/1606.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/1606.html).

<sup>160</sup> Department of Sustainability and Environment, 'Agreements with Traditional Owners', State of Victoria, Melbourne, 2011, accessed 22 December 2011, [www.dse.vic.gov.au/land-management/indigenous-and-native-title/agreements-with-traditional-owners](http://www.dse.vic.gov.au/land-management/indigenous-and-native-title/agreements-with-traditional-owners).

<sup>161</sup> Steering Committee for the Development of a Victorian Native Title Settlement Framework, *Report of the steering committee for the development of a Victorian native title settlement framework*, Department of Justice, Melbourne, 2008, p. 1, accessed 3 January 2012, [www.landjustice.com.au/?t=1](http://www.landjustice.com.au/?t=1).

<sup>162</sup> *Traditional Owner Settlement Act 2010* (Vic) part 2.

<sup>163</sup> Bendigo Advertiser, 'Dja Dja Wurrung Agreement Expected', *Bendigo Advertiser*, 6 June 2012, accessed 16 July 2012, [www.bendigoadvertiser.com.au/news/local/news/general/dja-dja-wurrung-agreement-expected/2581131.aspx](http://www.bendigoadvertiser.com.au/news/local/news/general/dja-dja-wurrung-agreement-expected/2581131.aspx).

Like the *Native Title Act*, the TOS Act does not provide a clear definition of traditional ownership, although the preamble states that traditional owner settlement agreements ‘recognise traditional owner groups based on their traditional and cultural associations to certain land in Victoria’.<sup>164</sup> It also provides for groups to be recognised as traditional owners ‘by the Attorney-General, by notice published in the Government Gazette as the traditional owners of the land, based on Aboriginal traditional and cultural associations with the land’.<sup>165</sup> In his second reading speech the then Premier, Mr Brumby, noted that the ‘government still requires those seeking traditional owner recognition to show that they are descended from the Aboriginal people present at the time of European settlement, and to demonstrate their relationship with, or association to, their country’.<sup>166</sup>

The TOS Act is part of an Australia-wide shift to negotiated and out-of-court agreements between traditional owner groups and the state, such as land and resource management agreements. Often these agreements require less comprehensive evidence to justify traditional relationships to land than is needed to achieve a positive native title determination. These agreements have typically employed a broad understanding of traditional ownership, sometimes understood with the use of the phrase, ‘the right people for the right country’.<sup>167</sup>

### 3.6 Traditional ownership and the *Aboriginal Heritage Act 2006* (Vic)

Native title decisions – whether determined under the Commonwealth *Native Title Act 1993* or the Victorian *Traditional Owner Settlement Act 2010* – only grant traditional owners rights in relation to public land. In contrast, the *Aboriginal Heritage Act 2006* provides for Aboriginal people to have input into the management of heritage sites located on both public and private land. In aligning native title and cultural heritage the Act aims to create consistency by ensuring that traditional owners recognised by one legislative framework are also acknowledged within Victoria’s heritage system. This prevents administrative duplication by not requiring native title holders to re-establish their status as traditional owners to the Victorian Aboriginal Heritage Council (the ‘Council’).

<sup>164</sup> D Edelman, ‘Broader native title settlements and the meaning of the term ‘traditional owners’’, conference paper, *AIATSIS native title conference, Melbourne, 4 June 2009*, Native Title Tribunal, Canberra, 2009, p. 3; *Traditional Owner Settlement Act 2010* (Vic) s. 1.

<sup>165</sup> *Traditional Owner Settlement Act 2010* (Vic) s. 3.

<sup>166</sup> Legislative Assembly (Victoria), ‘Traditional Owner Settlement Bill Second Reading’, Hansard, 29 July 2010, p. 2752.

<sup>167</sup> D Edelman, ‘Broader native title settlements and the meaning of the term ‘traditional owners’’, conference paper, *AIATSIS native title conference, Melbourne, 4 June 2009*, Native Title Tribunal, Canberra, 2009, p. 3. This language has been adopted by AAV for use in Aboriginal policy and is the name of a new initiative to promote and support agreement-making between Victorian traditional owner groups. See Right People for Country Project Committee, *Report of the right people for country project Committee*, Aboriginal Affairs Victoria, Melbourne, 2011, accessed 20 July 2012, [www.dpcd.vic.gov.au/indigenous/projects-and-programs/right-people-for-country](http://www.dpcd.vic.gov.au/indigenous/projects-and-programs/right-people-for-country).

The Act recognises the particular role of traditional owners in the protection of heritage in a number of ways:

- by including as one of the Act's key objectives the aim 'to accord appropriate status to Aboriginal people with traditional or familial links with Aboriginal cultural heritage in protecting that heritage'<sup>168</sup>;
- by requiring members of the Council to be individuals who 'can demonstrate, traditional or familial links to an area in Victoria'<sup>169</sup>; and
- by mandating that the Council appoint organisations that represent native title holders as RAPs.<sup>170</sup>

Of the current RAPs the Council was required by the Act to appoint three (Gunditj Mirring, Gunaikurnai and Barengi Gadjin) as these groups are also native title holders or parties to agreements under the *Traditional Owner Settlement Act 2010*.<sup>171</sup> As mentioned, the Dja Dja Wurrung people are currently negotiating a traditional owner settlement with the state, and were appointed as a RAP in 2008.

Importantly, the Act does not include a definition of 'traditional owner', nor does it provide guidance to the Council as to how a particular individual or group can be assessed as being traditional owners. Despite not defining 'traditional owner' the Act does outline what it intends by the phrase 'traditional or familial links':

A person has traditional or familial links to an area if –

- (a) the person is an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area; and
- (b) the person –
  - (i) has responsibility under Aboriginal tradition for significant places located in, or significant Aboriginal objects originating from, the area; or
  - (ii) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for significant Aboriginal places located in, or significant Aboriginal objects originating from, the area.<sup>172</sup>

This definition emphasises that Aboriginal people with 'traditional or familial' links to country are the rightful custodians of their heritage because the responsibility to care for heritage derives from their own traditional practices.

---

<sup>168</sup> *Aboriginal Heritage Act 2006* (Vic) s. 3(c).

<sup>169</sup> *ibid.*, s. 131(3)(a).

<sup>170</sup> *ibid.*, s. 151(2).

<sup>171</sup> *ibid.*, ss. 151(2), 151(2A).

<sup>172</sup> *ibid.*, s. 7.

While the Act broadly prioritises the appointment of traditional owners as RAPs, the Committee heard that ‘the legislative mandate for giving control over cultural heritage decisions to Traditional Owners needs to be maintained and strengthened’.<sup>173</sup> As Native Title Services Victoria argues:

Whilst the current VAHC has generally operated so that only Traditional Owner corporations are appointed as RAPs, this is as much a function of the policies adopted by the VAHC and how its members have defined their role, as it is a function of the current legislation.<sup>174</sup>

This position is echoed by the Victorian Traditional Owners Land Justice Group, which states that ‘no distinction is made in the objectives of the AHA [*Aboriginal Heritage Act 2006*] between the responsibilities of Aboriginal people generally and traditional owners specifically in relation to cultural heritage’.<sup>175</sup>

In response to the lack of clarity around defining traditional ownership and distinguishing between traditional owners and other Aboriginal people the Council has developed its own policies and criteria in relation to the RAP appointment process. The central policy driving the Council’s decision-making is the principle that it ‘will give **priority consideration** to applications made by groups who represent Traditional Owners’ (emphasis added).<sup>176</sup> The policies of the Council regarding RAP appointments will be discussed in detail in chapter five.

### 3.6.1 *Traditional owners and historical and contemporary people*

While the Council’s own policies prioritise the appointment of groups representing traditional owners over other Aboriginal groups, the Act does allow for the appointment of groups comprised of Aboriginal people with a ‘historical or contemporary interest in the Aboriginal cultural heritage’ of a particular area.<sup>177</sup> The Act’s distinction between Aboriginal people with ‘traditional and familial’ or ‘historical or contemporary’ links is consistent with distinctions made within Indigenous communities throughout Australia, and is also acknowledged in anthropological literature on native title.<sup>178</sup>

In the Victorian context this category of ‘historical or contemporary’ people can refer to a range of personal and familial situations, which are often the result of the upheavals of the reserve system and the movement of Aboriginal people throughout the state, a brief history of which was outlined above. The term can also cover traditional owners from other states who live in Victoria and have experience protecting heritage within their local community. It can also include those

<sup>173</sup> Native Title Services Victoria, submission no. 35, p. 1.

<sup>174</sup> *ibid.*

<sup>175</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 8.

<sup>176</sup> Victorian Aboriginal Heritage Council, *General principles – RAP decision-making*, Department of Planning and Community Development, Melbourne, 2010, accessed 12 January 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council](http://www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council).

<sup>177</sup> *Aboriginal Heritage Act 2006* (Vic) s. 151(3)(d).

<sup>178</sup> D Edelman, ‘Broader native title settlements and the meaning of the term ‘traditional owners’’, conference paper, *AIATSIS native title conference, Melbourne, 4 June 2009*, Native Title Tribunal, Canberra, 2009, pp. 7–8.

people whose primary mode of identification as an Aboriginal person is through their contemporary place of residence rather than a notion of traditional country. Groups representing 'historical or contemporary' interests in heritage are often Aboriginal cooperative organisations, many of which were first established as local service provision agencies.

Victoria's previous heritage system established in the 1970s and 1980s did not provide for traditional owners to be decision-makers in relation to heritage within their country. Under Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), a total of 29 local Aboriginal community organisations were allocated heritage responsibilities. The prescribed local Aboriginal organisations were generally co-operatives that provided health, employment, and legal services to their local Aboriginal community. Membership of the co-operatives was based around location. While many traditional owners were members of co-operatives, the organisations were not designed to represent traditional owners.

To date, the Council has not appointed an organisation with an historical or contemporary interest in heritage as a RAP. However, the Committee observed that the potential for this to occur under the Act is a source of conflict and frustration for many traditional owner groups and other community groups. In their submission the Victorian Traditional Owners Land Justice Group wrote:

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.<sup>179</sup>

Mr Bevan Harrison, a Bidawal traditional owner, argued that 'it is very hard for Aboriginal people to understand what is going on in government programs when you allow people to put in [RAP] applications for country where they do not belong'.<sup>180</sup> Similarly, Mr Richie Kennedy, a representative of the Tati Tati people, told the Committee that 'when the cooperatives were managing cultural heritage, the situation was an absolute disgrace. But under the current system, traditional owners are still not sufficiently recognised as the sole custodians of cultural heritage'.<sup>181</sup>

In contrast, the Committee heard evidence from one group of historical and contemporary people who had their RAP application declined – the Wathaurong Aboriginal Co-operative. The Cooperative previously undertook heritage responsibilities under Part IIA of the Commonwealth Act.

---

<sup>179</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 9.

<sup>180</sup> Bevan Harrison, submission no. 46, p. 1.

<sup>181</sup> Richie Kennedy (Tati Tati Aboriginal Corporation), submission no. 54, p. 1.

Mr Reg Abrahams described the situation of the Cooperative in the following way:

I think under the current legislation there were five ways you could become a registered Aboriginal party, and the Victorian Aboriginal Council only took one dot point out of that, which was traditional owners. So under the other four categories we tick them off like anything. It is just that traditional owner links [which we do not meet].<sup>182</sup>

The Cooperative disputed their loss of heritage responsibilities, and claimed that, notwithstanding the fact that their organisation is not designed to represent traditional owners, they did possess knowledge and interests in heritage over the area for which they were previously responsible. However, the Cooperative did not dispute the notion of traditional ownership, or the existence in Victoria of traditional owner groups.

The Committee received evidence from another local Aboriginal group – the Winda-Mara Aboriginal Corporation – that reported having a strong working relationship with their local traditional-owner-led RAP, the Gunditj Mirring Traditional Owners Aboriginal Corporation. The Corporation told the Committee that it had ‘worked in conjunction with the local traditional owners for the past 20 years’, and that ‘RAPs represent the best way to manage, preserve and develop our local culture and heritage’.<sup>183</sup>

The term ‘traditional owner’ was not universally embraced by witnesses to the inquiry. Mr John ‘Sandy’ Atkinson, representing the Bangerang people of northern Victoria, regarded the term traditional owner as a modern invention. While Mr Atkinson is adamant about his and his group’s claims to having long-standing and traditional connections to their country, he said that, ‘The term traditional owner is a politically created white-fella term that has become a cliché.’<sup>184</sup> In responding to the Yorta Yorta claims of traditional ownership, he stated that:

The claim is culturally incorrect because in the old days, no Aboriginal person ever said they were ‘the owner’ of country. The old people said they belonged to country. They said they sprang forth from country. They said they were part of the country.<sup>185</sup>

The majority of evidence received by the Committee – including from groups dissatisfied with the RAP appointment process – is that only traditional owners should be decision-makers in relation to their cultural heritage. Whilst the language, or terms, used to describe ‘traditional ownership’ may well have changed over time, the Committee understands that the basic concept that underpins the phrase has not. While Victorian Aboriginal groups have disputed who is the rightful traditional owner group for a given area, this basic concept does not appear to be in dispute.

---

<sup>182</sup> Mr Reg Abrahams, Cultural Heritage Advisor, Wathaurong Aboriginal Co-operative, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 65.

<sup>183</sup> Mr Michael Bell, Chief Executive Officer, Winda-Mara Aboriginal Corporation, Environment and Natural Resources Committee public hearing – Hamilton, 20 March 2012, transcript of evidence, p. 85.

<sup>184</sup> John ‘Sandy’ Atkinson, submission no. 58, p. 1.

<sup>185</sup> *ibid.*

With few exceptions, the respondents to this inquiry, both Aboriginal and non-Aboriginal, have supported the notion that heritage responsibilities should lie with traditional owner groups. This position was strongly argued by the Victorian Traditional Owners Land Justice Group (VTOLJG), the representative organisation for Victorian traditional owners, which claimed that ‘as we stand in the 21<sup>st</sup> century the proposition that a non-traditional-owner-controlled organisation be given responsibility for cultural heritage is a non-starter’.<sup>186</sup> In their submission to the inquiry the VTOLJG elaborated:

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 ...<sup>187</sup>

It was also suggested in a joint submission by the current Registered Aboriginal Parties that, ‘recognising and committing to Traditional Owners ... has not excluded historical or contemporary Aboriginal people as all Aboriginal people are traditional owners somewhere in Australia. The Victoria approach simply recognises and strengthens the right people for country in Victoria’.<sup>188</sup>

The Committee is aware that the history of Aboriginal movement across the state post-settlement has meant that there can be disputes as to who may constitute the rightful traditional owner group for a given area. Disputes of this nature are certainly more prevalent in some areas than others, and these issues will be dealt with in following chapters.

The Committee notes that in its current form the Act is inconsistent with regards to the priority of traditional owners within the heritage system. While section 151 does open the way for non-traditional owner groups to be appointed as RAPs, the Act’s objectives and definitions emphasise the unique status of traditional owners in relation to their own heritage.<sup>189</sup> Importantly, this emphasis on traditional owners harmonises with the native title process, produces consistency for government, land users and Aboriginal people, and is consistent with the evidence heard by the Committee from stakeholders, that only organisations representing traditional owner groups should have the ability to be appointed as RAPs.

Accordingly, the Committee recommends:

### **RECOMMENDATION 3.1**

The *Aboriginal Heritage Act 2006* (Vic) be amended to allow for only incorporated bodies representing traditional owners to be appointed as Registered Aboriginal Parties.

<sup>186</sup> Mr David Yarrow, Legal Advisor, Victorian Traditional Owners Land Justice Group, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 37.

<sup>187</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 9.

<sup>188</sup> Victorian Registered Aboriginal Parties – joint submission, submission no. 68, p. 6.

<sup>189</sup> One of the Act’s definitions for ‘cultural heritage significance’ is ‘significance in accordance with Aboriginal tradition’, *Aboriginal Heritage Act 2006* (Vic) s. 4.

While the majority of witnesses argued that it was inappropriate for groups representing historical and contemporary people to become RAPs, it was also acknowledged that non-traditional owner groups do often have an interest in the protection of heritage within their local communities. As Mr Ken Stewart, a representative for the Wamba Wamba people, argued:

It is reasonable to consider the views of other groups who have a non-traditional interest in cultural heritage in an area, but that does not mean that they have the same rights and responsibilities for cultural heritage as traditional owners. We need to be clear that according to our law and culture, only traditional owners have cultural heritage rights.<sup>190</sup>

The VTOLJG proposed that the interests of non-traditional owner groups are best accommodated under the purview of RAPs controlled by traditional owners:

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 would also need to be amended under the AHA to ensure that appropriate recognition is given to these groups.<sup>191</sup>

However, the Committee recognises that Aboriginal people who are not traditional owners often have both an interest and experience in caring for heritage within their local community. For example post-settlement sites, such as former missions and reserves, are often of heritage significance not only to traditional owners on whose country these sites are located, but to Aboriginal people from other areas who have historical connections to these places.

The Committee recommends:

### **RECOMMENDATION 3.2**

Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council develop policy guidelines to support Registered Aboriginal Parties to consult, where appropriate and relevant, Aboriginal people with historical or contemporary interests in heritage.

<sup>190</sup> Ken Stewart (Wamba Wamba Traditional Owner Group), submission no. 55, p. 2.

<sup>191</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 10.





# Chapter four

---

## *The membership and structure of the Victorian Aboriginal Heritage Council*

### KEY FINDINGS

---

- 4.1 Many Aboriginal stakeholders expressed deep dissatisfaction with the Victorian Aboriginal Heritage Council, but it was agreed that the responsibility for appointing Registered Aboriginal Parties should lie with a body composed of Victorian traditional owners.
  - 4.2 The majority of the inquiry's Aboriginal stakeholders strongly felt that the membership of the Victorian Aboriginal Heritage Council should reflect the diversity of Victoria's traditional owner groups.
  - 4.3 Witnesses held a wide range of views regarding how the membership criteria of the Victorian Aboriginal Heritage Council could be re-shaped. Some called for the direct election of Council members by traditional owners, while others wanted a regionally-based process in which traditional owner organisations put forward nominations for Council membership to the Minister.
  - 4.4 Representatives of the cultural heritage industry strongly supported the creation of an advisory committee of technical experts that would assist the Victorian Aboriginal Heritage Council by providing advice on issues relating to Aboriginal heritage, archaeology, anthropology and history.
- 

#### **4.1 Introduction**

This chapter examines the current membership and structure of the Victorian Aboriginal Heritage Council (the 'Council'). It explores term of reference (b) (i), which requests that the Committee consider:

The support available to the Council in making decisions about the appointment of Registered Aboriginal Parties including:

- (i) membership and structure of the Council

The chapter will also consider aspects of term of reference (b) (ii), the ‘council’s capacity to inquire into matters relevant to [RAP] applications’.

The Committee received a range of evidence about the structure and membership criteria of the Council. The majority of this evidence came from current RAPs, RAP applicant groups and other Aboriginal organisations. Industry and government stakeholders rarely commented on the composition of the Council, or commented only to note that they had minimal contact with the Council. For example, in their submission the Department of Sustainability and Environment stated that it would ‘not provide comment on this section [Council membership] as it does not directly impact on its experience and responsibilities in working with RAPs as a public land manager’.<sup>192</sup> In contrast, many of the inquiry’s Aboriginal stakeholders have had extensive contact with the Council through the RAP application and determination process, and have developed views on how the Council’s membership and structure has contributed to its ability to fulfil its legislative responsibilities.

## **4.2 Overview of the Victorian Aboriginal Heritage Council**

The *Aboriginal Heritage Act 2006* (Vic) (the ‘Act’) established the Council as a decision-making body comprised of Aboriginal people with ‘traditional or familial links’ to an area in Victoria who, in the opinion of the Minister, have relevant knowledge or experience in the area of cultural heritage.<sup>193</sup> In this way, the Council is deemed to be an appointed skills-based body. Since its inception, the Council has been primarily concerned with one of its core functions – the appointment of Registered Aboriginal Parties (RAPs). Under the Act the Council has a number of other prescribed functions, including providing advice to the Minister and the Secretary of DPCD, and promoting public awareness of Aboriginal heritage in Victoria.<sup>194</sup>

Council members are appointed by the Minister following an expression of interest process in which interested individuals nominate themselves for a position. The Act provides for the Council to have up to eleven members, who each serve three year terms and are eligible for re-appointment. A Council Chairperson is elected by the Council members for a one year term, and is eligible for re-election for a further one year term.<sup>195</sup> During the period of the inquiry, membership of the Council has fluctuated between five and ten members, as a result of a number of members completing their terms and the process of nomination for new members.

---

<sup>192</sup> Department of Sustainability and Environment, submission no. 18, p. 1.

<sup>193</sup> *Aboriginal Heritage Act 2006* (Vic) s. 131.

<sup>194</sup> *ibid.*, s. 132.

<sup>195</sup> *ibid.*, s. 138.

Under section 139 of the Act, the Council must meet at least every two months, which is the current rate that it meets. Generally Council meetings last two or three days, during which members discuss RAP applications and any other business.<sup>196</sup> Council members are not employed to work on Council matters full-time, but they are paid sitting fees for attending meetings.<sup>197</sup>

The Council is not constituted as an independent statutory authority; it is funded by Aboriginal Affairs Victoria (AAV).<sup>198</sup> The Council is currently supported by a secretariat housed within AAV that is staffed by two full-time, ongoing staff members (a manager and support officer), and two full-time and one part-time contract staff members.<sup>199</sup> The secretariat manages the day-to-day operation of the Council, such as receiving RAP applications and liaising with applicant groups.

The Council is accountable to the Auditor-General and the Ombudsman, and is required to adhere to freedom of information requirements and the *Public Administration Act 2004* (Vic).<sup>200</sup>

### 4.3 Membership of the Victorian Aboriginal Heritage Council

The Committee heard from a number of Aboriginal stakeholders who were concerned that Council members did not represent the diversity of Victoria's traditional owner groups. The majority of witnesses felt strongly that the membership criteria of the Council should ensure geographical balance to prevent any one traditional owner group from dominating the decision-making process for RAP appointments. At a public hearing in Melbourne Mr Darren Perry, a Ngintait traditional owner, commented that:

The heritage council is not representative of the regional tribal set-up of Victoria, and we believe that needs to be more so. Then maybe we can all work together.<sup>201</sup>

Similarly, in their submission to the inquiry Mr Gary Murray and Ms Margaret Gardiner argued that the design of the Council was 'undemocratic [and] unrepresentative', and that the Council was 'racked with conflicts of interest, nepotism and cronyism'.<sup>202</sup> At a public hearing in Shepparton, Bangerang elder Mr John 'Sandy' Atkinson told the Committee:

If you talk about RAPs, what a great joke that is. As I said, 38 communities and only 9 have got it [RAP status]. They set up a system of a committee of people who have very little connection with the communities and gave them the legal right to pick out the people who they want to give RAPs to. Think about that.<sup>203</sup>

<sup>196</sup> Victorian Aboriginal Heritage Council, submission no. 30, p. 9.

<sup>197</sup> *ibid.*

<sup>198</sup> *ibid.*, p. 10.

<sup>199</sup> *ibid.*, pp. 9–10.

<sup>200</sup> Victorian Aboriginal Heritage Council, submission no. 66, p. 1.

<sup>201</sup> Mr Darren Perry, Ngintait Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 182.

<sup>202</sup> Gary Murray and Margaret Gardiner, submission no. 28, pp. 2, 1.

<sup>203</sup> Mr John Atkinson, Elder, Bangerang Cultural Centre Cooperative Ltd, Environment and Natural Resources Committee public hearing – Shepparton, 15 May 2012, transcript of evidence, p. 139.

The Committee also received evidence from a number of witnesses who believed that not only was the current membership structure of the Council unrepresentative, but that it contravenes traditional cultural understandings of Aboriginal decision-making by allowing the appointment of immediate family members to the Council. This issue was raised by the Victorian Traditional Owners Land Justice Group (the VTOLJG):

The Council does not reflect Indigenous cultural practice in the old way. There are five people from one nation, none from another ... 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.<sup>204</sup>

The issue of family members sitting together was also raised by the South West Victorian Traditional Owners Group, who argued that the Council has 'expedited the appointment of RAP's [sic] that are directly connected with Council members and their families'.<sup>205</sup>

The frustrations of some witnesses led them to argue for the replacement of the Council with a body independent from government and directly-elected by traditional owners. Mr Gary Murray favours the establishment of an independent statutory authority that manages both Aboriginal heritage, as well as issues relating to native title and economic development:

I think they [the Council] have failed. Therefore we totally support the Victorian Traditional Owner Land Justice Group. The decision was made by a very big majority of traditional owners across this state to abolish the Victorian Aboriginal Heritage Council for its failings, because we want something better. That something better is potentially the Victorian Traditional Owner Commission, an alternative model, that is potentially statutory and it has to be elected democratically. Just like you fellas like democracy, so do we. We like to elect our representatives. We want to see that.<sup>206</sup>

At a public hearing in Melbourne, Barapa Barapa traditional owner Mr Jida Gulpilil-Murray suggested a similar body:

That is democratically elected and which includes members of our community, because we all know who the right people are to speak for our country particularly on issues concerning cultural heritage.<sup>207</sup>

In its submission to the inquiry the VTOLJG 'recommends replacing the VAHC with a well-resourced, efficient traditional-owner-controlled RAP appointment process'.<sup>208</sup>

---

<sup>204</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 4. See also Gary Murray and Margaret Gardiner, submission no. 28; Warby Range Landcare Group, submission no. 7.

<sup>205</sup> South West Victorian Traditional Owners Group, submission no. 17, p. 2.

<sup>206</sup> Mr Gary Murray, Dhudhuroa Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 194–195.

<sup>207</sup> Mr Jida Gulpilil-Murray, Barapa Barapa Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 210.

<sup>208</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 1.

One witness to the inquiry argued that the membership criteria of the Council should be altered to allow non-Aboriginal members. Mr Nicholas Clark, a professional archaeologist, suggested that non-Aboriginal heritage advisors and industry representatives could become members of ‘an enlarged Aboriginal Heritage Council’.<sup>209</sup> This proposition was not supported by any other submission to the inquiry.

The Committee heard that the appointed RAPs are broadly supportive of the current membership and structure of the Council. For example, the Wurundjeri Tribe Land and Compensation Cultural Heritage Council, stated that it ‘fully supports the existence and functions of the VAHC, including the current membership and structure of the VAHC and the process used to determine and identify successful RAPs’.<sup>210</sup> Some of the current RAPs did express concern regarding the resourcing and capacity of the Council, and these issues will be addressed in depth in chapter five.

#### **4.3.1 Council membership and conflicts of interest**

A number of unsuccessful RAP applicants indicated to the Committee that they believed that the current nature of the Council’s membership encouraged conflicts of interest by allowing more than one member of the same traditional owner group to be appointed. Some witnesses felt that this lack of balance had impacted negatively on how their RAP application was considered by the Council.<sup>211</sup> According to Mr Darren Perry this view is prevalent amongst traditional owners who are not associated with any of the appointed RAPs:

It appears to us that the RAPs that have been appointed so far all have connections to the Aboriginal heritage council. This smacks of collusion and maybe even corruption. This is how the traditional owners that have not been appointed RAP status so far view this whole process.<sup>212</sup>

Tati Tati traditional owner Mr Richie Kennedy also stated that ‘the feeling is that certain members of the Heritage Council were successful in becoming RAPs before other tribes because of their connection to members on the Heritage Council’.<sup>213</sup>

This understanding was also shared by the VTOLJG:

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

<sup>209</sup> Nicholas Clark, submission no. 26, p. 3.

<sup>210</sup> Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc., submission no. 25, p. 3.

<sup>211</sup> See, for example, Gary Murray and Margaret Gardiner, submission no. 28; Victorian Traditional Owners Land Justice Group, submission no. 29; and Aileen Blackburn, submission no. 45.

<sup>212</sup> Mr Darren Perry, Ngintait Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 180.

<sup>213</sup> Richie Kennedy (Tati Tati Aboriginal Corporation), submission no. 54, p. 1.

RAP applications is a divisive issue that is causing much anger and resentment within the Aboriginal community in Victoria.<sup>214</sup>

Others, such as Gulajin traditional owner Mr Ron Arnold, argued that ‘there are members of the Heritage Council sitting on our RAP application who have a conflict of interest’.<sup>215</sup> Mr Gary Murray and Ms Margaret Gardiner also claimed that the application of their traditional owner groups – the Dhudhuora and Waywurru – has been impacted by the conflicts of interest of Council members.<sup>216</sup>

In evidence given at a public hearing in Melbourne Mr Ian Hamm, Executive Director of AAV, drew attention to the fact that some traditional owners acknowledge connections to a number of different groups, while others identify primarily with one traditional owner group, and how this situation has impacted on Council membership: ‘On notions that you have five of them from one area, I have to say there is that hierarchy of connection ... We do not have five people on the council whose prime identity is of one group’.<sup>217</sup> The issue of traditional owners having a connection to more than one traditional owner group – or being ‘multi-clanned’ – was acknowledged by witnesses, including those critical of the Council’s membership such as Mr Gary Murray and Mr Geoff Clark.<sup>218</sup>

The issue of conflict of interest was also addressed by the Council, particularly in the context of the small size of the Aboriginal community. Ms Eleanor Bourke stated:

The issue of conflict of interest comes into play even when we are out talking to other groups, and I think we need to make sure that that is understood, because there is nowhere we can go without meeting relations or people who are in organisations who may have a vested interest.<sup>219</sup>

Other stakeholders have also acknowledged the potential difficulties of avoiding conflicts of interest within a community the size of Victoria’s Aboriginal community. Mr Pat Larkin, community representative and member of the Warby Range Landcare Group acknowledged that ‘given there are 50-odd clan groups in the state of Victoria that I am aware of, it is going to be very hard to structure a council that does not have some vested interest in looking after their own’.<sup>220</sup>

---

<sup>214</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 5.

<sup>215</sup> Ron Arnold (Gulajin Traditional Owner Group), submission no. 53, p. 1.

<sup>216</sup> Gary Murray and Margaret Gardiner, submission no. 28, p. 7.

<sup>217</sup> Mr Ian Hamm, Executive Director, Aboriginal Affairs Victoria, Environment and Natural Resources Committee public hearing – Melbourne, 28 May 2012, transcript of evidence, pp. 176–177.

<sup>218</sup> Mr Gary Murray, Dhudhuora Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 191. Mr Geoff Clark, Eastern Maar Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 201.

<sup>219</sup> Ms Eleanor Bourke, Council Member, Victorian Aboriginal Heritage Council, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 6.

<sup>220</sup> Mr Pat Larkin, Community Representative and Project Officer, Warby Range Landcare Group, Environment and Natural Resources Committee public hearing – Shepparton, 15 May 2012, transcript of evidence, p. 135.

