

6 May 2018
Aboriginal Victoria

Via email: Aboriginal.Victoria@dpc.vic.gov.au;

Dear Sir/Madam

SUBMISSION TO DRAFT ABORIGINAL HERITAGE REGULATIONS 2018 AND ACCOMPANYING REGULATORY IMPACT STATEMENT

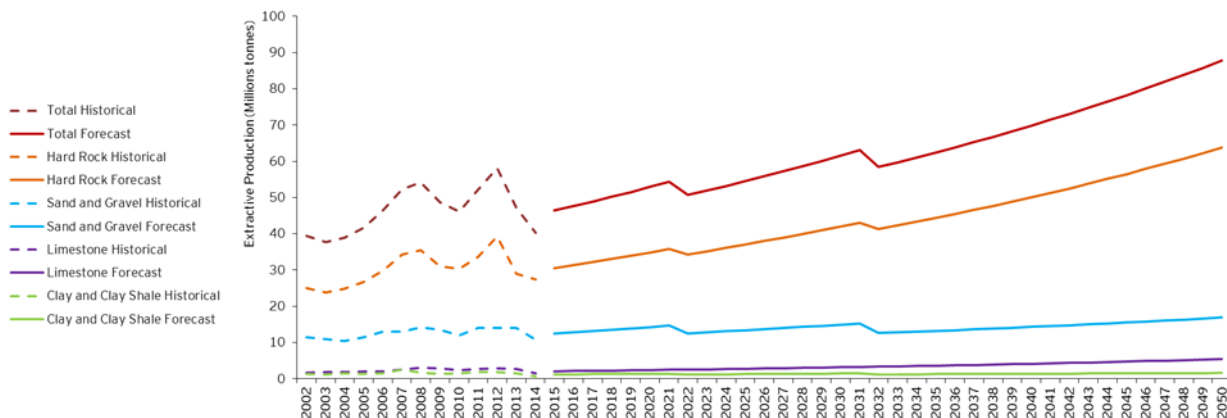
Thank you for the opportunity to comment on the Draft Aboriginal Heritage Regulations 2018 (AH Regulations 2018) and accompanying Regulatory Impact Statement (RIS).

The Construction Material Processors Association (CMPA) is dedicated to the representation and service of its Members in the Victorian Earth Resources industry. The CMPA represents a broad spectrum of businesses that extract and process hard rock, gravel, sand, clay, lime and soil. CMPA members also operate recycling businesses.

CMPA members are typically small to medium sized family and private businesses, local government and utilities. Many are regionally based employers and service local construction, infrastructure and road maintenance needs. The extractive industry provides an essential service that underpins growth and development in Victoria through supply of the construction materials described above (47 million tonnes in 2015/16, approximately \$786 million). Small and medium business account for approximately over half of this production.

Of relevance is the current demand for raw construction materials in Victoria that has been bought about by greater than predicted population growth and major projects of the Government. Current demand for this material is more than the highest prediction for 2017 and is illustrated in the figure below from the Government publication “Demand analysis of extractive resources in Victoria” 16 May 2016. Additionally, an announcement by the Treasurer The Hon Tim Pallas MP that there will be \$13.7 billion spent on a 12-month blitz on roads, railways and other infrastructure around Victoria for 2018/19.

Figure 16 – Extractive Resources Demand – Historic data and Forecast over the period 2002-2050 – million tonnes



It is very difficult and costly to obtain an approved work plan for a quarry or even an extension through a variation to an existing work plan. One of the many substantive barriers is Aboriginal Heritage regulations.

The CMPA recognises and respects the State's Aboriginal Heritage and Culture and the need to preserve significant and important sites. The CMPA also supports responsible, balanced legislation that is in the best interests of the State.

