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ABORIGINAL CULTURAL HERITAGE

Inside:

New Victorian
legislation aims
to strengthen
the protection of
Aboriginal cultural
heritage

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Proposed changes to Aboriginal cultural heritage protection in Victoria

On 18 October, the Victorian Government released the exposure draft of the Aboriginal Heritage Bill which aims to strengthen the protection of Aboriginal cultural heritage in Victoria. Senior Associate Julie Freeman and Lawyer Emily Gerrard look at the changes proposed by the draft Bill.

Aboriginal cultural heritage

Currently, Aboriginal cultural heritage in Victoria is protected by Commonwealth and State legislation. The Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* provides for the protection of significant Aboriginal areas and objects and other Aboriginal cultural property in Victoria from injury or desecration. Under this legislation, 'Aboriginal cultural property' is defined broadly to include any Aboriginal place, object or folklore (including traditions or oral history) that is of particular significance in accordance with tradition.

The Victorian *Archaeological and Aboriginal Relics Preservation Act 1972* operates in conjunction with Part IIA of the Commonwealth legislation and provides for the protection of physical evidence of past occupations, such as relics, artefacts and human remains. Changes to the Commonwealth legislation proposed by the Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005 will repeal Part IIA to enable the Victorian Government to administer Aboriginal heritage protection laws in Victoria directly.

Proposed changes

Victorian Aboriginal Heritage Council

Key changes proposed by the draft Aboriginal Heritage Bill (the **draft Bill**) include the establishment of the Victorian Aboriginal Heritage Council (the **Council**). The Council will be a statutory body comprised of 11 Aboriginal people appointed by the Minister. It will advise the Minister on matters in relation to Aboriginal cultural heritage, including:

- interim or ongoing protection declarations;
- cultural heritage audits;
- Aboriginal cultural heritage assessments; and
- compulsory acquisition of land.

The Council will also approve applications for registration of Aboriginal parties.

Registered Aboriginal Parties

Under the new regime Aboriginal parties can apply to the Council to be registered as cultural heritage decision-makers for an area (**Registered Aboriginal Parties**). A native title party, a body representing Aboriginal people asserting traditional or familial links to an area, or any other body representing Aboriginal people with links to the cultural heritage of an area, may become a Registered Aboriginal Party. Indigenous groups must demonstrate a degree of connection to an area to be registered.

More than one group may be registered for an area. Registered Aboriginal Parties will be able to enter voluntary cultural heritage agreements and will be involved in Aboriginal Cultural Heritage Assessments. They will be able to endorse or reject Aboriginal Cultural Heritage Assessments or Permits.

Aboriginal cultural heritage assessments and permits

A significant change introduced by the draft Bill is the requirement for Aboriginal Cultural Heritage Assessments (**assessments**) to be conducted for prescribed activities set out in the legislation and regulations. Examples of activities that will require an assessment include:

- development or activities that require an Environmental Effects Statement under the *Victorian Environmental Effects Act 1978*;
- larger-scale residential or industrial subdivisions; and
- large infrastructure or resource development projects.

A person may also conduct an assessment voluntarily. Where an assessment is to be undertaken, notice must be given to the Secretary for the Department of Victorian Communities (the **Secretary**) and to the owner or occupier of the affected land. The Secretary must notify any Registered Aboriginal Parties who may then notify the proponent that they intend to participate in or evaluate the assessment. Timeframes for notification are provided in the draft Bill, however, the overall time required for an assessment will vary according to the size and nature of a project.

A significant change introduced by the draft Bill is the requirement for Aboriginal Cultural Heritage Assessments to be conducted for prescribed activities set out in the legislation and regulations.

If it is determined that a project will have an impact on Aboriginal cultural heritage, recommendations for managing this will be set out in the assessment. The Registered Aboriginal Parties for the area may then decide to either endorse or reject the assessment. The Secretary then checks the assessment against minimum standards before it can be approved. The Secretary must refuse to approve the assessment if a Registered Aboriginal Party has refused to endorse the assessment. Government agencies and planning authorities, such as local governments, will not be able to issue leases, licences or permits for prescribed activities without an approved Assessment.

The ability of Registered Aboriginal Parties to refuse to endorse an assessment will require proponents to arrange cultural heritage surveys and assessments at an early stage in project planning and development. If an assessment is not endorsed by the relevant Registered Aboriginal Parties, proponents may seek to review the decision at the Victorian Civil and Administrative Tribunal (**VCAT**).

If an activity does not require an assessment, but involves works that would, or are likely to, harm Aboriginal cultural heritage, an Aboriginal Cultural Heritage Permit (**permit**) may be required. A permit will also be required to buy or sell an Aboriginal object or remove Aboriginal cultural heritage from Victoria. A Registered Aboriginal Party may approve or refuse a permit application. The Secretary must not grant a

permit if a Registered Aboriginal Party has refused the permit. Applicants may apply to VCAT for review of a refusal or any conditions attaching to an approval.

While the assessment framework will address the potential impacts of larger projects, the permit scheme appears sufficiently robust to protect Aboriginal cultural heritage at risk of harm from more minor activities not specified in the proposed legislation. These reforms should add clarity and certainty for stakeholders and afford greater protection for Aboriginal cultural heritage in Victoria.