The Act directs the Council to manage potential conflicts of interest, and instructs Council members to absent themselves from decisions in which they have a pecuniary or personal interest.<sup>221</sup> The Council explains the process of convening a decision-making quorum for RAP determinations in the following way: 'VAHC members consider each application to identify conflicts of interest at the earliest opportunity and where a situation of conflict of interest or bias is evident, VAHC members do not participate in the decision-making quorum'.<sup>222</sup>

However, as the VTOLJG notes, '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'.<sup>223</sup> Mr Gary Murray and Ms Margaret Gardiner also commented on this issue, stating that: 'It is our strong belief that the legal and political requirements are a different standard for VAHC members compared to other statutory agencies, for example Victorian Public Service, Local Government'.<sup>224</sup>

The Council addressed the issue of its membership in evidence to the inquiry, and drew attention to the difference between a body designed to be representative – in which members represent the interests of their own traditional owner group/s – and a skills-based body where individuals are selected because of their knowledge and expertise. In this way, the Council argued that:

It was never intended to be a representative body, but rather a specialist, skills-based body comprised of persons with cultural heritage expertise or knowledge as Victorian Traditional Owners. If Council becomes a representative body, it will look and function quite differently because members will feel that they have been appointed to represent their community. A representative structure is likely to increase perceptions of bias and give rise to conflicts of interest, and may not facilitate RAP registration decision-making for Council as it is likely to generate more complex issues in terms of bias, apprehended bias and conflicts of interest in its role as a decision-making body.<sup>225</sup>

The Council has also noted – in a submission to AAV's review of the Act – that the Australian National Audit Office advises that membership of public sector boards should be on a skills-basis, rather than in a representative capacity.<sup>226</sup> A skills-based membership model was also emphasised by Wamba Wamba traditional owner Mr Ken Stewart, who suggested that traditional owners should play a role in nominating people with 'skills, knowledge and talent' to the Minister for appointment to the Council.<sup>227</sup>

<sup>221</sup> *Aboriginal Heritage Act 2006* (Vic) s. 141.

<sup>222</sup> Victorian Aboriginal Heritage Council, submission no. 30, p. 28.

<sup>223</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 5.

<sup>224</sup> Gary Murray and Margaret Gardiner, submission no. 28, p. 12.

<sup>225</sup> Victorian Aboriginal Heritage Council, submission no. 30, p. 14.

<sup>226</sup> Victorian Aboriginal Heritage Council, *Second submission to the review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2012, p. 10, accessed 20 August 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006/submissions-on-issues-and-options-paper-2012](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006/submissions-on-issues-and-options-paper-2012).

<sup>227</sup> Mr Ken Stewart, Wamba Wamba Traditional Owners Group, Environment and Natural Resources Committee public hearing – Shepparton 15 May 2012, transcript of evidence, p. 147.



Many of the witnesses to this inquiry had trenchant criticism of the Council, its operations and its decision-making abilities. It is important to note that, while some Aboriginal stakeholders called for the replacement or reformation of the Council, none have suggested that non-traditional owners should be involved in the appointment of RAPs. It was the strong preference of Aboriginal witnesses that some form of body of traditional owners continue to be responsible for the selection of RAPs and that the membership of this body should reflect the diversity of Victoria's traditional owner groups.

#### **4.3.2      *Alternative criteria for Council membership***

The Committee acknowledges that there is widespread concern regarding the criteria for Council membership, and understands that many witnesses want the Council's membership to more strongly reflect the diversity of Victoria's traditional owner groups. The Committee also observes that many Aboriginal stakeholders perceive that the current membership criteria for the Council encourage conflicts of interest. The Committee notes that the views of witnesses differed significantly on how this issue could be addressed. A number of alternative membership models for the Council were suggested by stakeholders, including:

- that Council members could be directly elected by individual Victorian traditional owners;<sup>228</sup>
- that Council members could be appointed to the Council after a nomination process whereby traditional owner groups select their own representatives;<sup>229</sup>
- that nominations for Council membership could be forwarded by traditional owner groups, with the Minister appointing members from this list;<sup>230</sup>
- that Victoria be divided into broad 'regions' (such as AAV's service areas) with one or two members from each region selected either by traditional owners or the Minister to sit on the Council;<sup>231</sup> or,
- that Council membership should favour those individuals who are already part of RAPs, native title bodies, and/or groups with natural resource agreements with the state.<sup>232</sup>

Some witnesses, such as Wamba Wamba traditional owner Mr Ken Stewart, combined a number of the above options in their ideal model for Council membership:

At the moment those people who sit on the heritage council were nominated mainly by themselves, not even democratically. If we have a regionalised structure in north-west Victoria, if we put up three or four names, they would be elected by Aboriginal people — our community. ...

---

<sup>228</sup> Gary Murray and Margaret Gardiner, submission no. 28; Mr Geoff Clark, Eastern Maar Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne 4 June 2012, transcript of evidence, p. 199.

<sup>229</sup> Aileen Blackburn, submission no. 45. Darren Perry, Ngintait Traditional Owner Group, submission no. 52.

<sup>230</sup> Ken Stewart (Wamba Wamba Traditional Owner Group), submission no. 55.

<sup>231</sup> Pat Larkin, submission no. 24; Warby Range Landcare Group, submission no. 7; Ms J Sizer, Chairperson, Wathaurong Aboriginal Co-operative, Environment and Natural Resources Committee public hearing – Melbourne 27 February 2012, transcript of evidence, pp. 67–68.

<sup>232</sup> Nindi-Ngujarn Ngarigo Monero Aboriginal Corporation, submission no. 27.

I think if we had two people from each of the five regions — if we have five or six regions in Victoria — who are elected by their community and their region to represent people on the heritage council, that is the way to go.<sup>233</sup>

In their submission the Bangerang Cultural Centre Cooperative argued that the Council should be reformed and ‘a procedure of one vote per clan group established’.<sup>234</sup> At the public hearing in Lakes Entrance Ms Aileen Blackburn discussed the difficulties of altering the Council’s membership and structure given the ongoing importance of family connections to Aboriginal people:

I guess I have always promoted that our clans, our families, are the basis of our societies — and they still are. We are deeply criticised because we work closely within our own families. You get a non-indigenous structure trying to say, ‘Well, basically that is seen as nepotism’ and that, so we have to work with the process to try not to look like that. But I believe the basis of our society are our clans and families, and I believe from that level up some families will form natural alliances based on those traditional clan ties, and if we could build on that to the top level, that is the type of Aboriginal traditional owner structure I am talking about, not one that is appointed by the government.<sup>235</sup>

The Committee also heard concerns from some Aboriginal stakeholders that the ministerial appointment of Council members should not continue. For example, the VTOLJG argued that:

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.<sup>236</sup>

In a similar way Ms Aileen Blackburn argued that, ‘the Minister should not have decision-making powers’.<sup>237</sup> Mr Geoff Clark of the Eastern Maar traditional owner group also suggested that the Ministerial appointment of members should be replaced by ‘a heritage body fully elected, without interference’.<sup>238</sup>

The weight of evidence to this inquiry suggests that it is appropriate for a body composed of Aboriginal traditional owners to have the authority to appoint RAPs. The Committee understands that the appointment of traditional owners to such a body is also consistent with the key principles of the Act, in particular its aim to ‘recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage’.<sup>239</sup>

<sup>233</sup> Mr Ken Stewart, Wamba Wamba Traditional Owners Group, Environment and Natural Resources Committee public hearing – Shepparton 15 May 2012, transcript of evidence, p. 147.

<sup>234</sup> Bangerang Cultural Centre Cooperative Ltd, submission no. 21, p. 3.

<sup>235</sup> Ms Aileen Blackburn, Environment and Natural Resources Committee public hearing – Lakes Entrance 24 April 2012, transcript of evidence, p. 122.

<sup>236</sup> Victorian Traditional Owner Land Justice Group, submission no. 29, p. 4.

<sup>237</sup> Aileen Blackburn, submission no. 45, p. 3.

<sup>238</sup> Mr Geoff Clark, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 201.

<sup>239</sup> *Aboriginal Heritage Act 2006* (Vic) s. 3(b).

On the question of how such a body should be appointed, the Committee is not convinced that it would be advantageous, or indeed appropriate, that such a body be elected. The primary purpose of such a body is the appointment of RAPs, not to be a representative or politically engaged forum for traditional owners to discuss, or advocate for their interests. The Committee observes that the VTOLJG currently fulfils this representative role for traditional owners throughout the state. As such, membership of a reformed Council should continue to be skills-based with a view to supporting sound decision-making in relation to RAP determinations.

Therefore, the Committee determines that Aboriginal people should be appointed to a reformed Council by the Minister on the basis that they are Victorian traditional owners with knowledge and experience of Aboriginal cultural heritage.

As discussed above, the majority of the inquiry's Aboriginal stakeholders strongly felt that the membership of the Council should reflect the diversity of Victoria's traditional owner groups. As a matter of principle, the Committee agrees that the Council's membership should reflect the diversity of Victoria's traditional owner groups.

A Council membership comprised of individuals from a wide range of traditional owner groups will maximise its ability to form decision-making quorums for RAP determinations. Diversifying the Council's membership will also help to address allegations and perceptions of bias and conflicts of interest. The Committee is confident that diversity on a reformed Council can be achieved without the number of Council members increasing.

While not supporting an election model, the Committee understands that there is widespread support for traditional owners to play a more direct role in the selection of Council members. Rather than adopting an elected Council model, the Committee suggests that individuals who nominate for Council membership should be required to provide clear evidence that their nomination is broadly supported by their primary traditional owner group.

The Committee is aware that, in some instances, the Council has had difficulties with convening a quorum for RAP decision-making due to the need to manage members' conflicts of interest. Possible solutions to this issue are discussed below.

On the issue of membership criteria for the Council, the Committee recommends that:

**RECOMMENDATION 4.1**

The Minister appoints individuals to the Victorian Aboriginal Heritage Council who are recognised Victorian traditional owners, and who possess knowledge and experience of Aboriginal heritage. The Council will continue to comprise up to 11 individuals.

In relation to the diversity of Victoria's traditional owner groups, the Committee recommends that:

#### **RECOMMENDATION 4.2**

The *Aboriginal Heritage Act 2006* (Vic) be amended to require the Minister to take into consideration the diversity of Victoria's traditional owner groups when appointing members to the Victorian Aboriginal Heritage Council.

On the issue of Aboriginal community involvement with the selection of Council members, the Committee recommends that:

#### **RECOMMENDATION 4.3**

The *Aboriginal Heritage Act 2006* (Vic) be amended to require that individuals nominating for the Victorian Aboriginal Heritage Council:

- nominate the traditional owner group with which they primarily identify; and
- provide evidence, to the satisfaction of the Minister, that their self-nomination for membership of the Victorian Aboriginal Heritage Council is broadly supported by the relevant traditional owner group.

In relation to recommendation 4.3, AAV, in consultation with the Council, will develop policy guidelines to support this nomination process.

#### **4.3.3 Option for an advisory committee to assist Council**

The Committee heard from several stakeholders – particularly from groups representing archaeologists and cultural heritage advisors – who suggested that the decision-making capacity of the Council could be enhanced through the addition of an advisory committee comprised of individuals with technical expertise in archaeology, anthropology or history. For example, the Australian Association of Consulting Archaeologists recommended that:

the VAHC consider increasing their own resourcing via the appointment of a technical advisory panel that reports to the VAHC. This subcommittee would focus on additional 'technical' expertise such as legal, archaeological and anthropological expertise. It could also provide another avenue to hear disputes directly from particular stakeholder groups such as developers, RAPs and Cultural Heritage Advisors, prior to matters being elevated to VCAT.<sup>240</sup>

<sup>240</sup> Australian Association of Consulting Archaeologists Inc., submission no. 62, p. 3.

In the same way, the Environment Institute of Australia and New Zealand suggested that a 'subcommittee' of the Council could provide "technical" expertise such as legal, archeological [sic] and anthropological expertise'.<sup>241</sup>

The Committee is of the view that the development of a technical advisory committee would assist the Council by providing access to advice on a range of matters relating to Aboriginal history, the heritage industry, anthropology and archaeology. For example, the advisory board could assist the Council in its RAP determinations by providing advice and producing research materials on relevant issues. In particular, an advisory committee would enlarge the Council's capacity, as per term of reference (b) (ii), 'to inquire into matters relevant to [RAP] applications'. The Committee suggests that some members of the advisory committee could be drawn from relevant representative associations or peak bodies, such as the Heritage Council of Victoria.

Accordingly, the Committee recommends that:

#### **RECOMMENDATION 4.4**

The *Aboriginal Heritage Act 2006* (Vic) be amended to provide for the creation of an independent advisory committee of no more than six individuals, appointed by the Minister, with demonstrated expertise in archaeology, cultural heritage, anthropology, history and/or relevant industries. The advisory committee would be called upon at the Minister's discretion to assist the Council and would have no voting role on Council decisions. The Council can also seek from the Minister a convening of the independent advisory committee.

#### **4.3.4 Alternate or co-opted Council members**

One RAP, the Wathaurung Aboriginal Corporation, drew attention to the possibility of varying the terms of some Council members in order to avoid conflicts of interest and to assist the Council to convene decision-making quorums. The Wathaurung Aboriginal Corporation (trading as Wadawurrung) made the following comments about the Council's structure:

From an operational perspective Wadawurrung have experienced a minor failing within the membership of Council when it was unable to reach a quorum on Wadawurrung's application as a whole document. Instead Council insisted that the application be split into two parts in order to avoid conflicts of interest and to allow for a quorum in each part of the application. With this in mind, Wadawurrung recognises that the current appointment process restricts the co-opting of members which may help to avoid this type of situation in future.<sup>242</sup>

<sup>241</sup> Environment Institute of Australia and New Zealand, submission no. 31, p. 3. See also Heritage Insight, submission no. 65, p. 5.

<sup>242</sup> Wathaurung Aboriginal Corporation, submission no. 39, pp. 4–5.

Mr Gary Murray and Ms Margaret Gardiner expressed their dissatisfaction with the Council's request to split their RAP application, describing this practice as 'improper'.<sup>243</sup>

The Council has adopted the practice of splitting RAP applications into smaller areas in situations where members have been unable to meet a quorum for the entire application area. Under section 137 the Council may, with the Minister's approval, co-opt additional members. However, co-opted members do not have voting rights and cannot contribute to a decision-making quorum.<sup>244</sup> For the purposes of appointing a RAP a quorum of the Council is a majority of its members.<sup>245</sup> There is currently no provision for alternate members or for some members to have 'part-time' status.

The Committee considers it highly likely that difficulties related to meeting quorum requirements for RAP determinations would lessen if the membership of the Council was designed to ensure that individuals from a wide range of traditional owner groups were appointed. However, the Committee does acknowledge that given the complex relationship between traditional owner groups that in some cases it may continue to be difficult for the Council to reach quorums on some RAP applications. The Committee considers that a panel of alternate members will provide the Council with greater options when convening decision-making quorums. It will also assist in minimising conflicts of interest, both perceived and actual.

The Committee therefore recommends that:

#### **RECOMMENDATION 4.5**

The *Aboriginal Heritage Act 2006* (Vic) be amended to provide for the creation of a panel of no more than three alternate Council members who can be called upon, if required, by the Council to participate in RAP decision-making in situations where the Council is not able to convene a quorum. Members of this panel are to be appointed using the same criteria and processes as for ordinary members of the Council.

## **4.4 Council structure**

The Committee did not hear extensive evidence relating to the structure of the Council. However, the Council itself did present the Committee with a number of suggested structural changes that may improve the Council's ability to carry out its duties. In particular, the Council has recommended that the Chair become eligible to hold three year terms in line with other Council members as the current situation 'limit[s] the ability for Chairs to achieve strategic tasks' and is 'disruptive to the VAHC's work'.<sup>246</sup> The Council also argued that the Chair should become a

<sup>243</sup> Gary Murray and Margaret Gardiner, submission no. 28, p. 8.

<sup>244</sup> *Aboriginal Heritage Act 2006* (Vic) s. 137.

<sup>245</sup> *ibid.*, s. 139.

<sup>246</sup> Victorian Aboriginal Heritage Council, submission no. 30, p. 9.

full-time position in ‘acknowledgement of the significant workload and responsibilities of the VAHC and the Chair’.<sup>247</sup>

The Council has also expressed concern regarding its structural and financial relationship to AAV:

Currently the VAHC does not have its own budget and must make requests for funds from AAV on a need-by-need basis. The VAHC recommended that it is given recurrent funding separate to AAV’s funding in its submission to the review of the AHA to accord the VAHC greater independence as a statutory authority.<sup>248</sup>

A small number of other stakeholders commented on the structure of the Council and its relationship to both AAV and the government. Mr Geoff Clark, from the Eastern Maar traditional owner group, also expressed concern that the Council was too aligned with AAV and the Minister:

I think one of the major flaws of the heritage council is that it is too aligned to the bureaucrats in AAV and the old heritage officers. I think it needs to be taken outside of AAV. It needs to be an independent body.<sup>249</sup>

Moreover, Ms Aileen Blackburn has argued that a reformed Council should ‘take over the roles and responsibilities currently undertaken by AAV and the VAHC’.<sup>250</sup> The Heritage Council of Victoria did not comment directly on the relationship between the Council and AAV, but it did note with concern that the Council ‘does not enjoy the same breadth of powers’ that the Heritage Council of Victoria does in relation to non-Aboriginal heritage.<sup>251</sup>

The Committee considers it appropriate that a body of the Council’s size and scope is housed within a relevant government department. It notes the comments of the Heritage Council of Victoria, but also recognises that the Victorian Aboriginal Heritage Council has been established with a different set of roles and responsibilities.

The Committee is satisfied that the current system of one year terms for the Council’s Chair is potentially disruptive to the Council’s work. The Committee therefore recommends that:

#### **RECOMMENDATION 4.6**

The *Aboriginal Heritage Act 2006 (Vic)* be amended to allow the Chair of the Victorian Aboriginal Heritage Council to serve a term of two years, and to be eligible for re-election for a further two years, for a maximum of two terms.

<sup>247</sup> *ibid.*

<sup>248</sup> *ibid.*, p. 10.

<sup>249</sup> Mr Geoff Clark, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 201.

<sup>250</sup> Aileen Blackburn, submission no. 45, p. 3.

<sup>251</sup> Heritage Council of Victoria, submission no. 69, p. 4.

#### **4.4.1 Options for the future structure of the Council**

As part of the review of the *Aboriginal Heritage Act 2006*, AAV released an issues and options paper that included suggestions for altering the structure and roles of the Council. In particular, AAV invited comment on a suggestion to expand the Council into a fully independent statutory authority, with funding diverted from AAV to support a number of new responsibilities.<sup>252</sup> AAV has proposed that this new Council could take over the current functions of the Secretary of DPCD and could play a role in the ongoing monitoring of RAP activities.<sup>253</sup> The Committee acknowledges that it may be advantageous to transfer some of the current responsibilities of the Secretary of DPCD to the Council, particularly in relation to the protection of heritage in areas without RAPs. However, the Committee is not satisfied that the Council needs to be reformed as a statutory authority to take on further responsibilities. The possibility of the Council playing an ongoing role in supporting RAPs will be discussed in greater detail in chapter six, while the potential roles of the Council in areas without an appointed RAP will be discussed further in chapter seven.

The Committee notes that as currently constituted the Council's primary task is to appoint RAPs and that as a consequence any changes to the structure of the Council should aim, in the first instance, to expedite this task. The Committee is not satisfied that transforming the Council into a fully independent statutory authority would assist with the appointment of RAPs in any significant way. If in the future the Council were to appoint RAPs to 100 per cent of the state, the ongoing need for and purpose of the Council would need to be substantially reconsidered. In this future context a new statutory authority may be an appropriate option for the government to consider.

The Committee has heard extensive evidence relating to the resourcing and capacity of the Council, particularly in relation to their ability to support RAP applicants and their relationship with appointed RAPs. The Committee understands that these issues are not related to structure, but rather to resourcing, and as such will be discussed in detail in chapters five and six.

---

<sup>252</sup> Aboriginal Affairs Victoria, *Issues and options paper: Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2012, p. 23, accessed 5 June 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

<sup>253</sup> *ibid.*





# Chapter five

---

## *The appointment of Registered Aboriginal Parties*

### KEY FINDINGS

---

- 5.1 There is widespread dissatisfaction amongst both current and former Registered Aboriginal Party applicants regarding the level of information and feedback available to organisations during the application process. Moreover, the decision-making of the Victorian Aboriginal Heritage Council was considered by numerous witnesses to lack transparency.
- 
- 5.2 A significant number of current and former Registered Aboriginal Party applicants expressed confusion regarding the kind of information that they should supply to the Victorian Aboriginal Heritage Council to demonstrate their traditional relationships to country.
- 
- 5.3 The Victorian Aboriginal Heritage Council is routinely unable to determine applications for Registered Aboriginal Party status within the statutory time frame of 120 days, and this was a major source of frustration for applicant organisations.
- 
- 5.4 Currently, unsuccessful Registered Aboriginal Party applicants can appeal the decisions of the Victorian Aboriginal Heritage Council through the Supreme Court of Victoria. A number of unsuccessful applicants expressed a strong desire for a less costly and time consuming appeals option under the *Aboriginal Heritage Act 2006* (Vic).
- 
- 5.5 The majority of witnesses considered that the Victorian Aboriginal Heritage Council had insufficient capacity to support Registered Aboriginal Party applicants during the application and determination process. The Council was also considered to have limited scope to conduct research to support its decision-making.
- 
- 5.6 The appointment process for Registered Aboriginal Parties has been adversely impacted by conflict between traditional owner groups. However, there is support within the traditional owner community for increased opportunities to participate in mediation to discuss disputes over group membership and geographic boundaries. The Victorian Aboriginal Heritage Council has also, on occasion, arranged independent mediation for Registered Aboriginal Party applicants.
-

- 5.7 The limitations of the *Aboriginal Heritage Act 2006* (Vic) and a lack of resources have constrained the ability of the Victorian Aboriginal Heritage Council to undertake its various roles. However, the Council has developed a number of policy guidelines to support the process of appointing Registered Aboriginal Parties.
- 

## 5.1 Introduction

This chapter investigates the process and policies used by the Victorian Aboriginal Heritage Council (the ‘Council’) to appoint Registered Aboriginal Parties (RAPs). It explores issues related to term of reference (a), which directs the Committee to consider:

- (a) Victorian Aboriginal Heritage Council policies in relation to the appointment of Registered Aboriginal Parties including the factors that should be taken into account by the council in making a decision such as:
  - (i) the degree to which traditional ownership is contested in the area the subject of an application;
  - (ii) the impact that decisions may have on the community;
  - (iii) the capacity of the applicant to fulfil legislative responsibilities if appointed;
  - (iv) the process used to determine and identify the successful Registered Aboriginal Party.

In addition, the chapter addresses aspects of term of reference (b) (ii): ‘the council’s capacity to inquire into matters relevant to [RAP] applications, including supporting applicants to provide information needed to fully assess applications’.

Throughout the course of the inquiry the Committee heard a number of grievances related to the RAP application and determination process, particularly from groups that have had their RAP application declined by the Council. The issues raised by Aboriginal stakeholders included the transparency of the Council’s decision-making; the length of time the Council takes to determine applications; the adequacy of the support available to RAP applicants; and the Council’s approach to contestation over traditional ownership. The Committee also heard evidence from the Council itself about ways to improve the application and determination process for Aboriginal groups.

## 5.2 The Registered Aboriginal Party application and appointment process

The RAP application process is almost exclusively paper-based, with applicant organisations making a written application to the Council, and the Council’s secretariat then corresponding with applicants via letter. The Council does not meet face-to-face with RAP applicant groups at any stage of the RAP determination process. However, RAP applicants are able to contact members of the Council’s secretariat for assistance throughout the application process.

In 2007, after the introduction of the RAP system, the Council held information sessions throughout the state to brief prospective RAP applicants about the requirements of the application process.<sup>254</sup> Since then, the Council has been disinclined to provide direct support to applicants regarding their application in order to avoid perceptions of ‘bias in favour of or against a particular RAP applicant over another applicant’.<sup>255</sup> The Council is of the opinion that assisting RAP applicants to prepare their applications and/or providing advice to applicant groups produces both perceived and actual conflicts of interest.

To apply for RAP status applicant organisations make a written application to the Council that need only include what the Council has described as ‘limited information’.<sup>256</sup> Under section 150 of the *Aboriginal Heritage Act 2006* (Vic) (the ‘Act’), in order to be deemed valid, a RAP application must include the name and contact details of the applicant group; a description of the area over which the group is applying for RAP status (including a map); and a statement outlining the relationship between the applicant group and the area for which they are applying for RAP status.

The Council has developed an approved application form for RAP applicants to complete, and a list of guidelines to assist applicants to prepare the paperwork.<sup>257</sup> The application form advises RAP applicants to provide any supplementary information that they feel will support their application, particularly information that demonstrates their traditional and family links to the area over which they are applying for RAP status. After an application is received the Council issues a public notice inviting comment from interested parties.

Before meeting to determine a RAP application Council members declare whether they have a conflict of interest. At this stage Council members are able to seek advice from the Victorian Government Solicitor’s Office. Next, Council members form a decision-making quorum and the complete RAP application is only then distributed to the non-conflicted Council members.<sup>258</sup> In outlining to the Committee how Council members manage conflicts of interest, Ms Eleanor Bourke stated that:

I identify as a Wergaia woman. I am also descended from Wamba Wamba on the Murray, but I do not have as much to do with Wamba, and I do not participate in their business, even though I get that correspondence. I leave that to my male relation. Denise [Lovett] comes as Gunditjmara and Mick [Harding] as Taungurung. That is a clear statement about who we are, and that puts us out of certain

<sup>254</sup> Victorian Aboriginal Heritage Council, submission no. 66, p. 5.

<sup>255</sup> *ibid.*, p. 4.

<sup>256</sup> Ms Denise Lovett, Chairperson, Victorian Aboriginal Heritage Council, Environment and Natural Resources Committee public hearing – Melbourne, 27 February, transcript of evidence, p. 5.

<sup>257</sup> Victorian Aboriginal Heritage Council, *Application form for registration as a Registered Aboriginal Party for the purposes of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2010, accessed 3 September 2012, [www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms#rap](http://www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms#rap); Victorian Aboriginal Heritage Council, *Guidelines for RAP applicants*, Department of Planning and Community Development, Melbourne, 2010, accessed 3 September 2012, [www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms#rap](http://www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms#rap).

<sup>258</sup> Victorian Aboriginal Heritage Council, submission no. 66, p. 8.

applications. We are not involved in making any decisions about those applications that are neighbouring our [traditional] area.<sup>259</sup>

After meeting to consider a RAP application the Council will often correspond with the applicant group to request further information, to assist with the Council's decision-making. The Council reported that it considers that the current statutory requirements for valid RAP applications are insufficient, and frequently requests additional information from applicants, such as greater detail linking the applicant group to relevant ancestors or information about the membership rules of a group. If the Council requests further information from an applicant the determination of the application is deferred until the applicant responds to the Council.<sup>260</sup>

Once a determination has been made, a Council member will contact the RAP applicant via phone, and then in writing. At this time the Council also releases a public report about their decision on the Department of Planning and Community Development's (DPCD) website. Typically these reports include reference to the materials used by the Council to come to an understanding around the traditional ownership of a RAP applicant, including genealogical data, anthropological and historical reports, the Council's own knowledge of traditional owner groups, and other information provided by RAP applicants.<sup>261</sup>

### **5.3 Criteria used by the Council to determine Registered Aboriginal Party applications**

The RAP determination process is driven both by criteria established by the Act and policy guidelines developed by the Council.

If a RAP applicant has been registered as a native title holder under the *Native Title Act 1993* (Cth) or has entered into a recognition and settlement agreement with the state under the *Traditional Owner Settlement Act 2010* (Vic) the Council must register the applicant as a RAP.<sup>262</sup> In all other situations the Act directs the Council to consider a range of issues in determining an application, including:

- whether the applicant is a body that represents Aboriginal people with traditional or familial links to a particular area;
- whether the applicant is a body that has 'a historical or contemporary interest' in the heritage of a particular area and has demonstrated expertise in managing and protecting cultural heritage in the area;

---

<sup>259</sup> Ms Eleanor Bourke, Council Member, Victorian Aboriginal Heritage Council, Environment and Natural Resources Committee public hearing – Melbourne, 27 February, transcript of evidence, p. 8.

<sup>260</sup> Victorian Aboriginal Heritage Council, submission no. 66, pp. 8–9.

<sup>261</sup> Victorian Aboriginal Heritage Council, submission no. 30, p. 21. The Council has published information relating to unsuccessful RAP applications on its website. Victorian Aboriginal Heritage Council, 'Applications declined or withdrawn', Department of Planning and Community Development, Melbourne, 2010, accessed 6 June 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council/registered-aboriginal-parties/applications-declined-or-withdrawn](http://www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council/registered-aboriginal-parties/applications-declined-or-withdrawn).

<sup>262</sup> *Aboriginal Heritage Act 2006* (Vic) s. 151.

- the existence of any grant of land in fee simple by the state or Commonwealth Government to an Aboriginal body in the application area;
- whether the applicant has entered into any land or resource management agreement with the state in the application area; and
- any other matter the Council considers relevant.<sup>263</sup>

In making RAP determinations the Council must also consider the *Charter of Human Rights and Responsibilities 2006* (Vic) and comply with administrative law principles, such as procedural fairness.<sup>264</sup>

Alongside the criteria supplied by the Act, the Council has developed its own policies in relation to the appointment of RAPs. According to the Council, the central policy driving RAP decision-making is the principle that it ‘will give **priority consideration** to applications made by groups who represent Traditional Owners’ (emphasis added).<sup>265</sup> The Act itself does not provide any guidance on how a group’s traditional or familial links may be demonstrated adequately as part of the RAP application process.

In deciding RAP applications the Council is also concerned whether or not a traditional owner organisation is inclusive of as many traditional owners from a particular area as possible to ‘avoid entrenching divisions in communities’.<sup>266</sup> In order to determine this, the Council often asks applicants to provide membership information such as their organisation’s rule book, decision-making processes, and membership list. In order to ensure that groups applying for RAP status are inclusive the Council has encouraged some applicants to work together to make a joint application.<sup>267</sup> Although the Council has ‘developed clear principles that inform it as a decision-maker’, it also notes that ‘no two decisions concerning RAP applications have been the same as each has had different facts and considerations’.<sup>268</sup>

### 5.3.1 *Evidence used to determine traditional ownership*

As noted above, the Act does not instruct the Council on how to determine whether or not an applicant group is a body that represents traditional owners. As a result, the need for RAP applicants to satisfy the Council of their connection to country lies at the heart of the RAP determination process. The Committee heard a number of concerns regarding the weight that the Council gives to the different kinds of historical evidence that RAP applicants provide. There is widespread confusion over what kinds of evidence the Council considers appropriate to prove applicants’ connections to country for the purposes of RAP registration.

<sup>263</sup> *ibid.*

<sup>264</sup> Victorian Aboriginal Heritage Council, submission no. 66, p. 15.

