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# Aboriginal Heritage

## Understanding Developers' Obligations within Victoria

### Introduction

The *Aboriginal Heritage Act 2006* came into effect on May 28, 2007 and replaced former state and federal legislation relating to Aboriginal cultural heritage in Victoria. The primary purpose of the new legislation is to provide for the protection of Aboriginal cultural heritage.

The *Aboriginal Heritage Act 2006* and the *Aboriginal Heritage Regulations 2007* operate in tandem to ensure that all responsible authorities within Victoria have regard to the possible existence of items of Aboriginal cultural heritage significance, such as artefacts, places or human remains, when determining a planning permit application.

The legislative requirements of the Act and its Regulations are further strengthened by amendment VC45 to the Victorian Planning Provisions (VPP), made in late 2007. This amendment included changes to the State Planning Policy Framework which address the issue of heritage and include the following objective at Clause 15.03-2:

*To ensure the protection and conservation of places of Aboriginal cultural heritage significance.*

Policy Guidelines in this Clause include:

*Planning must consider as relevant:*

*The Aboriginal Heritage Act 2006 for all Aboriginal cultural heritage.*

Overall the legislative framework seeks to provide concise guidelines for managing Aboriginal heritage. Understanding the processes and requirements which it introduces is critical for anyone involved in the Victorian development industry. This article provides an overview of the relevant provisions and outlines what Victorian planning permit applicants need to know.

## Cultural Heritage Management Plans (CHMP)

Whilst the *Aboriginal Heritage Act 2006* addresses a number of issues relating to Aboriginal heritage in Victoria, Part 4 of the Act raises the issue of Cultural Heritage Management Plans (CHMP) and is of most relevance to permit applicants. A CHMP is defined in Section 42 of the Act as:

- a) *an assessment of the area to determine the nature of any Aboriginal cultural heritage present in the area; and*
- b) *a written report setting out-*
  - (i) *the results of the assessment; and*
  - (ii) *recommendations for measures to be taken before, during and after an activity to manage and protect the Aboriginal cultural heritage identified in the assessment.*

The preparation of a CHMP is required for an activity where all or part of the activity area is considered 'an area of cultural heritage sensitivity' and all or part of the activity is a 'high impact activity'. Where a CHMP is triggered, its preparation is required prior to a responsible authority determining an application.

## Area of Cultural Heritage Sensitivity

When identifying if a CHMP is required, it is necessary to refer to Part 2 Division 3 and Division 4 of the *Aboriginal Heritage Regulations 2007* which defines what constitutes "an area of cultural heritage sensitivity." The most commonly encountered examples of these include:

- a registered cultural heritage place and land within 50 metres;
- a waterway and land within 200 metres;
- coastal Crown land;
- land within 200 metres of the high water mark of the coastal waters of Victoria or any sea within the limits of Victoria;
- a National park, State park, marine national park and marine sanctuary;
- the volcanic cones of western Victoria;
- a sand sheet, including the Cranbourne sand.

To assist permit applicants, Aboriginal Affairs Victoria (AAV) has mapped the identified areas of cultural heritage sensitivity across the State. Whilst these maps are available at [www.aboriginalaffairs.vic.gov.au](http://www.aboriginalaffairs.vic.gov.au), most local Councils will also have copies relating to their municipality which are made available to the public. The Maps have also been made available at [www.land.vic.gov.au](http://www.land.vic.gov.au) via the Planning Property Reports.

## High Impact Activity

Part 2 Division 5 of the *Aboriginal Heritage Regulations 2007* relates to “high impact activities” which constitutes the second test which must be satisfied to determine whether a CHMP is required. This Division states that *high impact activities* involve buildings and works that result in significant ground disturbance and include, but are not limited to the following specified activities:

- the construction or carrying out of work for three or more dwellings on a lot;
- subdivisions of three or more lots;
- building or works in alpine resorts;
- the extraction or removal of sand or sandstone;
- searching for stone;
- the extraction or crushing of loose stone from land used for agriculture on the Victorian Volcanic Plain
- timber production;
- dams.

Whilst this list may be detailed, it is by no means exhaustive. Applicants wishing to ascertain if their activity constitutes one of “high impact” should refer to Sections 43-54 of the *Aboriginal Heritage Regulations 2007*.

## Registered Aboriginal Parties (RAPs)

When required, the preparation of a CHMP is to be undertaken in consultation with the relevant Registered Aboriginal Party (RAP) which is appointed by the Aboriginal Heritage Council. A number of RAPs are registered across the state and act on behalf of traditional land owners. The *Aboriginal Heritage Act 2006* allows for more than one body to be registered as an Aboriginal party for a particular area and in instances where one is yet to be appointed, AAV assumes the legislative responsibilities.

When a CHMP is completed, the relevant RAP is required to approve the plan before it can be registered. In instances where a RAP refuses to approve a CHMP a permit applicant (or “sponsor”) has the opportunity to appeal a RAP’s refusal at the Victorian Civil and Administrative Tribunal (VCAT) under Section 116 of the Act. A RAP may only refuse to approve the plan on the grounds contained in Section 61 of the *Aboriginal Heritage Act 2006*. Importantly, the local council is not involved in the evaluation of a CHMP or subsequent appeal to VCAT, should one eventuate.

## Level of investigation required

The *Aboriginal Heritage Regulations 2007* provides a three-tiered framework for the assessment of Aboriginal cultural heritage (or CHMP). These are identified under Part 3 Division 1 (Assessments) and include:

### 1) Desktop Assessment

Involves a review of the site’s history including ethno-historical accounts of Aboriginal occupation, previous publications about Aboriginal cultural heritage in the region and an examination of landforms or geomorphology of the area.

