

22 September 2017
Aboriginal Victoria

Via email: Aboriginal.heritage@dpc.vic.gov.au; jana.boulet@dpc.vic.gov.au

Dear Sir/Madam

SUBMISSION TO “REVIEW OF THE ABORIGINAL HERITAGE REGULATIONS 2007” DISCUSSION PAPER

Thank you for the opportunity to comment on the above discussion paper.

The CMPA is also appreciative of the extension to the submission due date, given we were unaware the Discussion Paper was released, having not received any notification, apart from an information session with Aboriginal Victoria in June 2017.

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, soil, and gypsum. 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 underpins growth and development in Victoria through supply of the construction materials described above (47 million tonnes in 2015/16, approximately \$786 million). CMPA members account for approximately half of this production.

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.

The following discussion points and questions in the discussion paper are addressed below.

Cultural Heritage Management Plans (CHMP)

- ***The cost of carrying out management conditions in CHMPs, including salvage requirements:***

The costs are excessively high. 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. Management conditions are a key component of the high costs, and this is largely due to the reality that the Registered Aboriginal Party (RAP) frequently determines that their standard management conditions are to be incorporated into the CHMP without regard for the views of the Heritage Advisor about the level of heritage risk or the views of the Sponsor about the practical, financial or engineering workability of the RAP’s

management conditions. The RAP's standard management conditions frequently exceed the requirements of the Regulations. It is not uncommon for stone material of dubious provenance to be recorded as artefacts at the insistence of the RAP. This results in additional survey and recording requirements (complex assessment) or costly management conditions such as avoiding works in areas where this material was recorded, or processes for salvage, relocation or reburial.

An additional and unnecessary cost component is the widespread requirement in the RAPs' management conditions for "compliance inspections". The Sponsor is required by law to comply with the CHMP management conditions, so there is no practical reason to justify management conditions requiring the Sponsor to pay the RAP to conduct additional compliance inspections.

A further cost component is that management conditions are often written in a complicated, repetitive and confusing manner, which has the potential for accidental breaches of the conditions to occur through misreading: prosecutions for breaches of CHMP conditions carry the potential for very large fines. To mitigate the risk of such a situation, some heritage advisors now advise Sponsors to have the management conditions evaluated and approved by lawyers before they are incorporated into the final version of a CHMP. It would be useful if the Regulations included a requirement for management conditions to be written in 'plain English', as would having Aboriginal Victoria produce a Practice Note about management conditions in CHMPs that emphasised the need to avoid complicated wording and costly over-servicing.

▪ ***Are there certain areas you believe should be included in the defined areas of cultural heritage sensitivity?***

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 CHMP where the genuine Aboriginal heritage risks are low.

Waterways

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 metres 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 metres 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.

Sandsheets and dunes

It is well understood that Aboriginal sites occur in some areas of sand dunes and in some areas where sandsheets occur, so that some of these areas may be culturally sensitive areas. However having vast tracks of land to the southeast of Melbourne labelled as culturally sensitive is too great an expanse which triggers unnecessary CHMPs for high impact activities. There is no data to suggest that each hectare of all of the hundreds of square kilometres to the southeast of Melbourne (including most of Frankston and surrounding areas) has a demonstrably high risk of Aboriginal site occurrence, however this is what is implicit in labelling these areas as areas of cultural heritage sensitivity.

An additional problematic area is the Warrnambool district, where vast areas are mapped as areas of cultural heritage sensitivity, based on erroneous mapping. The areas mapped as “dunes” are actually calcarenite rock (that was dunes approximately 1,000,000 years ago). As a result, costly CHMPs are required to be undertaken where there should be no need.

Overall, too great an expanse of Victoria is classified as having cultural heritage sensitivity. There would be benefit to Victoria and reduction of costs to development proponents from some refinement.