<sup>265</sup> Victorian Aboriginal Heritage Council, *General principles – RAP decision-making*, Department of Planning and Community Development, Melbourne, 2010, accessed 12 January 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council](http://www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council).

<sup>266</sup> Victorian Aboriginal Heritage Council, submission no. 30, p. 21.

<sup>267</sup> *ibid.*

<sup>268</sup> *ibid.*, pp. 16, 17.

Some witnesses are concerned that the Council does not give sufficient weight to historical records (for example, the diaries of early European settlers) in deciding group membership and the boundaries of traditional owner groups. Mr John ‘Sandy’ Atkinson, member of the Bangerang Cultural Centre Cooperative, argued that the Council should consider more fully the available historical records because, ‘historical records will show you about the people who lived on the land and who are the rightful traditional owners’.<sup>269</sup> Similarly, Mr Pat Larkin suggested that the Council consider the maps of Aboriginal tribal areas produced by the early settlers.<sup>270</sup>

Some witnesses were concerned that the Council requires too much genealogical detail from applicants in order to prove their connections to identified ancestors. Mr Bruce Pascoe, in relation to a current RAP application by the Bidwell Maap Nation in Far East Gippsland, notes that the process of providing genealogies is a ‘destructive’ one in which applicants are asked ‘virtually to disprove the claims of other people’.<sup>271</sup> In contrast, the Ella Maar Aboriginal Corporation felt that it was essential that RAP applicant groups provided a full account of their members’ genealogies.<sup>272</sup>

A number of witnesses were frustrated that the Council does not hold meetings with applicants and their elders during the RAP determination process. For example, the Nindi-Ngujarn Ngarigo Monero Aboriginal Corporation argued that ‘elders should be asked to come and speak for country ... as is asked in the processes of Native Title to determine connection and knowledge of country’.<sup>273</sup> This sentiment was echoed by Ms Annette Xiberras of the Victorian Traditional Owners Land Justice Group (VTOLJG), who argued that the current process ‘is not really getting to the heart of things ... [which] is just sitting down and talking around the table like we did in the old days’.<sup>274</sup>

The Council has also acknowledged the absence of oral history in the RAP determination process, and Ms Eleanor Bourke has argued that there is a need for anthropological research to record the stories of Victorian elders:

But who is going to capture it [oral history]? This is anthropological work that has been done up north for a long time, but nobody puts money into it here in Victoria, because we are not the priority. So, yes, there is a place, but whose responsibility is it, and is it in the context of RAP applications? It is certainly in the context of helping traditional owners capture their history.<sup>275</sup>

---

<sup>269</sup> Mr John ‘Sandy’ Atkinson, Elder, Bangerang Cultural Centre Cooperative Ltd, Environment and Natural Resources Committee public hearing – Shepparton, 15 May 2012, transcript of evidence, p. 139.

<sup>270</sup> Mr Pat Larkin, Community Representative and Project Officer, Warby Range Landcare Group, Environment and Natural Resources Committee public hearing – Shepparton, 15 May 2012, transcript of evidence, p. 133. See also Warby Range Landcare Group, submission no. 7, p. 2; John Paul, submission no. 16, p. 1; Victorian Farmers Federation (Wangaratta Branch), submission no. 20, pp. 1–2; Max Schier, submission no. 61.

<sup>271</sup> Mr Bruce Pascoe, Bidwell-Maap Nation, Environment and Natural Resources Committee public hearing – Lakes Entrance, 24 April 2012, transcript of evidence, p. 118.

<sup>272</sup> Ella Maar Aboriginal Corporation, submission no. 5, p. 2.

<sup>273</sup> Nindi-Ngujarn Ngarigo Monero Aboriginal Corporation, submission no. 27, p. 3.

<sup>274</sup> Ms Annette Xiberras, Co-chair, Victorian Traditional Owners Land Justice Group, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 36.

<sup>275</sup> Ms Eleanor Bourke, Council Member, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 224.

Other witnesses, such as Mr Allan Wandin, felt that the current determination process allows the Council to inappropriately comment on the culture and identify of traditional owners groups: ‘it would seem that the members of the Victorian Aboriginal Heritage Council know my CULTURE better than the Traditional WOI-WURRUNG people’, (emphasis in original).<sup>276</sup>

For some Aboriginal stakeholders the use of non-Aboriginal research expertise was seen to conflict with the need to acknowledge the role of elders within Aboriginal groups. As the Nindi-Ngujarn Ngarigo Monero Aboriginal Corporation argued, elders ‘decide who they pass on their knowledge to in family and community’.<sup>277</sup>

The Council has advised the Committee that it uses the following information to determine whether or not an organisation represents traditional owners:

- genealogical data provided by applicants;
- anthropological and historical materials;
- information gathered through the public notification process; and
- the Council’s own knowledge of traditional owner groups.

Alongside this evidence the Council has also adopted the practice of commissioning researchers to provide information about particular groups and areas.<sup>278</sup>

Some witnesses have expressed concern that that Council requires organisations to prove their connection to country to the standard that would be expected in a native title determination. At a public hearing in Melbourne Mr David Yarrow from Native Title Services, argued that:

The standard [used by the Council to appoint RAPs] should be ‘reasonable satisfaction’, which is the typical standard for public administration. The evidence that we would be directed to is genealogical, historical and anthropological evidence. By no means would we say that mere self-identification is sufficient. It is necessary to establish the constitution of a group and their membership rules by reference to their family histories and genealogy, but crucially that is not a native title standard; it is a reasonable satisfaction that a particular group is the right group for that country.<sup>279</sup>

The VTOLJG also argued that the Council should only need to be “reasonably satisfied” as to the status of the traditional owners for a particular area, with the option to vary boundaries or the decision if additional information becomes available at a later date’.<sup>280</sup>

<sup>276</sup> Allan Wandin (Wandoon Estate Aboriginal Corporation), submission no. 2, p. 1.

<sup>277</sup> Nindi-Ngujarn Ngarigo Monero Aboriginal Corporation, submission no. 27, p. 2.

<sup>278</sup> Victorian Aboriginal Heritage Council, submission no. 30, pp. 20–21.

<sup>279</sup> Mr David Yarrow, Legal Advisor, Native Title Services Victoria, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 27.

<sup>280</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 11.



### 5.3.2 *Impact of Council decision-making on local communities*

Some witnesses to the inquiry expressed concern about the impact that the Council's RAP determinations have had both on Aboriginal groups and on the broader community.

In particular, two unsuccessful RAP applicant groups – the Bangerang Cultural Centre Cooperative and the Wathaurong Aboriginal Co-operative – have argued that the Council's decision not to appoint them as RAPs has negatively impacted on their existing relationships with industry and local government.

For example, in their submission the Bangerang Cultural Centre Cooperative argued that 'the decision not to recognize equal RAP status for the Bangerang has negatively and unjustly affected their social identity and standing in the region today'.<sup>281</sup> Further, the Cooperative argued that 'traditional owners have also witnessed mainstream land owners disillusioned while being compelled to work with ubiquitous organizations that have no primary evidence to support their relationship to country'.<sup>282</sup>

The Council's decision not to appoint the Bangerang Cultural Centre Cooperative as a RAP was also a source of frustration for several non-Aboriginal community members and organisations, including the Wangaratta branch of the Victorian Farmers Federation, which argued that the Council 'has confused and alienated local landowners and created a climate of sceptism [sic] over information on Indigenous culture'.<sup>283</sup> Similarly, community member Mr Pat Larkin commented that Council decisions in relation to the Yorta Yorta Nation Aboriginal Corporation and the Bangerang Cultural Centre Cooperative have '... lead to both confusion and miss-trust [sic] in the wider community in the outcome and the process employed to achieve it'.<sup>284</sup>

Commenting on the Council's decision to decline their RAP application, the Wathaurong Aboriginal Co-operative argued that, 'this has caused a great deal of anger, sadness and stress to Aboriginal community members who are no longer **permitted** to work in their field of expertise, expertise gained through many years of working on our local country and cultural sites', (emphasis in original).<sup>285</sup> In their submission to the inquiry the City of Greater Geelong also commented on the Council's decision to decline the RAP application of the Wathaurong Aboriginal Co-operative, arguing that it has exacerbated tensions between Aboriginal community groups.<sup>286</sup>

---

<sup>281</sup> Bangerang Cultural Centre Cooperative Ltd, submission no. 21, p. 3.

<sup>282</sup> *ibid.*, p. 2.

<sup>283</sup> Victorian Farmers Federation (Wangaratta Branch), submission no. 20, p. 1.

<sup>284</sup> Pat Larkin, submission no. 24, p. 2.

<sup>285</sup> Wathaurong Aboriginal Co-operative, submission no. 32, p. 9.

<sup>286</sup> City of Greater Geelong, submission no. 37.

In relation to an area of south-west Victoria that is currently without a RAP, the South West Victorian Traditional Owners Group stated that:

The failure to appoint a RAP in this area despite numerous attempts to meet the fluctuating criteria of the VAHC has lead [sic] to total confusion with Traditional [sic] owners and stakeholders ... The loss of direct communication with local government developers and industry causes undue confusion and an opportunity to avoid due process.<sup>287</sup>

The impact of Council decisions on areas without a RAP was also raised by the Ella Maar Aboriginal Corporation, in relation to the difficulties faced by RAP applicants when attempting to engage with local industry stakeholders. In their submission the Corporation commented that: 'we did not have any leverage to get [Cultural Heritage Management Plan] sponsors to work with our corporation. This made [it] hard to operate a business and to manage overhead costs'.<sup>288</sup> The issues faced by Aboriginal organisations in areas without an appointed RAP are discussed in detail in chapter seven.

### **5.3.3 Capacity of Registered Aboriginal Party applicants to fulfil their legislative responsibilities if appointed**

The Council has acknowledged that, in some cases, organisations that apply for RAP status are newly formed bodies with minimal resourcing, infrastructure and capacity.<sup>289</sup> The Council has developed policies to consider the cohesiveness and inclusiveness of an organisation applying for RAP status, and under section 151 (2) (d) of the Act, is directed to consider the heritage expertise of organisations with historical or contemporary interests in Aboriginal heritage.

More broadly the Council considers the ability of RAP applicants to operate as a RAP as part of the application process. The RAP application form prepared by the Council asks RAP applicants to provide evidence of their expertise in cultural heritage management and to detail how the applicant organisation intends to undertake their RAP responsibilities if appointed, such as how their governance structures will function and how the organisation will make decisions about cultural heritage management.<sup>290</sup>

Currently, if the Council appoints an organisation as a RAP, the decision takes effect immediately.<sup>291</sup> The Council has argued that the Act should be amended to grant it the power to nominate the date at which a RAP appointment becomes effective.<sup>292</sup> This would allow new RAPs the time to develop appropriate work systems to manage their new role. Moreover, the Council has suggested that it be able to attach conditions to RAP appointments to ensure that

<sup>287</sup> South West Victorian Traditional Owners Group, submission no. 17, p. 1.

<sup>288</sup> Ella Maar Aboriginal Corporation, submission no. 5, p. 3.

<sup>289</sup> Mr Mick Harding, Deputy Chair, Victorian Aboriginal Heritage Council, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 6.

<sup>290</sup> Victorian Aboriginal Heritage Council, *Application form for registration as a Registered Aboriginal Party for the purposes of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2010, accessed 3 September 2012, [www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms#rap](http://www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms#rap).

<sup>291</sup> *Aboriginal Heritage Act 2006* (Vic) s. 152.

<sup>292</sup> Victorian Aboriginal Heritage Council, submission no. 66, p. 10.

organisations develop and maintain inclusive membership structures and decision-making processes.<sup>293</sup>

The Committee had heard a range of evidence relating to the capacity and resourcing of appointed RAPs and their abilities to perform their duties. These issues will be discussed in depth in chapter six.

## 5.4 Transparency of Council decision-making

A number of witnesses, including unsuccessful RAP applicants, commented on the transparency of the Council's decision-making and the quality of feedback available to RAP applicant groups.

In evidence to the Committee the Council stated that it 'endeavours to be open and transparent in its communication with [RAP] applicants'.<sup>294</sup> In particular, the Council noted that it has prepared information materials to support applicants during the process, and publishes reports on its reasons for making RAP determinations on its website.<sup>295</sup>

In their submission to the inquiry the Bangerang Cultural Centre Cooperative argued that 'it is important that the process for RAP status is an open and transparent one for all key stakeholders'.<sup>296</sup> The Cooperative added that the Council's decision-making 'demonstrates a lack of fairness and equity in the decision-making process'.<sup>297</sup>

Some witnesses stated that the Council's decision-making process lacks transparency, particularly in relation to the reasoning why RAP applications are rejected. This was one of the issues raised by Ms Aileen Blackburn when she reflected on her experience of being involved with three different RAP applications:

When RAP applications have been refused, we have been given some idea of why it has been. They may say it is something to do with family or genealogical links or the nature of why it has been refused, but there is never any transparent substantive information associated with it. If they say, 'You've been rejected because of your family information', we would expect to know what it is and who has made those decisions about our family and traditional ties to country, but we do not get that depth of information.<sup>298</sup>

Ms Doris Paton noted that the Nindi-Ngujarn Ngarigo Monero Aboriginal Corporation experienced similar frustrations during the RAP application process:

In trying to expedite, for example, our application, our issues with it are not knowing where we sit at the moment and not knowing what else needs to be done to progress an application. Our old people are used to sitting down and talking to

---

<sup>293</sup> *ibid.*

<sup>294</sup> Victorian Aboriginal Heritage Council, submission no. 30, p. 30.

<sup>295</sup> *ibid.*, p. 27.

<sup>296</sup> Bangerang Cultural Centre Cooperative Ltd, submission no. 21, p. 2.

<sup>297</sup> *ibid.*, p. 3.

<sup>298</sup> Ms Aileen Blackburn, Environment and Natural Resources Committee public hearing – Lakes Entrance, 24 April 2012, transcript of evidence, p. 121.

people; they are not used to a process where they sit and wait for people to do things to them. They want to sit down and talk about what the issues are, what the problems are and how they sort them out. For them, they feel like they are in limbo ...<sup>299</sup>

At a public hearing in Melbourne, Mr Ron Arnold, from the Guladjin traditional owner group explained that ‘there has been no information really provided as to why we have not got a RAP at all; it has just sort of dragged on — no information whatsoever that I can make or head tail from’.<sup>300</sup> Similarly, Mr Richie Kennedy, Chairperson of the Tati Tati Aboriginal Corporation commented that:

Tati Tati feel that the Heritage Council has done a very poor job over the years. We find it insulting that we have been submitting applications since the AHA first came in, in 2007, but we have never been successful. The Council asked us for additional details about who we were, our ancestry; we provided the information, but they continue to knock us back.<sup>301</sup>

The VTOLJG, arguing on behalf of a number of unsuccessful RAP applicants, also noted concerns regarding feedback for applicants, arguing that:

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.<sup>302</sup>

Some stakeholders have expressed concern that the Council’s response to queries about its decision-making is also inadequate. For example, Mr Gary Murray and Ms Margaret Gardiner stated that:

There is concern that there is a lack of transparency and openness evidenced by heavily sanitised Victorian Freedom of Information Act responses about the impact of the VAHA [Victorian Aboriginal Heritage Act] and the operations of the Victorian Aboriginal Heritage Council.<sup>303</sup>

## 5.5 Streamlining the Registered Aboriginal Party application and determination process

The Committee notes that the Council has developed policy guidelines to support the RAP appointment process, beyond the criteria stipulated in the Act. The Council also provides information directly to RAP applicants regarding its decisions, and to the wider public via the DPCD website. Nevertheless, the Committee observes that there is widespread confusion about

<sup>299</sup> Ms Doris Paton, Nindi-Ngujarn Ngarigo Monero Aboriginal Corporation, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 215.

<sup>300</sup> Mr Ron Arnold, Guladjin Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 205.

<sup>301</sup> Richie Kennedy (Tati Tati Aboriginal Corporation), submission no. 54, p. 1.

<sup>302</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 7.

<sup>303</sup> Gary Murray and Margaret Gardiner, submission no. 28, p. 3.

the processes and criteria used by the Council, amongst both current RAP applicants and unsuccessful RAP applicants.

There is also a great deal of uncertainty regarding how the selection criteria for RAP appointment relates to the native title determination process, and whether RAP applicants need to provide the same level of evidence about their relationship to country as native title applicants do.

The Committee also notes that the majority of RAP applicants have expressed a strong desire for face-to-face contact with the Council, more direct support during the application process, and clearer feedback regarding unsuccessful applications. In particular, Aboriginal stakeholders expressed concern that the bureaucratic processes adopted by the Council are alienating for elderly community members who would appreciate the opportunity to provide oral rather than written evidence to the Council.

The Committee is of the view that the level of frustration experienced by RAP applicants will lessen if the RAP appointment process is streamlined, with greater support available to applicants prior to submitting an application, during the determination process, and after the Council has assessed their application. The information, materials and feedback provided to RAP applicants need to be re-designed to avoid legal jargon and provide clarity about the appointment processes and criteria used by the Council. This information should be made readily available both on the Council's website and in hard copy.

The Council has suggested a number of changes to streamline the RAP application process including, the introduction of a power for a delegate of the Council to determine whether an application is valid, and the need for RAP applications to include more extensive documentation as the current threshold for supporting evidence provided by the Act is quite low.<sup>304</sup> The current absence of these provisions adds to the Council's workload and creates unnecessary delays in determining RAP applications.

In relation to the requirements for RAP applications as specified in the Act, the Committee therefore recommends that:

#### **RECOMMENDATION 5.1**

Section 150 (1) of the *Aboriginal Heritage Act 2006* (Vic) be amended:

- to require that applications for Registered Aboriginal Party status be made on the Department of Planning and Community Development's approved form;
- to mandate that applications must include all the supporting documentation specified by the approved form in order to be considered valid; and
- to state that staff of the Victorian Aboriginal Heritage Council may determine whether a Registered Aboriginal Party application is valid.

---

<sup>304</sup> Victorian Aboriginal Heritage Council, submission no. 66, pp. 8–9.

In relation to the RAP application process, the Committee recommends that:

### **RECOMMENDATION 5.2**

Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council develop policy guidelines to streamline the appointment process for Registered Aboriginal Parties to include:

- the opportunity for face-to-face meetings between secretariat staff of the Victorian Aboriginal Heritage Council and prospective Registered Aboriginal Party applicants prior to the submission of an application; and
- the production of plain English written materials to assist Registered Aboriginal Party applicants to gather the evidence necessary to support their application.

With respect to the process used by the Council to determine RAP applications, the Committee recommends that:

### **RECOMMENDATION 5.3**

The Victorian Aboriginal Heritage Council re-shape the process used to determine RAP applications to include the provision for face-to-face meetings between the Victorian Aboriginal Heritage Council and Registered Aboriginal Party applicants. The determination process should include:

- the opportunity for Registered Aboriginal Party applicants to attend meetings with Victorian Aboriginal Heritage Council members while an application is under deliberation, especially for the purpose of conveying oral evidence about traditional ownership; and
- provisions for meetings between unsuccessful Registered Aboriginal Party applicants and Victorian Aboriginal Heritage Council members to ensure that applicants receive clear feedback on why their application was declined.

Regarding the confusion amongst RAP applicants about the relationship between the RAP appointment process and native title determinations, the Committee recommends that:

### **RECOMMENDATION 5.4**

Aboriginal Affairs Victoria and the Native Title Unit, Department of Justice, develop plain English information publications to clarify the relationship between the Registered Aboriginal Party appointment process – and the level of evidence required to demonstrate traditional ownership within the context of the *Aboriginal Heritage Act 2006* (Vic) – and the distinct requirements of the native title determination process.

## 5.6 Council capacity and resourcing

Some witnesses, including the Council itself, have raised concerns regarding the resources available to the Council to assist it to assess RAP applications, to provide support to RAP applicants, and to undertake the RAP determination process more broadly. In evidence to the Committee, Council member Ms Eleanor Bourke explained that the Council has, since its inception, experienced difficulties with resourcing:

As you have probably gleaned there were no funds for the council at all, and there were certainly no funds for RAPs. We started off lobbying to get a meagre \$5000 so that the new organisations could mount a reasonable sort of application. From 2008 council has published its decisions on the website, and we have also had to undertake some mediation activities between groups of traditional owners — although we are not funded for that.<sup>305</sup>

### 5.6.1 Council's capacity to inquire into matters relevant to Registered Aboriginal Party applications

The Committee heard evidence from both current and former RAP applicants who believe that the Council does not have sufficient capacity to conduct its own research into issues relating to RAP applications. As Mr Darren Perry has commented:

Our understanding is that under the current structure the Aboriginal heritage council does not have the capacity nor the resources to support applicants through thorough research to provide the right information that is required to determine an applicant's RAP status. With the dispersion that has happened to our traditional owners in the past, under past governmental practices and policies, it is very difficult for some traditional owners to trace their ancestry.<sup>306</sup>

This sentiment has been echoed by appointed RAPs, such as the Wurundjeri Tribe Land and Compensation Cultural Heritage Council, who argued that 'additional support and resources are needed by the VAHC and/or RAP applicants in order to provide capacity and support to speed up the RAP applicant decision-making process. This includes undertaking research and facilitating meetings between Traditional Owner groups'.<sup>307</sup> In a similar way the VTOLJG argued that the Council needs to be 'adequately resourced' and:

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.<sup>308</sup>

---

<sup>305</sup> Ms Eleanor Bourke, Council Member, Victorian Aboriginal Heritage Council, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, pp. 3–4.

<sup>306</sup> Mr Darren Perry, Ngintait Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 180.

<sup>307</sup> Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc., submission no. 25, p. 2.

<sup>308</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, pp. 11, 6.

In their submission the Council explained that in the course of determining a RAP application it ‘refers to outside researchers with specialist academic, industry and/or governance expertise as required’.<sup>309</sup> The Council also provided detail about a collaborative research project that it has undertaken with the Department of Justice and Native Title Services Victoria to summarise historical evidence relating to traditional ownership to assist its decision-making.<sup>310</sup>

Some RAP applicant groups commented on the duplication of processes between native title and cultural heritage. For example, at the public hearing in Lakes Entrance Mr Bruce Pascoe suggested that:

Instead of having two organisations, let us look at the heritage council and the RAP system and native title services. We are virtually telling both groups exactly the same things. Why are we doing that? It is so inefficient, and what we have noticed is that those two organisations do not always get along.<sup>311</sup>

### **5.6.2 Council’s capacity to support Registered Aboriginal Party applicants during the application process**

Some witnesses, particularly those with limited resources and administrative support, have commented that they found the application process to be onerous. Some have also found the Council to be unresponsive and unwilling to provide detailed feedback on the progress of an application.<sup>312</sup>

In their submission to the inquiry, Aboriginal Affairs Victoria (AAV) noted that RAP applicant groups are eligible to apply for financial support of \$5,000 to off-set the administrative costs of applying to become a RAP.<sup>313</sup> To date 32 applicant groups have applied for, and received, financial assistance. Groups are also assisted by an AAV Geographic Information System (GIS) officer to map the area for which they are applying for RAP status.

Reflecting on the support that was offered by AAV when preparing their RAP application, Bidwell Maap Nation commented that:

Our organization felt that the demands to apply for RAP status were very numerous and the amount of \$5,000 to assist us was ludicrous given that we have absolutely no resources or staff. Several of us had to take time away from our private employment to comply with the application process.<sup>314</sup>

<sup>309</sup> Victorian Aboriginal Heritage Council, submission no. 66, p. 13.

<sup>310</sup> *ibid.*, p. 7.

<sup>311</sup> Mr Bruce Pascoe, Bidwell-Maap Nation, Environment and Natural Resources Committee public hearing – Lakes Entrance, 24 April 2012, transcript of evidence, p. 118. See also, Victorian Aboriginal Heritage Council, submission no. 66, p. 2.

<sup>312</sup> See for example Bidwell Maap Nation, submission no.4; Ella Maar Aboriginal Corporation, submission no. 5; Nindi-Ngujarn Ngarigo Monero Aboriginal Corporation, submission no. 27; Aileen Blackburn, submission no. 45; and Richie Kennedy (Tati Tati Aboriginal Corporation), submission no. 54.

<sup>313</sup> Department of Planning and Community Development (Aboriginal Affairs Victoria), submission no. 57, p. 27.

<sup>314</sup> Bidwell Maap Nation, submission no. 4, p. 1.



Accordingly, Bidwell Maap argued that a project officer should be made available to work with traditional owner groups to prepare their RAP applications.<sup>315</sup> At a public hearing in Melbourne Mr Gary Murray argued that the funding provided to RAP applicants is not sufficient to support groups to gather the information needed to accompany their applications, such as birth, death and marriage certificates.<sup>316</sup>

Mr David Yarrow, legal advisor at Native Title Services Victoria, argued that many RAP applicants felt unsupported because the system did not provide for them to meet face-to-face with the Council:

The RAP application process should not be paper driven. Obviously making an application is central to that process, but applicants do not necessarily meet with the council.<sup>317</sup>

The Committee is of the view that the independent advisory committee proposed in chapter four, recommendation 4.4, would greatly assist the Council to inquire into matters relevant to RAP applications. However, there may continue to be circumstances where the Council needs to commission longer research reports or projects from external experts to support its decision-making. Moreover, the Committee considers that the proposed changes to the RAP application process suggested above in recommendations 5.1 to 5.4 can enhance the ability of the Council and its secretariat to support RAP applicants, particularly through face-to-face meetings and the provision of clearer information materials. At the same time, the Committee acknowledges that these proposed changes do have resourcing implications that will need to be addressed by the Victorian Government and Aboriginal Affairs Victoria.

Accordingly, on the capacity and resourcing of the Council the Committee recommends that:

### **RECOMMENDATION 5.5**

The Victorian Government and Aboriginal Affairs Victoria review the resources allocated to the Victorian Aboriginal Heritage Council, with a view to:

- increasing the capacity of the Victorian Aboriginal Heritage Council to provide support to Registered Aboriginal Party applicants to gather the evidence and documentation needed to accompany an appropriate application;
- extending the Victorian Aboriginal Heritage Council's capacity to commission research to assist its decision-making; and
- enhancing the ability of the Victorian Aboriginal Heritage Council to provide face-to-face support and to facilitate meetings with applicants during the Registered Aboriginal Party determination process.

---

<sup>315</sup> *ibid.*

<sup>316</sup> Mr Gary Murray, Dhudhuroa Native Title Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 196.

<sup>317</sup> Mr David Yarrow, Legal Advisor, Native Title Services Victoria, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 26.

The Committee notes that a number of witnesses have suggested that the current roles of the Council could be expanded to include other responsibilities, such as the requirement to monitor and support RAPs in an ongoing capacity. Any proposal to enlarge the responsibilities of the Council would have resourcing and capacity implications, and this matter will be addressed in chapters six and seven.

## 5.7 Length of time the Registered Aboriginal Party determination process takes

Evidence received by the Committee indicates that the Council is regularly unable to meet the statutory requirement to determine a RAP application within 120 days.<sup>318</sup> The Council has itself argued that the 120 day time limit is not achievable as the amount of material RAP applicants provide is usually not sufficient to assist with determining their application.<sup>319</sup> This has been an issue for almost all groups applying for RAP status, who are often frustrated with the length of time it takes the Council to determine an application. Mr Ken Stewart, Wamba Wamba traditional owner, explained his situation in the following way:

I think the heritage council need to be accountable. They do not make decisions or they are hiding behind a little loophole in the legislation saying, 'We need more information'. One group put in 800 pages. How much more information do you need?<sup>320</sup>

Mr Allan Wandin, from the Wandoon Estate Aboriginal Corporation, has also expressed frustration at the length of time the Council takes for RAP decision-making:

The VAHC cannot follow the rules set out in the Act, one is 120 days to do evaluation of applications for RAP, but Government does not care, there have been many complaints about this, the complaints have fallen on deaf ears.<sup>321</sup>

Ms Doris Paton, representing RAP applicant group the Nindi-Ngujarn Ngarigo Monero Aboriginal Corporation, described the delays experienced as part of the determination process:

Initially, to us the RAP application process had a time frame with a close date. Since 2007 Nindi-Ngujarn has had a RAP application sitting on the table. Since that time new applications over the same area have also been lodged, and this has created a delaying process for Nindi-Ngujarn in dealing with the issues that come up with dealing with the application.<sup>322</sup>

<sup>318</sup> *Aboriginal Heritage Act 2006* (Vic) s. 151.

<sup>319</sup> Victorian Aboriginal Heritage Council, submission no. 66, pp. 8–9.

<sup>320</sup> Mr Ken Stewart, Wamba Wamba Traditional Owners Group, Environment and Natural Resources Committee public hearing – Shepparton, 15 May 2012, transcript of evidence, p. 143.

<sup>321</sup> Allan Wandin (Wandoon Estate Aboriginal Corporation), submission no. 2, p. 2. See also Gary Murray and Margaret Gardiner, submission no. 28, p. 3; South West Traditional Owners Group, submission no. 17, p.2.

<sup>322</sup> Ms Doris Paton, Nindi-Ngujarn Ngarigo Monero Aboriginal Corporation, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 214.

The VTOLJG has noted that the time frame for RAP determinations is particularly sensitive to some groups as there have been situations where some of the elders of a traditional owner group have died while they have been waiting for RAP determinations.<sup>323</sup> Similarly, Mr Ron Arnold representative of the Gulajin Traditional Owner Group, stated that:

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.<sup>324</sup>

This anxiety over the length of time the Council takes to determine applications is also shared by some of the appointed RAPs that have applications before Council to extend their geographic area of responsibility. For example, the Wurundjeri Tribe Land and Compensation Cultural Heritage Council commented that 'there has been a lot of anxiety within the Wurundjeri community over the VAHCs decision-making process. Traditional Owners feel it is taking too long for RAP applications to be determined'.<sup>325</sup>

On receiving an application the Council generally corresponds with an applicant to ask for further information, such as greater detail linking the applicant group to relevant ancestors or information about the membership rules of a group, thus deferring the determination of an application.<sup>326</sup> As mentioned above, under the Act a valid application only requires applicants to provide basic information, such as a description of the area the organisation is applying for RAP status over, and a statement outlining the applicant's interest in the heritage of the claim area.<sup>327</sup>

The Council has suggested that a 'stop the clock' mechanism could be inserted in the Act so that every time the Council corresponds with an applicant to ask for further information the length of time taken to determine the application pauses.<sup>328</sup> One organisation, Native Title Services Victoria, supported the Council having the power to extend the time frame for determinations in certain situations, such as when RAP applicant groups are engaged in mediation over their geographical boundaries.<sup>329</sup>

Delays with RAP appointments have impacted significantly on industry stakeholders, who consider the appointment of RAPs to cover 100 per cent of the state to be a priority. In this way, Cement Concrete and Aggregates Australia wrote that:

---

<sup>323</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, pp. 5–6.

<sup>324</sup> Ron Arnold (Gulajin Traditional Owner Group), submission no. 53, p. 1.

<sup>325</sup> Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc., submission no. 25, p. 2.