Comments on the Aboriginal Heritage Regulatory Impact Statement

Executive Summary

p. vii: By stakeholders does this include all parties RAPs, industry, consultants and what weighting was given to stakeholders' feedback?

p. ix: The Allen Consulting Report prepared for the Heritage Chairs and Officials of Australia and New Zealand: "Valuing the priceless: The value of historic heritage in Australia", Research Report 2 2005 is referred to throughout the RIS and specifically excludes indigenous heritage and so should not be relied upon for the RIS.

p. x: The majority of CHMPs are complex studies so it is not surprising that they account for 97% of the cost of management conditions.

p. xiii. "...AV considers that the CHMP process remains an effective heritage management tool." There is no emphasis on the quality of Aboriginal Heritage being found and its usefulness in preserving meaningful Aboriginal Heritage.

p. xv 2nd dot point: Updating the areas of cultural heritage sensitivity by expanding the definition of "waterways to ensure that tributaries of named waterways and channelized sections" is not supported due to the all-encompassing nature of the definition. It also appears to be inconsistent with the definition for a waterway in the draft AH Regulations 2018.

Areas of cultural heritage sensitivity should logically be areas where there is a demonstrably high risk that Aboriginal heritage materials will occur in undisturbed settings. There is no need to extend the number or scope of areas of cultural heritage sensitivity currently listed in the Regulations. The problem is that the scope and definition of the current areas of cultural heritage sensitivity are too broad, which generates the requirement for a CHMP where the genuine Aboriginal heritage risks are low. This has not been addressed in the draft AH Regulations 2018.

Also not addressed in CMPA previous submission on the discussion paper was that the current definition of the area of cultural heritage sensitivity extending 200m either side of a waterway is unnecessarily large when the data in the Victorian Aboriginal Heritage Register clearly shows that the majority of artefacts occur within 20-50 m of a waterway. The area of cultural heritage sensitivity adjacent to a waterway should only extend 50 m either side of a waterway. An additional problem is that under the current definition of "waterway" in the Regulations, an artificial channel, not on the alignment of the original waterway that is named on the Register of Geographical Place Names with the word "creek" (for example Bendigo Creek) is, by definition, a waterway. As a result, high impact activities within 200 m of the artificial channel of Bendigo Creek trigger the requirement for a CHMP to be undertaken. The current definition in Regulation 4:

"waterway means—

(a) a river, creek, stream or watercourse the name of which is registered under the

Geographic Place Names Act 1998; or” should be amended along the following lines:

“a natural channel of a river, creek, stream or watercourse the name of which is registered under the Geographic Place Names Act 1998”

Any artificially constructed channel, race, pipeline or other construction that may or may not be connected to a natural channel is not a waterway, even if the name is registered under the Geographic Place Names Act 1998.

This proposal by CMPA was totally disregarded in the RIS.

p. xv 4th dash: “ensure that management conditions recommended are consistent with the conclusions of the assessment”. There are issues with current management conditions, for example:

- the requirement of a quarry owner to retain pebbles of a certain size for collection by the RAP: the said pebbles subsequently never having been collected;
- the requirement of a quarry owner to have an induction by the RAP for every employee and contractor prior to their commencement at a quarry site (\$1200 for 20 minute induction).

More guidance is required for management conditions which should be set so that they are relevant, realistic and practicable in their preservation of Aboriginal Heritage. Please see CMPA’s submission on the Discussion Paper 2017 for further comments. It is noted that CHMP guidance material is to be amended to provide greater clarity to CHMP sponsors and RAPs regarding the standards required for a CHMP by ensuring that the management conditions recommended are consistent with the conclusions of the assessment. CMPA would like the opportunity to comment on these amendments.

p. xvii Table 6 Option 1: There is an error in the actual fee unit in that it differs from the Aboriginal Heritage Regulations 2007 (Regs 2007):

	RIS	Regs 2007
	fee units	
CHMP-one authority		
Standard assessment –large activity	120	160
Complex assessment-small activity	60	80
Complex assessment – medium activity	120	160
Complex assessment – large activity	240	320
CHMP – two authorities		
Standard assessment –large activity	160	120
Complex assessment-small activity	80	60
Complex assessment – medium activity	160	120
Complex assessment – large activity	320	240