- ***What has worked well and what could be improved?***

From the perspective of the Sponsor little has worked well. The cost is very high due to routine over-servicing by the RAP or heritage advisors or both. Generally, where an assessment is conducted and nothing found, the RAP will still require that the CHMP proceed to a complex assessment. The requirement that excavation of test pits is done using hand tools such as shovels is clearly at odds with current OH&S guidelines that indicate excavation by hand should only be carried out where soils are easily dug (i.e. sand) and then only to shallow depths (30cm). Routine excavation of open sites to locate and recover artefacts using pick, shovel and trowel is unnecessarily time consuming and costly and carries unnecessary OH&S risks – particularly as most open sites are in areas where soils and Aboriginal heritage materials have had some level of agricultural disturbance from clearing or cultivating. Rather than the default requirement being hand excavation, the default should be such excavation by small excavators, with hand excavation only being undertaken in exceptional circumstances (i.e. human remains or organic materials being present).

The cost of digging 1 pit is ~\$7,000.

- ***The thresholds for progressing through the types of assessment when preparing a CHMP:***

There are desktop, standard and complex levels of assessment. Extremely few stop at the desktop assessment level and proceed on to standard or, more likely, complex assessments. The level of detail required by RAPs continues to increase and quite often will not refer to the CHA or regulations.

- ***The cost of undertaking the assessment and preparation of a CHMP:***

CMPA member Sponsors’ experience has been that the research, project documentation, map preparation and writing component of a CHMP costs in the order of ~\$36 k, taking about 4 weeks for a single heritage advisor. The final documents are generally about the size of an Honours thesis, being 100-150 pages long. The steps undertaken by the heritage advisor in preparing a report based on historical research and archaeological method should result in a set of management conditions that reflect the background research, field results and demonstrable risk. However, the reality is that the management conditions are generally dictated by the RAP, regardless of the level of demonstrable risk or the historical and archaeological background research. It is inconsistent for the Regulations to require

an archaeological process for the body of the CHMP and then insert the RAPs management conditions that are frequently inconsistent with the body of the CHMP document.

If the end point of a CHMP is a set of management conditions required by the RAP, considerable cost saving could occur by not using a heritage advisor at all: it would be simpler to avoid the historical research and archaeological field investigation and proceed straight to a negotiation with the RAP about the management conditions – particularly the contingency plans.

The cost of undertaking a complex assessment may be greater than \$500K and may take 4 years or more for the extractive industry.

- ***The relevance of the prescribed requirements for undertaking the types of assessment:***

The prescribed requirements for undertaking the types of assessments are largely irrelevant with most becoming complex assessments – refer previous comments.

- ***What is your experience of undertaking assessments for CHMPs?***

Time requirements

The process from first lodgement of a Notice of Intention to Conduct a CHMP to final approval takes an excessive amount of time. In practical terms, the pace of progress through the key stages of a CHMP are controlled by the RAP. This is due to long lead-times and limited availability of relevant personnel for meeting, fieldwork, CHMP evaluation etc. There are anecdotal accounts from our members that the more compliant (to the wishes and views of the RAP) heritage advisors appear to be given preferential treatment by RAPs in relation to bookings, communication, CHMP evaluation etc. so their CHMPs are delayed to a lesser extent than those undertaken by other heritage advisors. The RAP controls the extent of time taken and often requiring more work to be done than is required by the regulations. The Sponsor is entirely in the hands of the RAP. Firstly a Notice of Intention to prepare a CHMP is sent to the RAP seeking their involvement in a desktop study. Invariably a site survey is required which lengthens time. The whole process from beginning to end is controlled by the RAP; the original intent of the AH Act (discussion and exchange) appears to have been lost.

Evaluation and approval

The evaluation and approval of CHMPs by RAPs is a contentious, costly and time consuming issue for our members. Members have found that CHMPs are often not approved by RAPs because they do not contain text, maps, information or interpretations of data that the RAP requires be included – even when the material required by the RAP is not required by the Regulations. As the only alternative is a costly (in terms of delays and hearing costs) VCAT appeal, most find it simpler to appease the wishes of the RAP rather than argue the case at VCAT. The cost of such additional meetings, re-writing or additions to the CHMP and additional RAP evaluation fees adds considerably and unnecessarily to the costs.