<sup>326</sup> Victorian Aboriginal Heritage Council, submission no. 66, pp. 8–9.

<sup>327</sup> *Aboriginal Heritage Act 2006* (Vic) s. 150.

<sup>328</sup> Victorian Aboriginal Heritage Council, submission no. 66, pp. 9–10.

<sup>329</sup> Native Title Services Victoria, submission no. 35, p. 9.

AAV is encouraged to support the Aboriginal Heritage Council to finalise the appointment of RAPs across Victoria within a set period to improve certainty for business. Many applications have been with the Council for more than 4 years. The finalization of these applications should be a matter of priority for all parties.<sup>330</sup>

The Committee is aware that the length of time that the Council has taken to determine RAP applications has been a source of frustration for a number of RAP applicants. The Committee notes that if the RAP application and determination process is re-shaped as suggested above, the Council will be able to assess RAP applications in a more timely fashion. At the same time, the Committee is of the view that the 120 day requirement stipulated by the Act is unrealistic and has exacerbated the dissatisfaction of RAP applicants. In particular, the Act does not allow sufficient time for the Council to communicate with RAP applicants to clarify aspects of their application or to request necessary further information.

Accordingly, the Committee recommends that:

### **RECOMMENDATION 5.6**

The *Aboriginal Heritage Act 2006* (Vic) be amended to remove section 151 (1), which requires the Victorian Aboriginal Heritage Council to determine applications for Registered Aboriginal Party status within 120 days of receiving an application. In its place, Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council are to develop policy guidelines to ensure that Registered Aboriginal Party applications are assessed within a maximum of one year with an extension of six months if required.

## **5.8 Competing and overlapping Registered Aboriginal Party applications**

As discussed in chapter three, the European settlement of Victoria led to the movement of Aboriginal people throughout state and the disruption of relationships to both family and traditional country. As a result, it has been difficult to determine the precise location, geographic boundaries and membership of some Victorian traditional owner groups. Since the introduction for the Act conflict over traditional ownership has emerged within the context of the RAP application process.

The Committee heard from some witnesses who believe that the RAP determination process has exacerbated conflicts regarding the composition and boundaries of traditional owner groups. Mr John ‘Sandy’ Atkinson argued that ‘RAPs is [sic] an absolute failure. Unless you give it to every one

<sup>330</sup> Cement Concrete and Aggregates Australia, submission no. 15, p. 2. See also GWMWater, submission no. 12; VicForests, submission no. 13; VicRoads, submission no. 14.

of those communities that we have talked about, it ain't [sic] worth nothing. I want to stop this fight. We have been going for a long, long time'.<sup>331</sup> Mr Bruce Pascoe had similar concerns:

We have a lot of frustration with the RAP process. We have a lot of frustration with [the] native title process, because you are continually having to prove what you already know about your own family to a different group of people every five years. You could not design a more destructive system than RAP and native title, because it insists that family fights family, when in fact the people of far East Gippsland know who they are. They know their families.<sup>332</sup>

Other witnesses suggested that the RAP system is a new forum for older conflicts between groups to re-emerge. In relation to conflicts in Far East Gippsland, Ms Aileen Blackburn suggested that:

The conflicts were there before, and I think the RAP process has now allowed it to surface. Getting back to my distinction about being a native title applicant as distinctly opposed to being a RAP applicant under the Victorian Aboriginal Heritage Act, I think the divisiveness in far East Gippsland can be clearly linked to conflicts prior to the heritage act and the RAP, but then it can be linked to early native title processes that took place in East Gippsland.<sup>333</sup>

Since the introduction of the RAP system the issue of conflict and disagreement over traditional ownership has emerged in the context of RAP applications in the following ways:

- when the Council receives applications from more than one organisation for the same area, with both groups claiming to represent the same traditional owner group;
- when the Council receives applications from more than one organisation for the same area, with both groups claiming to representing different traditional owner groups; and
- when the Council receives applications from organisations representing different traditional owner groups that overlap, particularly at the boundary of the two areas.

The Committee has received evidence relating to a number of areas in Victoria subject to competing and overlapping RAP applications, including:

- Far East Gippsland – Evidence received by the Committee demonstrates that this region is contested, to varying extents, by the Gunaikurnai, Monero, Ngarigo and Bidwell traditional owner groups.
- Shepparton/North Central Victoria – The appointment of the Yorta Yorta Nation Aboriginal Corporation as a RAP is also disputed, particularly by the Bangerang Cultural Centre Cooperative. The Bangerang Cultural Centre Cooperative claims to represent the Bangerang as a distinct traditional owner group. The Committee heard from the Yorta Yorta RAP that they seek to represent Bangerang people as a clan group within the Yorta Yorta nation. The Committee also heard evidence from the Barapa Barapa, Dhudhuroa and Waywurru traditional owner groups, which dispute the geographic boundary of the Yorta Yorta RAP.

---

<sup>331</sup> Mr John 'Sandy' Atkinson, elder, Bangerang Cultural Centre Cooperative Ltd, Environment and Natural Resources Committee public hearing – Shepparton, 15 May 2012, transcript of evidence, p. 140.

<sup>332</sup> Mr Bruce Pascoe, Bidwell-Maap Nation, Environment and Natural Resources Committee public hearing – Lakes Entrance, 24 April 2012, transcript of evidence, p. 116.

<sup>333</sup> Ms Aileen Blackburn, Environment and Natural Resources Committee public hearing – Lakes Entrance, 24 April 2012, transcript of evidence, p. 123.

- Mornington Peninsula/West Gippsland – The Council has considered two applications for this area from organisations that both assert that they represent Boon Wurrung traditional owners.
- The Otways region – The Committee has heard that this area has been claimed by a number of competing organisations from the Kirrae Wurrung (Eastern Maar), Gujalin and Gadubanud traditional owner groups.
- Geelong – The appointment of the Ballarat-based Wathaurung Aboriginal Corporation has been challenged by the Wathaurong Aboriginal Co-operative. The Co-operative does not claim to be representative of the area's traditional owners, although it did have heritage responsibilities under Part IIA of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

The Council has developed guidelines that are published on its website to support its decision-making in situations where traditional ownership is contested in the context of RAP applications. In appointing RAPs the Council states that its priority is to ensure that RAPs are inclusive organisations that represent all the relevant traditional owners of a particular area. In the course of determining RAP applications the Council has asked applicant groups to provide data relating to their membership processes and their organisation rule book to offer evidence of the organisation's inclusiveness. The Council has also requested that RAP applicant groups alter their membership rule book prior to RAP appointment.<sup>334</sup>

One witness argued that the Council asks for too much information regarding the governance and membership processes of RAP applicant organisations. Mr Geoff Clark, writing on behalf of current RAP applicants, the Eastern Maar Traditional Owners Aboriginal Corporation, argues that the Council has asked for an excessive amount of information regarding the internal decision-making processes of the Corporation, which should not be of concern to the Council.<sup>335</sup>

Frequently, the Council asks RAP applicant groups to demonstrate that they have made efforts to discuss disagreements or boundary overlaps with neighbouring groups. It also requests that groups claiming to represent the same traditional owner group meet to discuss contestations over group membership.<sup>336</sup> However, the Council has also noted that it currently has no power under the Act to compel applicant groups to meet, and does not have sufficient resourcing to provide mediation for these groups. In a few circumstances the Council has organised mediation for RAP applicants on a voluntary basis.<sup>337</sup>

The Committee has heard from a number of groups who are engaged in disputes over group boundaries, including with appointed RAPs. For example, the Barapa Barapa, Dhudhroa and Waywurru traditional owner groups are in disagreement over boundaries with the same appointed RAP – the Yorta Yorta Nation Aboriginal Corporation. The Committee has also heard that some organisations – such as the Wathaurong Aboriginal Co-operative and Barapa Barapa traditional owners – have attempted to meet with neighbouring groups but that these groups

<sup>334</sup> Victorian Aboriginal Heritage Council, submission no. 30, p. 21.

<sup>335</sup> Geoff Clark (Eastern Maar Traditional Owner Group), submission no. 51.

<sup>336</sup> Victorian Aboriginal Heritage Council, submission no. 30, p. 18.

<sup>337</sup> *ibid.*, p. 23.

have refused.<sup>338</sup> As Mr Jida Gulpilil-Murray noted from the perspective of the Barapa Barapa traditional owner group:

Currently with the Yorta Yorta nations we have made, through our lawyers and NTSV [Native Title Services Victoria], several attempts to have them come to the table to discuss boundary issues and this overlap, if you put it that way. On those occasions they have not accepted the invitation or they have pulled out. It has made it very difficult for us to work with our lawyers and to move towards finalising our boundaries.<sup>339</sup>

Further, Mr Gary Murray and Ms Margaret Gardiner argued that the Council ‘failed ... to take any lead role in mediating disputes between Traditional Owner Groups over development or RAP applications that overlap’.<sup>340</sup> Under section 155 of the Act the Council has the power to vary the geographic boundaries of an appointed RAP only with that RAP’s consent.

The Act provides for the Council to appoint two RAPs over the same geographic area, only if doing so does not hinder the operation of the Act.<sup>341</sup> In their evidence to the Committee the Council explained that it had considered, but has yet to appoint, more than one RAP over the same area. The Council stated that: ‘where appointing more than one RAP would likely entrench conflict within a Traditional Owner group, the VAHC has not considered the registration of multiple RAPs favourably’.<sup>342</sup>

As an example, the Council cited its response to two overlapping organisations each claiming to represent the same traditional owner group, the Boon Wurrung Foundation Limited and Bunurong Land Council Aboriginal Corporation, in which it stated that in acknowledging ‘the history of dispute between the two organisations, including the failure to recognise each other as Traditional Owners, there is doubt about the proper functioning of the Act if two RAPs were appointed’.<sup>343</sup>

### **5.8.1      *Mediation and the Right People for Country project***

Both RAP applicants and the Council have suggested that traditional owner groups require greater resources to support mediation and the production of agreements between groups. The Council has often asked RAP applicants to engage with neighbouring groups to come to agreements regarding proposed RAP boundaries, although as mentioned the Council has no power to compel groups to meet.

---

<sup>338</sup> Wathaurong Aboriginal Co-operative, submission no. 32, p. 5; Mr Jida Gulpilil-Murray, Barapa Barapa Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 210.

<sup>339</sup> Mr Jida Gulpilil-Murray, Barapa Barapa Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 210.

<sup>340</sup> Gary Murray and Margaret Gardiner, submission no. 28, p. 10.

<sup>341</sup> *Aboriginal Heritage Act 2006* (Vic) s. 153.

<sup>342</sup> Victorian Aboriginal Heritage Council, submission no. 30, p. 25.

<sup>343</sup> Victorian Aboriginal Heritage Council, submission no. 66, p. 11.

Commenting on the issue of overlapping and competing RAP applications, Mr David Yarrow, legal advisor at Native Title Services Victoria, argued that:

Contending applicants and overlapping applicants do not have opportunities for formal and structured dispute resolution before the council. Those kinds of reforms would speed up the process, potentially reducing delay and cost.<sup>344</sup>

In a similar way, the VTOLJG commented that:

A major problem with the decision-making process is that the VAHC is unable to hold hearings. 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 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.<sup>345</sup>

Some witnesses, including Native Title Services Victoria and the Council, have expressed strong support for the Right People for Country project recently established by Aboriginal Affairs Victoria as an avenue for traditional owner groups to reach agreements regarding group membership and boundaries.<sup>346</sup> At a public hearing in Melbourne, Council member Ms Eleanor Bourke commented on the issue of mediation and Council resourcing:

The final thing I want to say is that the matter of resources comes up all the time, but council really has had great difficulty in having RAP applicants, even successfully appointed RAPs, engage in discussions with their neighbours. Again, we cannot force it; we can only suggest it, and we do it time and time again. We do it before any formal decision is made, and we do it subsequently, asking that people do that. Hence the Right People for Country project ...<sup>347</sup>

The Right People for Country project aims to provide a framework whereby traditional owner groups can be supported to reach their own agreements – both within and between groups – relating to group membership and land boundaries.<sup>348</sup> The project operates on the proposition that disputes around traditional ownership not only impact on the Victorian Aboriginal community but create uncertainty within the wider community, leading to social and economic costs for government and land users.<sup>349</sup> In particular, the project acknowledges that a lack of negotiation experience in traditional owner groups has hitherto prevented meaningful discussion

<sup>344</sup> Mr David Yarrow, Legal Advisor, Native Title Services Victoria, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 26

<sup>345</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 6.

<sup>346</sup> Native Title Services Victoria submission no. 35; Victorian Aboriginal Heritage Council, submission no. 30.

<sup>347</sup> Ms Eleanor Bourke, former Council Member, Victorian Aboriginal Heritage Council, Environment and Natural Resources Committee public hearing – Melbourne, 4 June, transcript of evidence, p. 221.

<sup>348</sup> Department of Planning and Community Development (Aboriginal Affairs Victoria), submission no. 57, p. 20.

<sup>349</sup> Right People for Country Project Committee, *Report of the right people for country project committee*, Aboriginal Affairs Victoria, Melbourne, 2011, p. 6, accessed 6 January 2012, [www.dpcd.vic.gov.au/indigenous/projects-and-programs/right-people-for-country](http://www.dpcd.vic.gov.au/indigenous/projects-and-programs/right-people-for-country). See also, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native title report 2011*, Australian Human Rights Commission, Canberra, 2011, accessed 6 January 2012, [www.hreoc.gov.au/social\\_justice/nt\\_report/ntreport11/index.html](http://www.hreoc.gov.au/social_justice/nt_report/ntreport11/index.html).



and mediation from taking place. The project also aims to minimise the harm caused by disputes both within and between traditional owner groups.<sup>350</sup>

AAV has funded Right People for Country for 2012 to conduct several pilots to test the project's potential as a way forward for settling disputes relating to traditional ownership. It is hoped that it will eventually assist in settling native title claims and contribute to the RAP appointment process.<sup>351</sup>

The Committee acknowledges that the Council has encouraged mediation between traditional owner groups, but that it does not have the power to compel groups to attend mediation. The Committee also notes that it has heard from a number of traditional owner groups who appear willing to enter into mediation to address conflicts over group composition and geographic boundaries.

Accordingly, the Committee is of the view that the Council should be empowered to take a leadership role in supporting RAP applicants and appointed RAPs to undertake mediation in relation to the conflict that has emerged in the context of RAP applications.

The Committee understands that the Right People for Country project is not designed to deal specifically with issues relating to RAP applications. However, in addressing broader conflicts between and within traditional owner groups the project has the potential to contribute to both the appointment of RAPs, and the negotiation of settlements under the *Traditional Owner Settlement Act 2010* (Vic). At the same time, the Committee acknowledges that some areas of the state may continue to be impacted by conflicts over traditional ownership and disputes over RAP appointments.

The Committee therefore recommends that:

#### **RECOMMENDATION 5.7**

That *Aboriginal Heritage Act 2006* (Vic) be amended to provide for the Victorian Aboriginal Heritage Council to be empowered to compel both appointed Registered Aboriginal Parties and organisations applying to become Registered Aboriginal Parties to attend independent mediation.

The Committee is aware that empowering the Council to facilitate mediation between appointed RAPs and RAP applicant groups has resource and capacity implications. The Committee considers that greater resourcing for mediation – either facilitated by the Council itself or through the Right

---

<sup>350</sup> Right People for Country Project Committee, *Report of the right people for country project committee*, Aboriginal Affairs Victoria, Melbourne, 2011, p. 7, accessed 6 January 2012, [www.dpcd.vic.gov.au/indigenous/projects-and-programs/right-people-for-country](http://www.dpcd.vic.gov.au/indigenous/projects-and-programs/right-people-for-country).

<sup>351</sup> Mr Ian Hamm, Executive Director, Aboriginal Affairs Victoria, Environment and Natural Resources Committee public hearing – Melbourne, 28 May 2012, transcript of evidence, pp. 172–173.

People for Country project – can contribute to the long-term resolution of disputes both between and within traditional owner groups.

In relation to the resourcing of opportunities for mediation between traditional owners, the Committee recommends that:

### **RECOMMENDATION 5.8**

The Victorian Government provide funding:

- to continue the Right People for Country project beyond 2012, subject to the outcomes of the pilot phase; and
- to the Victorian Aboriginal Heritage Council to facilitate independent mediation within the context of the appointment of Registered Aboriginal Parties.

## **5.9 Appeals processes for unsuccessful Registered Aboriginal Party applicants**

The Committee heard from a number of unsuccessful RAP applicant groups who felt that under the current RAP determination process there is little scope for appealing the decisions of the Council. Currently the only avenue for appeal for groups that have had their RAP application declined is to contest the decision in the Supreme Court of Victoria on the basis of administrative law principles and procedural fairness. To date no declined applicants have pursued this appeal option.<sup>352</sup>

Although a number of witnesses expressed the desire for an enhanced appeals mechanism, there was no agreement as to what this process should entail. Some witnesses have suggested that there could be a process whereby unsuccessful RAP applicants could appeal Council decisions at the Victorian Civil and Administrative Tribunal (VCAT). As Ms Aileen Blackburn notes:

With RAP applicants, if you are rejected you do not have the avenue of going to VCAT — the Victorian appeals tribunal. I think even that at the very least would be some due process or some justice to Aboriginal RAP applicants. You do not put in a RAP application lightly ... Developers can go to VCAT if they are not happy with parts of the cultural heritage management plan, so why would you not afford that to traditional owners?<sup>353</sup>

At public hearing in Melbourne Mr Gary Murray also considered the use of VCAT for an appeals process:

The appeal process is already there. You can go to the Supreme Court and seek an administrative review on a decision. But who has the money to do that? If you

<sup>352</sup> Ms Denise Lovett, Chairperson, Victorian Aboriginal Heritage Council, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, pp. 8–9.

<sup>353</sup> Ms Aileen Blackburn, Environment and Natural Resources Committee public hearing – Lakes Entrance, 24 April 2012, transcript of evidence, pp. 122–123.

are like us, you do not have a dollar in the bank — you do not even have a bank account open. Of course there has to be an appeal process. How far does it go? Does it go to VCAT? Does it go to the Supreme Court? Does the heritage council set it up as a subcommittee of its own council, or what? We need to make sure it is fair and equitable.<sup>354</sup>

Other stakeholders did not directly suggest an appeals process, but were strongly critical of the outcome and impact of the Council's decision-making. For example, the Bangerang Cultural Centre Cooperative argued that, 'the Heritage council have not demonstrated competence ... It appears that the Heritage Council ignored traditional owner groups and cultural heritage records in favour of unsuccessful Native Title claimants'.<sup>355</sup>

Both AAV and the Council also conceded the difficulty of designing an appropriate appeals mechanism. Mr Jamin Moon, senior heritage policy officer with AAV noted that:

It would be difficult for me to see an appeals mechanism that went to an external agency that then was able to overturn a decision of a traditional owner organisation. I suppose it would be flying in the face of the principle of allowing traditional owners to make decisions about their heritage. Having said that, I think it probably would be beneficial to establish some sort of support for appealing decisions, but I would not know where that would go.<sup>356</sup>

Similarly, the Council argued that providing for non-Indigenous people to over-ride the decisions of the Council 'would dilute the fundamental objective of the Act to ... give Traditional Owners real decision-making power in the management of their cultural heritage'.<sup>357</sup>

The Committee notes that there is a strong desire from some Aboriginal stakeholders for an enhanced appeals process. At the same time the Committee considers that if the transparency of the RAP determination process and the quality of the support and feedback supplied to applicant groups improves, the desire for unsuccessful groups to seek appeals may lessen. Nevertheless, the Committee determines that it would be advantageous for the Council to introduce new procedures and mechanisms for appeals.

The Committee understands that for many traditional owner groups the current appeals process via the Supreme Court is untenable given the resources needed to fund such an action. Accordingly, the Committee is of the view that aggrieved RAP applicant groups should be afforded a meaningful and low-cost avenue to appeal the Council's rejection of their RAP application. The Committee notes that the Act provides for both the Council and VCAT to be involved in appeals around Cultural Heritage Management Plans. It also notes that the Act does not prevent unsuccessful RAPs from re-applying to the Council for RAP status.

---

<sup>354</sup> Mr Gary Murray, Dhudhuroa Native Title Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, pp. 195–196.

<sup>355</sup> Bangerang Cultural Centre Cooperative Ltd, submission no. 21, p. 4.

<sup>356</sup> Mr Jamin Moon, Senior Heritage Policy Officer, Aboriginal Affairs Victoria, Environment and Natural Resources Committee public hearing – Melbourne, 28 May 2012, transcript of evidence, p. 178.

<sup>357</sup> Victorian Aboriginal Heritage Council, submission 66, pp. 15–16.

The Committee acknowledges that the Council, as a skills-based body of traditional owners, is the appropriate decision-making authority in relation to the appointment of RAPs. In particular, the Committee understands that the Council has specialist expertise relating to traditional ownership that is unavailable to other public bodies, such as VCAT. As such, the Council should be responsible for reassessing the applications of unsuccessful RAP applicants, rather than another body or individual.

In order to avoid repeated and vexatious appeals, the Committee determines that the Minister for Aboriginal Affairs is the appropriate authority to consider whether a RAP applicant group has sufficient grounds to appeal the decision of the Council. If the Minister is satisfied that appropriate grounds for appeal do exist, the Council should then be compelled to reconsider the relevant unsuccessful RAP application. As part of the appeals process, it would be appropriate for the Council to seek the advice of the independent advisory committee as suggested in chapter four, recommendation 4.4.

On the subject of appeal options for unsuccessful RAP applications, the Committee recommends that:

#### **RECOMMENDATION 5.9**

The *Aboriginal Heritage Act 2006* (Vic) be amended:

- to provide for the Minister for Aboriginal Affairs to determine whether an unsuccessful Registered Aboriginal Party applicant has sufficient grounds to appeal the decision of the Victorian Aboriginal Heritage Council to decline their application;
- to require the Victorian Aboriginal Heritage Council, at the direction of the Minister for Aboriginal Affairs, to reconsider an unsuccessful Registered Aboriginal Party application; and
- to allow the Minister provision, in exceptional circumstances, to require a review of previous Registered Aboriginal Party appointments, when satisfied such a course of action is warranted.

Further, that Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council develop policy guidelines to support the development of the appeals process for unsuccessful RAP applicants.



# Chapter six

---

## *The effectiveness of established Registered Aboriginal Parties*

### KEY FINDINGS

---

- 6.1 According to a majority of stakeholders, the system of Registered Aboriginal Parties established by the *Aboriginal Heritage Act 2006* (Vic) has provided clarity for government and landholders by identifying the appropriate traditional owners to be consulted in relation to cultural heritage.
- 
- 6.2 Industry and local government stakeholders reported that their experiences with Registered Aboriginal Parties have been generally positive, particularly in relation to the assessment of Cultural Heritage Management Plans. There are, however, some concerns relating to the consultation fees charged by Registered Aboriginal Parties.
- 
- 6.3 There is widespread concern about the financial sustainability of the Registered Aboriginal Party system, in which income generation is linked to the production of Cultural Heritage Management Plans. Some stakeholders expressed concern that it was difficult for Registered Aboriginal Parties in areas of low development to generate sufficient funds to support their operations.
- 
- 6.4 A number of stakeholders – including Registered Aboriginal Parties – are dissatisfied that the protection of heritage sites is dependent on demand for Cultural Heritage Management Plans. There are concerns that this model limits the ability of Registered Aboriginal Parties to care for all the known heritage sites within their area.
- 
- 6.5 There is support for an expansion of the role of the Victorian Aboriginal Heritage Council to include the ongoing monitoring of Registered Aboriginal Parties.
- 

### 6.1 Introduction

This chapter examines the effectiveness of the currently established Registered Aboriginal Parties (RAPs). As such, the chapter addresses term of reference (c), which instructs the Committee to consider ‘the effectiveness of the established Registered Aboriginal Parties’.

The Committee received evidence from eight of the nine currently appointed RAPs, and received one joint submission from all nine RAPs. The Committee also heard evidence from a number of industry representative groups, local government, statutory authorities, utility providers, and heritage advisors about their experiences working with RAPs.

In addition, the Committee heard from a number of unsuccessful RAP applicants who felt disenfranchised from the system of heritage protection established by the *Aboriginal Heritage Act* 2006 (Vic) (the 'Act'). The Committee also acknowledges that there are particular issues relating to those areas of the state without an appointed RAP. Both of these issues will be discussed in chapter seven.

## 6.2 Established Registered Aboriginal Parties

The Act provides for the Victorian Aboriginal Heritage Council (the 'Council') to appoint RAPs for specific geographic areas of Victoria. Once appointed, RAPs take on the responsibility of managing the Aboriginal heritage within their local area. To date the Council has appointed nine RAPs, as outlined in table 6.1 below. Collectively, the nine established RAPs cover 56 per cent of the land mass of Victoria (see map in appendix four).

**Table 6.1** Established Registered Aboriginal Parties

RAPs	Region	Location	Date appointed
Barengi Gadjin Land Council Aboriginal Corporation	Wimmera	Horsham	September 2007
Dja Dja Wurrung Clans Aboriginal Corporation	Loddon Mallee	Bendigo	September 2008
Gunaikurnai Land and Waters Aboriginal Corporation	Gippsland	Bairnsdale	May 2008
Gunditj Mirring Traditional Owners Aboriginal Corporation	South West Victoria	Heywood	May 2007
Martang Pty Ltd	Grampians area	Pomonal	September 2007
Taungurung Clans Aboriginal Corporation	North Central Victoria	Kilmore	July 2009
Wathaurung Aboriginal Corporation	Central/Barwon/Surf Coast	Ballarat	May 2009
Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc.	Melbourne	Melbourne	August 2008
Yorta Yorta Nation Aboriginal Corporation	North Central Victoria	Barmah and Shepparton	September 2007

Source: Department of Planning and Community Development (Aboriginal Affairs Victoria), submission no. 57, p. 13.

Both RAPs and groups applying for RAP status are required to be incorporated bodies. The majority of current RAPs are incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), the incorporation statute used for native title bodies.

### **6.3 The statutory functions of Registered Aboriginal Parties**

Registered Aboriginal Parties are designed to provide for traditional owners to be involved in the management and protection of their heritage on a local level. When organisations become registered as RAPs they take on a number of designated roles and responsibilities. Under section 148 of the Act RAPs have the following defined functions:

- (a) to act as a primary source of advice and knowledge for the Minister, Secretary and Council on matters relating to Aboriginal places located in or Aboriginal objects originating from the area for which the party is registered;
- (b) to advise the Minister regarding, and to negotiate, the repatriation of Aboriginal cultural heritage that relates to the area for which the party is registered;
- (c) to consider and advise on applications for cultural heritage permits;
- (d) to evaluate and approve or refuse to approve cultural heritage management plans that relate to the area for which the party is registered;
- (e) to enter into cultural heritage agreements;
- (f) to apply for interim and ongoing protection declarations;
- (g) to carry out any other functions conferred on registered Aboriginal parties by or under this Act.

Despite the wide range of functions outlined by the Act, the Committee has heard that the primary activity of RAPs is to evaluate Cultural Heritage Management Plans (CHMPs). The Committee heard only limited evidence relating to the use of cultural heritage permits and cultural heritage agreements, which have been examined in detail by Aboriginal Affairs Victoria's (AAV) review of the Act.<sup>358</sup>

### **6.4 Opportunities associated with becoming a Registered Aboriginal Party**

The Committee heard evidence from a number of established RAPs that there are many benefits associated with gaining RAP status. Broadly, becoming a RAP provides traditional owner groups with state recognition that they are the 'right people for country'. Moreover, becoming a RAP entitles traditional owner groups to play a direct role in the management of heritage on their country through the assessment of CHMPs. Gaining RAP status has also, for many groups, provided employment and training opportunities for local Aboriginal people.

---

<sup>358</sup> Aboriginal Affairs Victoria, *Summary report: Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2012, pp. 16–18, accessed 18 September 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).



At the Shepparton public hearing Ms Kym Monohan, executive officer of the Taungurung Clans Aboriginal Corporation, a RAP based in central Victoria, reported that the experience of becoming a RAP has been positive for local traditional owners:

From our point of view, becoming a RAP has made a significant difference, especially in dealing with our proponents. It is really sad that it has happened this way, but there is a legitimacy attached to us as a legislative body. They now see us a little bit differently — not just as the little blackfellas in the corner who have a say. It is now a lot easier to develop those relationships with the people that we work with ...<sup>359</sup>

Native Title Services Victoria argued that in contrast to the previous legislative regime, the Act has provided traditional owners with the opportunity to be more involved in the protection of their heritage. Accordingly:

In areas where RAPs have been appointed, Traditional Owners have been able to provide a greater level of protection to cultural heritage. RAPs provide Traditional Owners with increased opportunities to participate in decision-making over their traditional lands and strengthened capacity to protect and manage their cultural heritage.<sup>360</sup>

The Barengi Gadjin Land Council Aboriginal Corporation, the RAP for the Wimmera area, noted that becoming a RAP has allowed the local traditional owner group to develop employment and training opportunities in heritage management.<sup>361</sup> Heritage Insight, a consultancy of heritage advisors, also commented on the employment opportunities that have been created for traditional owners by the introduction of RAPs:

It is heartening to me as a heritage advisor to see the growing number of younger Aboriginal people completing qualifications in cultural heritage management, and taking up positions within their communities and being involved in more traditional management of Country.<sup>362</sup>

## 6.5 Cultural Heritage Management Plans

Cultural Heritage Management Plans are designed to ensure that Aboriginal cultural heritage is managed in line with the requirements of the Act. Cultural Heritage Management Plans are documents that identify the heritage located within a particular area and set out the measures to be taken to ensure that any heritage is appropriately managed and protected during the conduct of an activity or development.<sup>363</sup> The proponent of an activity is known as the 'sponsor' of a CHMP.<sup>364</sup> Typical CHMP sponsors include property developers, utility companies, statutory authorities, and local government.

---

<sup>359</sup> Ms Kym Monohan, Executive Officer, Environment and Natural Resources Committee public hearing – Shepparton, 15 May 2012, transcript of evidence, p. 152.

<sup>360</sup> Native Title Services Victoria, submission no. 35, p. 11.

<sup>361</sup> Barengi Gadjin Land Council Aboriginal Corporation, submission no. 44, p. 1.

<sup>362</sup> Heritage Insight, submission no. 65, p. 5.

<sup>363</sup> *Aboriginal Heritage Act 2006* (Vic) s. 42.

<sup>364</sup> *ibid.*, s. 44.

Under the Act, the actual preparation of a CHMP must be undertaken by a cultural heritage advisor who is engaged by the sponsor.<sup>365</sup> The Act specifies that a cultural heritage advisor must be appropriately qualified in a discipline directly relevant to Aboriginal cultural heritage (such as anthropology, archaeology or history) and/or has extensive experience in relation to the management of Aboriginal heritage.<sup>366</sup>

The Act specifies a number of situations where the preparation of a CHMP is mandatory.<sup>367</sup> These include:

- where a CHMP is required by the *Aboriginal Heritage Regulations 2007* (Vic) (the 'Regulations');
- where the Minister for Aboriginal Affairs directs the preparation of a CHMP;
- where a proposed activity requires an Environment Effects Statement.

