

The Aboriginal Heritage Act 2006 and the planning permit process

General Practice Note

JULY 2007 (Revised October 2007)

This General Practice Note describes the key provisions of the *Aboriginal Heritage Act 2006* (the Act) and its regulations and how it interacts with the planning permit process. The General Practice Note covers:

- what has changed since the introduction of the Act
- the requirement for, and preparation of, Cultural Heritage Management Plans
- the role of Registered Aboriginal Parties
- the role of local government, and the effect of Cultural Heritage Management Plans on planning permit applications
- transitional provisions
- enforcing Cultural Heritage Management Plans.

Background

The *Aboriginal Heritage Act 2006* (the Act) and regulations came into effect on 28 May 2007 and replace the *Archaeological and Aboriginal Relics Preservation Act 1972* and Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

What has changed?

The *Aboriginal Heritage Act 2006* continues to provide protection for all Aboriginal places, objects and human remains in Victoria, regardless of their inclusion on the Victorian Aboriginal Heritage Register or land tenure.

Many provisions from the previous legislation have been retained or updated. These include:

- the key principle of community-based decision making
- requirements to report the discovery of Aboriginal cultural heritage, and to submit information gathered during assessments
- constraints on possessing Aboriginal remains and buying or selling traditional Aboriginal objects
- the Victorian Aboriginal Heritage Register, with additional functions
- inspectors authorised to protect heritage, with revised powers and responsibilities.

The *Aboriginal Heritage Act 2006* establishes:

- an Aboriginal Heritage Council of 11 Victorian Traditional Owners
- broader and more flexible Aboriginal community representation, through Registered Aboriginal Parties
- improved procedures for Cultural Heritage Permits (different from planning permits) and Agreements
- a process for the development and timing of Cultural Heritage Management Plans
- a process for Cultural Heritage Audits, backed by Stop Orders
- dispute resolution through the Victorian Civil and Administrative Tribunal (VCAT).

One of the objectives of the *Aboriginal Heritage Act 2006* is to recognise, protect and conserve Aboriginal cultural heritage in Victoria.

The *Aboriginal Heritage Act 2006* provides a more consistent approach to protecting and managing Aboriginal cultural heritage as well as providing clear guidance to planners and developers about when, and how, Aboriginal cultural heritage management issues need to be considered.

Aboriginal Heritage Regulations 2007

The *Aboriginal Heritage Regulations 2007* are used in association with the *Aboriginal Heritage Act 2006*. The Regulations cover:

- fees, forms and procedures
- establish when a Cultural Heritage Management Plan is required
- set minimum standards for Cultural Heritage Management Plans.

What changes are made to the *Victoria Planning Provisions* and all planning schemes?

The *Aboriginal Heritage Act 2006* introduces a requirement to prepare a Cultural Heritage Management Plan if all or part of the activity is a listed high impact activity, resulting in significant ground disturbance, and all or part of the activity area is an area of cultural heritage sensitivity, which has not been subject to significant ground disturbance.

Areas of cultural heritage sensitivity, high impact activities and significant ground disturbance, are specified in the *Aboriginal Heritage Regulations 2007* (the Regulations).

Minor and consequential amendments to the *Victoria Planning Provisions* have been made to give effect to and support the operation of the *Aboriginal Heritage Act 2006*.

Clause 15.11-2 will state:

"Planning and responsible authorities should identify, conserve and protect places of natural or cultural value from inappropriate development. These include: Places of Aboriginal cultural heritage significance and historical and archaeological sites... .

"Planning and responsible authorities must take account of the requirements of the Aboriginal Heritage Act 2006."

What will local councils have to do?

A responsible authority must check whether a Cultural Heritage Management Plan is required prior to determination of a planning permit application (referred to as a statutory authorisation).

A rezoning request does not trigger a requirement to prepare a Cultural Heritage Management Plan.

If a Plan is required the responsible authority cannot issue a planning permit until it receives a copy of an approved Plan [AHA s 52(1)].

