

# **Victorian Traditional Owners Land Justice Group**

## **Submission to the Parliamentary Inquiry into the establishment and effectiveness of Registered Aboriginal Parties**

### **1. Introduction**

The Victorian Traditional Owner Land Justice Group (the VTOLJG) is an initiative of traditional owners to develop a statewide body to promote the rights and interests of traditional owners.

Our culture dictates that traditional owners are the custodians of cultural heritage in our traditional country and that we – as traditional owners – have sole responsibility for its preservation and protection. It is critical for government and other parties to understand that this responsibility falls uniquely upon us. Protecting and preserving cultural heritage is vital to protecting our living culture, traditions and beliefs.

The *Aboriginal Heritage Act 2006* (Vic) (AHA) is core business for traditional owners, with the provisions relating to Registered Aboriginal Parties (RAPs) having a very specific impact upon us. 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.

THE VTOLJG fully supports a well-resourced, deliberative traditional-owner-controlled RAP appointment process that is empowered to establish RAPs for the whole of Victoria, which are: (i) well-resourced; (ii) fully constituted by the traditional owners for the relevant area; and (iii) provided with effective powers and functions in relation to the preservation and management of cultural heritage in that area.

Since the introduction of the AHA, however, it is clear that serious issues have arisen with regards to the effectiveness and establishment of RAPs, with particular problems plaguing the VAHC membership and decision-making processes.

In the 2006 VTOLJG submission to the former Government on the Aboriginal Heritage Bill, we noted that the legislation would fail if it did not accord proper status to traditional owners and our rights, and if it did not provide proper processes for the benefit of all parties. These concerns were not adequately addressed in the AHA and – as anticipated – there is now significant uncertainty among and division between Aboriginal groups throughout Victoria.

To end this uncertainty and division, the VTOLJG recommends replacing the VAHC with a well-resourced, efficient traditional-owner-controlled RAP appointment process; and the introduction of a time limit by which all of Victoria must be covered by RAPs constituted by the relevant traditional owner groups for those areas. We also want to see RAPs provided with increased resources and more effective

enforcement powers, in order to better protect and preserve cultural heritage in Victoria – not just for traditional owners, but for the benefit of all Victorians.

### **Cultural heritage exists irrespective of whether there is an appointed RAP**

Before discussing the establishment and effectiveness of RAPs, an important point first needs to be made regarding areas where there are as yet no RAPs.

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. 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.

*For example, I asked for a copy of the [mapping] system; I asked for a copy of the manual at a training. She said, “You can’t have a copy of this because you haven’t got a RAP group”. If you’ve got your RAP then you can learn all about what you’re doing; if you haven’t got a RAP, you haven’t got access to the mapping system. We’re talking about protecting country, who cares about the RAP?<sup>1</sup>*

If traditional owner groups are unsuccessful in gaining recognition as RAPs, we are unable to access the rights provided to those with RAP status: we have no right to consult on cultural heritage decisions affecting our traditional land, no resources and limited ability to protect our cultural heritage in areas where there are no RAPs:

*There is no money to protect cultural heritage in areas where there is no RAP. There has to be a change in the legislation: it needs to identify quite clearly that – especially for some who don’t have RAP status – for Parks, Environment, Water, DPI, DSE, whatever it may be - our cultural heritage is in the landscape and it needs to be preserved and protected and we need the resources to do it.<sup>2</sup>*

Given that, to date, only 9 RAPs have been registered to cover 56% of the State, this means that cultural heritage within the remaining 44% of Victoria is currently either unprotected or that traditional owners for those areas are seriously under-resourced in carrying out their core responsibilities as traditional owners.

This practice of promoting RAPs above other traditional owner groups who, for a variety of reasons, have been unable to gain RAP status, is fundamentally at odds with the way cultural heritage is understood through Aboriginal knowledge and cultural and traditional practices. Traditional owner groups who are not RAPs are being denied important rights relating to their cultural heritage. The promotion of RAPs over non-RAP traditional owner groups is also creating deep divisions between

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<sup>1</sup> T01

<sup>2</sup> T02

Aboriginal groups in Victoria and a sense that traditional owner groups who are not RAPs are being treated unfairly.

The emphasis on becoming a RAP under the AHA and accompanying policy needs to be reassessed with regards to all traditional owner groups, in recognition of the fact that traditional owner duties to protect and preserve cultural heritage persist irrespective of their RAP status. There needs to be a fundamental shift in Government and other parties' understanding of traditional owners and their responsibilities with respect to cultural heritage.

### **Implications of failure to be appointed a RAP – power to the Secretary**

Under the current regime, the establishment and effectiveness of RAPs is critical to our success in being able to preserve and protect Aboriginal cultural heritage in Victoria. However, the VAHC has failed to appoint RAPs for all of Victoria within a reasonable timeframe.