Since the Act came into force in 2007 1,191 CHMPs have been completed to the end of June 2011. Of these CHMPs 1,083 were mandatorily prepared in line with the Regulations and 108 were developed voluntarily.<sup>368</sup>

The Regulations advise that a CHMP is required for listed high impact activities that will take place within defined areas of cultural sensitivity.<sup>369</sup> Areas of cultural heritage sensitivity include land types or areas where Aboriginal cultural heritage can typically be found, such as waterways (and the immediate surrounding areas), ancient lakes, Ramsar wetlands, coastal Crown land, parks, high plains, greenstone outcrops and caves.<sup>370</sup>

The Regulations list the kinds of high impact activities that may necessitate the preparation of a CHMP, including the construction of transport and telecommunications infrastructure; land subdivision (into three or more lots); activities requiring earth resource authorisations; extraction and removal of sandstone; timber production (greater than 40 hectares).<sup>371</sup> Many of these activities are exempt if the land in question has already been subject to significant ground disturbance.<sup>372</sup>

---

<sup>365</sup> *ibid.*, s. 58.

<sup>366</sup> *ibid.*, s. 189.

<sup>367</sup> *ibid.*, s. 46.

<sup>368</sup> Aboriginal Affairs Victoria, *Discussion paper for the Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2011, p. 15.

<sup>369</sup> *Aboriginal Heritage Regulations 2007* (Vic) r. 6.

<sup>370</sup> *ibid.*, rr. 23–38.

<sup>371</sup> *ibid.*, rr. 43–54.

<sup>372</sup> Aboriginal Affairs Victoria, *Information sheet: Cultural heritage management plans and planning*, Department of Planning and Community Development, Melbourne, 2012, p. 1, accessed 13 March 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/cultural-heritage-management-plans](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/cultural-heritage-management-plans).

### 6.5.1 *Registered Aboriginal Parties and Cultural Heritage Management Plans*

When a sponsor identifies the need to prepare a CHMP for their proposed activity, they are required under the Act to notify each relevant RAP and the Secretary of the Department of Planning and Community Development (DPCD).<sup>373</sup> At this stage, RAPs have the opportunity to elect to evaluate the CHMP and must notify the sponsor of their intentions.<sup>374</sup> If a RAP decides not to evaluate a CHMP, this task is undertaken by AAV on behalf of the Secretary of DPCD.

In assessing a CHMP, both RAPs and AAV are required to take the following matters into account:

- (a) whether the activity will be conducted in a way that avoids harm to Aboriginal cultural heritage;
- (b) if it does not appear to be possible to conduct the activity in a way that avoids harm to Aboriginal cultural heritage, whether the activity will be conducted in a way that minimises harm to Aboriginal cultural heritage;
- (c) any specific measures required for the management of Aboriginal cultural heritage likely to be affected by the activity, both during and after the activity;
- (d) any contingency plans required in relation to disputes, delays and other obstacles that may affect the conduct of the activity;
- (e) requirements relating to the custody and management of Aboriginal cultural heritage during the course of the activity.<sup>375</sup>

RAPs are given 30 days after receiving a completed CHMP to assess it.<sup>376</sup> RAPs can only refuse to approve a CHMP if it has not been prepared according to prescribed standards or does not address the issues set out in section 61. RAPs are not able to refuse CHMPs on the grounds that an activity simply harms Aboriginal heritage or that they disagree with the proposed activity.

Along with their assessment responsibilities, RAPs often have a role during the preparation stage of CHMPs. If a RAP has been appointed for a given area, the sponsor of a CHMP, 'must make reasonable efforts to consult' with the relevant RAP during the preparation of the plan.<sup>377</sup> Likewise, the RAP 'must use reasonable efforts to co-operate with the sponsor in the preparation of the plan'.<sup>378</sup> In practice, RAPs frequently consult with sponsors and participate in the preparation of CHMPs. In published advice on the CHMP process designed for sponsors, DPCD recommended that as, 'the Management Plan process relies heavily on effective negotiation ... it is critical to involve the relevant RAP or RAP(s) as early as possible in the planning process'.<sup>379</sup>

---

<sup>373</sup> *Aboriginal Heritage Act 2006* (Vic) s. 54.1.

<sup>374</sup> *ibid.*, s. 55.

<sup>375</sup> *ibid.*, s. 61.

<sup>376</sup> *ibid.*, s. 63.

<sup>377</sup> *ibid.*, s. 59.2.

<sup>378</sup> *ibid.*, s. 59.3.

<sup>379</sup> Department of Planning and Community Development, *Guide to preparing a cultural heritage management plan: For the purposes of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2010, p. 4, accessed 13 March 2012, [www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms](http://www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms).

If there is no RAP for an area of proposed development then AAV, under the Secretary of DPCD, is solely responsible for approving CHMPs.

Since the inception of the Act to the end of June 2011, RAPs approved 338 CHMPs out of a total of 1,191. The remainder of the CHMPs were approved by AAV. However, the proportion of CHMPs approved by RAPs has begun to rise as more RAPs have been appointed. In the 2010-2011 financial year RAPs approved 182 out of a total of 390 CHMPs.<sup>380</sup>

During the preparation of a CHMP, both the sponsor and/or the relevant RAP can refer a dispute to the Chair of the Victorian Aboriginal Heritage Council for resolution.<sup>381</sup> The Act also stipulates that the decision of either a RAP or the Secretary to refuse a CHMP can be referred to the Victorian Civil and Administrative Tribunal for review.<sup>382</sup>

### **6.5.2 Relationships between Registered Aboriginal Parties and sponsors of Cultural Heritage Management Plans**

Evidence from industry stakeholders and the sponsors of CHMPs indicates that the established RAPs are generally considered effective in their role. For example VicRoads – which has sponsored 65 CHMPs, the largest number by a single organisation – wrote that their ‘experience with existing RAPs has been positive and in most cases we have been able to build strong working relationships with them’.<sup>383</sup> Moreover, the Department of Sustainability and Environment noted that it ‘has generally experienced good working relationships with the RAPs.’<sup>384</sup>

A number of CHMP sponsors specified that they had forged a strong relationship with the RAP in their local area. Grampians Wimmera Mallee Water (GWMWater) reported that it had developed ‘a very successful working relationship’ with their local RAP – the Barengi Gadjin Land Council Aboriginal Corporation – during work on the Wimmera Mallee Pipeline.<sup>385</sup> VicForests outlined their positive relationships with both the Wurundjeri Tribe Land and Compensation Cultural Heritage Council and the Gunaikurnai Land and Waters Aboriginal Corporation.<sup>386</sup> Further, at the public hearing in Lakes Entrance Mr David Sedunary from VicForests stated that ‘we have not ever experienced, where there is a RAP in place, any issues with timeliness of advice and assistance’.<sup>387</sup>

Notwithstanding some concerns relating to the costs associated with CHMPs (to be discussed below), industry stakeholders overwhelmingly supported the appointment of further RAPs to ensure that all of Victoria is serviced by a RAP. For example, GWMWater stated that ‘the RAP

<sup>380</sup> Aboriginal Affairs Victoria, *Discussion paper for the review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2011, p. 14.

<sup>381</sup> *Aboriginal Heritage Act 2006* (Vic) s. 113.

<sup>382</sup> *ibid.*, s. 116.

<sup>383</sup> VicRoads, submission no. 14, p. 2.

<sup>384</sup> Department of Sustainability and Environment, submission no. 18, p. 2.

<sup>385</sup> GWMWater, submission no. 12, p. 1.

<sup>386</sup> VicForests, submission no. 13.

<sup>387</sup> Mr David Sedunary, Manager, Planning Systems, VicForests, Environment and Natural Resources Committee public hearing – Lakes Entrance, 24 April 2012, transcript of evidence, p. 112.

process where one aboriginal [sic] party is responsible for formal responses to CHMPs and the like is a better arrangement than endeavouring to seek agreement from a range of different and at times disparate groups'.<sup>388</sup> In their submission Cement Concrete and Aggregates Australia urged 'the Aboriginal Heritage Council to finalise the appointment of RAPs across Victoria.'<sup>389</sup> In addition, the Department of Sustainability and Environment argued that 'where RAPs are appointed, it is clear to DSE which Traditional Owners it needs to formally engage in heritage planning under the Act. In these cases, DSE is able to act with certainty in consultation with those legally appointed bodies'.<sup>390</sup>

The Wurundjeri Tribe Land and Compensation Cultural Heritage Council also noted that the Act had brought a dramatic change to relationships between Aboriginal organisations and sponsors:

Under the old Commonwealth legislation the only way in which the Traditional Owners could manage Aboriginal cultural heritage was as it was being demolished. Aboriginal cultural heritage was often discovered while development was well under way and the Wurundjeri Council's only say in the process was to either issue a Consent to Disturb an Aboriginal Place or refuse to issue such a Consent. This set up an antagonistic relationship with developers and land managers, which was open to bribery and corruption. The only Aboriginal people who benefited under this legislation were the ones who were able to exploit this confrontational system and strike deals of compensation with developers and land managers for the destruction of their cultural heritage.<sup>391</sup>

The Committee also heard from representatives of the cultural heritage advisor industry, who provided further evidence that the RAP system had provided certainty for landowners and developers. Accordingly, the Australian Association of Consulting Archaeologists stated that:

The RAPs and the VAHC have been effective and successful in promoting good Aboriginal heritage protection and management in the State of Victoria. The establishment of the RAPs has provided certainty in regard to the consultation process for Aboriginal heritage matters.<sup>392</sup>

Local councils have also reported that their experiences with RAPs have been positive. At a public hearing in Melbourne Mr Gary Detez, Indigenous development officer with the Yarra Ranges Shire Council, noted that 'the RAP process has provided Yarra Ranges — and I assume other local governments — with a platform for meaningful and consistent engagement with the right people.'<sup>393</sup> Similarly, at the public hearing in Lakes Entrance Ms Kate Nelson from the East Gippsland Shire Council commented that:

---

<sup>388</sup> GWMWater, submission no. 12, p. 1.

<sup>389</sup> Cement Concrete and Aggregates Australia, submission no. 15, p. 2.

<sup>390</sup> Department of Sustainability and Environment, submission no. 18, p. 2.

<sup>391</sup> Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc., submission no. 64, p. 3.

<sup>392</sup> Australian Association of Consulting Archaeologists Inc., submission no. 62, p. 2.

<sup>393</sup> Mr Gary Detez, Indigenous Development Officer, Yarra Ranges Shire Council, Environment and Natural Resources Committee public hearing — Melbourne, 27 February 2012, transcript of evidence, p. 20.

I would have to say that our relationship with the RAP in the western part of the shire is very good not only in their role as a RAP but as an organisation that is a lead organisation in this part of Gippsland. I think we have developed a pretty good working relationship and understanding and opportunities ...<sup>394</sup>

Some RAPs reported that they have used their status to build partnerships with industry and other local stakeholders outside the CHMP process. For example, the Taungurung Clans Aboriginal Corporation has developed a project with the Department of Sustainability and Environment in relation to works within the Tallarook State Forest.<sup>395</sup> In particular, the Committee heard from a range of groups that have developed strong partnerships with the Wurundjeri Tribe Land and Compensation Cultural Heritage Council, including the Port Phillip and Westernport Catchment Management Authority, the City of Yarra and the Merri Creek Management Committee.<sup>396</sup> On building partnerships with CHMP sponsors and other stakeholders, the Wurundjeri Tribe Land and Compensation Cultural Heritage Council argued that:

The current [RAP] system gives the Traditional Owners the platform with which to start building these relationships and then through a collaborative approach, Aboriginal cultural heritage can be properly and effectively managed in a culturally sensitive way.<sup>397</sup>

Despite hearing that RAPs have built strong relationships with many CHMP sponsors, the Committee also received some evidence to suggest that there are some sponsors who remain unaware of their responsibilities under the Act. As Martang Pty Ltd – a RAP based in the Grampians area – argued:

A lack of knowledge on the part of Sponsors [sic] ... is particularly evident with large international companies, but also to large Australian companies with head offices in other States.<sup>398</sup>

In order to promote the activities of RAPs and educate sponsors about the importance of cultural heritage, some RAPs have arranged for CHMP sponsors to undergo cultural heritage training.<sup>399</sup> Some sponsors have also been proactive in engaging local RAPs to educate their employees. For example, VicForests described how they have strengthened their relationships with RAPs by arranging for them to deliver cultural awareness training to their staff.<sup>400</sup>

<sup>394</sup> Ms Kate Nelson, Director Planning and Community, East Gippsland Shire Council, Environment and Natural Resources Committee public hearing – Lakes Entrance, 24 April 2012, transcript of evidence, p. 106.

<sup>395</sup> Taungurung Clans Aboriginal Corporation, submission no. 49, p. 2.

<sup>396</sup> Port Phillip and Westernport Catchment Management Authority, submission no. 59, p. 2; City of Yarra, submission no. 10, p. 1; Merri Creek Management Committee, submission no. 67, p. 1.

<sup>397</sup> Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc., submission no. 25, p. 4.

<sup>398</sup> Martang Pty Ltd, submission no. 60, p. 5.

<sup>399</sup> Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc., submission no. 64, p. 4.

<sup>400</sup> VicForests, submission no. 13, p. 2.

## 6.6 Protecting Aboriginal heritage beyond Cultural Heritage Management Plans

While the Committee heard that the established RAPs have been effective in their primary role of assessing CHMPs, a number of stakeholders expressed concern that the RAPs have a limited capacity to manage heritage outside the CHMP process. In particular, the Committee heard that a number of RAPs feel that the Act's focus on CHMPs does not adequately provide for the monitoring of existing heritage sites that are not impacted by proposed development activity.

In their evidence RAPs have described feeling frustrated by having their role so closely tied to CHMPs. The Gunditj Mirring Traditional Owners Aboriginal Corporation described this situation as 'reactive' and argues that RAPs need 'an act that allows us to have a presence on our country, to be proactive in management of all sites and to adequately resource these activities'.<sup>401</sup> Further, in their submission the Corporation noted that:

Becoming a RAP is undoubtedly beneficial to Traditional Owner groups, but does come with added pressure to effectively manage cultural heritage being under resourced. The danger still remains of cultural heritage sites being destroyed. Due to the lack of resourcing, at times we cannot suitably ensure all our sites are being protected like we would want them to be.<sup>402</sup>

In a similar way, Martang Pty Ltd argued that:

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.<sup>403</sup>

The Victorian Traditional Owners Land Justice Group also commented on the restrictiveness of the Act's focus on CHMPs, commenting that:

The amount of development within a region should not dictate the level of protection afforded to Aboriginal cultural heritage or the level of resources available to a RAP in order to carry out its responsibilities ...

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.<sup>404</sup>

In a socioeconomic impact assessment prepared for AAV, PricewaterhouseCoopers commented on the overall effectiveness of established RAPs, noting that:

---

<sup>401</sup> Gunditj Mirring Traditional Owners Aboriginal Corporation, submission no. 22, p. 2.

<sup>402</sup> *ibid.*

<sup>403</sup> Martang Pty Ltd, submission no. 60, p. 6.

<sup>404</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, pp. 14–15.

Aboriginal cultural heritage is better protected where the requirements of the Act are followed. It is, however, difficult to assess the overall level of compliance with the Act. While AAV undertakes a number of investigations each year, it is difficult for AAV to effectively monitor compliance due to the geographic distance between many sites and inspectors which may mean that it is not possible for a lot of proactive compliance checks.<sup>405</sup>

Although it is not possible to determine whether less heritage sites are being destroyed under the current Act than Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), RAPs have indicated that the focus on CHMPs has limited their ability to play a broader and more strategic role in the management of their heritage. Further, the Committee found that most RAPs aspire to be able to undertake works to preserve known heritage sites, to monitor works being undertaken in their areas, and to extensively map the heritage sites on their country. The Committee is also concerned that the Act's focus on CHMPs does not adequately provide for the conduct of works to protect known heritage sites, including places listed on the Victorian Aboriginal Heritage Register.

In order to ensure that known heritage sites are protected regardless of development activity, the Committee recommends that:

#### **RECOMMENDATION 6.1**

Aboriginal Affairs Victoria resource Registered Aboriginal Parties, on a project basis, to undertake works to preserve heritage sites that are identified as priority sites by the Registered Aboriginal Parties. Consultation for all works should take place with the respective landholder/land manager.

The protection of heritage sites in areas without an appointed RAP was also of concern to Aboriginal stakeholders, and will be addressed in chapter seven.

#### **6.6.1 Country mapping**

Evidence gathered as part of AAV's review of the Act indicated that the strategic, statewide assessment of heritage sites – otherwise known as country mapping – is widely supported by Aboriginal stakeholders, industry and local government. Proposed country mapping is designed to identify and clarify the location of areas of cultural heritage sensitivity, which should reduce the 'cost burden on individual cultural heritage management plans'.<sup>406</sup>

<sup>405</sup> PricewaterhouseCoopers, *Socioeconomic impacts of the Aboriginal Heritage Act 2006*, PricewaterhouseCoopers, Melbourne, 2012, p. 3., accessed 24 September 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

<sup>406</sup> Aboriginal Affairs Victoria, *Summary report: Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2012, p. 5, accessed 18 September 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).



A number of RAPs indicated their desire to participate in country mapping as part of their broader role of managing heritage outside the CHMP process. The joint submission from all nine established RAPs, argued that:

We support a statewide tangible and intangible knowledge base of culture heritage. We believe that Traditional Owner organisations are best placed to undertake country wide assessment and mapping of cultural heritage.<sup>407</sup>

One RAP, Martang Pty Ltd, suggested that country mapping could be funded by the introduction of a levy on CHMP sponsors 'of up to 1%' of the total value of a development project.<sup>408</sup>

The issue of involving RAPs in country mapping and broader strategic planning was raised by local government representatives. At the public hearing in Lakes Entrance, Ms Kate Nelson from the East Gippsland Shire Council noted that 'a more strategic approach' to heritage assessment might assist the Shire in relation to residential developments and natural resource management projects, rather than waiting until a CHMP is triggered to engage with Aboriginal heritage issues.<sup>409</sup> In their submission to the inquiry, the Municipal Association of Victoria also addressed the issue of country mapping, arguing that:

A statewide assessment program of mapping cultural heritage values – country mapping – will be of great value to refine sensitivity mapping so that cultural heritage management plans (CHMPs) are prepared when they are needed. This work would also be a useful input into strategic planning exercises such the Regional Growth Plans currently being prepared by the Department of Planning and Community Development.<sup>410</sup>

The Committee is of the view that a program of country mapping would not only improve the quality of information available to both government and CHMP sponsors about the existence and location of Aboriginal cultural heritage, but would enable RAPs to enhance their ability to monitor and maintain heritage sites on their country. Currently, knowledge about Aboriginal heritage is increased incrementally through the development of Cultural Heritage Management Plans; there is limited capacity to conduct heritage assessments on areas not subject to development activity.

On the subject of country mapping, the Committee therefore recommends that:

## **RECOMMENDATION 6.2**

The Victorian Government resource Aboriginal Affairs Victoria to develop a statewide program of country mapping to improve the available knowledge about areas of cultural heritage sensitivity. Country mapping should be undertaken in conjunction with local government, Registered Aboriginal Parties and land owners/managers.

---

<sup>407</sup> Victorian Registered Aboriginal Parties – joint submission, submission no. 68, p. 5.

<sup>408</sup> Martang Pty Ltd, submission no. 60, p. 5.

<sup>409</sup> Ms Kate Nelson, Director Planning and Community, East Gippsland Shire Council, Environment and Natural Resources Committee public hearing – Lakes Entrance, 24 April 2012, transcript of evidence, p. 105.

<sup>410</sup> Municipal Association of Victoria, submission no. 70, p. 2.

### 6.6.2 *Registered Aboriginal Parties and the repatriation of human remains*

The Committee heard very limited evidence about the role of RAPs in the repatriation of human remains and other heritage, despite this being one of the designated functions of RAPs. The Committee did, however, receive evidence from Museum Victoria, which has played a key role in the repatriation of Aboriginal heritage from its collections. According to Museum Victoria, ‘the establishment of RAPs has added to the complexity of dealing with Traditional Owners in Victoria’, because although RAPs are the Museum’s first point of contact under the Act, human remains are often subject to claims from competing and overlapping traditional owner groups.<sup>411</sup> The Museum also notes that in some instances:

Aboriginal communities have not been able to deal with remains expeditiously in ways that would generally be considered appropriate ... Unfortunately there have also been rare occasions when remains have been returned to Museum Victoria for safekeeping.<sup>412</sup>

Given the dearth of evidence on this issue, the Committee is satisfied that the current provisions of the Act – which prioritises the role of established RAPs in the repatriation of heritage items – is appropriate.

### 6.6.3 *Enforcement of the Aboriginal Heritage Act 2006 (Vic) and Registered Aboriginal Parties*

Some witnesses noted that under the Commonwealth Act Aboriginal people had a stronger role in the enforcement of the Act, especially in relation to issuing stop orders and the inspection of development sites. Previously, Aboriginal people were appointed as inspectors for their local communities. Under the current Act, ‘inspectors are now exclusively public servants to ensure their actions are indemnified.’<sup>413</sup> A small number of witnesses have identified this loss of an explicit enforcement role as the primary area in which the previous legislation was preferable to the current Act. In this way, some established RAPs have suggested that they would like to take on an enforcement role under the Act, particularly in relation to monitoring development to ensure that the provisions of a CHMP are adhered to.

According to Mr Ron Arnold, a representative of the Gulajin Traditional Owner Group, ‘it is impossible to assess RAP effectiveness in protecting cultural heritage without also looking at AAV effectiveness in enforcing breaches. The protection provided through the RAP system needs to be stronger.’<sup>414</sup>

<sup>411</sup> Museum Victoria, submission no. 23, p. 2.

<sup>412</sup> *ibid.*, p. 3.

<sup>413</sup> PricewaterhouseCoopers, *Socioeconomic impacts of the Aboriginal Heritage Act 2006*, PricewaterhouseCoopers, Melbourne, 2012, p. 57, accessed 24 September 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

<sup>414</sup> Ron Arnold (Gulajin Traditional Owner Group), submission no. 53, p. 3.

In a similar way, Native Title Services Victoria argued that:

RAPs are currently severely limited in their ability to enforce compliance and address breaches of cultural heritage protection. NTSV submits that RAPs require greater enforcement powers to assist in the adequate protection of cultural heritage.<sup>415</sup>

At the public hearing in Shepparton, Mr Mick Harding, Chair of the Taungurung Clans Aboriginal Corporation suggested that RAPs take on a role in monitoring whether CHMPs are adhered to by developers:

Because it is one thing to have the CHMP that has all the thickness of documents, but when it comes to recommendations and compliance — I think they are the key things so we are actually afforded the responsibility and the respect to fulfil those obligations and to look at those places and spaces and make sure those proponents are actually doing what they said they were going to do or what they agreed to do.<sup>416</sup>

Further, both Native Title Services Victoria and Martang Pty Ltd have suggested that RAPs could be empowered to issue stop orders to halt activity that threatens Aboriginal heritage.<sup>417</sup>

Under the Act RAPs are currently able to apply for interim and ongoing protection declarations in relation to heritage objects and places — however the declarations are issued by the Minister for Aboriginal Affairs.<sup>418</sup> According to PricewaterhouseCoopers, only five stop orders have been issued since the introduction of the Act, and no protection orders.<sup>419</sup>

The PricewaterhouseCoopers socioeconomic review of the Act also examines the enforcement provisions of the Act relative to both the previous legislative regime in Victoria and those in other Australian jurisdictions. Accordingly:

It appears that there are now greater *incentives* to comply. According to AAV, before the introduction of the Act, the penalties for harming heritage were not high enough to act as an effective deterrent and it was difficult to prosecute offences. The Act now generally sets the highest penalties in Australia for harming Aboriginal cultural heritage and defines offences so they are clearer.<sup>420</sup>

---

<sup>415</sup> Native Title Services Victoria, submission no. 35, p. 15.

<sup>416</sup> Mr Mick Harding, Chair, Taungurung Clans Aboriginal Corporation, Environment and Natural Resources Committee public hearing — Shepparton, 15 May 2012, transcript of evidence, pp. 153–154.

<sup>417</sup> Native Title Services Victoria, submission no. 35, p. 16; Martang Pty Ltd, submission no. 60, p. 8.

<sup>418</sup> *Aboriginal Heritage Act 2006* (Vic) s. 96.

<sup>419</sup> PricewaterhouseCoopers, *Socioeconomic impacts of the Aboriginal Heritage Act 2006*, PricewaterhouseCoopers, Melbourne, 2012, accessed 24 September 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

<sup>420</sup> *ibid.*, p. 55, italics in original.

As part of the review of the Act, AAV considered strengthening the role of RAPs in relation to enforcement, and found that 'most stakeholders supported Registered Aboriginal Parties undertaking standard compliance checks of cultural heritage management plan recommendations for a prescribed fee'.<sup>421</sup>

While the Committee acknowledges that some Aboriginal people regret the loss of enforcement powers under the new Act – especially in relation to issuing stop orders – the Committee considers that the system of CHMPs has ensured that heritage issues are identified early in development projects, decreasing the use of reactive stop orders. However, given the key function of CHMPs under the Act, the Committee is of the view that it would be appropriate for RAPs to be involved in assessing whether the provisions of CHMPs are adhered to.

Therefore, in relation to the enforcement of the Act, the Committee recommends that:

### **RECOMMENDATION 6.3**

Aboriginal Affairs Victoria, in conjunction with the Victorian Aboriginal Heritage Council, develop policy guidelines to monitor the adherence of sponsors to approved Cultural Heritage Management Plans, with the involvement of Registered Aboriginal Parties.

## **6.7 Staffing and financial capacity of Registered Aboriginal Parties**

The RAP system is underpinned by a commercial business model whereby RAPs generate their primary income by assessing CHMPs. However, 'start up' assistance is provided to RAPs by AAV. Newly appointed RAPs receive a one-off grant from AAV of \$20,000 for costs associated with the establishment of the RAP operation, and a further \$3,000 for purchasing computer equipment. In addition, some RAPs have also been the beneficiaries of infrastructure grants, governance training, and business planning services from AAV.<sup>422</sup>

The Committee has heard that the resourcing and capacity of RAPs varies significantly throughout the state, with a particular disparity between RAPs located in areas of high and low economic development. As VicRoads noted in their submission to the inquiry:

Capacity and resourcing levels currently vary wildly within existing RAPs, ranging from organisations with corporate offices and significant staff to those with no corporate base and a small number of part-time staff.<sup>423</sup>

<sup>421</sup> Aboriginal Affairs Victoria, *Summary report: Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2012, p. 32, accessed 18 September 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

<sup>422</sup> Department of Planning and Community Development (Aboriginal Affairs Victoria), submission no. 57, pp. 32–33.

<sup>423</sup> VicRoads, submission no. 14, p. 3.

The Committee heard that for some RAPs gaining RAP status has allowed for the development of a cultural heritage business with employment opportunities for a sizeable number of Aboriginal community members. The Melbourne-based Wurundjeri Tribe Land and Compensation Cultural Heritage Council, for example, currently employs 40 staff (both full and part-time), with 34 employees being Wurundjeri traditional owners.<sup>424</sup> In contrast, the Gunditj Mirring Traditional Owners Aboriginal Corporation, based in south-west Victoria, employs a cultural heritage officer two days per week and has employed its current CEO on a six month contract 'as the RAP cannot see past this point in time with any certainty'.<sup>425</sup> Some RAPs noted that the unevenness of their CHMP workflow impacted on their ability to train and retain long-term staff members. In this way, the Wathaurung Aboriginal Corporation noted that although it:

Is able to generate sufficient funds to pay a small number of staff full-time (n=4), the majority of staff can only be employed on a casual basis (n=9) as there is no assurance that work will continue to come in to finance good quality staff.<sup>426</sup>

A number of CHMP sponsors have expressed concern about the impact that the staffing capacity of RAPs can have on their work. According to West Wind Energy, 'our experience is that there are not enough representatives of the RAPs to supervise field work. Proponents often have to wait for some time to ensure representatives are available for projects'.<sup>427</sup> VicRoads also noted that:

Resourcing or capacity issues can lead to delays during the planning of projects in cases where RAP staff are not available to participate in heritage assessment and/or management activities when required, or where project meetings are delayed due to availability pressures.<sup>428</sup>

In a similar way, the Department of Sustainability and Environment commented that it:

Has generally experienced good working relationship with RAPs. However, DSE notes that some concerns have been raised regarding the capacity of some of the RAPs to meet their obligations under the Act. RAPs require the appropriate resources, the necessary information, tools and expertise to function with efficiency and efficacy.<sup>429</sup>

### **6.7.1 Fees charged by Registered Aboriginal Parties**

As noted above, RAPs generate the bulk of their income from the assessment of CHMPs. There are two categories of fees that RAPs may charge the sponsors of CHMPs:

- a prescribed fee for assessing the CHMP; and
- variable fees for consulting with sponsors and participating in the preparation of the CHMP.

---

<sup>424</sup> Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc., submission no. 25, p. 3.

<sup>425</sup> Gunditj Mirring Traditional Owners Corporation, submission no. 22, p. 2; Winda-Mara Aboriginal Corporation, submission no. 19, p. 1.

<sup>426</sup> Wathaurung Aboriginal Corporation, submission no. 39, pp. 3–4.

<sup>427</sup> WestWind Energy, submission no. 8, p. 3.

<sup>428</sup> VicRoads, submission no. 14, p. 3.

<sup>429</sup> Department of Sustainability and Environment, submission no. 18, p. 2.

## PREScribed CHMP ASSESSMENT FEES

Under the Regulations RAPs are entitled to be paid a fee for assessing a completed CHMP. The same fees are payable to AAV if the Secretary of DPCD is to assess the CHMP in areas without an appointed RAP. These fees are prescribed by the Regulations and indexed annually by DPCD.

The assessment fees for CHMPs vary according to the size of the activity proposed (small, medium, large) and the level of complexity of the plan, for example, whether the plan consists of a desktop assessment, a standard assessment or complex assessment of the relevant area. The Regulations specify the 'fee units' that should be charged to assess each CHMP, and these are calculated and indexed annually by the department.<sup>430</sup> Currently, assessment fees range from \$134.40 for a CHMP that consists of a desktop assessment of a small activity up to \$4,301.40 for a CHMP that includes a complex assessment of a large activity.<sup>431</sup> The Regulations define whether a CHMP should feature a desktop assessment, a standard assessment or complex assessment – the latter two kinds of assessment typically involve archaeological digging.<sup>432</sup>

## CHMP CONSULTATION FEES

RAPs are also able to charge fees for consulting with sponsors and participating in the preparation of CHMPs. There are a range of activities that RAPs may charge for during the preparation phase, including:

- consultation with the sponsor in relation to how the heritage assessment should be carried out;
- participating in fieldwork; and
- consulting with the sponsor about the recommendations to be included in the CHMP.