## 2) Standard Assessment

Involves a physical examination of the activity area including an examination of any mature indigenous tree, cave or rock shelter.

## 3) Complex Assessment

Involves a disturbance or excavation of the subject site to uncover any items of Aboriginal cultural heritage. The works may involve the use of machinery however if any items of relevance are discovered they must be uncovered and assessed by controlled excavation.

The level of investigation required will depend upon the possible existence of Aboriginal artefacts within the study area. For example a desktop assessment is required in each instance and a standard assessment *is required if the results of a desktop assessment show that it is reasonably possible that Aboriginal cultural heritage is present in the activity area*. The next level of assessment may then be required if *it is not possible to identify the extent, nature and significance of the Aboriginal cultural heritage in the activity area unless a complex assessment is carried out*. The level of investigation required will invariably depend upon negotiations with the relevant RAP as they have the power to approve (or reject) the CHMP.

## Exemptions from a CHMP

Considering the significant time and costs involved in preparing a CHMP, permit applicants should be aware of exemptions which are afforded under the *Aboriginal Heritage Regulations 2007*. Despite the tests prescribed above, Part 2 Division 2 (exempt activities) of the Regulations provides that a CHMP is not required if one or more of the following is proposed:

- The construction of one or two dwellings on an allotment;
- Works ancillary to an existing dwelling;
- The demolition or removal of a building;
- The consolidation of land;
- Subdivision of an existing building; or
- Where an approved cultural heritage management plan is already in existence.

Not limited to the above, exemptions are also provided where “significant ground disturbance” has previously occurred. On this matter, the definitions contained within the regulations are specific and hold that significant ground disturbance means disturbance of the topsoil or surface rock layer of the ground or a waterway by:

*machinery in the course of grading, excavating, digging, dredging or deep ripping, but does not include ploughing other than deep ripping*

Deep ripping in turn means the ploughing of soil using a ripper or subsoil cultivation tool to a depth of 60 centimetres or more.

On this matter, previous determinations of VCAT provide a valuable reference for understanding the implications. The decision of *Mainstay Australia Pty Ltd v Mornington Peninsula SC & Ors* [2009] (VCAT 145), for example, provides commentary on the level of inquiry required by a planning authority to determine whether significant ground disturbance has occurred. In this instance, despite the assertions of both the Permit

Applicant and Council that significant ground disturbance had occurred, the Tribunal found otherwise. Photographs and a land use history dating back to the 1960's were presented at the hearing and detailed discussions took place which related to implements used in ploughing of the land and to what depth it had occurred. The Tribunal eventually found that while significant ground disturbance had occurred to part of the land through the excavation of a house site, the digging of three sewerage and drainage pits, and the excavation of two drainage pipelines, the areas affected comprised only 25% to 30% of the site and a CHMP was required for activity proposed. Other notable conclusions to be arrived at by the Tribunal were:

- It is the fact of significant ground disturbance that creates an exception under the Regulations, and determines if a CHMP is not required. The actual likelihood of Aboriginal heritage existing in the area is irrelevant to this determination;
- The timing of the significant ground disturbance is irrelevant. It may have occurred many years ago in the early history of European settlement in the state;
- If only part of the land has been subject to past significant ground disturbance, and the remaining part is still in an area of cultural heritage sensitivity, a CHMP will still be required for the whole development activity;
- The burden of proving that the land has been the subject of significant ground disturbance rests with the applicant. The planning decision maker (and, on review, the Tribunal) must feel an actual persuasion of the existence of that fact to its reasonable satisfaction. This should not be derived produced by inexact proofs or indirect inferences, and little weight should be given to a mere assertion by an applicant or landowner;
- In assessing whether significant ground disturbance has occurred, there are four levels of inquiry that might commonly arise, and the assessment should be dealt with at the lowest applicable level. These levels are:
  1. common knowledge
  2. publicly available records
  3. further information from the applicant
  4. expert advice or opinion

## **Time and Cost**

Safeguards are built into the Aboriginal Heritage Act 2006 to ensure that the assessment of an activity area along with the preparation of a CHMP is done by person(s) with an appropriate level of experience. For example, Section 58 of the Aboriginal Heritage Act 2006 states that the sponsor of a cultural heritage management plan must engage a cultural heritage advisor to assist in the preparation of the plan. This is held to be someone that:

- 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.

The Regulations also state that a completed CHMP must include the qualifications and experience of the person who compiled the report. Previous experiences of Clause:1 have shown that the preparation and approval of a CHMP can cost between \$2.5K - \$15K (where significant onsite excavation is required). Simply desktop assessments can usually be completed within 2 weeks with more complex assessments sometimes taking several months.

## Conclusion

Both Municipal Council's and VCAT (on matters of appeal) must give effect to the legislative framework that seeks to protect aboriginal cultural heritage throughout Victoria. Undertaking 'high impact activities' in 'areas of cultural heritage sensitivity' will generally trigger the need to complete a cultural heritage management plan unless an exemption to the trigger can be established.

Planning permit applicant's working in areas of cultural heritage sensitivity should familiarise themselves with the CHMP process and be aware of the potential additional time, cost and risk associated with such projects.

### Cases of Interest

Mainstay Australia P/L v Mornington Peninsula & Ors [2009] VCAT 145  
Tsourounakis v Ballarat CC [2009] VCAT 905  
Merrivale v Brimbank CC [2009] VCAT 715  
Architectural Plans & Permits v Banyule [2010] VCAT 1463  
Three Pillars Property Group v Brimbank CC (Red Dot) [2012] VCAT 368  
Lake Park Holdings v East Gippsland SC & Ors (Red Dot) [2014] VCAT 826

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Last updated 270913