The failings of the RAP appointment processes are particularly apparent in areas where there are no RAPs in place. At present in these areas, all power goes to the Secretary under the AHA with the result that AAV is effectively operating as a RAP by default in these areas.

This is completely at odds with the stated purpose of the AHA, 'to recognise, protect and conserve Aboriginal cultural heritage in Victoria in ways that are based on respect for Aboriginal knowledge and cultural and traditional practices'. (Section 3(a) of the AHA). By failing to support traditional owners to protect and conserve Aboriginal cultural heritage in almost half of Victoria, current practice clearly contradicts the first listed objective of the AHA.

Even where there is no RAP appointed in an area, traditional owners must still be responsible for decisions relating to their cultural heritage. The fact that there is no RAP for any particular area is *not* a consequence of traditional owners no longer being able to speak for country. The fact that RAPs have not yet been appointed for almost half of Victoria is a failing of the processes embedded in the AHA; in particular, it is a consequence of the passive, low resource, low cost RAP appointment process set out under the AHA.

In light of the VAHC's failure over five years to appoint RAPs to ensure complete coverage of the state, the VTOLJG recently passed a resolution to replace the VAHC with a more effective and well-resourced traditional-owner-controlled structure. This structure – and the core principles that must inform its development – is outlined in more detail below.

## **2. VAHC membership and decision-making processes**

The VTOLJG fully supports a traditional-owner-controlled RAP appointment process. Article 33(2) of the DRIP states that Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures. Traditional-owner-control must therefore be the model of the

VAHC, in line with the DRIP and the expectation that Aboriginal people should be controlling and deciding their own future.

However, the VTOLJG assert that there are significant failings with the current model, and urgent reforms need to be made to the VAHC's current membership and decision-making processes. These failings are having the effect of undermining the authority of the VAHC – and the validity of its decisions – in the eyes of traditional owners.

It is important to note that the following criticisms are not related to individual members, but are criticisms of the legislation as it was enacted.

### **Membership**

The VTOLJG highlights the following concerns in relation to the membership processes of the VAHC:

- **Ministerial appointments**

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.

At present there is no requirement under the AHA for members of the VAHC to be traditional owners. Our concerns that there must be a requirement for VAHC members to be traditional owners were clearly communicated to the previous Government during the development of the AHA. These concerns were ignored. This review presents the current Government with a crucial opportunity to rectify the former Government's failings.

- **Representation of traditional owner groups**

Traditional owner groups are not adequately represented in the membership of the VAHC. Where more than one member from the same traditional owner group sits on the Council, other traditional owner groups are less likely to be represented. Diversity of group representation is an important objective for appointments to the VAHC:

*... The Council does not reflect Indigenous cultural practice in the old way. There are five people from one nation, none from another. And that's just on the Heritage Council. There are five regions in the whole system, which they fill up in government: Loddon, NE, NW, City and Gippsland area. There should be some wider view, with people on the Heritage Council from each of those regions. And 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>3</sup>*

- **Perceived conflict of interest**

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<sup>3</sup> T03

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 RAP applications is a divisive issue that is causing much anger and resentment within the Aboriginal community in Victoria:

*The Heritage Council: we regard them as our enemies because certain members on the Council got RAP status above other tribes because they had members on the Council. They've really done a bad job over the years – they've asked us who our tribe is, who we were, what our ancestry was, we gave them the information. We've put in three-four applications and they're still knocking us back. But someone on the Heritage Council got RAP status straight away.<sup>4</sup>*

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. Section 142 of the AHA specifies that a conflict of interest may arise where a member has a pecuniary or personal interest, and it also specifies a conflict of interest where a member is also a member of a particular RAP. The AHA does not deal, however, with the potential conflict of interest that may arise when a VAHC member is considering a RAP application from their own traditional owner group.

**The VTOLJG recommends that the AHA be amended to include a conflict of interest provision for VAHC members that:**

- (i) recognises the special nature of being a member of a traditional owner group**
- (ii) requires positive disclosure of any connection – whether under Aboriginal tradition or ancestral – with the traditional owner group applying, and**
- (iii) establishes that a connection to a traditional owner group application is mandatory grounds for disclosure.**

**The AHA must be clear that a VAHC member cannot determine applications when they are also a part of or have connection to the applicant traditional owner group.**

### **Decision making processes**

It is taking too long for the VAHC to make decisions on unresolved issues in RAP applications – in particular on issues relating to who speaks for country and how boundary overlaps are dealt with. Section 151(1) of the AHA states that the VAHC is required to determine a RAP application within 120 days of receiving the application. However, there are examples within the VTOLJG of decisions taking anywhere from 12 months to four years:

*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*

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<sup>4</sup> T01

*through. And development continues to take place and destroy our cultural heritage because we don't have a RAP.<sup>5</sup>*

The anxiety of RAP applicants who are still waiting for a decision is heightened by the fact that until they are recognised as a RAP, they have limited power and resources to protect, preserve and manage their cultural heritage under the AHA.

