

## SUBMISSION TO THE AUSTRALIAN GOVERNMENT

### INDIGENOUS HERITAGE LAW REFORM PROCESS

November 2009

#### GENERAL COMMENT: TRADITIONAL CUSTODIANS

The Victorian Aboriginal Heritage Council (the Council) believes that Traditional Owners, that is traditional custodians<sup>1</sup>, should be at the centre of all decision making relating to Aboriginal cultural heritage matters. This principle relates to all aspects of the proposed reform. The Council makes the following general comments on this matter.

#### *Identifying Traditional Owners*

At their heart, questions of who is who and who belongs to which Country are questions for Aboriginal communities. Decisions on these matters ought to be left with the respective custodial community itself to decide. In Victoria, the Victorian Traditional Owners Land Justice Group is a key collective of Traditional Owners. Recently, the Victorian Government has started to develop an Indigenous-led project, the 'Right People for Country Project', which will aid the identification of Traditional Owners for Country. Similarly the Council is actively engaged in appointing groups to speak for Country as Registered Aboriginal Parties (RAPs) under the *Aboriginal Heritage Act 2006* (Vic) (the **Victorian Act**). All RAPs currently appointed in Victoria represent local Traditional Owners.

In all aspects of the reform agenda, and in particular regarding potential accreditation of State and Territory laws, sufficient weight should be given to existing sources of knowledge about who are the Traditional Owners of an area.

#### *Traditional Owners are groups not individuals*

The Council is of the view that the traditional owner of an area is a group of people, not an individual. 'Traditional custodians' and 'Traditional Owners' must be considered as collective terms. In all cases, these terms should be used to imply the *collective* authority (or understanding, responsibility or action) of an *inclusive* Traditional Owner group. An individual can not be considered the sole source of authority for any group.

In order to achieve workable and acceptable outcomes, Traditional Owner groups need to be adequately supported and resourced by Governments and other stakeholders. This will ensure mechanisms for exercising collective authority function effectively and, where traditional decision-making has been impacted by post-contact policies of dispersal and forced removal from Country, satisfactory arrangements can be developed.

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<sup>1</sup> The Council does not make any specific distinction between 'Traditional Owner' and 'traditional custodian', and believes the terms are interchangeable. The Council prefers the term Traditional Owner. In Council's view Traditional Owners exist for everywhere in Australia, and this is unrelated to whether native title is found to exist in a particular location or not.

## SPECIFIC COMMENTS

### ***Proposal 1 - Clarifying the purposes of the legislation***

The Council generally supports this proposal.

The terminology used in reforming the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the **Commonwealth Act** or **the Act**) or any new legislation should refer specifically to Traditional Owners (or ‘custodians’ as is used elsewhere) rather than Indigenous Australians generally.

The Council encourages the reform process to consider the objectives of the Victorian Act as a source of potential purposes. The Council believes any new or revised Commonwealth legislation should place Traditional Owners at the centre of decision-making about their heritage. This would echo the objectives in the Victoria Act.

### ***Proposal 2 - Making terminology consistent with the purposes***

The Council generally supports this proposal subject to the following comments.

The terminology used in any revised or new Commonwealth Act should be improved to bring it up to date with contemporary heritage practice. It should embed in the legislation the principle that Traditional Owners are the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage. It should set up the legislation to empower Traditional Owners with decision-making responsibilities over their heritage places.

The Council notes that the Victorian Act offers some useful options for terminology which might assist.

#### ***Aboriginal tradition and traditional laws and customs***

The Council notes the emphasis on ‘Aboriginal tradition’ and ‘traditional laws and customs’ but does not agree on the implied limit to the protection of heritage if ‘traditional laws and customs’ are defined narrowly. For example, if such terms were to have similar requirements for continuity of tradition as in native title laws, many areas of south-eastern Australia may be interpreted as being devoid of heritage.

The Council would be concerned if the emphasis on ‘Aboriginal tradition’, and ‘traditional laws and customs’ disadvantaged the protection of heritage in Victoria.

While in Victoria, as in much of south eastern Australia, the history of disruption may mean that some of the stories and knowledge about a place may have been lost or even in dispute, it does not mean the place has no meaning. It will still hold significance to Aboriginal people today. Victoria Aboriginal people are still traditional people who hold different values through our traditional laws and customs.

The Victorian Act, in contrast to this proposal, protects all Aboriginal cultural heritage.