A planning permit cannot be granted for an activity that is inconsistent with an approved Plan [AHA s 52(3)].

Aboriginal Affairs Victoria has developed an assessment tool to assist applicants to determine if a Cultural Heritage Management Plan is required. This tool is available at www.dpcd.vic.gov.au/aav.

Cultural Heritage Management Plan Process

- Step 1: An applicant proposes an activity that requires a planning permit (eg. a large subdivision in a coastal area) and applies to the responsible authority for a planning permit.
- Step 2: If the applicant has not provided an approved Cultural Heritage Management Plan (and one is required), the responsible authority notifies the applicant that a Cultural Heritage Management Plan is required under section 52 of the *Aboriginal Heritage Act 2006* (with reference to the 'triggers' as outlined in the Regulations).
(If the applicant provides an approved Cultural Heritage Management Plan go directly to Step 7.)
- Step 3: The applicant advises the relevant Registered Aboriginal Party or Parties for the area, and engages a cultural heritage advisor. The responsible authority is not required to be involved in this process.
- Step 4: A Cultural Heritage Management Plan is prepared by the applicant, with the assistance of a cultural heritage advisor. Registered Aboriginal Parties may participate in this process.
- Step 5: The Registered Aboriginal Parties endorse or reject the Cultural Heritage Management Plan. (Rejection may be appealed to VCAT.)
- Step 6: The applicant submits the approved Cultural Heritage Management Plan to the responsible authority.
- Step 7: The responsible authority can then decide the planning permit application. The statutory time limit for assessing the planning permit application does not commence until the approved Cultural Heritage Management Plan has been received. The responsible authority must not grant a planning permit if the proposed development is inconsistent with the approved Cultural Heritage Management Plan. (Section 52 (3) of the *Aboriginal Heritage Act 2006*.)

When is a Cultural Heritage Management Plan required?

A Cultural Heritage Management Plan is required for a proposed development if the:

- proposal is a listed high impact activity that will cause significant ground disturbance AND is in an area of cultural heritage sensitivity, that has not been subject to significant ground disturbance, as defined by the *Aboriginal Heritage Regulations 2007*
- activity requires an Environmental Effects Statement; or
- the Minister for Aboriginal Affairs so directs.

Plans can also be prepared voluntarily.

What is a 'High Impact Activity'?

High impact activities are specified in the *Aboriginal Heritage Regulations 2007* (Part 2, Division 5), and generally include buildings and works that result in significant ground disturbance. The specified activities include, but are not limited to:

- the construction of three or more dwellings
- subdivisions of three or more lots
- building or works in alpine resorts
- the extraction or removal of sand or sandstone
- searching for stone
- timber production
- dams.

If the proposed activity is **not** a *listed* high impact activity it **does not** trigger a Cultural Heritage Management Plan.

What is an area of cultural heritage sensitivity?

Areas of cultural heritage sensitivity are also specified in the *Aboriginal Heritage Regulations 2007* (Part 2, Division 3).

They include registered cultural heritage places, waterways, ancient lakes, declared Ramsar wetlands, coastal land, coastal Crown land, parks, the high plains, Koo Wee Rup Plain, greenstone outcrops, stony rises, the volcanic cones of Western Victoria, caves, lunettes, dunes and sand sheets, and land within specified distances of these areas of cultural heritage sensitivity.

These areas have been defined as a result of:

- analysis of the Aboriginal Heritage Register
- knowledge of where Aboriginal cultural heritage occurs in the landscape; and
- research and analysis of where cultural heritage has been threatened.

Aboriginal Affairs Victoria has mapped these areas of cultural heritage sensitivity. These maps are available from Aboriginal Affairs Victoria – www.dpcd.vic.gov.au/aav.

Local councils can also work with Aboriginal Affairs Victoria and Registered Aboriginal Parties to refine the sensitivity mapping to reflect conditions and land use history. These maps can then be included in Schedule 1 to the Regulations and take precedence over the Statewide map.