The above error is repeated throughout the RIS.

p. xix Preferred fee option: “Fee option 2 results in estimated annual revenue of approximately \$1.6 million for Government and \$300,000 for RAPs.”. The Wathaurang Aboriginal Corporation had income for CHMPs listed as \$154K for 2016/17 (available from the Office of the Registrar of Aboriginal Corporations, www.oric.gov.au). With 10 active RAPs in Victoria this equates to approximately \$1.54 million per annum: nearly 5 times that cited in the RIS.

p. 33 6.1.1 Key assumptions:

“None of the Options involve changes that are anticipated to systematically cause CHMP figures to vary from the Year 1 volume over the 10 year period.” Population growth in Victoria is at an all-time high,

therefore, the inclusion of construction of residential villages and residential buildings will lead to a greater increase of CHMPs than anticipated in the RIS.

“There was significant variation in the 15 responses regarding the time and cost of activities, in particular, engaging a heritage advisor to prepare a CHMP and the cost of management conditions.” There are currently ~200 heritage advisors operating in Victoria leading to a low response rate of 7.5% which is too low to base an analysis on.

“As an indication, the lowest cost of a CHMP was \$2,200, while the highest was \$80,000.” The cost of undertaking a complex assessment may be greater than \$500K and may take 4 years or more for the extractive industry.

p. 37: Costs of each option 1st para: “... with responses from a separate survey of sponsors being used as a check.” The extractive industry/CMPA was not included in the survey.

p. 38 Amendments to CHMPs: “It is estimated that amendments to CHMPs cost approximately 36 per cent of a full CHMP.” Advice to the CHMP from a Heritage Advisor indicates that there are no cost savings in an amendment to a CHMP.

p. 39 Total cost of preparing CHMPs: “In total, the attributable cost of preparing CHMPs equates to approximately \$13.8 million per year”. This figure does not include opportunity costs nor any construction-related sunk costs from land-users ceasing their development activity resulting in an incomplete CHMP.

p. 39 Table 11 Frequency and cost of CHMP management conditions:

The frequency and cost of CHMP management conditions appear to be seriously underestimated at \$5.2 million per annum for CHMPs with a complex assessment.

p. 47 6.4.3 The costs of reduced development due to the Regulations: “...it is likely that a number (land-users) would choose not to undertake development, as the probable cost of a CHMP could outweigh the marginal benefit of development.” CMPA has had feedback from a number of quarry owners wishing to seek an additional quarry site or extension to a quarry site stepping away from the project because of the cost of CHMPs.

p. 48 6.5.2: “The quantified cost of Option 2 is estimated to be \$38,382 for each of the CHMPs... Using the \$78,984 benefit per approved CHMP calculated above this gives a net benefit of \$36,602 per CHMP approved, and a total benefit of \$21.6 million per year”

The figures quoted are based upon a small response rate from Heritage advisors to the AV survey and do not take into account that some CHMPs can cost \$500K.

p. 49 6.6.2 Assessment criteria, Benefit related criteria: “Increased certainty for businesses.” The impact of increased certainty for businesses does not take into account businesses that walk away from prospective quarries due to the cost of CHMPs. Additionally, there have been cases of listing of sites on the Aboriginal Heritage Register that may lead to a suspension of the quarrying activity.

p. 51 Scoring assessments: “This could lead to a mismatch in costs between those landowners who are respectful of aboriginal heritage and those who disregard it” This is a subjective and emotive statement which requires rewording.

p. 55 7.2 Impact on small businesses: 55% of production of construction material (extractive industry) in Victoria is produced by small to medium businesses (quarries). Some of these small to medium businesses are unable to open up new sites or to expand existing operations due to the cost of obtaining a CHMP and

subsequent management conditions. Hence, the statement that “AV does not consider it likely that the impact is proportionally greater than that on large sized businesses” is not correct.