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.

*The Heritage Commission has not made a decision over a disputed area in six years. They are never going to. This has upset some people because it's been left to fester too long. There are some sections of areas of overlay that could have been resolved. The decision makers have not had the strength to make a decision. The commission declined RAP applications rather than make the hard decision. They never made a decision over disputed area, so what's the use? The traditional owners have no say over the government appointed decision makers.<sup>6</sup>*

Because the VAHC has no deliberative power, and because there is no urgency to the RAP appointment process, a significant level of power is given to the Secretary in relation to non-RAP areas, with the Secretary being able to decide who speaks for country on cultural heritage matters until a RAP appointment is made.

It is clear that the VAHC needs to be 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.

**The VTOLJG recommends urgent reform to the RAP appointment process to establish a deliberative process that allows for meetings, conferences and hearings with RAP applicants and traditional owners. Such a process would enable VAHC members to seek out additional information, specify the kinds of information required to assist in making a determination, provide feedback on applications and assist in the resolution of overlapping applications.**

**This is fundamentally a resource issue. Any reforms to the current VAHC structure and processes will fail if not adequately resourced. The VTOLJG asserts that increased resources must be committed to the reformed traditional-owner-controlled RAP appointment process.**

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<sup>5</sup> T01

<sup>6</sup> T04

### **Inadequate access to information**

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:

*The Council is not open at all about why our RAP is taking so long; I've said to our board members – what do we do? The response is not adequate at all about why we're not a RAP; we're left in the dark, told we need to present more evidence. There's an area in between mid-country, where there's no family link, so we included a small boundary to look after that country, and they asked us, "Well, how come you put that bit in?" So we took that bit out, but they told us, "We'll review your application once you've reviewed your application."<sup>7</sup>*

*Who owns the records? Is it AAV? The Heritage Council? Or traditional owners? Traditional owners should own the records, and have access to them fairly regularly. A farmer can, but my people, they can't get it. Now we've just had a big battle trying to get access to [RAP] applications. The Heritage Council upheld it and only granted access the other day – this is 8 mths before the State wants everything tidied up and we were not allowed access to our records – if you've got a RAP application you can, but we are not in a position to be a RAP at the moment.<sup>8</sup>*

Given that after four years there are only nine RAPs, we would like to be able to understand some of the difficulties that the VAHC is having in making decisions. For example, if there are problems with resources or regulations, we wish to be made aware of the issues.

The AHA should be amended so that, when making a determination, the VAHC is required to provide reasons to applicants. In providing these reasons, there needs to be an additional requirement for the VAHC to specify how groups can go from failure to success in their claims, and the VAHC should have face-to-face communication with applicants when providing those reasons.

**The VTOLJG requests access to the VAHC minutes of all meetings and determinations relating to RAP applications conducted to date.**

**We also recommend that the AHA be amended to establish a deliberative process for the VAHC that involves holding meetings, conferences and hearings with traditional owners to discuss their applications.**

**If an application fails, traditional owners must be given guidance on how to succeed as part of a statement of reasons. VAHC members must be required to have face-to-face communication with applicants when providing reasons.**

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<sup>7</sup> T01

<sup>8</sup> T03

### **Core principles for a traditional-owner-controlled RAP appointment process**

The VTOLJG notes the keen disappointment of many traditional owners in the failure of the Victorian Aboriginal Heritage Council in its statutory mandate in appointing RAPs for the whole of the State.

**In light of the VAHC's failure over five years to appoint RAPs to all areas of Victoria, the VTOLJG recommends that the VAHC be replaced or reformed to become a more deliberative, faster, more efficient, and more representative structure – to ultimately improve decision making.**

**The core principles around which the VAHC must be replaced or reformed are:**

- **accountability to traditional owners – with members nominated by traditional owner groups to ensure that the VAHC has a representative basis in community**
- **proper resourcing – with resources reallocated from the current structure**
- **controlled by traditional owners**
- **representative – there should be a larger representative spread of traditional owners, to ensure that no more than one or two from each nation are represented. Family members should not sit together.**
- **members should have a demonstrated, long-term commitment to Aboriginal cultural heritage.**

To put this recommendation into effect, the VTOLJG is developing further recommendations to submit to the Government as part of the next stage of this review.

### **3. VAHC criteria for determining RAP applications**

The VTOLJG has significant concerns regarding the operation of the AHA provisions and VAHC policies in appointing RAPs, particularly relating to:

- insufficient recognition of traditional owners as the sole custodians of cultural heritage in our traditional country.
- equating historical or contemporary interests with traditional owner rights of cultural heritage, and
- lack of resources available to the VAHC to carry out in-depth research into who speaks for country.

