

**SUBMISSION
FROM NATIVE TITLE SERVICES VICTORIA
TO
THE VICTORIAN GOVERNMENT**

VICTORIAN ABORIGINAL CULTURAL HERITAGE MANAGEMENT STRATEGY

INTRODUCTION

Native Title Services Victoria (NTSV) hereby makes submission to the Government in the context of the current consultation process being undertaken by the Minister for Aboriginal Affairs, the Hon Gavin Jennings, with regard to the development of a Victorian Aboriginal Cultural Heritage Management Strategy. This submission draws on our recent submission in relation to the Aboriginal Land and Resource Development Strategy¹ and deals specifically with proposed changes to Victoria's Aboriginal cultural heritage legislation.

We anticipate that this initial submission will be fleshed out and expanded following the statewide meeting of traditional owners in February 2005, which will allow extensive input by Victorian traditional owners into both the land and resource development strategy and the cultural heritage management strategy.

NTSV currently carries out the functions of an Aboriginal representative body under the *Native Title Act 1993* (Cth) ('NTA') for the State of Victoria. It represents claimants in 16 of the 20 native title claims in Victoria. In addition, NTSV has a key role in representing Victorian traditional owners in relation to their wider land-related interests.

Cultural heritage is consistently stated to be a priority for our clients. The proposed repeal of Part IIA of the Commonwealth Heritage Act has raised concerns that the existing protections may be watered down. NTSV supports the retention of broad coverage and a broad definition of cultural heritage.

For Victorian traditional owners, culture and connection to country are inextricably linked. To adequately reflect this relationship, any strategy for the management of Aboriginal cultural heritage must be developed in close partnership with Victorian traditional owners, and recognize the primacy of traditional owners' rights under traditional law and custom to manage and protect cultural heritage that relates to their traditional country.

In addition, the protection and management of cultural heritage is seen by Victorian traditional owners as an important aspect of the settlement of native title claims across the State.

Focusing on traditional ownership as the basis for cultural heritage management ensures that the management of cultural heritage is consistent with, and integrated into, the broader strategy for Aboriginal management of land and resources currently being developed by the Department for Victorian Communities.

¹ NTSV, Submission in Relation to Aboriginal Land and Resource Development Strategy, 21 November 2004.

Importantly, understanding cultural heritage management as primarily an incident of a traditional relationship to country accords with traditional law and custom, and ensures that the regime for managing Aboriginal cultural heritage reflects traditional decision-making structures within Victorian Aboriginal communities. As a result such an approach is likely to lead to the strengthening and empowerment of Victorian traditional owner groups.

Such an approach necessarily involves a shifting of primary responsibility for cultural heritage management from Aboriginal cooperatives (as set out in the Schedule to Part IIA of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*) to structures that properly reflect traditional owner groups.

NTSV acknowledges that doing so will affect those Aboriginal people involved in cooperatives who have traditional country elsewhere. However it is NTSV's submission that the transfer of primary responsibility for cultural heritage management to traditional owner groups does not preclude the involvement of those Aboriginal people who have assumed relationships and responsibilities in relation to country, or are currently involved in cultural heritage management on that country.

It is for traditional owners to determine how those relationships are to be managed, and NTSV is willing to work with the government and with traditional owner groups to develop models that might assist with this process.

If managed properly, transfer of primary responsibility for cultural heritage to traditional owners groups (possibly in conjunction with local cooperatives) need not diminish the role of cooperatives as service providers within local communities nor impact adversely on the relationship between traditional owners and other indigenous people within those communities. Management of these relationships should not be seen as an impediment to developing a cultural heritage regime in Victoria that is consistent with a broader Aboriginal land and resource management strategy, and which properly reflects the primary responsibility of traditional owners for cultural heritage, while accommodating other indigenous people within that regime.

1. THE PROCESS TO DATE

NTSV welcomes the recent initiatives of the Victorian government in relation to Aboriginal land justice. Most relevant are the initiatives of the Department of Victorian Communities in relation to the Whole of Government Aboriginal Affairs Framework, the Aboriginal Land and Resource Development Strategy, and the Aboriginal Cultural Heritage Strategy.