p. 55 Table 21 Criteria for determining adverse completion impacts: There are now more triggers for CHMPs which will lead to small to medium extractive industry businesses being further impacted. The small to medium sized quarry owners do not have access to the finance that multi-national quarry operators or residential developers have. Additionally the cost of a CHMP is ameliorated over the life of the quarry (decades) whilst the residential developer recoups costs immediately (on selling land).

p. 56 Table 21 Criteria for determining adverse completion impacts: “Would it be more difficult for new firms or individuals to enter the industry after the imposition of the proposed measure?” “No the changes do not involve the imposition of any barriers to entry, and they provide further clarity, which should benefit new entrants” Disagree, the definition of a waterway has been expanded which will be a greater barrier to entry for small businesses.

“Would the cost/benefits associated with the proposed measure affect some firms or individuals substantially than others (e.g. small firms...)” “Possibly as the cost of a CHMP may be more significant for smaller firms” “Minimal (significance) as the cost of a CHMP is a small part of the cost of large developments” Disagree, see comments above.

“Would the proposed measure restrict the ability of businesses to choose the price, quality, range or location of their products?” “Minimal (significance)” Disagree, see comments above.

“Would the proposed measure lead to higher ongoing costs for new entrants that existing firms do not have to meet?” “None (significance)” Disagree, see comments above.

“Is the ability or incentive to innovate or develop new products or services likely to be affected by the proposed measure?” “None (significance)” Disagree, see comments above.

“The preceding chapters and analysis have generally demonstrated that based on the quantified costs and benefits the proposed measures represent a net benefit, and that the government’s objectives can only be achieved by restricting competition in this way.” There are greater costs attributed to small to medium businesses (quarries) leading to a barrier to entry or further expansion proportionally than for say residential developers as discussed above. Additionally, consideration needs to be given to the aggregated costs due to ALL regulations associated with the extractive industry.

p. 83 Table 3.5 Responses to common stakeholder feedback:

“The regulations should address the significant costs associated with archaeological salvage operations” Whilst it is disappointing that there has been no changes to the AH Regulations 2018, the action by AV to consult with key stakeholders is welcome.

p. 85 Table 3.5 Responses to common stakeholder feedback:

“The area of cultural heritage sensitivity associated with waterways should be reduced” “No change to the regulations” It is disappointing that the issue has not been addressed by AV.

CMPA member Sponsors indicate that there is a generic problem with CHMPs arising from the fact that the RAPs dictate the process, methods, outcomes and pace (as a result of their availability for meetings, fieldwork etc.) of CHMPs and that the system appears to be designed to encourage over-servicing by RAPs and heritage advisors.

Summary

In summary, the interpretation of the Regulations and the policy and practice of the RAPs has created an adversarial environment for CHMPs, which was never the intent. An environment for cooperative discussion and exchange between Sponsor, heritage advisor and RAP does not currently exist and has not been addressed by the draft AH Regulations 2018. There are a number of issues that have not been addressed by the RIS, including:

- Costs from delays in the CHMP process;
- Lack of a prompt and binding arbitration mechanism;
- Disconnect between RAPs expectations and the regulations;
- Triggers for CHMPs - inaccurate or excessive mapping of cultural heritage sensitivity;
- Excessive penalties and enforcement.

Mandatory public reporting of the total cost for each approved CHMP with a breakdown between the RAP fees and consultants' fees, together with the time taken for preparation and approval of the CHMP would be of benefit.

In conclusion, an opportunity has been missed to resolve the many issues raised by CMPA in this submission (and previous CMPA submissions including to the 2017 discussion paper, attached) and as such the proposed AH Regulations 2018 and accompanying RIS are not supported.

I thank you for the opportunity to comment via this submission. I would be happy to discuss our submission which aims to ensure that small to medium extractive industry businesses are able to continue to exist in the Victorian market.

Yours sincerely



Dr Elizabeth Gibson
General Manager