#### **Equating historical/contemporary interests with traditional owner rights**

The AHA provides insufficient recognition of traditional owners as the sole custodians of cultural heritage in our traditional country.

One of the stated objectives under section 3(b) of the AHA is to 'recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage'. No distinction is made in the objectives of the AHA between the responsibilities of Aboriginal people generally and traditional owners specifically in relation to cultural heritage. The term 'primary' guardians also diminishes the rights traditional owners can be recognised as having over cultural heritage.

Other sections of the AHA reinforce our view that traditional owners are not accorded appropriate respect and status as the sole custodians of cultural heritage. For example, under section 151(3)(d)(i) ('Determination of application for registration') in determining an application for registration as a RAP, the VAHC must consider whether the applicant is a body representing Aboriginal people that has 'a historical or contemporary interest in the Aboriginal cultural heritage relating to the area to which the application relates'.

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.

*There are three different organisations putting in claims in our country, and they don't even belong there; they've knocked out [our group] all together. We tried to put in a RAP but got knocked back because other people put in a RAP application for our country. I created organisations to help with Aboriginal people, housing and other services, I helped set them up, not as traditional owners but as service providers, and then they've gone and put their own RAP in. [...] So now we have four RAP applications in one area – I don't understand why the heritage system has let the other people put in their claims; within their research it should be recorded, all the paperwork should be recorded as to who are traditional owners of country.<sup>9</sup>*

This situation has arisen largely due to the defective consultative process in developing the AHA, whereby there was no special status provided to – and no specific consultation undertaken with – traditional owners. As a consequence, the AHA places traditional owners, local Aboriginal and historical community groups on equal footing in regards to RAP determinations.

*The 2006 legislation includes traditional owners, local Aboriginal and historical community groups, whereas they should've had traditional owners doing cultural heritage and land aspects, and local Aboriginal community groups doing education and social services. But the Government didn't listen, and so they started a big split and again another fight between my people. [...] The AAV consultative process in determining who could apply for RAP status was flawed. During the consultation on the 2006 Heritage Act, [...] there was only Aboriginal community consultation, no traditional owner consultation. And that's how local Aboriginal communities and historical communities can put in RAP applications and have status.<sup>10</sup>*

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.

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<sup>9</sup> T05

<sup>10</sup> T04

*... just because all my kids live in [another town] so does that give them a right to have a say in those issues? No, they have rights in [this area] but legally my kids could go and put a RAP application in [the town where they live] tomorrow.<sup>11</sup>*

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. This issue needs to be addressed urgently and in accordance with traditional cultural practices.

**In order to speed up the RAP process and resolve the divisions between Aboriginal groups in relation to RAP appointments, the VTOLJG makes the following recommendations.**

**Section 3 (the ‘objectives’ statement) of the AHA should be amended to:**

- **recognise traditional owners as the *sole* custodians of cultural heritage within their traditional country**
- **establish traditional ownership as the *key criteria* for RAP appointments, and**
- **set out that it is the ultimate goal of the AHA for the whole of Victoria to be covered by RAPs within a *reasonable timeframe*.**

**Section 150 of the AHA also needs to be amended to ensure that applications for registration as a RAP can only be accepted from traditional owners – that is, groups with traditional links to the area. Local Aboriginal community or historical groups should not be able to submit applications for registration as a RAP, and the AHA must be amended accordingly.**

**The VTOLJG further recommends that the functions of RAPs set out in the AHA should be amended to specify that traditional owners/RAPs have a responsibility to historical and contemporary groups to consult with them on relevant cultural heritage matters.**

#### **Lack of resourcing to conduct in-depth research**

One effect of allowing historical and community groups to apply for RAP status has been that the VAHC has been unable to resolve competing RAP applications, with the result that all power relating to those areas affected by unresolved applications is consequently given to the Secretary. Such power is unjustified, given that traditional owner groups exist who are able to and should speak for country.

To avoid the Secretary gaining unwarranted power with respect to Aboriginal cultural heritage, the Government needs to speed up the RAP appointment process,

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<sup>11</sup> T03

to ensure that the entire State is covered with RAPs to protect and preserve cultural heritage across the State.

To successfully do this, the VAHC and participants must be adequately resourced to carry out the in-depth research required to resolve outstanding issues as to who speaks for country. There is a serious lack of resourcing provided for the VAHC to conduct in-depth research into the recognition of traditional owners. Given that this research could resolve many of the unresolved issues relating to RAP applications, this lack of funding represents a significant failure in the RAP appointment process.