What must a Cultural Heritage Management Plan include?

A Cultural Heritage Management Plan is a written report that assesses the nature of any Aboriginal cultural heritage present in an area. An assessment may include background research, consultation, field survey and excavation.

Plans must focus on minimising harm to cultural heritage, or managing any unavoidable impacts (Section 61 of the *Aboriginal Heritage Act 2006*). They deal with cultural heritage identified during the assessment, denote areas where further heritage may be discovered during works and provide contingencies (agreed processes) for managing cultural heritage uncovered during works.

Completion of a Cultural Heritage Management Plan at an early stage provides applicants and planners with maximum design flexibility to respond to and manage Aboriginal cultural heritage values. When a Cultural Heritage Management Plan is approved for an activity it is not necessary for the proponent to seek additional Cultural Heritage Permits to deal with heritage values identified during works.

Who prepares the Cultural Heritage Management Plan?

The person, company or agency that proposes an activity is responsible for establishing whether their project requires a Cultural Heritage Management Plan. The proponent is known as the 'sponsor' for the Cultural Heritage Management Plan.

The sponsor must engage a cultural heritage advisor to assist in preparation of a Cultural Heritage Management Plan.

What is the role of Registered Aboriginal Parties in approving Cultural Heritage Management Plans?

A Registered Aboriginal Party that nominates to evaluate a Cultural Heritage Management Plan may also:

- participate in the assessment of the area to determine the nature of cultural heritage present; and
- consult with the sponsor on proposed cultural heritage management recommendations.

A Registered Aboriginal Party's decision not to approve a plan can only be made on the cultural heritage management grounds listed in the *Aboriginal Heritage Act 2006* (Section 61).

The sponsor may apply to the Victorian Civil and Administrative Tribunal (VCAT) for review of a Registered Aboriginal Party decision not to approve a plan (*Aboriginal Heritage Act 2006*, Section 116).

VCAT can approve, amend or refuse to approve the Cultural Heritage Management Plan. The local council is not required to be involved in this process.

What if other Aboriginal people object to a planning permit application?

Only Registered Aboriginal Parties are able to evaluate (approve or reject) a Cultural Heritage Management Plan. If there is more than one party, both have the same standing and are both able to evaluate a Cultural Heritage Management Plan.

Other Aboriginal people, or organisations, have the same standing as any other potential objectors to planning permit applications.

What happens to planning permit applications lodged prior to 28 May 2007?

A Cultural Heritage Management Plan is not required for an activity if, immediately before the commencement day of the new Act (and Regulations):

- a planning permit for the activity was in force
- a decision maker has received an application for a statutory authorisation for that activity
- an archeological study has been completed and all site information provided to the Secretary in accordance with the *Archaeological and Aboriginal Relics Preservation Act 1972*; and
- a consent given for the activity under section 21U of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is in force to do an act referred to in section 21U(1) of that Act.

Do amendments to existing planning permits require a Cultural Heritage Management Plan?

Amendments to planning permits are statutory authorisations for which a Cultural Heritage Management Plan may be required. An assessment of whether the proposed activity is a high impact activity on land of cultural heritage sensitivity, that has not been subject to significant ground disturbance is required. However, amendments to planning permits where there is already an approved Cultural Heritage Management Plan in place do not trigger a further Cultural Heritage Management Plan if the amendments are consistent with the approved Plan.

Who is responsible for enforcing a cultural heritage management plan?

Inspectors appointed under the *Aboriginal Heritage Act 2006*, working with Aboriginal Affairs Victoria and relevant Registered Aboriginal Parties, will be responsible for ensuring that conditions and recommendations contained in approved Cultural Heritage Management Plans are adhered to.

Responsible authorities must ensure that an activity authorised by a planning permit is consistent with the approved Cultural Heritage Management Plan.

Further information

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