Fees for RAP participation and consultation are not regulated by DPCD, although the department has developed guidelines to assist RAPs in determining their fee structure based on hourly rates (see table 6.2 below). These guidelines suggest that hourly rates charged by RAPs should vary depending on the experience and qualifications of the RAP staff involved in a project.

---

<sup>430</sup> Department of Planning and Community Development, 'Fees and charges', Department of Planning and Community Development, Melbourne, 2012, accessed 13 March 2012, [www.dpcd.vic.gov.au/home/about/fees-and-charges](http://www.dpcd.vic.gov.au/home/about/fees-and-charges).

<sup>431</sup> *ibid.*

<sup>432</sup> *Aboriginal Heritage Regulations 2007* (Vic) r. 59.

**Table 6.2**                      **Fee guidelines for Registered Aboriginal Parties**

Activity	Hourly rate (inclusive of all reasonable expenses: travel, accommodation and GST)	
	7.00 am to 5.00 pm Monday to Friday	All other times
Consult with sponsor on the assessment of the area for the purposes of the plan  Consult with sponsor in relation to the recommendations to be included in the plan	\$80 to \$100	\$120 to \$150
Participation in the conduct of the assessment	\$50 to \$80 (charged hourly but with a minimum of 5 hours)	\$75 to \$120 (charged hourly but with a minimum of 5 hours)

Source: Department of Planning and Community Development, 'Fees and conduct guidelines for Registered Aboriginal Parties', Department of Planning and Community Development, Melbourne, 2008, p. 5, accessed 7 March 2012, [www.dpcd.vic.gov.au/indigenous/heritage-tools/fees-and-charges](http://www.dpcd.vic.gov.au/indigenous/heritage-tools/fees-and-charges).

#### INCOME GENERATED FROM CHMPs

The number of CHMPs that a RAP evaluates varies considerably across the state (see table 6.3 below). As such, the income received by RAPs fluctuates depending on the rate of development in each area.

In addition, RAPs do not receive the full cost of developing a CHMP. The costs paid by the sponsor of a CHMP are split between the cultural heritage advisor (who prepares the CHMP) and the RAP (who participates in the preparation of, and assesses, the CHMP). According to a socio-economic impact report on the Act prepared by PricewaterhouseCoopers, a RAP receives approximately 20-30 percent of the total cost to sponsors of preparing a CHMP, with the remaining funds going to cultural heritage advisors.<sup>433</sup> For example, the Committee heard from WestWind Energy that when preparing a CHMP for their Moorabool wind project 'more than \$750,000 was spent on work'.<sup>434</sup> WestWind Energy provided a detailed breakdown of these costs and noted that the company paid the cultural heritage advisor \$500,409.74 to prepare the CHMP; the RAP received a prescribed assessment fee of \$4,206.40; and the RAP received a further \$244,860 for consulting with WestWind and participating in the preparation of the CHMP.<sup>435</sup>

<sup>433</sup> PricewaterhouseCoopers, *Socioeconomic impacts of the Aboriginal Heritage Act 2006*, PricewaterhouseCoopers, Melbourne, 2012, p. 31, accessed 5 June 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

<sup>434</sup> WestWind Energy, submission no. 8, p. 2.

<sup>435</sup> Phil Burn, Response to question on notice, WestWind Energy, 28 February 2012.

The following table outlines the number of CHMPs that have been evaluated by individual RAPs since their appointment.

**Table 6.3 Cultural Heritage Management Plans evaluated by RAPs 2008-2011**

RAPs	FY2008	FY2009	FY2010	FY2011
Barengi Gadjin Land Council Aboriginal Corporation	–	4	5	2
Dja Dja Wurrung Clans Aboriginal Corporation	–	1	3	9
Gunaikurnai Land and Waters Aboriginal Corporation	–	1	11	16
Gunditj Mirring Traditional Owners Aboriginal Corporation	6	5	3	4
Martang Pty Ltd	–	3	2	5
Taungurung Clans Aboriginal Corporation	–	–	1	9
Wathaurung Aboriginal Corporation	–	–	21	51
Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc.	–	8	60	65
Yorta Yorta Nation Aboriginal Corporation	1	9	12	22
<b>Total</b>	<b>7</b>	<b>31</b>	<b>118</b>	<b>183</b>

Source: PricewaterhouseCoopers, *Socioeconomic impacts of the Aboriginal Heritage Act 2006* PricewaterhouseCoopers, Melbourne, 2012, p. 22, accessed 5 June 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

### 6.7.2. Concerns relating to the consultation fees charged by Registered Aboriginal Parties

The Committee heard from a number of CHMP sponsors that the consultation fees charged by some RAPs lack consistency and transparency. Evidence received by the Committee suggests that fees vary considerably between different RAPs, and the full cost of RAP consultation fees are often not clarified at the beginning of a project. Commenting on the variability of RAP fees, GWMWater argued that ‘the RAPs effectively operate as contractors and hence it would be



beneficial to have a consistent basis and a schedule for charges, clearly defined ‘up-front’, so that sponsors can effectively plan and budget for projects’.<sup>436</sup>

Throughout the inquiry the Committee heard from CHMP sponsors who argued that the guidelines provided by DPCD for RAP consultation fees should be binding rather than suggested rates. VicRoads noted that these guidelines are ‘not binding on RAPs ... and in many cases Indigenous organisations are now charging rates substantially higher than those recommended....’<sup>437</sup> In a similar way, Cement Concrete and Aggregates Australia argued that the Council should ensure that RAPs adhere to the fee guidelines.<sup>438</sup> Crowther and Sadler, a Gippsland-based planning consultancy, speculated that, ‘without a ceiling, these figures [RAP fees] are able to be increased at the whim of a greedy RAP....’<sup>439</sup> The Minerals Council of Australia also argued for capping RAP consultation fees:

Fees for services provided by RAPs need to be regulated – the minerals industry is encountering the situation where the fee for service varies from group to group ...<sup>440</sup>

The Australian Association of Consulting Archaeologists is also supportive of capping the fees that RAPs are able to charge, ‘as the RAPs are effectively monopoly groups, a potential capping of fees and yearly review should also be set out by the VAHC.’<sup>441</sup>

Further, Cement Concrete and Aggregates Australia expressed concern that RAPs are both involved in the preparation and assessment of CHMPs, arguing that ‘best practice governance models generally provide for a separation of powers between the developer of a management plan and the final approver of such a plan’.<sup>442</sup>

The Committee acknowledges that the uncertainty regarding the consultation costs charged by RAPs is of concern to CHMP sponsors. Accordingly, the Committee is of the view that all RAPs should fully brief CHMP sponsors about their fees prior to commencing work, which should include outlining all potential costs if there are difficulties or time delays associated with the project. Further, the Committee contends that the Council should play a role in monitoring the consultation fees charged by RAPs, as part of an expanded role overseeing the operations of RAPs and their relationships with stakeholders (to be discussed in further detail below).

---

<sup>436</sup> GWMWater, submission no. 12, p. 2.

<sup>437</sup> VicRoads, submission no. 14, p. 4.

<sup>438</sup> Cement Concrete and Aggregates Australia, submission no. 15, p. 2.

<sup>439</sup> Crowther and Sadler Pty Ltd, submission no. 63, p. 3.

<sup>440</sup> Minerals Council of Australia, submission no. 43, p. 4.

<sup>441</sup> Australian Association of Consulting Archaeologists Inc., submission no. 62, p. 3.

<sup>442</sup> Cement Concrete and Aggregates Australia, submission no. 15, p. 2.

In relation to the consultation fees charged by RAPs, the Committee recommends that:

#### **RECOMMENDATION 6.4**

Aboriginal Affairs Victoria, in consultation with the Victorian Aboriginal Heritage Council, review the fee guidelines for the participation of Registered Aboriginal Parties in the development of Cultural Heritage Management Plans, and establish a fee structure that balances the needs of both sponsors and Registered Aboriginal Parties.

Following this review the hourly rates charged by Registered Aboriginal Parties to participate in the development of a Cultural Heritage Management Plan will be capped according to the new fee structure published on the Department of Planning and Community Development's website.

The Committee is of the view that the Council should play an ongoing role in overseeing the operations of RAPs, which should include monitoring the consultation fees charged by RAPs to participate in the development of Cultural Heritage Management Plans. Accordingly, the Committee recommends that:

#### **RECOMMENDATION 6.5**

The Victorian Aboriginal Heritage Council monitors the consultation fees charged by Registered Aboriginal Parties, as part of an expanded role for the Council in relation to overseeing the activities of appointed Registered Aboriginal Parties.

The Committee has considered and recommends further additions to the role of the Council in relation to monitoring RAPs, and these are discussed later in the chapter.

## **6.8 Supporting Registered Aboriginal Parties into the future**

The Committee heard that AAV and the Council have supported established RAPs in a number of ways. In addition to \$20,000 of start-up funding, some RAPs have also been provided with infrastructure grants to assist with the cost of office space and to support the purchase of equipment.<sup>443</sup> The Council has been funded by AAV to conduct 'regular statewide forums of RAPs to share experience, network and engage with stakeholders'.<sup>444</sup> Importantly, AAV has also funded business planning for RAPs to assist 'in strengthening RAPs to develop a strategic vision for the operation of their organisations'.<sup>445</sup>

The Committee received evidence that the activities of many of the established RAPs are constrained by limited income and support. In particular, the Committee heard concerns about

<sup>443</sup> Department of Planning and Community Development (Aboriginal Affairs Victoria), submission no. 57, p. 33.

<sup>444</sup> *ibid.*

<sup>445</sup> *ibid.*

the viability of RAPs located in non-urban areas of low development, where few CHMPs are required. Numerous witnesses argued that RAPs should receive a base level of funding to ensure that they can operate a basic office and employ sufficient staff to fulfil their legislative requirements. The Wurundjeri Tribe Land and Compensation Cultural Heritage Council, for example, suggested that ‘as the RAPs are carrying out statutory functions on behalf of the government, there needs to be a base level of funding from government to effectively carry out these functions’.<sup>446</sup> In their submission Native Title Services Victoria drew attention to the limitations of the RAP business model:

While there is a small budget provided to RAPs to assist in the initial start-up costs of the organisation, it is then expected that RAPs will generate income through the provision of consultation services. This fails to note the reality that not all RAP areas are areas of high development and therefore there are insufficient means for RAPs to generate income. The consequence of this being that RAPs are under resourced, underfunded and unable to adequately protect cultural heritage.<sup>447</sup>

Some RAPs, including the Yorta Yorta Nation Aboriginal Corporation argued that the absence of baseline funding has impacted on the effectiveness of their operations. In this way the RAP argued that ‘the level of human or financial resource supplied to Registered Aboriginal Parties, including Yorta Yorta has been a “disservice” to the State of Victoria’ ...<sup>448</sup>

In a similar way, the Taungurung Clans Aboriginal Corporation reported that it has experienced difficulties with funding and argued that ‘current income does not allow TCAC to meet our operational costs which hampers the growth of our organisation’.<sup>449</sup> In addition, the Wathaurung Aboriginal Corporation argued that government funding is critical to the success of the RAP system, and that ‘it is unheard of anywhere else in Government to create a body with a statutory function and not provide substantial resources to fulfil that function’.<sup>450</sup>

A number of established RAPs have sought to generate income outside the CHMP process, such as through agreements and relationships with local government and industry stakeholders. At the Shepparton public hearing Mr Jade Miller, chief executive officer of the Yorta Yorta National Aboriginal Corporation, explained that the RAP had ‘activated a number of area agreements with different agencies’ in order to address the fact that relying on CHMP income ‘the viability of a RAP over the long-term is low to medium’.<sup>451</sup>

The Committee heard evidence from a number of CHMP sponsors who believed that RAPs required further resources in order to operate appropriately. For example, Minerals Council of Australia ‘request[ed] that the RAPs are resourced adequately so that they are able to undertake their duties efficiently when dealing with developers’.<sup>452</sup> Moreover, GWMWater noted that ‘an

---

<sup>446</sup> Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc., submission 25, p. 4.

<sup>447</sup> Native Title Services Victoria, submission no. 35, p. 11.

<sup>448</sup> Yorta Yorta Nation Aboriginal Corporation, submission no. 40, p. 5.

<sup>449</sup> Taungurung Clans Aboriginal Corporation, submission no. 49, p. 2.

<sup>450</sup> Wathaurung Aboriginal Corporation, submission no. 39, p. 3.

<sup>451</sup> Mr Jade Miller, Chief Executive Officer, Yorta Yorta Nation Aboriginal Corporation, Environment and Natural Resources Committee public hearing – Shepparton, 15 May 2012, transcript of evidence, p. 160.

<sup>452</sup> Minerals Council of Australia, submission no. 43, p. 2.

issue for the RAPs is an appropriate level of resourcing, and their ability to provide timely servicing of their responsibilities and deal with the range of issues and activities they may be involved with.<sup>453</sup>

The level of support that witnesses understood as potential ‘baseline funding’ for RAPs varied. The Wurundjeri Tribe Land and Compensation Cultural Heritage Council, suggested that basic funding should include: ‘the employment of a cultural heritage officer and funding for a car, office, servers, phones etc’ ...<sup>454</sup> In their joint submission to the inquiry the current RAPs argued strongly for baseline funding for RAPs to employ an executive officer, cultural heritage manager and administrative support officer.<sup>455</sup>

In contrast, other witnesses argued that RAPs should be resourced to the same level that AAV provides to service those areas of Victoria without a RAP. The Wathaurung Aboriginal Corporation drew attention to the level of staffing AAV provides to undertake CHMP work in areas without RAPs:

Aboriginal Affairs Victoria employs a regional manager for each AAV region, at least one qualified anthropologist or archaeologist and a mix of other qualified and unqualified heritage staff per region to assess and evaluate cultural heritage management plans under a similar framework to that which is expected of RAPs.<sup>456</sup>

Accordingly, the Wathaurung Aboriginal Corporation argued that resources could be diverted to RAPs from the Heritage Branch of AAV, for instance, by embedding heritage officers in RAPs to assist them to fulfil their statutory role.<sup>457</sup> The Council also claimed that the minimum funding for RAPs should reflect the level of resourcing AAV provides to manage those areas of the state without a RAP. At a public hearing in Melbourne Ms Denise Lovett, Chair of the Council, argued for:

Equal resourcing across Victoria for areas with RAPs and no RAPs ... I am saying that RAPs should be resourced to the same level that the secretary of AAV is resourced to make decisions where there are no RAPs.<sup>458</sup>

The Council is supportive of increasing the funding of RAPs, noting in their submission that:

The VAHC is impressed by the level and quality of work undertaken by RAPs despite their under-resourcing, yet this situation is not sustainable. ... The failure to properly resource RAPs undermines the effective operation of the AHA by restricting RAPs’ ability to carry out their duties within statutory timelines and could potentially have a negative impact on Victorian industry growth and development in this way. Without RAPs, the entire cost of managing cultural heritage would fall back on Government.<sup>459</sup>

<sup>453</sup> GWMWater, submission no. 12, p. 1.

<sup>454</sup> Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc., submission 25, p. 4.

<sup>455</sup> Victorian Registered Aboriginal Parties – joint submission, submission no. 68, p. 7.

<sup>456</sup> Wathaurung Aboriginal Corporation, submission no. 39, p. 4.

<sup>457</sup> *ibid.*

<sup>458</sup> Ms Denise Lovett, Chair, Victorian Aboriginal Heritage Council, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 10.

<sup>459</sup> Victorian Aboriginal Heritage Council, submission no. 30, p. 31.

While some witnesses argued for baseline funding for all RAPs, others have argued that financial assistance should be targeted towards the RAPs located in areas of limited development. In their submission the Australian Association of Consulting Archaeologists (AACAI) wrote that:

AACAI supports any initiative or funding that supports RAPs and particularly outlying rural RAPs that do not have income streams derived from a high volume of CHMP work ... AACAI suggests that perhaps a levee on every evaluation of a CHMP (whether evaluated by a RAP or by the Department of Planning and Community Development) be used and this pool of funds be distributed by the VAHC according to need.<sup>460</sup>

The evidence received by the Committee suggests that the business model currently underpinning the RAP system has a number of limitations. The Committee understands that the RAP system provides RAPs with a high level of autonomy, which provides scope for RAPs to develop relationships with stakeholders in their local area as they choose. Further, as independently incorporated bodies, RAPs are able to make their own decisions regarding how the income generated through the CHMP process is used both within the organisation and beyond in the local Aboriginal community. However, the Committee is of the view that the current business model for RAPs severely limits the ability of some RAPs to provide a consistent level of service to CHMP sponsors, and hampers the capacity of RAPs to undertake long-term and strategic projects. This is a particular concern in areas of low development where few CHMPs are required and thus, limited income is generated to support the ongoing operation of RAPs.

The Committee has also heard from numerous stakeholders that it is the responsibility of the government to ensure that all RAPs can fulfil their statutory responsibilities, regardless of the level of CHMP activity in their area. The Committee acknowledges that RAPs undertake the management of Aboriginal heritage for the benefit of all Victorians. Further, the creation of RAPs has allowed government to delegate a number of statutory roles and limit the amount of resources needed to undertake heritage assessments.

In relation to the current business model for RAPs, the Committee recommends that:

#### **RECOMMENDATION 6.6**

The Victorian Government and Aboriginal Affairs Victoria review the level of assistance provided to Registered Aboriginal Parties, to reflect the principle that Registered Aboriginal Parties undertake the management and protection of Aboriginal heritage on behalf of all Victorians.

As RAPs are appointed to protect heritage on behalf of all Victorians, it is necessary that all RAPs be supported to sustain their operations at a minimum level. Accordingly, the Committee recommends that:

---

<sup>460</sup> Australian Association of Consulting Archaeologists Inc., submission no. 62, p. 2.

**RECOMMENDATION 6.7**

Aboriginal Affairs Victoria identifies a structure that provides ongoing support to Registered Aboriginal Parties to ensure that every Registered Aboriginal Party is able to sustain a minimal level of staffing and infrastructure to support their operations.

Evidence received by the Committee suggests that the appointment of RAPs has resulted in cost savings for AAV, as their staff members are no longer required to assess CHMPs in those areas. In this way, there may be existing resources within AAV that could be redirected to support RAPs to fulfil their statutory responsibilities. On the issue of identifying additional resources for RAPs, the Committee recommends that:

**RECOMMENDATION 6.8**

Aboriginal Affairs Victoria reviews the resources currently available to its heritage branch, with a view to identifying those resources that may be redirected to support the operations of Registered Aboriginal Parties.

To ensure that RAPs are able to develop as sustainable organisations, the Committee recommends that:

**RECOMMENDATION 6.9**

Aboriginal Affairs Victoria continues to make business planning advice available to Registered Aboriginal Parties, with a view to supporting all Registered Aboriginal Parties to maximise income generation opportunities outside the process of assessing Cultural Heritage Management Plans.

As part of business planning, it would be appropriate for RAPs to consider the support and advice offered by Business Victoria and Tourism Victoria. RAPs could also consider the possibility of developing commercial ecotourism and heritage tourism operations. Further, RAPs should be encouraged to explore partnerships, grants and fee-for-service opportunities within their local communities and at both local and federal government levels.

**6.8.1 Industry support for Registered Aboriginal Parties**

The introduction of the Act has led to significant growth in the cultural heritage advisor industry. PricewaterhouseCoopers has argued that this growth is not related to an increase in the number of CHMPs – as these roughly correlate to the number of heritage assessments that were

completed under the previous system – but to an increased demand for more complex, and thus more costly, heritage assessments.<sup>461</sup> PricewaterhouseCoopers has estimated that the cultural heritage advisor industry received a combined \$42.71 million from CHMP preparation fees in 2010–2011.<sup>462</sup> Further, prior to the introduction of the Act 60 cultural heritage advisors operated in Victoria; as at November 2011, 163 cultural heritage advisors were registered with AAV.<sup>463</sup>

Currently, cultural heritage advisors must apply to AAV for access to the Victorian Aboriginal Heritage Register, which is essential to the performance of their role under the Act. When applying for access to the register, cultural heritage advisors must supply proof of their qualifications (for example, an academic transcript), and are able to nominate whether they wish to have their name included on a public list of qualified cultural heritage advisors.<sup>464</sup> This list of appropriately qualified cultural heritage advisors is maintained by AAV and published on DPCD's website to assist sponsors. There is currently no cost to cultural heritage advisors associated with this process.

The review of the Act conducted by AAV explored introducing an accreditation system for cultural heritage advisors, to supplement or replace the current Ministerial guidelines. The review found mixed support for this proposal, with some cultural heritage advisors arguing that it was unnecessary and could restrict the number of heritage advisors available to work in the industry.<sup>465</sup> The Committee also received evidence on this issue from Heritage Insight, a heritage consultancy, which argued that:

The position of cultural heritage advisors also needs to be considered if the Act is amended. Many advisors have invested heavily in equipment and staff in order to comply with the Act. The Act has encouraged the growth of heritage consulting firms, and the impact of any changes to the legislation on these firms should be considered, as it may result in potential job losses and the collapse of some businesses.<sup>466</sup>

The Committee heard evidence from some cultural heritage advisors, who noted the disparity in income generated from CHMPs by cultural heritage advisors and RAPs. At a public hearing in Melbourne Mr Nicholas Clark estimated that the split in CHMP fees between cultural heritage advisors and RAPs is 'two-thirds to the heritage adviser, one-third to the registered Aboriginal party'.<sup>467</sup> Mr Clark argued that this is related to the volume of work that the Act requires cultural

---

<sup>461</sup> PricewaterhouseCoopers, *Socioeconomic impacts of the Aboriginal Heritage Act 2006*, PricewaterhouseCoopers, Melbourne, 2012, p. 39, accessed 9 October 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

<sup>462</sup> *ibid.*

<sup>463</sup> *ibid.*

<sup>464</sup> Aboriginal Affairs Victoria, *Victorian Aboriginal Heritage Register – application to be listed as a cultural heritage advisor*, Department of Planning and Community Development, Melbourne, 2010, accessed 9 October 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/cultural-heritage-advisors](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/cultural-heritage-advisors).

<sup>465</sup> Aboriginal Affairs Victoria, *Summary report: Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2012, p. 8, accessed 9 October 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

<sup>466</sup> Heritage Insight, submission no. 65, p. 6.

<sup>467</sup> Mr Nicholas Clark, Heritage Advisor, Clarkeology, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 51.

heritage advisors to undertake when preparing a CHMP, which could in future be minimised by amendments to the Act and Regulations. Mr Clark explained the complexities of the process of developing a CHMP in the following way:

I have to write a book about every project. It might be a three-lot subdivision in suburban Frankston that has triggered the requirement for a cultural heritage management plan, but I still have to write that enormous document with all of the background history and the ethnography and I have to go and dig holes and sieve things by hand when it is quite clear that the risk of there being sites in those locations is almost zero.<sup>468</sup>

In their review of the Act, AAV found that most stakeholders were supportive of simplifying the technical requirements for CHMPs, to 'allow for some flexibility according to the needs of the sponsor or the specific project', and 'a more user friendly format designed to be more accessible for sponsors'.<sup>469</sup> Simplification of the technical requirements for CHMPs could also result in significant cost savings for sponsors, particularly if it reduces the quantity and complexity of the work that cultural heritage advisors need to perform.

The Committee is of the view that the cultural heritage advisor industry has been a major beneficiary of the Act, particularly through the CHMP process. Although this is clearly a positive development for the industry, and has led to increased employment opportunities for qualified cultural heritage advisors, there is concern that this new field is largely unregulated. In contrast, the Act and its Regulations have developed a robust framework for supporting the activities and conduct of RAPs.

The Committee contends that the long-term viability of the RAP system could be enhanced if industry expanded its contribution to the sector. The development of a sustainable RAP system is not only of benefit to individual RAPs, but cultural heritage advisors who benefit from income generation opportunities created by the Act and from the knowledge and expertise of RAPs.

The Committee therefore recommends that:

#### **RECOMMENDATION 6.10**

Aboriginal Affairs Victoria develops a licensing and accreditation system for cultural heritage advisors, including the development of policy guidelines for the conduct of cultural heritage advisors. This licensing system, to be established by Aboriginal Affairs Victoria, should include an annual registration fee that is to be used by Registered Aboriginal Parties in the resourcing of Aboriginal cultural heritage activities, such as country mapping.

<sup>468</sup> *ibid.*

<sup>469</sup> Aboriginal Affairs Victoria, *Summary report: Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2012, p. 6, accessed 9 October 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).



The Committee acknowledges that through the CHMP process sponsors have supported the operations of RAPs. However, some stakeholders to the inquiry have suggested that sponsors could further support the protection of Aboriginal cultural heritage. For example, the Australian Association of Consulting Archaeologists argued that a levy could be applied to all CHMPs to be used by AAV or the Council to support RAPs.<sup>470</sup> One RAP – Martang Pty Ltd – made a similar suggestion in relation to a possible levy on sponsors that could be used to fund country mapping.<sup>471</sup>

Although the primary contact that many sponsors have with RAPs is through the CHMP process, sponsors may also benefit from the work undertaken by RAPs outside this process. For example a program of country mapping, as discussed earlier, has the potential to significantly lower the future cost of CHMPs, which will greatly benefit sponsors. Further, the development of a sustainable RAP system benefits sponsors by ensuring that all RAPs have sufficient capacity to respond to sponsors' requests, reducing time delays associated with intermittent staffing levels.

On the issue of extending the support of CHMP sponsors for the protection of Aboriginal cultural heritage, the Committee recommends that:

#### **RECOMMENDATION 6.11**

Aboriginal Affairs Victoria develops an Aboriginal heritage protection levy to be paid by all Cultural Heritage Management Plan sponsors, to be used to fund heritage protection activities and Registered Aboriginal Parties, particularly those located in areas of low development. The levy would operate on a sliding scale based on the total cost of producing a Cultural Heritage Management Plan.

### **6.8.2 Opportunities for Registered Aboriginal Parties within the cultural heritage advisor industry**

While it is difficult to assess the total revenue generated by RAPs through the CHMP process, as noted above, PricewaterhouseCoopers estimates that RAPs receive only 20–30 per cent of the total cost of a CHMP. As part of the review of the Act, AAV sought views 'on possible option[s] to make the cultural heritage management plan process more equitable in terms of the distribution of fees between cultural heritage advisors and Registered Aboriginal Parties'.<sup>472</sup> This suggestion was met with mixed responses. For example, some cultural heritage advisors argued to the review that they receive a greater share of the cost of a CHMP as they do more work to prepare the CHMP than the RAP.<sup>473</sup> In contrast, the Victorian Traditional Owner Land Justice Group suggested an alternative CHMP model whereby sponsors would directly engage RAPs to prepare

<sup>470</sup> Australian Association of Consulting Archaeologists, submission no. 62, p. 2.

<sup>471</sup> Martang Pty Ltd, submission no. 68, p. 5.

<sup>472</sup> Aboriginal Affairs Victoria, *Summary report: Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2012, p. 9, accessed 9 October 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

<sup>473</sup> *ibid.*

CHMPs, with RAPs subcontracting work to other experts as needed.<sup>474</sup> Other stakeholders noted that conflicts of interest could potentially arise if RAPs were to both prepare and assess CHMPs in-house.<sup>475</sup>

The Council recently commissioned a report on the cultural heritage advisor industry, which also explored ways to increase the involvement of both RAP staff and other Aboriginal people in the sector. The report found that:

Aboriginal people (either working for RAPs or not) consistently expressed a desire to find work managing the heritage of their Country, either by having the RAPs act as CHAs [cultural heritage advisors] or through other means (such as community education).<sup>476</sup>

Although there are difficulties in gathering data relating to the employment of Aboriginal people within the industry, the report estimates that between five and ten Aboriginal people are currently employed as cultural heritage advisors.<sup>477</sup>

The report identified the current Ministerial guidelines for cultural heritage advisors as a major impediment to the increased participation of Aboriginal people in the cultural heritage advisor industry. As discussed above, a sponsor must engage a cultural heritage advisor to prepare a CHMP on their behalf. The Act defines a cultural heritage advisor as someone who:

- (a) is appropriately qualified in a discipline directly relevant to the management of Aboriginal cultural heritage, such as anthropology, archaeology or history; or
- (b) has extensive experience or knowledge in relation to the management of Aboriginal cultural heritage.<sup>478</sup>

The Minister is responsible for issuing guidelines that specify the appropriate qualifications required to attain recognition of being a cultural heritage advisor for the purposes of the Act. Currently, the Ministerial guidelines do not provide any direction on how individuals with 'extensive experience or knowledge', but no formal qualifications, may operate as cultural heritage advisors.<sup>479</sup>

---

<sup>474</sup> *ibid.*

<sup>475</sup> Libby Riches Cultural Heritage Services, *Aboriginal cultural heritage industry evaluation: A paper prepared for the Victorian Aboriginal Heritage Council and Aboriginal Affairs Victoria*, Melbourne, Libby Riches Cultural Heritage Services, 2012, pp. 17–18, accessed 11 October 2012, [www.dpcd.vic.gov.au/\\_\\_data/assets/pdf\\_file/0009/111123/Aboriginal-cultural-heritage-management-industry-report-June-2012.pdf](http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0009/111123/Aboriginal-cultural-heritage-management-industry-report-June-2012.pdf).

<sup>476</sup> *ibid.*, p. 21.

<sup>477</sup> *ibid.*, p. 9.

<sup>478</sup> *Aboriginal Heritage Act 2006* (Vic) s. 189.

<sup>479</sup> Libby Riches Cultural Heritage Services, *Aboriginal cultural heritage industry evaluation: A paper prepared for the Victorian Aboriginal Heritage Council and Aboriginal Affairs Victoria*, Melbourne, Libby Riches Cultural Heritage Services, 2012, p. 23, accessed 11 October 2012, [www.dpcd.vic.gov.au/\\_\\_data/assets/pdf\\_file/0009/111123/Aboriginal-cultural-heritage-management-industry-report-June-2012.pdf](http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0009/111123/Aboriginal-cultural-heritage-management-industry-report-June-2012.pdf).

The report commissioned by the Council suggested that a system of recognition of prior learning could be introduced to form part of an accreditation process for all cultural heritage advisors, which would recognise skills acquired outside formal education.<sup>480</sup> The report also supported the recently developed Certificate IV in Aboriginal Cultural Heritage Management, which was designed to address skill shortages within RAPs, and has been ‘delivering positive employment outcomes’ for Aboriginal people in RAPs, government land management agencies and the private heritage advisor sector.<sup>481</sup>

The Committee considers it desirable to increase the participation of Aboriginal people – including those employed by RAPs – in the cultural heritage industry. The Committee is also of the view that building the skills and education of RAP employees can lead to increased opportunities for income generation, which will support the long-term financial sustainability of RAPs. Further, while there may be potential conflicts of interest related to RAPs preparing CHMPs in-house, this proposal could also streamline the CHMP process for both sponsors and RAPs by minimising the need to consult with third party cultural heritage advisors.