**The RAP recognition process must be urgently provided with increased resources and made more efficient so that traditional owners can be provided with the rights that are due by becoming a RAP. In particular, the VAHC should be supported to conduct in-depth research as to who the traditional owners are in relation to overlapping applications.**

#### **Lower threshold than native title for traditional owner status**

To make the RAP process more efficient and less open to criticism, criteria need to be developed that set out a meaningful way of identifying the traditional owner group of that area.

A key element of this is identifying to what extent the VAHC needs to be satisfied as to the traditional links of any given traditional owner group to an area. Given that – unlike native title – cultural heritage is not a land ownership issue, the VTOLJG submits that the connection threshold should be lower for RAP determinations than for native title. We assert that the VAHC need only be ‘reasonably satisfied’ that the traditional owner group is able to speak for that country, rather than being exhaustively convinced that a particular group has a traditional connection with country.

An additional criterion that could be introduced would be to create the option of varying boundaries in the future, which would allow for flexibility and reduce the pressure on the VAHC to make sure a recognition decision is impossible to challenge. If different or more accurate information comes to hand at a later date, either from a RAP or from a later RAP applicant, the RAP boundaries could be altered upon consideration of the new information.

**In recognition of the fact that cultural heritage is not a land ownership issue, but a question of land management, we recommend that the criteria in section 151(3) of the AHA be amended to lower the bar for traditional owners to become RAPs and to provide specific guidelines for the VAHC in determining RAP applications.**

**The specific guidelines would establish that the VAHC need only 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.**

### **Time-limit on Secretary treating all Aboriginal groups as equal with regards to CH**

The Secretary's policy of treating all Aboriginal people as having equal status with regards to areas where RAP applications are made over the same area but are not yet determined. Whilst it seems reasonable to accept a RAP application based on limited information, there must be a time limit by which the Secretary cannot continue to regard all people for the area as having equal prospects of demonstrating that they are traditional owners. This approach has created deep divisions within communities and needs to be urgently addressed.

*We've applied for RAP status on several occasions, we've never been passed. It's insulting really. Since RAP applications first started; we haven't done any good. They keep going on about boundaries, and people who have an interest – even people who don't come from our land, they even come from NSW, SA – and they put in a letter of interest about our claim, and they seem to be getting more respect than what the traditional owners do. There are people who are doing a lot of cultural heritage work who don't even come from the area. But if you've got an interest, you've got a say; the same say as the traditional owners. The Native Title Act and AHA supports people like that. It doesn't support traditional owners.<sup>12</sup>*

**The VTOLJG recommends that the AHA be amended to:**

- (i) impose a duty on the Secretary to be responsive to new information as it becomes available with regards to traditional owners' connection to country; and**
- (ii) set a time limit on how long the Secretary is able to treat all groups equally as regards to traditional owner status for an area. After a certain period, the Secretary should have to refer the issue to the VAHC for an inquiry. A reasonable time limit would be 12 months.**

**The Government urgently needs to speed up the RAP appointment process to ensure that the remaining 44% of Victoria is covered by RAPs. Without a speedy RAP appointment process, the AHA gives unjustified power to the Secretary in cultural heritage matters in areas where there are no RAPs.**

## **4. Effectiveness of the established Registered Aboriginal Parties.**

### **Benefits in becoming a RAP**

Traditional owners who have been successful in being registered as RAPs note definite improvements in their ability to protect, preserve and manage their cultural heritage. We recognise that – for the most part – where RAPs exist, they are the primary contact for parties dealing with cultural heritage matters, and traditional owners are able to have more of an input into decisions being made over their land than previously was the case:

*We are happy to be the first contact and have an input into decisions that are being made over our land. The hardest group to get that message through to is the five councils in our area. Previously, they've just done the deal with AAV behind closed*

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<sup>12</sup> T06

*doors and we were getting second hand information. Now we say, “you come sit down with us, we want to know what your forward planning is, we want to know what’s going to happen in the next 10 -20 yrs.” We get to sit down at the table with them now.<sup>13</sup>*

*We do an assessment of [a CHMP], and make it quite clear to the developer or archeologists that this is what we need to be done; identify if there’s going to be any damage; they are working for us at the moment. We run an introductory course for developers and machine operators; it’s all got to be monitored by our people. In past the archeologist would do a desktop study and then they’d let AAV tick it off. But it’s a totally different ballgame today.<sup>14</sup>*

*If you’ve got RAP status you can do the CHMP and have a big input into it. If you don’t have RAP status, they’ll still talk to you but not with the same respect or on the same level. Once they see a certificate, they’re a bit more wary of you. It gives only a little bit more power, but it would still be good to have it. With the native title process, we get land back as part of a deal with the State Government - at least it’s some sort of recognition. Like a RAP – it’s something but it’s a token gesture.<sup>15</sup>*

It must be acknowledged, though, that it is an ongoing learning process, with some levels of government and government departments still coming to grips with the new way of doing business.