### *Contemporary and post-contact heritage places*

The Council would also be concerned if the term ‘traditional’ excluded places of contemporary or post-contact heritage value from protection, for example battle or massacre sites. Post-contact places are also significant to Aboriginal people and should be included in any Commonwealth law intended to offer protection where State or Territory laws are inadequate.

### *How traditional laws and customs are identified*

The Council firmly believes that traditional laws and customs should be defined by the Traditional Owner group. Traditional Owners, acting authoritatively and collectively, should be the sole source of knowledge about traditional laws or customs and there should be no other evidentiary requirement imposed. This is also addressed under Proposal 9 below.

### ***Proposal 3 - Promoting effective laws through accreditation***

The Council supports this proposal. The Council believes that high standards should be set for State and Territory laws to be accredited to ensure the best possible heritage protection is achieved. In particular, the Council supports the notion that the full suite of relevant State laws should be considered. This should include the proper administration of heritage protection and planning and environment laws, for example by local government.

It also supports the notion that accreditation be reviewed periodically, and revoked where a State or Territory’s laws do not meet the set standards.

### ***Proposal 4 - Specifying standards for effective protection***

The Council broadly supports the Standards set out under this proposal, subject to the following comments.

On **Standard 5**, consultation regarding human remains should be with *Traditional Owner groups*, not Indigenous persons generally. In making this change, consideration might also be given to circumstances in which Traditional Owners can not be identified or are unavailable to provide a direction. In Victoria, for example, responsibility in such cases rests with the Victorian Aboriginal Heritage Council.

On **Standard 7**, the Council refers to its general comments above regarding Traditional Owners. The Council does not agree that a person who knows the traditional laws and customs applying to an area or object can substitute for the Traditional Owners of that area or object. Further, an Indigenous heritage body responsible for consulting with traditional custodians may not adequately represent the views of those traditional custodians. Preference should be given to systems which allow Indigenous people to identify the Traditional Owners of an area, or for an Indigenous body to act for the benefit of and in consultation with Traditional Owners where they are unable to act themselves. The Victorian Aboriginal Heritage Council provides such an example.

On **Standard 12** the Council refers to its comments about the definition of traditional laws and customs under Proposal 2.

On **Standard 13**, the Council supports the requirement that a State or Territory’s laws must allow reasonable opportunity for traditional custodians to provide information and

comment. In assessing this, consideration should be given to whether Traditional Owners have the capacity and resources to adequately participate.

The Council queries the requirements set out in **Standard 15** for a range of other matters to be considered in approving an activity that might harm heritage. While the Council acknowledges that a range of factors should be taken into account in development approvals, decisions which relate to the protection of heritage should be based on the best advice and knowledge about protecting that heritage. In the view of the Council, to include other factors such as the interests of the proponent; the interest of other persons; and the cultural, social, economic and environmental welfare of the community, as considerations for heritage assessment creates too many loopholes and puts heritage at risk. The comments here also apply to **Standard 17**.

The Council queries the need for **Standard 16** which requires that representations made by the Commonwealth Minister be taken into account in deciding whether to approve an activity. Broadly speaking, the requirement set out in Standard 16 appears to undermine the principle that Traditional Owners should be in charge of decisions that effect their heritage. The Council queries such a requirement in relation to legislation dealing with the protection of Aboriginal heritage matters in particular.

In the Victorian context, the mechanism proposed in Standard 16 might not be consistent with the role of RAPs which are the primary decision-makers on cultural heritage issues. Where they are appointed, RAPs have sole responsibility to approve cultural heritage management plans under the Victorian Act. To introduce a third party to the matters involved in such approvals would potentially undermine this system, particularly if the Commonwealth Minister was to disagree with the decision of a RAP. In Victoria, cultural heritage management plans are approved by RAPs and reasons for rejection are specified. In the interests of Aboriginal people retaining authority to decide on their heritage matters, RAPs are not required to take into account representations from the Victorian or Commonwealth Minister. Decisions made by RAPs are, however, subject to review by an independent tribunal (the Victorian Civil and Administrative Tribunal).

The Council believes that **additional standards** ought to be developed to cover:

- approvals mechanisms by local government, and whether these are effectively operating and
- whether State and Territory laws raise awareness about Aboriginal cultural heritage as a measure to better protect heritage.