In relation to the increased involvement of Aboriginal people within the cultural heritage advisor industry, the Committee recommends that:

#### **RECOMMENDATION 6.12**

The Minister review the current guidelines for cultural heritage advisors to address section 189 (b) of the *Aboriginal Heritage Act 2006* (Vic), which provides for the recognition of ‘extensive experience or knowledge in relation to the management of Aboriginal cultural heritage’.

On the issue of expanding the opportunities for RAPs to participate within the cultural heritage advisor industry, the Committee recommends that:

#### **RECOMMENDATION 6.13**

Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council work with Registered Aboriginal Parties to identify further opportunities for participation in the cultural heritage advisor industry. This should include the development of a policy framework to support Registered Aboriginal Parties to produce Cultural Heritage Management Plans in-house.

---

<sup>480</sup> *ibid.*, p. 18.

<sup>481</sup> *ibid.*, p. 10. See also Department of Planning and Community Development (Aboriginal Affairs Victoria), submission no. 57, pp. 33–34.

## 6.9 Relationship between Registered Aboriginal Parties and the Victorian Aboriginal Heritage Council

While the Council has taken on the role of supporting RAPs through forums, the Act does not provide for the Council to have an ongoing monitoring or support role in relation to RAPs. Under the Act the Council does, however, have the power to suspend or revoke the registration of a RAP, but may only do so if the Council believes that a RAP has not acted in good faith ‘in the discharge of any of its functions or the exercise of any of its power under the Act’.<sup>482</sup>

As part of the review of the Act, AAV considered a number of options to alter the relationship between established RAPs and the Council. In particular, AAV suggested that the introduction of ‘a system to support the effective performance of Registered Aboriginal Parties’, under which additional roles be assigned to the Council including the requirement to:

Review the operation of all Registered Aboriginal Parties, apply new conditions on the operation of a Registered Aboriginal Party where reasonable and may also include an ongoing monitoring role to ensure the requirements of the Act are being met.<sup>483</sup>

After consulting with stakeholders, AAV found that these proposals were ‘mostly supported’, although it was also noted that ‘some concerns were raised about the Council establishing and maintaining a system to support the effective performance of Registered Aboriginal Parties unless by mutual agreement’.<sup>484</sup>

The Council itself suggested that its roles in relation to RAPs could be expanded:

Five years on from the enactment of the AHA, the VAHC believes that it is appropriate that its role is expanded in recognition of its successful development as a statutory authority with established policies [sic] and procedures and also because its work in appointing RAPs is finite. The VAHC welcomes the opportunity to take on greater responsibility in terms of monitoring and supporting RAPs, yet only if this function is appropriately resourced.<sup>485</sup>

Amongst the new roles suggested by the Council, was the power to attach conditions to the appointment of a RAP, such as nominating ‘when an appointment becomes effective and/or specifying requirements for governance, accountability and inclusiveness’.<sup>486</sup> The Committee heard that a few of the established RAPs have experienced governance issues relating to inclusiveness provisions. For example, both the South West Victorian Traditional Owners Group

<sup>482</sup> *Aboriginal Heritage Act 2006* (Vic) s. 156.

<sup>483</sup> Aboriginal Affairs Victoria, *Summary report: Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2012, p. 22, accessed 18 September 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

<sup>484</sup> *ibid.*

<sup>485</sup> Victorian Aboriginal Heritage Council, submission no. 30, p. 32.

<sup>486</sup> Victorian Aboriginal Heritage Council, submission no. 66, p. 10.

and Mr Geoff Clark have argued that the membership structure of Martang Pty Ltd is not inclusive of all relevant traditional owners.<sup>487</sup>

The Committee did not hear a significant amount of evidence relating to the relationship between the Council and the established RAPs, although this is unsurprising given the limited statutory role that Council currently has. Notably, the Municipal Association of Victoria supported 'the [Victorian] Aboriginal Heritage Council having a role in measuring the performance of Registered Aboriginal Parties'.<sup>488</sup>

In their joint submission to the inquiry, the established RAPs recommended that the Council take on a greater role in educating the public about Aboriginal heritage, in order to:

Improve public awareness, to facilitate strategic research into aboriginal cultural heritage in Victoria and reporting on the state of cultural heritage in Victoria. We believe that this is only possible if the Council is properly funded and resources [sic] to undertake this role.<sup>489</sup>

Similarly, the Wathaurung Aboriginal Corporation argues that both RAPs and the Council require greater resources in order to facilitate public education.<sup>490</sup>

The Committee acknowledges that the priority for the Council during its first five years has been the appointment of RAPs. The Committee is also aware that the Act does not empower the Council to play an ongoing role in monitoring or supporting the activities of RAPs. However, as the body responsible for 'registering' Registered Aboriginal Parties, the Committee considers it the responsibility of the Council to be involved both in assessing the performance of RAPs, and supporting RAPs to fulfil their statutory obligations. For example, the Committee recognises the important role that the Council has played in facilitating forums for RAPs to meet and discuss their shared experiences.

It would therefore be appropriate for the Council to oversee the activities of RAPs through general and financial reports about their operations; to monitor the relationships between RAPs and the sponsors of CHMPs; and to ensure that RAPs maintain inclusive governance structures that include all of an area's relevant traditional owners. In asserting this the Committee is aware that expanding the responsibilities of the Council has resource implications for government.

---

<sup>487</sup> South West Victorian Traditional Owners Land Justice Group, submission no. 17; Geoff Clark (Eastern Maar Traditional Owner Group), submission no. 51. See also other submissions that raise the issue of inclusiveness: Yorta Yorta Nation Aboriginal Corporation, submission no. 40; Bangerang Cultural Centre Cooperative Ltd, submission no. 21.

<sup>488</sup> Municipal Association of Victoria, submission no. 70, p. 1.

<sup>489</sup> Victorian Registered Aboriginal Parties – joint submission, submission no. 68, p. 5.

<sup>490</sup> Wathaurung Aboriginal Corporation, submission no. 39, p. 3.

On the subject of expanding the legislative responsibilities of the Council in relation to RAPs, the Committee recommends that:

#### **RECOMMENDATION 6.14**

The *Aboriginal Heritage Act 2006* (Vic) be amended to empower the Victorian Aboriginal Heritage Council to have oversight of Registered Aboriginal Parties in relation to the performance of their statutory duties on an annual basis. In addition, the Act will also be amended to provide for the Victorian Aboriginal Heritage Council to attach conditions to both the initial appointment and ongoing registration of Registered Aboriginal Parties.

In order to support the Council in its new role of monitoring the activities of RAPs, the Committee recommends that:

#### **RECOMMENDATION 6.15**

Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council develop policy guidelines to support the Council to monitor the performance and activities of Registered Aboriginal Parties. The guidelines should provide direction on how to assess:

- whether a Registered Aboriginal Party has adequately fulfilled its legislative responsibilities;
- the conduct of a Registered Aboriginal Party in relation to the preparation and assessment of Cultural Heritage Management Plans, including the appropriateness of any fees charged;
- the inclusiveness of the membership rules and governance structure of a Registered Aboriginal Party; and
- whether any conditions imposed by the Victorian Aboriginal Heritage Council are being met.

On the issue of resourcing the Council to monitor and support RAPs, the Committee recommends that:

#### **RECOMMENDATION 6.16**

The Victorian Government and Aboriginal Affairs Victoria review the resources provided to the Victorian Aboriginal Heritage Council, with a view to ensuring that the Council can undertake all additional responsibilities.



# Chapter seven

---

## *Traditional owners in areas without a Registered Aboriginal Party*

### KEY FINDINGS

---

- 7.1 In the view of traditional owners, the responsibility to care for their heritage persists whether or not a traditional owner group is associated with an established Registered Aboriginal Party.
  - 7.2 Many traditional owners who are not associated with an appointed Registered Aboriginal Party desire to play a stronger role in the consultation process for Cultural Heritage Management Plans.
  - 7.3 Sponsors of Cultural Heritage Management Plans usually prefer to consult only with appointed Registered Aboriginal Parties, rather than with organisations applying to become a Registered Aboriginal Party. This is especially so in areas where there are multiple Registered Aboriginal Party applications.
  - 7.4 Industry groups have indicated that they wish that the appointment process for Registered Aboriginal Parties is expedited in order that the whole of the state is covered by a Registered Aboriginal Party.
- 

### **7.1 Introduction**

In examining the effectiveness of Registered Aboriginal Parties (RAPs), the Committee heard evidence from a number of traditional owners who felt disenfranchised from the system of heritage protection established by the *Aboriginal Heritage Act 2006* (Vic) (the 'Act'). In particular, the Committee heard from some traditional owner groups – including both current and former RAP applicants – who argued that the need to protect their heritage continued to exist whether or not their group attained RAP status.

This chapter examines issues specific to those areas of the state without an appointed RAP, including the role of RAP applicant groups in the development of Cultural Heritage Management Plans (CHMPs), and the roles of Aboriginal Affairs Victoria (AAV) and the Victorian Aboriginal Heritage Council (the 'Council') in these areas. In addressing term of reference (c) relating to the



effectiveness of RAPs, the Committee acknowledged that it was appropriate to also consider the concerns of those traditional owners who are not represented by an appointed RAP.

## **7.2 Areas without an appointed Registered Aboriginal Party**

The Council is yet to appoint a RAP for approximately 44 per cent of the area of Victoria. Much of this area is subject to a number of pending RAP applications and as discussed in chapters three and five, is the site of conflict both between and within traditional owner groups. Uncertainty around the boundaries of traditional owner groups has meant that there are parts of the state without a RAP that have been subject to overlapping RAP applications from different traditional owner groups. For example:

- Far East Gippsland: Evidence received by the Committee demonstrates that this region is contested, to varying extents, by the Gunaikurnai, Monero, Cann River, Ngarigo and Bidwell traditional owner groups.
- The Otways region: The Committee has heard that this area has been claimed by a number of competing organisations from the Kirrae Wurrung (Eastern Maar), Gujalin and Gadubanud traditional owner groups.

Some areas without RAPs have been subject to applications from different organisations claiming to represent the same traditional owner group. This is the case on the Mornington Peninsula where there exist two groups both claiming to represent Boon Wurrung traditional owners.

The North West (including Mildura, Swan Hill and Kerang) is another significant region without an appointed RAP. Organisations representing the Latji Latji and Tati Tati traditional owner groups currently have RAP applications before the Council. There are also several traditional owner groups located in this region that have not yet sought RAP status (such as the Ngintait, Wadi Wadi, Wamba Wamba, and Barapa Barapa traditional owner groups).

The North East (including Wodonga, Bright and Corryong) is another area without an appointed RAP, although it has been subject to unsuccessful RAP applications from members of the Dhudhuroa, Waywurru and Yaitmathang groups.

### **7.2.1 *Experiences of traditional owners in areas without an appointed Registered Aboriginal Party***

The Committee has heard evidence from groups and individuals without RAP status, including some declined RAPs, who argued that the duty of traditional owners to care for heritage sites persists whether or not a group has been registered as a RAP. Some traditional owners without RAP status felt that it was difficult for them to protect their heritage sites, and be acknowledged by both AAV and sponsors during the development of CHMPs.

The Victorian Traditional Owners Land Justice Group (VTOLJG) argued that many traditional owners felt frustrated with the RAP system because:

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.<sup>491</sup>

Some traditional owners who were involved in the previous heritage system under Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) noted that they now felt excluded from heritage protection activities. For example, Mr John ‘Sandy’ Atkinson described his frustration with the RAP system:

We have no authority whatsoever since that came into place. ... We built relationships, we built partnerships — we built all the things that indigenous people need to do to progress through society. And all of those things have been destroyed, wrecked. They are gone. Until this is cleaned up — even when this is cleaned up, we will have to start all over again and build those bridges, relationships and partnerships all over again.<sup>492</sup>

In a similar way, at a public hearing in Melbourne Mr Jida Gulpilil-Murray, from the Barapa Barapa traditional owner group argued that the current Act ‘has destroyed a lot more sites, and we still do not know how many, because there has not been any sort of audit’ ...<sup>493</sup>

Other witnesses argued that neither the previous legislative system nor the current Act adequately engaged traditional owners in the protection of their heritage. In this way, Mr Richie Kennedy from the Tati Tati traditional owner group, argued that:

When the cooperatives were managing cultural heritage, the situation was an absolute disgrace. But under the current system, traditional owners are still not sufficiently recognised as the sole custodians of cultural heritage. At present, as traditional owners and the rightful owners of the cultural heritage in our country, we have no say in that land.<sup>494</sup>

Another concern of traditional owners living in areas without a RAP was that the current Act did not provide for appropriate protection of heritage sites in these areas. At the Lakes Entrance hearing Ms Aileen Blackburn explained her concerns regarding the protection of heritage sites:

There is this understanding that the legislation is protecting our sites. Quite frankly, it is not. Our sites are being exposed to a high level of potential risks. Prior to the RAP process, in East Gippsland we had archaeological surveys done, but generally they were just done in response to things like, ‘If there is going to be logging in one

<sup>491</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 2.

<sup>492</sup> Mr John ‘Sandy’ Atkinson, Elder, Bangerang Cultural Centre Cooperative Ltd, Environment and Natural Resources Committee public hearing – Shepparton, 15 May 2012, transcript of evidence, p. 140.

<sup>493</sup> Mr Jida Gulpilil-Murray, Barapa Barapa Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne, 28 May 2012, transcript of evidence, pp. 209–210.

<sup>494</sup> Richie Kennedy (Tati Tati Aboriginal Corporation), submission no. 54, p. 1.

area, we had better survey it' ... There are sites out there that have not even been recorded.<sup>495</sup>

Concerns about the protection of heritage sites in areas without RAPs were also echoed by RAPs who still had an application before the Council to extend their area of responsibility. As Mr Ron Jones, member of the Wurundjeri Tribe Land and Compensation Cultural Heritage Council, noted:

I am seeing a lot of stuff being destroyed, and we have no input in the non-RAP area. It is pretty sad to see some of the beautiful sites in our area being destroyed. With a little bit of consultation, maybe some of those sites could be protected for future generations ...<sup>496</sup>

Although it is difficult to assess whether or not heritage sites are being destroyed in areas without a RAP, the Committee acknowledges that some traditional owners are concerned about the capacity of both the Act and AAV to protect heritage in these areas. The Committee understands that it is the responsibility of AAV to oversee the enforcement of the Act, and that options to improve the enforcement process have been considered as part of AAV's review of the Act.<sup>497</sup> The Committee also acknowledges that as many traditional owners live on country, they are often able to monitor heritage sites more closely and regularly than AAV staff members. It may be the case that the avenues of communication between AAV and traditional owners who are not associated with a RAP need improvement, particularly in relation to possible breaches of the Act.

Evidence presented to the Committee throughout the inquiry indicates that the system of RAPs has not only delivered certainty for landholders, but has enabled traditional owners to participate in the management of their own heritage. In particular, the use of CHMPs has allowed both sponsors and RAPs to identify and manage Aboriginal heritage values early on in the development process, thus minimising the potential for unwanted damage.

In chapter five, the Committee made a number of recommendations designed to expedite the appointment of RAPs for the remainder of Victoria. In particular, it was recommended that further resources be made available to support RAP applicant groups to prepare applications; to assist the Council to inquire into matters relevant to RAP applications; and to provide opportunities for mediation between overlapping and competing RAP applicant groups. The Committee is hopeful that, if adopted, these recommendations may streamline the RAP appointment process and minimise those areas of the state without a RAP.

However, the Committee acknowledges that this process will take time, and that in the interim it is important that heritage protection be properly afforded to those areas of the state without a RAP. AAV remains the statutory authority for those areas. It is therefore incumbent upon AAV to

---

<sup>495</sup> Ms Aileen Blackburn, Environment and Natural Resources Committee public hearing – Lakes Entrance, 24 April 2012, transcript of evidence, p. 123.

<sup>496</sup> Mr Ron Jones, Elder, Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc., Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 14.

<sup>497</sup> Aboriginal Affairs Victoria, *Summary report: Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2012, pp. 31–33, accessed 26 September 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

ensure that the concerns of traditional owners regarding local heritage, including heritage sites at potential risk of damage or destruction, be listened to and where appropriate, acted upon.

In relation to the protection of heritage in those areas of the state without a RAP, the Committee recommends that:

### **RECOMMENDATION 7.1**

Aboriginal Affairs Victoria, on behalf of the Secretary of the Department of Planning and Community Development, continue to manage Aboriginal heritage in those areas of the state without a Registered Aboriginal Party, ensuring that the concerns of traditional owners located in these areas in relation to the ongoing protection of known heritage sites are considered and where appropriate, acted on.

In chapter six the Committee argued that AAV should review the resources currently available to its heritage branch, with a view to directing resources to support the operations of RAPs. However, given the above considerations, it will be important that AAV does retain sufficient resources in order to fulfil its ongoing statutory obligations in those areas of the state that do not have an appointed RAP.

## **7.3 Cultural Heritage Management Plans in areas without an appointed Registered Aboriginal Party**

Under the Act, organisations that have applied for RAP status have no formal role in the development and assessment of CHMPs. In areas without an appointed RAP AAV, on behalf of the Secretary of the Department of Planning and Community Development (DPCD), is the body that assesses CHMPs.

The Committee heard from a number of Aboriginal stakeholders that the Act's requirement that only RAPs be formally consulted as part of the CHMP process unfairly excludes those traditional owners who are not associated with a RAP, including those traditional owners that have a RAP application currently before the Council. According to the VTOLJG:

By requiring that only 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.<sup>498</sup>

Heritage Insight, a cultural heritage consultancy, argued in a similar way that:

Where there is no RAP Aboriginal people are also effectively disenfranchised from any role in cultural heritage management, unless either sponsors, the Victorian Government through Aboriginal Affairs Victoria or individual cultural heritage advisors choose to engage with the community. This effectively means that non-

<sup>498</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 2.

RAP groups in areas where no RAPs are appointed, have no statutory role in protecting Aboriginal heritage and very little voice in the heritage management process.<sup>499</sup>

While traditional owners not associated with a RAP have no prescribed role under the Act, DPCD is required to consider the view of ‘any Aboriginal person or Aboriginal body that the Secretary considers relevant’ when assessing a CHMP application for an area without an appointed RAP.<sup>500</sup> In practice, this has meant that AAV will often consider the views of RAP applicant groups when assessing CHMPs.

Moreover, the Committee heard that despite the fact that the Act does not require sponsors to consult with bodies that are not RAPs, a number of sponsors do involve RAP applicants and other traditional owner groups in the preparation of CHMPs. In some instances, this has resulted in sponsors consulting with a number of competing and overlapping traditional owner groups, which can be a costly and drawn-out process.

### **7.3.1 Experiences of sponsors in areas without a Registered Aboriginal Party**

The Committee received evidence from a number of CHMP sponsors who do consult with RAP applicants, and who reported difficulties in consulting with overlapping or competing traditional owner organisations. Moreover, a number of sponsors argued that it was often difficult to determine which groups to involve in consultation processes in areas without RAPs. For example, VicForests outlined the difficulties that they have experienced in identifying the appropriate groups to include in consultation:

In the past, we have certainly sought to engage with the most relevant party and sought advice from AAV. That has not always been clear to us – who that is – and in some circumstances we have done the best we can.<sup>501</sup>

VicRoads has also reported that they frequently consult with groups that are not RAPs. At a public hearing in Melbourne, Mr Christopher Reeve explained VicRoad’s approach to consultation in the following way:

Where there is no RAP we will consult early and often with AAV. We get the involvement of any RAP applicants that may be involved in a particular area, and AAV will consult with RAP applicants as well during their evaluation of the plan.<sup>502</sup>

---

<sup>499</sup> Heritage Insight, submission no. 65, p. 3.

<sup>500</sup> *Aboriginal Heritage Act 2006* (Vic) s. 65.3.

<sup>501</sup> Mr Nathan Trushell, Director, Corporate Affairs, VicForests, Environment and Natural Resources Committee public hearing – Lakes Entrance, 24 April 2012, transcript of evidence, p. 110.

<sup>502</sup> Mr Christopher Reeve, Senior Environmental Policy Officer, VicRoads, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence p. 41.

The Municipal Association of Victoria noted that local government stakeholders sometimes found it difficult to consult with groups that were not RAPs:

In areas where there are no Registered Aboriginal Parties there needs to be greater clarity around who should be consulted and when, particularly for Traditional Owners, as well as the weight to be given to their input.<sup>503</sup>

In contrast, one RAP applicant argued that the difficulties associated with consulting with applicant groups had been overstated by CHMP sponsors. At the public hearing in Lakes Entrance, Ms Aileen Blackburn argued that:

On occasions the agencies can hand pick and deal with one applicant and not the others. It is a very convenient argument to say, 'We don't know who to speak to', but it is quite clear that East Gippsland is not that big. Everybody knows each other at Orbost, Cann River and Mallacoota. I do not believe that is a legitimate argument, that having various RAP applicants or various groups to deal with is a legitimate argument for not doing the right process.<sup>504</sup>

As a result of the frustrations of dealing with multiple RAP applicant groups, some stakeholders have urged the Council to accelerate the RAP appointment process. In their submission Cement Concrete and Aggregates Australia wrote that:

AAV is encouraged to support the Aboriginal Heritage Council to finalise the appointment of RAPs across Victoria within a set period to improve certainty for business. Many applications have been with the Council for more than four years. The finalization of these applications should be a matter of priority for all parties.<sup>505</sup>

In a similar way, the Department of Sustainability and Environment noted that 'where RAP applications are yet to be determined, it would be desirable for the Council to resolve these assessments in a timely manner.'<sup>506</sup> The Swan Hill Rural City Council also urged the Council to appoint RAPs within its local area because, 'a Registered Aboriginal Party would allow Council the opportunity to deal directly with one consistent group'.<sup>507</sup>

## 7.4 Guidelines for consulting with traditional owners in areas without an appointed Registered Aboriginal Party

Witnesses to the inquiry put forward a number of suggestions to address the difficulties of dealing with more than one RAP applicant group in areas without an appointed RAP. One former RAP applicant group, the Ella Maar Aboriginal Corporation, argued that RAP applicant groups

<sup>503</sup> Municipal Association of Victoria, submission no. 70, p. 9.

<sup>504</sup> Ms Aileen Blackburn, Environment and Natural Resources Committee public hearing – Lakes Entrance, 24 April 2012, transcript of evidence, p. 122.

<sup>505</sup> Cement Concrete and Aggregates Australia, submission no. 15, p. 2.

<sup>506</sup> Department of Sustainability and Environment, submission no. 18, p. 2.

<sup>507</sup> Swan Hill Rural City Council, submission no. 11, p. 2.

should 'have the same rights as an approved RAP while under consideration', including that sponsors be required to consult with RAP applicant groups when preparing CHMPs.<sup>508</sup>

A number of other witnesses suggested that only AAV – or perhaps the Council – should be involved in areas without an appointed RAP. For example, Mr Roger Buckley, from Cement Concrete and Aggregates Australia argued that only AAV should be involved in the CHMP process, and that this 'may encourage the RAP application process to be finalised in a more timely manner'.<sup>509</sup> In contrast, Mr Geoff Clark from the Eastern Maar Traditional Owner Group suggested that a redesigned Council could take on the role of AAV in areas without a RAP.<sup>510</sup>

In their review of the Act AAV also examined options for consultation in areas without RAPs. The review found that 'stakeholders agreed that the Council providing guidance on who to consult would assist' sponsors, while some 'suggested that Aboriginal Affairs Victoria should play a more active role in these areas'.<sup>511</sup> The review also found support from some Aboriginal stakeholders for the Council to play an expanded role in areas without RAPs, including taking on the Secretary's role of assessing CHMPs and also providing guidance to sponsors on who to consult in these areas.<sup>512</sup> Under this proposal 'all, or the majority of functions currently with the Secretary of the Department of Planning and Community Development' would be transferred to a re-designed Council, which would be developed into a fully independent statutory authority.<sup>513</sup>

The Committee acknowledges evidence from AAV's review of the Act, that there is some support for an expansion of the Council into an independent statutory authority, which would take on the Secretary's current power to assess CHMPs in areas without RAPs. However, the Committee is not aware that, to date, this option has been explored sufficiently by AAV and is thus unable to comment on whether this proposal would improve outcomes for sponsors and traditional owners in areas without a RAP. It may in fact complicate the Council's primary contemporary task of appointing RAPs and would, in any case, have significant funding implications for both AAV and the Council.

In regards to the concerns of industry about expediting the appointment of RAPs for the remainder of the state, the Committee is of the view that the recommendations made in previous chapters will, if implemented, significantly advance the RAP appointment process.

In relation to the suggestion from some stakeholders that applicant RAPs be afforded the same rights as appointed RAPs, including in the development of CHMPs, the Committee is not of the view that this would improve or strengthen the current system.

---

<sup>508</sup> Ella Maar Aboriginal Corporation, submission no. 5, p. 6.

<sup>509</sup> Mr Roger Buckley, Industry Relations Manager, Victoria, Cement Concrete and Aggregates Australia, Environment and Natural Resources Committee public hearing – Melbourne, 27 February 2012, transcript of evidence, p. 44.

<sup>510</sup> Mr Geoff Clark, Eastern Maar Traditional Owner Group, Environment and Natural Resources Committee public hearing – Melbourne, 4 June 2012, transcript of evidence, p. 202.

<sup>511</sup> Aboriginal Affairs Victoria, *Summary report: Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne, 2012, p. 11, accessed 26 September 2012, [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).

<sup>512</sup> *ibid.*

<sup>513</sup> *ibid.*, p. 21.

In terms of the assessment of CHMPs in areas without a RAP, the Committee therefore considers it appropriate for AAV to continue to approve CHMPs, on behalf of the Secretary of DPCD. In doing so, AAV should continue to consider the views of traditional owners who are not associated with a RAP, as directed by the Act. In addition, AAV should ensure that, wherever appropriate, it directs sponsors of CHMPs to the relevant traditional owners for a given area that lacks an appointed RAP.

On the subject of whether AAV or the Council should approve CHMPs in areas without a RAP, the Committee recommends that:

### **RECOMMENDATION 7.2**

The Secretary of the Department of Planning and Community Development continue to be the authority responsible for the approval of Cultural Heritage Management Plans in areas without a Registered Aboriginal Party, and to consider the views of traditional owners in those areas. In addition, Aboriginal Affairs Victoria will ensure that the sponsors of Cultural Heritage Management Plans consult with relevant traditional owners in areas without appointed Registered Aboriginal Parties.

As discussed in chapter four, the Council's current priority is the appointment of RAPs, and the Committee has made a number of recommendations designed to assist the Council with this task. In chapter five, the Committee recommended that the functions of the Council be expanded to include the ongoing monitoring of RAPs. This recommendation is consistent with the current design of the Council as the body solely responsible for the appointment of RAPs.

However, the Committee does acknowledge that once RAPs have been appointed for the bulk of Victoria, the role of the Council may need to be redesigned. In this future context, the Council could become a statutory authority responsible for the administration and enforcement of the Act, including the assessment of CHMPs in those few remaining areas without a RAP.

In relation to possible future roles for the Council, including the possibility of transferring responsibilities from AAV to the Council, the Committee recommends that:

### **RECOMMENDATION 7.3**

Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council examine options for the future role of the Council.

The Committee acknowledges that traditional owners who are not associated with an appointed RAP, including those groups that have a RAP application pending, continue to have traditional responsibilities to protect the heritage in their country. As such, the Committee commends the practices of those CHMP sponsors who regularly involve traditional owners in the preparation of CHMPs in areas without an appointed RAP. However, it is clear that the majority of stakeholders



would prefer to deal only with appointed RAPs, as these groups have been acknowledged as the 'right people for country'.

The Committee also acknowledges that it will take time for the Council to appoint further RAPs and that during this period it would be beneficial to establish clear guidelines to assist sponsors who do wish to consult with RAP applicant groups in the preparation of CHMPs.

The Committee considers that both AAV and the Council have the appropriate knowledge to identify relevant parties to consult in areas without RAPs, and can provide guidance to sponsors as to whether any groups other than current RAP applicants should be involved in consultation.

On the issue of consulting with traditional owners in areas without a RAP, the Committee recommends that:

#### **RECOMMENDATION 7.4**

Aboriginal Affairs Victoria and the Victorian Aboriginal Heritage Council develop policy guidelines to assist sponsors of Cultural Heritage Management Plans to consult with traditional owners in areas without an appointed Registered Aboriginal Party.

### **7.5 Traditional owner groups that do not wish or are unable to become Registered Aboriginal Parties**

The Committee heard from a small number of witnesses who suggested that smaller traditional owner groups did not necessarily want to become a RAP, yet nevertheless wished to be consulted in relation to heritage on their country. Wamba Wamba traditional owner Mr Ken Stewart argued that it was difficult for smaller traditional owner groups to develop the organisational and financial capacity to become a RAP:

It is important to note that not every traditional owner group is actually in the position of applying to become a RAP. It is against the law to set up a corporation to fail; and yet the funding is not available for traditional owner groups to establish RAPs. Our estimates show that it costs about \$300,000 or so per year to run a RAP, whereas Wamba has about \$20,000 per annum available.<sup>514</sup>

In a similar way, the VTOLG noted that although some groups do not have the capacity to become a RAP and operate a heritage business:

At present, applying to become a RAP is the only option available to traditional owner groups wanting to have some of their rights recognised with regards to cultural heritage and in order to be able to access certain resources to carry out their core duties as traditional owners.<sup>515</sup>

---

<sup>514</sup> Ken Stewart (Wamba Wamba Traditional Owner Group), submission no. 55, p. 4.

<sup>515</sup> Victorian Traditional Owners Land Justice Group, submission no. 29, p. 1.

It has been suggested that groups unable to become RAPs could nevertheless be acknowledged as key stakeholders in the heritage system, and have input into the preparation of CHMPs. For example, Mr Darren Perry from the Ngintait traditional owner group argued that:

There needs to be an alternative to the RAP appointment process. For example, in areas where there are no RAPs or where a traditional owner group would not be able to function financially as a RAP, there could be some sort of formal agreement between AAV and the traditional owners relating to cultural heritage management in the area. Such an agreement could provide traditional owners with the right to manage and protect cultural heritage, whilst giving financial responsibility for cultural heritage to AAV.<sup>516</sup>

The majority of the evidence received by the Committee suggested that RAPs provide certainty and clarity to all stakeholders in the Aboriginal heritage system, including traditional owners. In chapter six, the Committee addressed a number of resourcing and capacity issues faced by established RAPs, and made recommendations designed to ensure that RAPs develop into sustainable organisations. It is hoped that these recommendations will make becoming a RAP more achievable for both small traditional owner groups, and those located in areas of low development.