Balance

There is an unfair imbalance of power between the RAP and the Sponsor throughout a CHMP. With varying degrees of subtlety, the RAPs dictate the terms and conditions throughout the entire process from first engagement to final approval of the CHMP. The RAP has the capacity to extend the amount of time it takes for a CHMP to be completed and approved, and the implicit threat of delays at various stages forces Sponsors to agree to RAP requirements in all areas. Members have found that the fastest

way to get a CHMP finished and approved is to agree with any and all of the RAP requirements at all stages throughout the CHMP process.

- ***What is your experience of the time it takes to complete an assessment for a CHMP? What obstacles have you encountered in completing the assessment?***

There is a perception that the RAPs and/or heritage advisors obtain financial benefit by extending the scope of CHMPs beyond what is required by the Regulations (for example, requiring that a CHMP proceed to a complex assessment when this is not required by the Regulations). There is no timely means of getting such matters arbitrated. Creating a means of timely independent appeal/review would give Sponsors more options, and would be likely to reduce CHMP time requirements and therefore reduce costs.

- ***Have you been satisfied with the involvement of the RAP, Sponsor, and the heritage advisor in the preparation of the CHMP?***

The CHMP process appears set up for over-servicing by the RAP and heritage advisor. This adds unnecessary cost and time burdens to the project which must be carried by the Sponsor. Because there is no mechanism for timely arbitration or review of the behaviour of the RAP or heritage advisor, Sponsors have little choice but to go accept that they are powerless throughout the process if they want to get their CHMP completed and approved. CMPA member Sponsors feel there is a lack of fair process; a lack of adherence to the regulations and lack of a timely appeal process. There needs to be the ability to appeal to an independent body without the delays inherent with VCAT. A critical aspect of every CHMP is whether the management conditions are reasonable in terms of the demonstrable Aboriginal heritage risks.

- ***Is it clear and reasonable at what point assessment should progress through the assessment types (desktop, standard, and complex)?***

There is generally insistence by the RAP that a standard, or more likely, a complex assessment is always undertaken.

- ***What is your experience in making amendments to approved CHMPs?***

It is perceived that undertaking an amendment to a CHMP is no shorter than undertaking a new CHMP.

Preliminary Aboriginal Heritage Tests (PAHT)

- ***Does the prescribed form include all the necessary information?***

CMPA members' experience is that few heritage advisors are recommending Sponsors undertake PAHTs because of the relatively high cost (~\$10k or more) the time requirement for both the preparation of the PAHT and the 21 day assessment period, and because the PAHT is assessed at officer level within Aboriginal Victoria. There is the perception that PAHT assessments are weighted in accordance with AV policy/political views rather than being a fair assessment of the facts and/or the requirements of the Regulations and VCAT precedents – so that PAHTs are likely to be refused (i.e. CHMP is required). The fact that there is no opportunity for an independent contest of ideas (as would occur at VCAT) and that there is no right of appeal also does not encourage Sponsors to undertake PAHTs.

▪ ***Would you consider preparing a PAHT for a proposed activity? Why or why not?***

Unlikely, as per the previous point.

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. There are a number of issues that have not been addressed by the Discussion Paper, including:

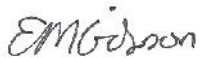
- Costs and delays in the CHMP process;
- Lack of a prompt and binding arbitration mechanism;
- Disconnect between RAPs expectations and the regulations;
- Triggers for CHMPs - inaccurate or excessive mapping of cultural heritage sensitivity;
- Excessive penalties and enforcement.

It is pleasing to note that a regulatory impact statement (RIS) will be conducted.

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.

I thank you for the opportunity to comment via this submission. I would be happy to discuss our submission and provide further input into the making of the Regulations/RIS to ensure that small to medium extractive industry businesses are able to exist in the market.

Yours sincerely



Dr Elizabeth Gibson
General Manager