1.1 Statewide consultation

During 2002-03 the Regional Cultural Heritage Program undertook consultation with Aboriginal communities (in this case, those statutory authorities identified in part IIA of the *ATSIHP*) to identify issues and priorities to be considered for the Aboriginal Cultural Heritage Management Strategy. The stated aims of that program were:

- Recognizing & promoting Aboriginal community involvement in managing their cultural heritage;
- Building partnerships between Aboriginal communities, Government and other stakeholder groups; and
- Promoting consideration of Aboriginal cultural heritage as an integral part of land and resource management.

In NTSV's view, this consultation did not give proper weight to the role of traditional owners in cultural heritage management. By focusing on the role of co-operatives, the consultations failed to recognize the primary and quite distinct relationship of traditional owners to cultural heritage.

In July and October/November 2004, the Minister for Aboriginal Affairs travelled throughout the State to consult with Aboriginal communities. Issues for discussion included:

- The proposed new Victorian Aboriginal Cultural Heritage Legislation,
- Development of an Aboriginal Land and Resource Development Strategy
- The amendment to the Victorian Constitution:
- The Whole of Government approach to service delivery in Victoria.

Notably, the Minister was accompanied by senior staff from DSE, DOJ and AAV, the first signs of the whole of government approach in action.

A discussion paper sent out to Victorian communities setting out the issues arising out of the July consultations² confirmed that control of cultural heritage was the issue of greatest concern to Aboriginal people in Victoria. Opinions on who should have that control were naturally diverse. In general, those with traditional obligations to protect particular areas opted for primary control by traditional owners whilst those with statutory, rather than traditional, obligations tended to support the status quo. In some cases traditional owners opted to include non-traditional owners in the management process whilst some statutory rights holders opted for primary control by traditional owners.

² Department of Victorian Communities, Discussion Paper Arising from Minister Jennings Regional Consultations, July 2004.

Along with other government and non-government stakeholders, NTSV was involved in the Victorian Aboriginal Cultural Heritage Management Strategy Workshop, 'Long Ago, Here Today', held in November by AAV.³ Some of the common views expressed at that meeting were that:

- Victorian cultural heritage legislation needs to stay strong by maintaining the powers granted by the Commonwealth Act;
- Cultural heritage should be a springboard for a spectrum of benefits to Aboriginal communities (eg. employment, natural resource management, education) which could be developed further;
- The government approach needs to be integrated, coordinated and consistent as does the accompanying legislation;
- Victoria needs dedicated, well funded, Aboriginal-controlled cultural heritage organizations driven by community aspirations;
- Aboriginal heritage should be a key component of sustainable land and resource management;
- All participants in the Strategy need to be equally resourced with equal participation.⁴

NTSV endorses these principles.

It is important to note that this workshop was not well attended by indigenous representatives, in particular native title claimants. As a result, their views were not adequately represented (although NTSV did its best to represent them). The fact that all Aboriginal representatives present at the workshop were government employees also means that these individuals may have felt unable to speak freely about matters such as cultural heritage being a native title right. The forthcoming statewide meeting of traditional owners offers an important opportunity for the views of traditional owners and native title claimants to be expressed.

1.2 Statewide meeting for traditional owners co-convened by the Minister and NTSV

NTSV looks forward to working with AAV to organize a statewide meeting for traditional owners in early 2005. Such a meeting will ensure that traditional owners have the opportunity to provide input at this consultation phase and to demonstrate the government's commitment to re-establishing land justice for Aboriginal people in Victoria.

NTSV believes it can make useful contributions to formation of a meaningful cultural heritage regime by:

- Providing a level of certainty regarding right people to speak for right country;

³ AAV, 'Long Ago, Here Today.' *Developing an Aboriginal Cultural Heritage Management Strategy for Victoria*, 2004.

⁴ AAV, Report on Victorian Aboriginal Cultural Heritage Management Workshop, November 2004.

- Providing a level of certainty about traditional countries in Victoria, specifically territorial boundaries;
- Identifying and conveying the aspirations of Victoria's traditional owners;
- Mediating intra-indigenous disputes to successful resolution.

NTSV views this meeting as a significant opportunity to obtain input from Victorian traditional owners, and welcomes the Minister's commitment to this meeting.