It may also be appropriate for some traditional owner groups to seek to build partnerships with neighbouring groups to pursue RAP status. In all other instances, traditional owner groups in areas without a RAP will continue to be considered by AAV under the Act's requirement that the Secretary 'must consult with, and consider the views of, any Aboriginal person or Aboriginal body that the Secretary considers relevant to the application'.<sup>517</sup>

In relation to the capacity of small traditional owner groups to become RAPs, the Committee recommends that:

#### **RECOMMENDATION 7.5**

The Victorian Aboriginal Heritage Council develop policy guidelines to assist traditional owner groups to build partnerships with neighbouring groups, with a view to forming a single organisation able to apply for appointment as a Registered Aboriginal Party .

**Adopted by the Environment and Natural Resources Committee on  
Monday 22 October 2012**

<sup>516</sup> Darren Perry (Ngintait Traditional Owner Group), submission no. 52, p. 3.

<sup>517</sup> *Aboriginal Heritage Act 2006* (Vic) s. 65.3.



# Appendix one

---

## *List of submissions*

1	Nina Earl
2	Allan Wandin (Wandoon Estate Aboriginal Corporation)
3	Confidential submission
4	Bidwell Maap Nation
5	Ella Maar Aboriginal Corporation
6	Confidential submission
7	Warby Range Landcare Group Inc.
8	WestWind Energy Pty Ltd
9	Commissioner Environmental Sustainability Victoria
10	City of Yarra
11	Swan Hill Rural City Council
12	GWMWater
13	VicForests
14	VicRoads
15	Cement Concrete and Aggregates Australia
16	John Paul
17	South West Victorian Traditional Owners Group
18	Department of Sustainability and Environment
19	Winda-Mara Aboriginal Corporation
20	Victorian Farmers Federation – Wangaratta Branch
21	Bangerang Cultural Centre Cooperative Ltd
22	Gunditj Mirring Traditional Owners Aboriginal Corporation
23	Museum Victoria
24	Pat Larkin

25	Wurundjeri Tribe Land & Compensation Cultural Heritage Council Inc. (see also submission no. 64)
26	Nicholas Clark
27	Nindi-Ngujarn Ngarigo Monero Aboriginal Corporation
28	Garry Murray and Margaret Gardiner
29	Victorian Traditional Owners Land Justice Group
30	Victorian Aboriginal Heritage Council (see also submission no. 66)
31	Environment Institute of Australia and New Zealand
32	Wathaurong Aboriginal Co-operative
33	Wadi Wadi Wamba Wamba Barapa Barapa
34	City of Melbourne
35	Native Title Services Victoria
36	Confidential submission
37	City of Greater Geelong
38	Yarra Ranges Council
39	Wathaurung Aboriginal Corporation
40	Yorta Yorta Nation Aboriginal Corporation
41	Keicha Day
42	Tom Day
43	Minerals Council of Australia
44	Barengi Gadjin Land Council Aboriginal Corporation
45	Aileen Blackburn
46	Bevan Harrison
47	Albert Mullet
48	East Gippsland Shire Council
49	Taungurung Clans Aboriginal Corporation
50	Dja Dja Wurrung Clans Aboriginal Corporation
51	Geoff Clark (Eastern Maar Traditional Owner Group)
52	Darren Perry (Ngintait Traditional Owner Group)
53	Ron Arnold (Gulajin Traditional Owner Group)
54	Richie Kennedy (Tati Tati Aboriginal Corporation)
55	Ken Stewart (Wamba Wamba Traditional Owner Group)

56	Skeet and Sylvia Morrow Pty Ltd
57	Department of Planning and Community Development (Aboriginal Affairs Victoria)
58	John ‘Sandy’ Atkinson
59	Port Phillip and Westernport Catchment Management Authority
60	Martang Pty Ltd
61	Max Schier
62	Australian Association of Consulting Archaeologists Inc.
63	Crowther and Sadler Pty Ltd
64	Wurundjeri Tribe Land & Compensation Cultural Heritage Council Inc. (see also submission no. 25)
65	Heritage Insight Pty Ltd
66	Victorian Aboriginal Heritage Council (see also submission no. 30)
67	Merri Creek Management Committee
68	Victorian Registered Aboriginal Parties – joint submission
69	Heritage Council of Victoria
70	Municipal Association of Victoria



# Appendix two

---

## *List of public hearings*

### **27 FEBRUARY 2012 – MELBOURNE**

#### **Victorian Aboriginal Heritage Council**

Ms D Lovett, Chair

Mr M Harding, Deputy Chair

Ms E Bourke, Council Member

#### **Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc.**

Mr A Palmerton, Cultural Heritage Archaeologist

Mr R Jones, Elder

#### **Yarra Ranges Shire Council**

Mr G Detez, Indigenous Development Officer

#### **Native Title Services Victoria**

Mr M Storey, Chief Executive Officer

Ms E Alberts, Board Member

Mr D Yarrow, Legal Adviser

#### **Victorian Traditional Owners Land Justice Group**

Ms A Xiberras, Co-Chair

Mr D Yarrow, Legal Adviser

#### **VicRoads**

Dr H Murphy, Director, Environment Sustainability

Mr C Reeve, Senior Environmental Policy Officer

#### **Cement Concrete and Aggregates Australia**

Mr D Pallot, Chairman, Victoria, Cement Concrete and Aggregates Australia, and Regional General Manager, Hanson

Mr R Buckley, Industry Relations Manager, Victoria



**Clarkeology**

Mr N Clark, Heritage Adviser

**WestWind Energy**

Mr P J Burn, Project Development and Planning

**Wathaurong Aboriginal Co-operative**

Ms J Sizer, Chairperson

Ms T Currie, Chief Executive Officer

Mr R Abrahams, Cultural Heritage Adviser

Mr C Edwards, Manager, Community Services

**Wandoon Estate Aboriginal Corporation**

Mr A Wandin, Director

**20 MARCH 2012 – HAMILTON**

**Gunditj Mirring Traditional Owners Aboriginal Corporation**

Ms K Day, Lake Condah Project Officer

Mr T Day, Chief Executive Officer

**Winda-Mara Aboriginal Corporation**

Mr M Bell, Chief Executive Officer

**Grampians Wimmera Mallee Water**

Mr S Jewell, Executive Manager, Sustainable Water and Infrastructure

Mr N Binney, Manager, Sustainable Resources

**Wathaurung Aboriginal Corporation**

Mr B Powell, Chairperson

Mr J Young, RAP Manager

**Barengi Gadjin Land Council Aboriginal Corporation**

Ms K Hunt, RAP Manager

**24 APRIL 2012 – LAKES ENTRANCE**

**East Gippsland Shire Council**

Ms K Nelson, Director Planning and Community

**VicForests**

Mr N Trushell, Director, Corporate Affairs

Mr D Sedunary, Manager, Planning Systems

**Bidwell-Maap Nation**

Mr B Pascoe

Mr B Harrison

**Ms Aileen Blackburn****15 MAY 2012 – SHEPPARTON****Victorian Farmers Federation**

Ms R Diffey, Secretary, Wangaratta branch

**Warby Range Landcare Group**

Mr R Ellis, Aboriginal Liaison Officer

Mr P Larkin, Community Representative and Project Officer

**Bangerang Cultural Centre Cooperative Ltd**

Mr J Atkinson, Elder

**Wamba Wamba Traditional Owners Group**

Mr K Stewart

**Taungurung Clans Aboriginal Corporation**

Mr M Harding, Chair

Ms K Monohan, Executive Officer

**Yorta Yorta Nation Aboriginal Corporation**

Mr J Miller, Chief Executive Officer

Mr N Atkinson, Chairperson

Mr D Morgan, Elders Representative

**28 MAY 2012 – MELBOURNE****Aboriginal Affairs Victoria**

Mr I Hamm, Executive Director

Mr J Moon, Senior Heritage Policy Officer

## **4 JUNE 2012 – MELBOURNE**

### **Ngintait Traditional Owner Group**

Mr D Perry

### **Dja Dja Wurrung Clans Aboriginal Corporation**

Mr R Kerr, Program Manager, Heritage and Environment

Mr T Nelson, Board Member

### **Dhudhuroa Native Title Group, and Waywurru Native Title Group**

Mr G Murray, Dhudhuroa Native Title Group

Ms M Gardiner, Waywurru Native Title Group

### **Eastern Maar Traditional Owner Group**

Mr G Clark

### **Guladjin Traditional Owner Group**

Mr R Arnold

### **Barapa Barapa Traditional Owner Group**

Mr J Gulpilil-Murray

### **Nindi-Ngujarn Ngarigo Monero Aboriginal Corporation**

Ms D Paton

### **Victorian Aboriginal Heritage Council**

Ms D Lovett, Council Member

Ms E Bourke, Former Council Member

# Appendix three

---

## *List of briefings and site inspections*

### **19 MARCH 2012 – HAMILTON**

#### **Briefing**

The Committee received briefings from the Winda-Mara Aboriginal Corporation and the Gunditj Mirring Traditional Owners Aboriginal Corporation.

#### **Site inspection**

The Committee conducted site inspections at:

- Lake Condah Mission site
- Budj Bim National Heritage Landscape, and
- Tyrendarra Indigenous Protected Area

### **13 – 15 JUNE 2012 – NEW ZEALAND**

#### **Briefing**

The Committee received briefings from:

- New Zealand Historic Places Trust
- Maori Heritage Council, and
- Ministry for Culture and Heritage

#### **Site inspection**

The Committee conducted site inspections at:

- Te Aro Pa, Wellington
- Te Rangitatau Pa, Wellington
- Waiwhetu Marae in the Hutt harbour area, and
- Museum of New Zealand Te Papa Tongarewa

### **21 AUGUST 2012 – MT WILLIAM (LANCEFIELD) AND SUNBURY**

#### **Briefing**

The Committee received a briefing from the Wurundjeri Tribe Land and Compensation Cultural Heritage Council.

#### **Site inspection**

The Committee conducted site inspections at:

- Mount William Stone Hatchet Quarry, and
- Sunbury Rings



# Appendix four

---

## *Map of Registered Aboriginal Parties in Victoria*

*As at September 17, 2012*





# Registered Aboriginal Parties in Victoria as at September 17 2012

Registered Aboriginal Parties

Barengi Gadjin Land Council Aboriginal Corporation

Dja Dja Wurrung Clans Aboriginal Corporation

Gunaikurnai Land and Waters Aboriginal Corporation

Gunditj Mirring Traditional Owners Aboriginal Corporation

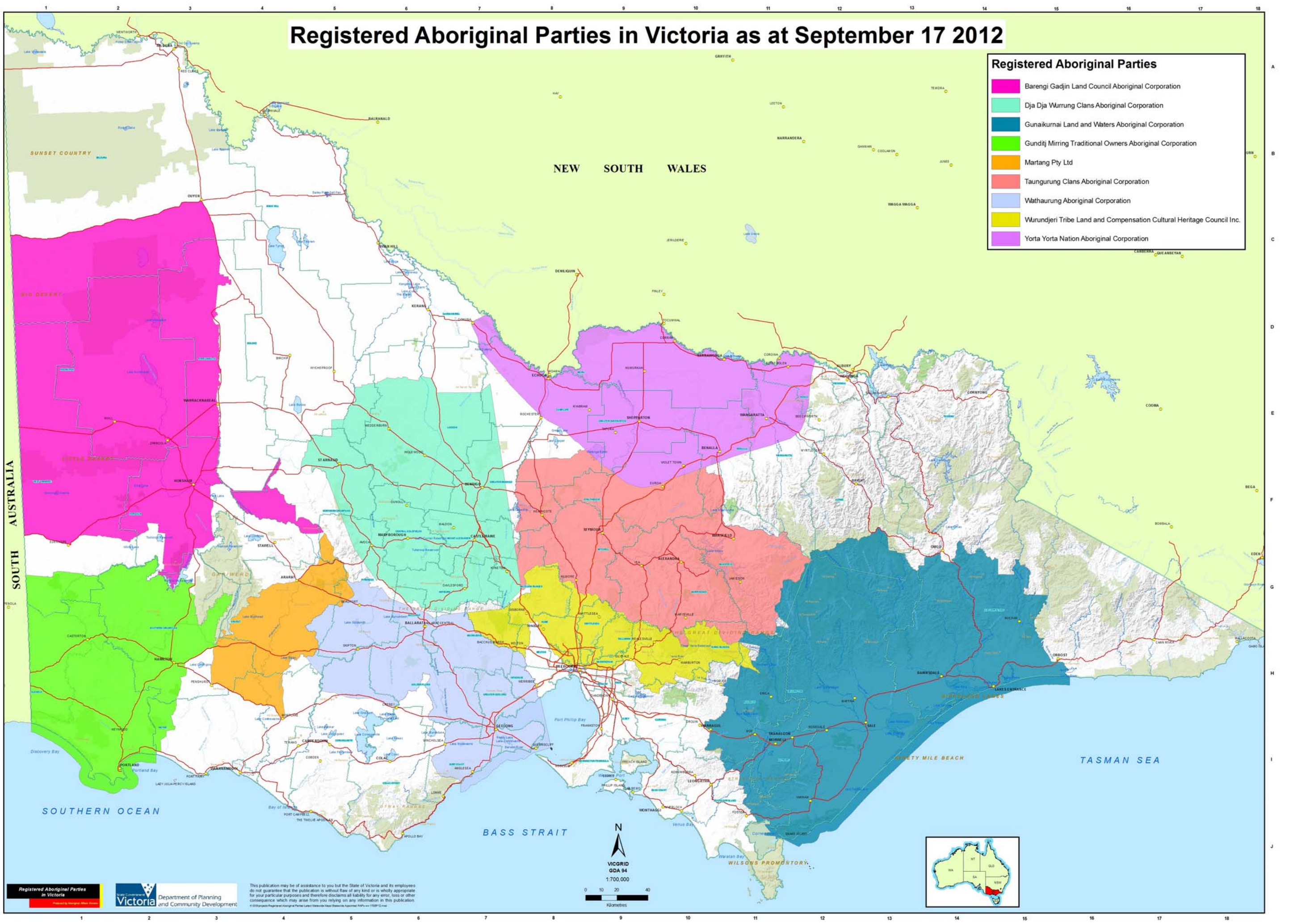
Martang Pty Ltd

Taungurung Clans Aboriginal Corporation

Wathaurung Aboriginal Corporation

Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc.

Yorta Yorta Nation Aboriginal Corporation





# Appendix five

---

## *Extract from the minutes of proceedings – 22 October 2012*

The minutes of the proceedings of the Environment and Natural Resources Committee show the following division which took place during consideration of the draft report. A summary of that proceeding follows:

### **Recommendation 5.9**

Question: That recommendation 5.9 be amended with the addition of a third dot point, which states: 'to allow the Minister provision, in exceptional circumstances, to require a review of previous Registered Aboriginal Party appointments, when satisfied such a course of action is warranted.'

On the motion of Mr Tim Bull, MP.

The Committee divided.

#### **Ayes: 3**

Mr David Koch, MLC

Mr Tim Bull, MP

Ms Joanne Duncan, MP

#### **Noes: 1**

Hon. John Pandazopoulos, MP

Question agreed to.



# Bibliography

---

- Aboriginal Affairs Victoria (2010) 'Cultural heritage management plans', Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/cultural-heritage-management-plans](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/cultural-heritage-management-plans).
- Aboriginal Affairs Victoria (2010) 'Victorian Aboriginal Heritage Council', Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council](http://www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council).
- Aboriginal Affairs Victoria (2010) *Victorian Aboriginal Heritage Register – application to be listed as a cultural heritage advisor*, Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/cultural-heritage-advisors](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/cultural-heritage-advisors).
- Aboriginal Affairs Victoria (2011) 'Aboriginal Heritage Act 2006,' Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/aboriginal-heritage-act-2006).
- Aboriginal Affairs Victoria (2011) *Discussion paper for the review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).
- Aboriginal Affairs Victoria (2012) *Information sheet: Cultural heritage management plans and planning*, Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/cultural-heritage-management-plans](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/cultural-heritage-management-plans).
- Aboriginal Affairs Victoria (2012) *Issues and options paper: Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).
- Aboriginal Affairs Victoria (2012) *Summary report: Review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).
- Aboriginal and Torres Strait Islander Social Justice Commissioner (2011) *Native title report 2011*, Australian Human Rights Commission, Canberra. [www.hreoc.gov.au/social\\_justice/nt\\_report/ntreport11/index.html](http://www.hreoc.gov.au/social_justice/nt_report/ntreport11/index.html).
- Attwood, B (2009) *Possession: Batman's treaty and the matter of history*, The Miegunyah Press, Melbourne.

- Australian Bureau of Statistics (2011) '2075.0: Census of population and housing – Counts of Aboriginal and Torres Strait Islander Australians, 2011', Australian Bureau of Statistics, Canberra. [www.abs.gov.au](http://www.abs.gov.au).
- Bendigo Advertiser (2012) 'Dja Dja Wurrung agreement expected', *Bendigo Advertiser*, 6 June. [www.bendigoadvertiser.com.au/news/local/news/general/dja-dja-wurrung-agreement-expected/2581131.aspx](http://www.bendigoadvertiser.com.au/news/local/news/general/dja-dja-wurrung-agreement-expected/2581131.aspx).
- Boer, B and Wiffen, G (2006) *Heritage law in Australia*, Oxford University Press, Melbourne.
- Broome, R (2005) *Aboriginal Victorians: A history since 1800*, Allen & Unwin, Crows Nest.
- Christie, M F (2008) 'Port Phillip Protectorate', *eMelbourne: the city past & present*, School of Historical Studies, University of Melbourne, Melbourne. [www.emelbourne.net.au/biogs/EM01169b.htm](http://www.emelbourne.net.au/biogs/EM01169b.htm).
- Davison, G (2000) *The Use and Abuse of Australian History*, Allen & Unwin, Crows Nest.
- Department of Environment and Resource Management (2009) *Indigenous cultural heritage acts review: Key issues and draft recommendations*, Department of Environment and Resource Management, Brisbane. [www.derm.qld.gov.au/cultural\\_heritage/legislation/index.html](http://www.derm.qld.gov.au/cultural_heritage/legislation/index.html).
- Department of Environment and Resource Management (2010) 'Role of cultural heritage bodies', Department of Environment and Resource Management, Brisbane. [www.derm.qld.gov.au/cultural\\_heritage/legislation/cultural\\_heritage\\_bodies.html](http://www.derm.qld.gov.au/cultural_heritage/legislation/cultural_heritage_bodies.html).
- Department of Environment, Climate Change and Water (2010) *Aboriginal cultural heritage consultation requirements for proponents 2010*, State of NSW and Department of Environment, Climate Change and Water.
- Department of Environment, Water, Heritage and the Arts (2009) *Indigenous heritage law reform – For discussion, August 2009*, Australian Government, Canberra. [www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/discussion-paper/index.html](http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/discussion-paper/index.html).
- Department of Environment, Water, Heritage and the Arts (2009) *The Australian Environment Act – Report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999*, Australian Government, Canberra. [www.environment.gov.au/epbc/review/publications/final-report.html](http://www.environment.gov.au/epbc/review/publications/final-report.html).
- Department of Indigenous Affairs (2012) 'Aboriginal Heritage Act', Government of Western Australia, Perth. [www.dia.wa.gov.au/en/Heritage-and-Culture/Heritage-Act-Reform/](http://www.dia.wa.gov.au/en/Heritage-and-Culture/Heritage-Act-Reform/).
- Department of Justice (2010) 'Native title in Victoria', State Government of Victoria, Melbourne. [www.justice.vic.gov.au/home/your+rights/indigenous+ Victorians/native+title/justice+-+d+native+title+in+Victoria](http://www.justice.vic.gov.au/home/your+rights/indigenous+ Victorians/native+title/justice+-+d+native+title+in+Victoria).
- Department of Planning and Community Development (2007) *General practice note: The Aboriginal Heritage Act 2006 and the planning permit process*, Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/planning/publicationsandresearch/practicenotes/planning-permit-process](http://www.dpcd.vic.gov.au/planning/publicationsandresearch/practicenotes/planning-permit-process).

- Department of Planning and Community Development (2008) *Fees and conduct guidelines for Registered Aboriginal Parties*, Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/indigenous/heritage-tools/fees-and-charges](http://www.dpcd.vic.gov.au/indigenous/heritage-tools/fees-and-charges).
- Department of Planning and Community Development (2012) 'Fees and charges', Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/home/about/fees-and-charges](http://www.dpcd.vic.gov.au/home/about/fees-and-charges).
- Department of Planning and Community Development (2010) *Guide to preparing a cultural heritage management plan: for the purposes of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms](http://www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms).
- Department of Primary Industries, Parks, Water and Environment (2012) 'Review of Aboriginal heritage legislation', Tasmanian Government, Hobart. [www.dpiw.tas.gov.au/inter.nsf/WebPages/LBUN-8G4VUM?OpenDocument](http://www.dpiw.tas.gov.au/inter.nsf/WebPages/LBUN-8G4VUM?OpenDocument).
- Department of Sustainability, Environment, Water, Population and Communities (2012) 'Indigenous protected areas', Department of Sustainability, Environment, Water, Population and Communities, Canberra. [www.environment.gov.au/indigenous/ipa/index.html](http://www.environment.gov.au/indigenous/ipa/index.html).
- Department of Sustainability and Environment (2011) 'Agreements with Traditional Owners', State of Victoria, Melbourne. [www.dse.vic.gov.au/land-management/indigenous-and-native-title/agreements-with-traditional-owners](http://www.dse.vic.gov.au/land-management/indigenous-and-native-title/agreements-with-traditional-owners).
- Di Carlo, A and Kennedy, R (2010) *Comparative literature review – Indigenous cultural heritage protection*, Sir Zelman Cowen Centre, Faculty of Business and Law, Victoria University, Melbourne. [www.achp.org.au/downloads.html](http://www.achp.org.au/downloads.html).
- Edelman, D (2009) 'Broader native title settlements and the meaning of the term 'traditional owners'', conference paper, *AIATSIS native title conference, Melbourne, 4 June 2009*, Native Title Tribunal, Canberra.
- Evatt, E (1996) *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Minister for Aboriginal and Torres Strait Islander Affairs, Canberra. [www.austlii.edu.au/au/other/IndigLRes/1996/1/index.html](http://www.austlii.edu.au/au/other/IndigLRes/1996/1/index.html).
- Environment and Sustainable Development (2012) 'Review of the Heritage Act 2004', ACT Government, Canberra. [www.environment.act.gov.au/heritage/review\\_of\\_the\\_heritage\\_act\\_2004](http://www.environment.act.gov.au/heritage/review_of_the_heritage_act_2004).
- Gardiner, G (2006) 'The Aboriginal Heritage Bill 2006', *D-Brief No. 2*, Parliamentary Library Research Service, Melbourne.
- Heritage Victoria (2010) 'Heritage overlays', Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/heritage/local-government/heritage-overlays-local-heritage-legislation](http://www.dpcd.vic.gov.au/heritage/local-government/heritage-overlays-local-heritage-legislation).
- Heritage Victoria (2010) 'Victorian heritage register', Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/heritage/victorian-heritage-register](http://www.dpcd.vic.gov.au/heritage/victorian-heritage-register).

Koori Heritage Trust, Australian Broadcasting Commission & the State Library of Victoria (2004) *Mission Voices*, Australian Broadcasting Commission, Melbourne.  
[www.abc.net.au/missionvoices/](http://www.abc.net.au/missionvoices/).

Libby Riches Cultural Heritage Services (2012) *Aboriginal cultural heritage industry evaluation: A paper prepared for the Victorian Aboriginal Heritage Council and Aboriginal Affairs Victoria*, Melbourne, Libby Riches Cultural Heritage Services.  
[www.dpcd.vic.gov.au/\\_\\_data/assets/pdf\\_file/0009/111123/Aboriginal-cultural-heritage-management-industry-report-June-2012.pdf](http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0009/111123/Aboriginal-cultural-heritage-management-industry-report-June-2012.pdf).

Ministry for Culture and Heritage (2011) 'The Treaty in brief', *New Zealand History online*, Ministry for Culture and Heritage, Wellington. [www.nzhistory.net.nz/politics/treaty/the-treaty-in-brief](http://www.nzhistory.net.nz/politics/treaty/the-treaty-in-brief).

National Native Title Tribunal (2010) *Commonwealth, state and territory heritage regimes: Summary of provisions for Aboriginal consultation: A report prepared for the New South Wales Aboriginal Land Council*, Commonwealth of Australia, Canberra.

Native Title Unit (2011) 'Fact sheet: When to engage with Victoria's Traditional Owners', Department of Justice, Melbourne.  
[www.justice.vic.gov.au/home/about+us/when+to+engage+with+victorias+traditional+owners+fact+sheet](http://www.justice.vic.gov.au/home/about+us/when+to+engage+with+victorias+traditional+owners+fact+sheet).

New South Wales Aboriginal Land Council (2010) *Caring for culture: Perspectives on the effectiveness of Aboriginal cultural heritage legislation in Victoria, Queensland and South Australia*, New South Wales Aboriginal Land Council, Parramatta.

New Zealand Historic Places Trust (2004) *Heritage management guidelines for resource management practitioners*, New Zealand Historic Places Trust, Wellington.

New Zealand Historic Places Trust (2008) 'Maori heritage', New Zealand Historic Places Trust, Wellington. [www.historic.org.nz/en/ProtectingOurHeritage/MaoriHeritage.aspx](http://www.historic.org.nz/en/ProtectingOurHeritage/MaoriHeritage.aspx).

New Zealand Historic Places Trust (2008) 'Maori Heritage Council', New Zealand Historic Places Trust, Wellington. [www.historic.org.nz/AboutUs/MaoriHeritageCouncil.aspx](http://www.historic.org.nz/AboutUs/MaoriHeritageCouncil.aspx).

New Zealand Historic Places Trust (2008) 'Review of the Historic Places Act 1993', New Zealand Historic Places Trust, Wellington. [www.historic.org.nz/en/AboutUs/HPARReview.aspx](http://www.historic.org.nz/en/AboutUs/HPARReview.aspx).

Office of Environment and Heritage (2011) 'Information on Aboriginal heritage impact (AHIPs)', NSW Government, Sydney.  
[www.environment.nsw.gov.au/licences/Section87Section90.htm](http://www.environment.nsw.gov.au/licences/Section87Section90.htm).

Office of Environment and Heritage (2012) 'Aboriginal heritage', NSW Government, Sydney.  
[www.heritage.nsw.gov.au/06\\_subnav\\_01.htm](http://www.heritage.nsw.gov.au/06_subnav_01.htm).

Office of the Registrar of Indigenous Corporations (2008), Australian Government, Canberra.  
[www.orac.gov.au/](http://www.orac.gov.au/).

Office of Treaty Settlements (2004) *Healing the past, building a future: A guide to Treaty of Waitangi claims and negotiations with the Crown – Summary edition*, Office of Treaty Settlements, Wellington.

- PricewaterhouseCoopers (2012) *Socioeconomic impacts of the Aboriginal Heritage Act 2006*, PricewaterhouseCoopers, Melbourne. [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006).
- Relics Act Review Committee (1985) *Aboriginal cultural heritage – Victoria: Discussion paper*, F D Atkinson Government Printer, Melbourne.
- Right People for Country Project Committee (2011) *Report of the right people for country project Committee*, Aboriginal Affairs Victoria, Melbourne.  
[www.dpcd.vic.gov.au/indigenous/projects-and-programs/right-people-for-country](http://www.dpcd.vic.gov.au/indigenous/projects-and-programs/right-people-for-country).
- Ross, C and Merner, B (2010) 'Traditional Owner Settlement Bill 2010', *Research Brief No. 13*, Parliamentary Library Research Service, Melbourne.
- Shearing, S (2006) 'One step forward? Recent developments in Australian state and territory Indigenous cultural heritage laws', *Macquarie Journal of International and Comparative Environmental Law*, Vol. 3, No. 1, pp. 35-66.
- Shearing, S (2010) 'Editorial: Australia's national heritage law framework under review', *Asia Pacific Journal of Environmental Law*, Vol. 13, No. 1, pp. 1-15.
- Smith, L, McCalman, J, Anderson, I, Smith, S, Evans, J, McCarthy, G and Beer, J (2008) 'Fractional identities: The political arithmetic of Aboriginal Victorians', *Journal of Interdisciplinary History*, Vol. XXXVIII, No. 4, Spring 2008, pp. 533-551.
- Steering Committee for the Development of a Victorian Native Title Settlement Framework (2008) *Report of the steering committee for the development of a Victorian native title settlement framework*, Department of Justice, Melbourne. [www.landjustice.com.au/?t=1](http://www.landjustice.com.au/?t=1).
- Treaty2U (2012) 'The content of the Treaty', Museum of New Zealand Te Papa Tongarewa, Wellington. [www.treaty2u.govt.nz/the-treaty-up-close/the-content-of-the-treaty/index.htm](http://www.treaty2u.govt.nz/the-treaty-up-close/the-content-of-the-treaty/index.htm).
- Victorian Aboriginal Heritage Council (2010) *Application form for registration as a Registered Aboriginal Party for the purposes of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne.  
[www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms#rap](http://www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms#rap).
- Victorian Aboriginal Heritage Council (2010) 'Applications declined or withdrawn', Department of Planning and Community Development, Melbourne.  
[www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council/registered-aboriginal-parties/applications-declined-or-withdrawn](http://www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council/registered-aboriginal-parties/applications-declined-or-withdrawn).
- Victorian Aboriginal Heritage Council (2010) *General principles – RAP decision-making*, Department of Planning and Community Development, Melbourne.  
[www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council](http://www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council).
- Victorian Aboriginal Heritage Council (2010) *Guidelines for RAP applicants*, Department of Planning and Community Development, Melbourne.  
[www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms#rap](http://www.dpcd.vic.gov.au/indigenous/heritage-tools/guides-and-forms#rap).
- Victorian Aboriginal Heritage Council (2010) 'Registered Aboriginal Parties', Department of Planning and Community Development, Melbourne.  
[www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council/registered-aboriginal-parties](http://www.dpcd.vic.gov.au/indigenous/aboriginal-heritage-council/registered-aboriginal-parties).

Victorian Aboriginal Heritage Council (2012) *Second submission to the review of the Aboriginal Heritage Act 2006*, Department of Planning and Community Development, Melbourne. [www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006/submissions-on-issues-and-options-paper-2012](http://www.dpcd.vic.gov.au/indigenous/aboriginal-cultural-heritage/review-of-the-aboriginal-heritage-act-2006/submissions-on-issues-and-options-paper-2012).

Victorian Traditional Owners Land Justice Group (2012) 'Current members of Land Justice Group', Victorian Traditional Owners Land Justice Group, Melbourne. [www.landjustice.com.au/?t=6](http://www.landjustice.com.au/?t=6).

Waitangi Tribunal (2012) 'About the Tribunal', Waitangi Tribunal, Wellington. [www.waitangi-tribunal.govt.nz/about/established.asp](http://www.waitangi-tribunal.govt.nz/about/established.asp).

Waitangi Tribunal (2012) 'Treaty of Waitangi', Waitangi Tribunal, Wellington. [www.waitangi-tribunal.govt.nz/treaty/meaning.asp](http://www.waitangi-tribunal.govt.nz/treaty/meaning.asp).

Weir, J K (2009) *The Gunditjmara land justice story*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra.