Voluntary agreements for protection of Aboriginal cultural heritage

The draft Bill provides for voluntary Aboriginal Cultural Heritage Agreements (**agreements**) for the management and protection of Aboriginal cultural heritage. Agreements may be used for matters that do not require an assessment or permit. Agreements relating to land (other than Crown land) may be registered on the Register of Titles. Following registration, the burden of any covenant contained in the Agreement will run with the land affected.

Protected areas

The draft Bill provides for ongoing or interim declarations for protection of certain areas. These declarations are similar to existing provisions under the Commonwealth *Aboriginal & Torres Strait Islander Heritage Protection Act 1984*. An interim declaration is designed to protect an area while an assessment is undertaken as to whether permanent protection is justified. An ongoing declaration may be ordered where protection of a place or object of exceptional significance to Aboriginal people is required.

Enforcement and penalties

The draft Bill enables an audit to be ordered if the Minister suspects that the recommendations contained in an assessment, or conditions of a permit, have not been followed or the impact on Aboriginal cultural heritage is greater than expected at the time of the assessment's approval or grant of the permit. The Minister may order an audit at his or her discretion or on advice from an inspector, the Secretary or the Council. Audits are to be undertaken at the developer's expense, although, if no problem is uncovered, the Government will reimburse the developers.

A 'stop order' will replace the existing emergency declaration and may be used when urgent intervention is required to prevent harm to Aboriginal cultural heritage.

The draft Bill also increases fines for contravention of protection provisions. Penalties include a fine of more than \$150,000 (up from \$10,000) and/or five years' imprisonment for individuals and a fine of more than \$1 million (up from \$50,000) for corporations. Inspectors will also have increased powers.

Interaction with planning laws

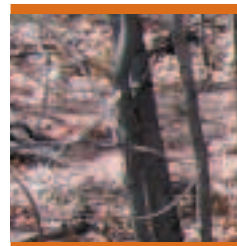
The changes proposed to Aboriginal Cultural Heritage protection will affect the planning approvals process. Currently, the Victorian Planning Policy provides that planning and responsible authorities (such as local governments) should identify, conserve and protect places of natural or cultural value from inappropriate development. These include places of Aboriginal cultural heritage significance.

Affording Registered Aboriginal Parties an effective refusal right in relation to assessments further emphasises the importance of engaging with Aboriginal groups early in project scoping and planning phases.

Further, the State Planning Policy Framework provides that planning and other responsible authorities must take into account the requirements of the Victorian and Commonwealth Aboriginal cultural heritage protection legislation and the views of local Aboriginal communities in providing for the conservation and enhancement of places of Aboriginal cultural heritage value. By increasing the protection available under Aboriginal cultural heritage legislation, these provisions will have greater impact.

While the timeframe for making decisions in relation to planning applications under the *Planning and Environment Act 1987* is not being amended, the proposed requirement for planning authorities to have an approved assessment before issuing permits and approvals for prescribed activities may delay proponents who have not sufficiently addressed Aboriginal cultural heritage issues in their project development.

The draft Bill provides that, where a decision maker is required to grant an authorisation within a certain timeframe, that period is deemed not to commence until the decision maker receives the approved assessment. In this regard, if a planning authority fails to receive an approved assessment at the time of a permit application, it may rely on its discretion to require more information from



the applicant under s54 of the *Planning and Environment Act 1987*. In these circumstances, the prescribed time within which a planning authority has to make a decision on the application will be suspended until the requested information is received.

Affording Registered Aboriginal Parties an effective refusal right in relation to assessments further emphasises the importance of engaging with Aboriginal groups early in project scoping and planning phases. The proposed changes should provide guidance and clarification to proponents, decision makers and planning consultants on the need for an assessment. In the context of planning law, it is likely that the Minister, the Council or the Secretary will be a referral authority for planning applications.

The draft Bill's impact

The draft Bill provides for greater participation of Aboriginal groups in matters concerning land use, management and cultural heritage protection. This is in accordance with the Victorian Government's project to develop an Aboriginal Land and Resource Development Strategy, in particular its commitment to provide greater authority for indigenous people in cultural heritage management. The Bill reflects many of the new concepts introduced in Queensland in 2003.

The broad and significant changes contained in the draft Bill are an important development for Aboriginal communities in Victoria. Following the 2002 High Court decision in the *Yorta Yorta* case, decreased recognition under native title law has frustrated relationships between Aboriginal communities, the Government and industry in relation to land use and management.

While the impact of the draft Bill will be restricted by the requirement for Aboriginal bodies to become registered, under the proposed legislation, increased penalties and prescriptive requirements for assessments and permits will require proponents to consult with Aboriginal groups and include Aboriginal cultural heritage considerations at an early stage in project development.

Consultation between the Government, Aboriginal communities, councils and industry will take place in the coming months and it is expected that the Bill will be introduced into Parliament in autumn 2006. Comment on the draft Bill may be submitted to Aboriginal Affairs Victoria by 19 December 2005.

If you would like further information on the draft Bill or the issues discussed above or want help in formulating a submission please contact us.

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