***Proposal 5 - Ensuring that, if legally recognised traditional custodians exist, only they can seek Commonwealth protection***

The Council generally agrees with this principle. However, what constitutes a ‘recognised’ Traditional Owner should be broadened to other groups. In Victoria, recognised Traditional Owner groups may include RAPs<sup>2</sup>, and groups that have entered into agreements with the State under the Victorian Native Title Settlement Framework. Again, a recognised Traditional Owner should refer to a collective, or to an individual acting on the authority of an entire Traditional Owner group. Again such groups need to be properly resourced to have this capacity.

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<sup>2</sup> While under the Victoria Act, RAPs do not have to be Traditional Owner organisations, to date all RAPs appointed in Victoria represent local Traditional Owners. Under the Victorian Aboriginal Heritage Council’s General Principles for RAP Decision-Making, the Council gives priority to applications made by or on behalf of Traditional Owner groups in organisations it appoints as RAPs. The Council itself is comprised of Victorian Traditional Owners.

Having said that in cases where short-term or emergency protection is warranted the protection of heritage should be the paramount consideration. This could mean that an emergency protection measure might need to be available to anyone - Aboriginal or non-Aboriginal.

#### *Traditional Owners of objects*

The Council notes that it may be possible to determine the Traditional Owners of an object if it is a traditional object and not made for sale, trade or gift. It believes that efforts should be made to determine the origins of objects, and thus the Traditional Owners of that object, and to fully engage with these Traditional Owners in decisions that affect that object.

In the case of objects made for sale, trade or gift, there may still be protocols with or between the maker and the receiver which ought to be respected.

#### ***Proposal 6 - Ensuring that Commonwealth protection would not prevent an act authorised under a registered ILUA***

The Council supports this proposal.

#### ***Proposal 7 - Removing duplication of state and territory protection for Indigenous remains***

The Council supports this proposal.

#### ***Proposal 8 - Addressing gaps in state and territory laws to ensure respectful treatment of Indigenous secret sacred objects.***

The Council supports this proposal.

The Council also suggests a new mechanism be included in any reformed Commonwealth legislation to prevent the movement of cultural heritage across State borders. This control is available in Victoria but may be lacking in other States.

#### ***Proposal 9 - Specifying the information needed for applications for protection***

The Council generally supports this proposal. However, the Council makes the following comments.

#### *Information about traditional laws and customs*

The Council queries the requirement for a statement about traditional laws and customs to be provided, and is concerned about how this might be treated. In applications for protection the emphasis should be on identifying the appropriate Traditional Owners of a place or object, and ensuring the information they provide is appropriately authorised by the Traditional Owner group. Where Traditional Owners have satisfied a process of identification they should not be required to again 'prove' their traditional laws and customs. When a Traditional Owner group, acting in a collective and authorised manner, provides information about traditional laws and customs the information should be accepted, without the need to meet additional evidentiary requirements.

Recognition should be given to the impacts that widespread disruption and dispossession has had on the way knowledge about traditional laws and customs is held in south eastern Australia. This may differ from elsewhere in Australia.

Furthermore, as discussed above, tradition should not be limited to the pre-contact period. Whilst it is suggested that the pre-contact period is akin to a 'classical' period of Aboriginal cultural life, and the post-contact period to 'contemporary' Aboriginal cultural life. Traditional laws and customs have been continuously understood and interpreted by Aboriginal people across both periods.

#### *Reasonable opportunity to make an application or provide additional information*

The Council supports the proposal to allow reasonable opportunity for applicants to provide missing information in an application. Reasonable opportunity should consider the resources available to Traditional Owner groups in particular for authorising applications and the information contained in them. Furthermore, in all such cases there *must* be mechanisms for heritage to be protected whilst an application is completed or additional information is sought and obtained, particularly in the case of imminent risk to heritage. This length of time proposed for interim protection measures is a matter of concern, as discussed under Proposal 12.

#### *Grants of support*

The Council supports retaining an opportunity for applicants to apply to the Attorney-General for a grant of assistance. Consideration should be given to the speed with which this grant are made in cases where there is an imminent risk to heritage, in particular in respect of the timelines of interim protection measures under Proposal 12.

#### *Adequate resourcing*

In all of the matters set out in this proposal, Traditional Owners will need to be adequately resourced to ensure decision-making processes are effective and information provided is properly authorised.

#### ***Proposal 10 - Using conferences to consider how best to deal with the issues***

The Council generally supports this proposal. Traditional Owner groups need to be supported to participate in agreement making on an equal footing. The Traditional Owner group or groups will need to be adequately resourced with support, information and professional advice, as well as to ensure decision-making processes are effective and information provided is properly authorised.