### **Insufficient resourcing for RAPs to protect and preserve cultural heritage**

Despite the benefits of becoming a RAP, there is nonetheless a real risk of damage to sites in RAP areas, due to a lack of capacity and resources for the RAP to properly protect cultural heritage sites. RAPs do not have the resources available to be able to ensure adequate protection of all significant sites in RAP areas.

*There needs to be sufficient capacity for some RAPs to protect and preserve cultural heritage sites. I’d like to see more resources to RAPs to do that better. We don’t have the resources; for example, some areas have quite a number of registered sites but in our area there are just as many unregistered sites. We are reluctant to make the unregistered sites known to the public because we can’t protect them all. We have to work on this to ensure adequate protection of registered and unregistered. There’s a risk of desecration and damage to unregistered sites. It’s a known fact that a number of sites are damaged deliberately sometimes.<sup>16</sup>*

Whether or not a RAP exists for a particular area, all LJG members strongly contend that for the Act to properly protect Aboriginal cultural heritage, resources and support must be made available for its protection right across Victoria:

*Gippsland has the most national parks in the State of Victoria, and where there are no RAPs in neighbouring areas, we try to work with our neighbours and support each other,*

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<sup>13</sup> T07

<sup>14</sup> T07

<sup>15</sup> T06

<sup>16</sup> T08

*but they don't have any resources from AAV or anyone to protect our sites. To me, that makes a hypocrite of the legislation.<sup>17</sup>*

In areas where there is little or no development, RAPs find it particularly difficult to maintain sufficient resources to properly protect their cultural heritage. Under the RAP structure, a small budget is provided to kick-start the RAP, after which it is necessary for the RAP to generate its own income. However, this incorrectly assumes that all regions within Victoria will have the same capacity to raise funds from CHMPs required for development applications and neglects important differences between regional and metropolitan areas: for example, the cost of protecting sites is much greater in remote areas with large areas to protect and preserve; and, due to limited development in regional areas, RAPs in regional areas are limited in their ability to raise funds from development to fund cultural heritage protection.

In some RAP areas, development is occurring but at an insufficient rate for the relevant RAPs to finance a coordinator's salary on an ongoing basis or to pay for maintenance work on sites that have been eroded:

*Under the RAP structure, they gave a small budget to kick-start it, but no money to follow up in terms of funding for a coordinator; you have to generate income out of your own work projects and so on. Well we up here got a big area, but those metro areas around Geelong and Melbourne have got enormous projects going on, with big benefits to those traditional owners. Up here, development is happening but we're never going to be able to pay a salary for a coordinator. And there's no budget whatsoever for maintenance work on sites that have been eroded; AAV got a \$500k budget, and they employed three people up here under AAV structure. Well, that money should come to traditional owners. It should be a budget for traditional owners instead, to cover the maintenance of our sites, a coordinator and on an ongoing basis. They've been giving that money to themselves.<sup>18</sup>*

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. At present, however, the AHA erroneously ties development and cultural heritage together, so that development in a culturally important area provides both the trigger and the funding necessary for a RAP to protect or manage cultural heritage in accordance with the AHA. This approach makes the AHA an anomaly in heritage legislation: it makes Aboriginal cultural heritage dependent upon development for its protection – and makes RAPs dependent upon development in order to sustain themselves. This is completely inconsistent with the policy underlying other areas of heritage protection, and is fundamentally unjust.

The VTOLJG asserts that there should be minimum standards for protection and preservation of cultural heritage across the board. Similar to other non-Indigenous

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<sup>17</sup> T07

<sup>18</sup> T07

heritage protection regimes, setting minimum standards for the protection of Aboriginal cultural heritage must be recognised as a public cost.

**The VTOLJG recommends the introduction of minimum standards for the protection and preservation of Aboriginal cultural heritage across the board. This must be recognised as a public cost, and it must be covered in the same way that mainstream heritage protection is accepted as a necessary public cost.**

**Further, in light of the differences between regions in terms of development, the VTOLJG submits that increased resources be made available to RAPs, particularly in regional areas, to ensure that they have the requisite capacity to carry out their core duties in protecting and preserving cultural heritage at the local level.**

### **Financial viability and cultural appropriateness of RAPs**

The current cultural regime ensures that RAPs are central to the management and preservation of Aboriginal cultural heritage in Victoria. However, due to the AHA's emphasis on development and the lack of resources provided to RAPs to carry out their core responsibilities, the option of becoming a RAP is not financially viable for all traditional owner groups:

*It is against the law to set up a corporation to fail. But the funding [for RAPs] is not there. Studies that we've had done - based on what [AAV] want you to do - it costs about \$300k or so a year to run a RAP. We've got about \$20k. We are not based in Melbourne. This Act is based in Melbourne, where with land development, subdivision, you could do a CHMP everyday. At the end of the day, they're making good dollars, but in the north-west, we don't have those infrastructures all the time. We struggle to try to find funds to do these CHMPs, because the Act is written that tight.<sup>19</sup>*

There needs to be resources and support provided to all traditional owner groups in order to support their applications, and once recognised as a RAP, to sustain their activities in preserving and protecting cultural heritage. Resources must be made available for all groups to protect their cultural heritage, irrespective of the level of development occurring in any area.