#### ***Proposal 11 - Protecting sensitive information***

The Council supports this proposal, so long as the protection of sensitive information is agreed by the Traditional Owners of that information. The Council would be concerned if the provisions of this proposal were used against Traditional Owners to require the release of information.

#### ***Proposal 12 - Clarifying the reasons for providing and revoking interim protection***

The Council supports the inclusion of measures for interim or emergency protection. However, these measures need to be effective. To this end the Council believes the following amendments need to be made to this proposal.

#### *Multiple short term protection measures*

It should be possible for more than one 48 hour declaration (and / or 96 hour declaration) to be made sequentially. This might be needed, for example, to protect heritage at imminent risk of destruction whilst allowing “reasonable opportunity” for an applicant to provide any missing information in an application (Proposal 9). It could also be required where an applicant is seeking support from the Attorney General to make an application. The Council believes it is unlikely that 48 hours will be sufficient time for either an application to be completed, or a grant to be obtained.

Consideration should also be given to the making of 96 hour declarations and / or 28 day declarations in absence of a completed application, where there is sufficient evidence to suggest protection is needed.

#### *Administrative mechanisms for short term protection*

The mechanisms to make interim protection declarations need to be efficient, and freely available to all people. This means, for example, that applications for emergency protection should be accepted by telephone, facsimile or email as well as in writing. It also means officers of the Department with authority to make an interim protection order must be available 24 hours, 7 days a week. It means that contact details and any administrative requirements (such as forms) must be readily available, including to remote or regional areas and to people with limited access to technology or resources.

The Council notes with concern that administrative systems operating under the current legislation have proven largely ineffective in protecting heritage. This needs to be addressed as a matter of priority in any reform.

#### *Criteria for temporary protection*

The Council is very concerned that this proposal suggests the Minister would consider the “costs and inconveniences to individuals of delaying activities” in deciding whether to make an interim protection declaration. It believes that such a proposal means that important heritage places may be lost, even where emergency protection is found to be warranted. Matters unrelated to the protection of heritage should not be taken into account in determining short term protection measures. Being serious about protecting heritage in cases where an emergency declaration is warranted means costs and inconveniences should never prevent a protection measure from being made. In cases where the Government is concerned about the economic impact on businesses and the community, it could consider compensating those affected by the protection of heritage. After all, the heritage itself is irreplaceable.

#### ***Proposal 13 - Clarifying the reasons for providing and revoking longer-term protection***

The Council generally supports this proposal. However, it is concerned that under this proposal decisions about longer term protection still lie solely with the relevant Minister. It also queries how independent experts would be identified, and what qualifications, knowledge, experience and cultural backgrounds they would be expected to have.

To respond to these concerns, the Council suggests that consideration be given to establishing a national Aboriginal heritage body, along the same lines as the Victorian Aboriginal Heritage Council.

Such a body could be constituted by Traditional Owners from across Australia with expertise or experience in Aboriginal heritage matters. It could have decision-making and advisory functions over significant Aboriginal heritage matters and would support the principle that Aboriginal people retain primary responsibility for our heritage places.

A national Aboriginal heritage council might have a range of functions. For example the council could provide independent advice to the Minister and others, make decisions about protection declarations, or indicate from whom independent advice might be sought.

***Proposal 14 - Updating the penalties and improving the enforcement powers***

The Council generally supports this proposal. In particular the Council supports improving enforcement, offences and penalties under any new or revised legislation to better effect the protection of heritage. It agrees that a range of offences and penalties, related to the degree of intent or knowledge behind an Act should be available. Many of the lessons learnt from enforcement of the Victorian Act might be relevant to consider in this regard.

***Inspectors***

The Council is of the view that any inspectors under Commonwealth Aboriginal heritage legislation should have specific cultural knowledge and experience. It is supportive of Federal Police and Customs officers having some powers, however they should be appropriately trained in Aboriginal cultural heritage. The Council would also be concerned if the enforcement powers were left to these officers alone given their demands on them to deal with other matters.

The Council believes it would be ideal if any new or revised Act established a new category of inspectors, sourced from Australian Traditional Owner communities, to enforce the legislation. Such inspectors could be aligned with any national Aboriginal heritage body established under the Act (see Proposal 13).

***Proposal 15 - Reviewing the effectiveness of the legislation at regular intervals***

The Council supports this Proposal, in particular the review of accreditation at regular intervals.