*We only know of RAPs where there's a large corporation behind that RAP. That's all there is at this point - there's no smaller RAPs, it's a very closed shop for us. In areas where there are not going to be a lot of CHMPs [because there's not a lot of development], there won't be a great income stream for a RAP. There needs to be an alternative; I don't know whether it could be some sort of formal agreement between AAV and TOs of that area; whether TOs could still do their business about country but AAV take care of all legalities for them, I don't know<sup>20</sup>.*

*It's not the same experience for everyone – it's only based around subdivision/development, but up here we have a different landscape. There's hardly any work up here; but there's probably more burial sites than anywhere in the*

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<sup>19</sup> T03

<sup>20</sup> T03

*southern hemisphere. They're fenced off, getting looked after, but no-one really manages them because there are no RAPs. In urban development, some of them have done 80 CHMPs in a year; we do one every 2 yrs here – how can you set up a RAP application to do that? You can't viably do that. So our RAP application is not viable at the moment: it's 5 years down the track but we're still not a RAP in that sense. You've got to set up a business that has an arm off it. We need to look at economical things, tourism and so on; need to sit down and talk to Parks about doing all their cross cultural training. First you got to set up a business that can support the RAP application, but then what about insurance? You need to have public liability of \$20m – we couldn't do that. On \$20k where would you run it from? You can't set up a corporation that you know is going to fail.<sup>21</sup>*

The RAP structure and resourcing model therefore needs to be more flexible so that it can be adapted to fit the significant variations between traditional owner groups and their traditional areas, and to recognise the different levels of development occurring in these areas throughout Victoria.

Further, the RAP structure is not suitable for all traditional owner groups and needs to be more flexible in order to accommodate different ways of doing business as traditional owners:

*My Elders have said that they don't want to do business like that anyway, they don't want a formal corporation because that's not our way of doing business, so where does that leave groups like us? There's no option – it's RAP or nothing. Sure, we miss out on resourcing, but more importantly we miss out on a lot of decision making. The most important aspect is the decision making.<sup>22</sup>*

*In a corporation you can vote people in and out – so there's the potential for non-TOs to end up making decisions about cultural heritage. This is the exact reason why Elders will not go with a corporation, because our old people never had democracy: our decisions were based on a collective of wisdom of the Elders. You couldn't vote them in or out; once they were accepted by the people, that was it. So a corporation is not a traditional way of doing business. If you're an Aboriginal person who wants to make money from doing business, then a corporation is the way to do that. But for traditional people, the only real concern is caring for our culture and heritage – and a corporation is a bad thing.<sup>23</sup>*

**We recommend amendments to the RAP structure and funding model to allow for increased flexibility, and to acknowledge the differences between traditional owner groups' priorities and requirements in relation to preserving and protecting cultural heritage in their traditional lands.**

### **RAP powers to improve enforcement**

The functions of a RAP in protecting cultural heritage under a Cultural Heritage Management Plan (CHMP), and in enforcing CHMPs or Cultural Heritage Permits

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<sup>21</sup> T03

<sup>22</sup> T01

<sup>23</sup> T06

(CHPs) to ensure the protection or preservation of important sites, are extremely limited:

*Even people who have RAPs through, there's still development that goes on because AAV do not enforce the Act. For example, Spring Creek, Torquay – Wauthurong RAP tried to halt development but they couldn't get it halted; had no say in it even though they have RAP status.<sup>24</sup>*

*When you've got RAP status, it just means you've got a say and can be involved in CHMPs, but at the end of the day the Act will still go against you. RAP status is just a little certificate that gives you just a little bit more say than what I've got right now.<sup>25</sup>*

Even if a RAP decides not to approve a CHMP, VCAT can overturn that decision and provide consent to the plan: section 116(1) of the AHA. Furthermore, deviations from a CHMP that cause, or threaten to cause, damage to heritage values are a matter of enforcement by AAV; a RAP has no role other than to bring the matter to the attention of AAV.

A RAP can request a 'Stop Order' under Division 2 of the AHA where activity is harming or likely to harm Aboriginal cultural heritage. However, in practice, Stop Orders are unlikely to be issued because the inspector conducting the cultural heritage audit is engaged by AAV. Based on past evidence of AAV enforcement decisions, it seems very unlikely that AAV would ever prosecute.

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

*If the Act is for Aboriginal people, then it should not allow for destruction of our sites. Why have a clause that says it's OK for developers to knock over Aboriginal sites if they're so far away from a waterway? We had a 15,000 yr old midden along a pipeline. ... An archaeologist come along, said it was 15000 yrs old, didn't matter. We protested, stopped work for a while and then they kept it going. Aboriginal people can't stop anything under the Act – virtually powerless. Can't think of any powers it gives us. Even as a RAP, you get a little bit more say but we still couldn't have stopped the destruction of a 15000 year old midden site.<sup>26</sup>*

**We recommend that RAPs be provided with enforcement powers in relation to Stop Orders, similar to those that were previously held under the former Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*. For example, RAPs could be given at least temporary Stop Order powers, with appropriately trained RAP employees provided with the option of becoming enforcement officers. There should be an option for RAP representatives to complete the same training as provided to officers with Parks Victoria in respect of DSE enforcement.**

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<sup>24</sup> T06

<sup>25</sup> T06

<sup>26</sup> T06

### **Cultural Heritage Permits**

It is the view of the VTOLJG that the current operation of CHPs is to provide an open licence to destroy sites. The power to issue a permit is centralised under AAV: AAV has complete authority to sign off on a CHP, and if there is no RAP for the area, traditional owners have no say. Traditional owners may be consulted, but ultimately the Secretary has control.

In order to subject CHPs to greater scrutiny by traditional owners, where a RAP has been appointed for an area, the VTOLJG submits that RAPs should be provided with the power to grant a CHP.

**The following amendments therefore should be made to the CHP processes:**

- **RAPs should be provided with a power to grant CHPs.**
- **RAPs should also be provided with a veto over the CHP process.**
- **In granting a CHP, a RAP should have the power to impose certain terms and conditions.**
- **In situations where a RAP has granted a CHP or used a veto over the CHP process, an option to appeal a RAP decision could be made available to the Secretary in certain circumstances.**

**We further recommend that the AHA be amended so that RAPs are provided with standing to seek – and VCAT is given the power to grant – injunctions to prevent unlawful harm to Aboriginal cultural heritage, or to prevent a breach of a CHMP or CHP (or to request a declaration about those matters).**

Resourcing urgently needs to be made available so that RAPs are able to pursue these options. In providing resources for enforcement under the AHA, the Government needs to recognise that, in protecting Aboriginal cultural heritage, RAPs and traditional owner groups are providing a public service in protecting Aboriginal cultural heritage and must be provided with adequate funding to carry out this service.

### **RAPs and community awareness**

RAPs can be assisted in carrying out their duties relating to cultural heritage protection, management and preservation, by promoting awareness among sponsors, government departments, and the public. The VTOLJG believe that there is currently insufficient work being done to promote public awareness of cultural heritage matters.

Traditional owner groups and RAPs require assistance and support from AAV to promote the protection and management of Aboriginal cultural heritage in the wider community, by developing information and awareness packages to deliver in conjunction with traditional owners.

Further, it is our view that every CHMP should incorporate induction training. For example, contractors could be provided with an 'Ochre Card', to indicate that the contractor has completed relevant cultural heritage awareness induction training.

Such training could cover all aspects of development, including the basics of cultural heritage awareness and recognition.

**We submit that additional resources be made available to RAPs and traditional owner groups to promote awareness of cultural heritage issues within the general public, to dispel the misinformation and myths that persist about Aboriginal cultural heritage.**

**The VTOLJG recommends the introduction of a mandatory requirement for all contractors to apply for an 'Ochre Card' as part of a CHMP, to demonstrate that they have completed relevant cultural heritage awareness training.**

**Most importantly, there should be recognition that the use of traditional owner knowledge is not a free resource. The VTOLJG calls upon the Government to ensure that traditional owners/RAPs are appropriately compensated for any training and use of our cultural knowledge by Government and experts.**

#### **IN SUMMARY**

The key concern for all traditional owner groups is the protection and preservation of *all* Aboriginal cultural heritage across Victoria. Regardless of whether or not a RAP exists for any given area, we are unanimous in wanting to see Aboriginal cultural heritage protected and preserved across the board.

At present, whether cultural heritage is protected is dependent upon its location: that is, whether or not it is within a RAP area. Irrespective of its cultural, historical or spiritual significance, the protection and preservation of cultural heritage in RAP areas is being prioritised over the protection and preservation of cultural heritage in non-RAP areas.

To ensure that cultural heritage is protected across Victoria, it is essential that there is a speedy resolution of unresolved RAP applications to establish well-resourced, effective and empowered RAPs right across Victoria. The VTOLJG recommendation to replace the VAHC with a reformed traditional-owner-controlled RAP appointment process is therefore critical to the successful resolution of RAP applications, and to the preservation and protection of Aboriginal cultural heritage in Victoria.