1.3 The 'whole of government' approach

Both the Aboriginal Land and Resource Management Strategy and the Aboriginal Cultural Heritage Management Strategy are informed by the Whole of Government approach to Aboriginal Affairs. Such an approach is welcome, and indeed is crucial for the successful implementation of Aboriginal land justice. The previous lack of coordination between government departments and agencies resulted in duplication and frustration, and placed particular strain on Elders within traditional owner groups who are often frail yet are required to attend multiple meetings and to provide leadership and advice on a wide range of matters.

NTSV was heartened by the recent meeting between the NTSV Board and the Minister at which the Minister made clear his support for a land management approach that prioritises the settlement of native title claims, views native title in a wider land justice framework, and establishes a partnership with NTSV to ensure that traditional owners are at the core of such a strategy.

Consistent with this approach is the need to understand cultural heritage protection as a native title right, a primary responsibility of traditional owners, and a crucial component of any Aboriginal land and resource management strategy.

Whilst it is clear that the whole of government approach has been embraced at a Ministerial level, the process has been slower for the relevant Departments, namely DOJ, AAV and DSE.

To date, AAV has shown some reluctance to acknowledge the importance of traditional ownership of country in its dealings with Aboriginal people in Victoria, preferring the term 'Aboriginal communities'. This term does not distinguish between those with ancestral and cultural connections to specific areas and those who have the same degree of association to an area as many Europeans. It is a consistent refrain from our clients that they wish to have their traditional ownership of their country recognized and acknowledged.

We encourage the coordination of the key agencies through AAV, and the recognition of the importance of approaching land management and land justice in Victoria in a comprehensive and integrated manner.

2. KEY ISSUES IN RELATION TO CULTURAL HERITAGE REFORM

NTSV understands that the new Victorian cultural heritage legislation is scheduled for completion by November 2005.

This section of the submission highlights some of the major issues that NTSV considers should inform the development of that legislation. NTSV looks forward to making more detailed submissions once draft legislation has been circulated.

2.1 Whose cultural heritage?

It was clear from the Minister's recent series of consultations that cultural heritage is one of the primary areas of concern to Victorian Aboriginal people. In the past two decades, Victoria's cultural heritage regime has been an empowering force for Indigenous constituents. It has provided one of the only means by which Aboriginal people in Victoria are able to exercise some degree of control over third party activity on land.

This regime, if properly administered, has the potential to:

- Restore some measure of Indigenous control over all land in the State of Victoria;
- Affirm cultural identity;
- Demonstrate occupation and the nature of that occupation to non Indigenous Victorians;
- Provide a livelihood via cultural tourism and cultural resource management;
- Generate appreciation and respect from the wider community;
- Forge successful partnerships between government and non-government stakeholders and Victorian Aboriginal people; and
- Unite the Victorian community in a bid to protect Aboriginal heritage.

For these reasons, the prospect of change to the existing cultural heritage regime has caused concern among many Aboriginal people in Victoria.

At present the combined powers of the State *Archaeological and Aboriginal Relics Preservation Act 1972 (AARPA)* and Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSHP)* place control of Aboriginal heritage fairly and squarely in the hands in Victorian Aboriginal people. This control is provided by part IIA of the Commonwealth Act which provides the Local Aboriginal Community with Consent to Refuse or Consent to Disturb an Aboriginal place or object.

With the proposed repeal of Part IIA of the Commonwealth Act, this control is threatened. As set out at 2.4 below, the starting point for any consideration of reform to the present regime must be to ensure that this control continues to be exercisable by Victorian Aboriginal people. The question is *which* Aboriginal people.

2.2 Competing legislative regimes: cultural heritage versus native title

During the recent consultations, it became clear that one of the most pressing concerns with the current regime is that it does not reflect traditional ownership and the relationship between country and culture. This mirrors the concerns of NTSV's constituents.

The primary problem with the current cultural heritage management arrangements is the existence of two conflicting legislative regimes: cultural heritage and native title. At present the regimes do not operate in any consistent or integrated manner. It is NTSV's view that this review provides an opportunity to the State Government to address these concerns.

The *Native Title Act 1993* recognizes registered claimant groups, namely the descendants of those first recorded as living in a specific territory, as those with the right to negotiate over the management of Crown lands within this territory and all resources contained within. Each registered claimant group has been able to provide the Government with a level of certainty that they are the right people to speak for that country. In time these groups hope to prove that they are entitled to full native title recognition and benefits.

The Schedule to Part IIA of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* identifies Aboriginal cooperatives as the statutory authorities for the protection of cultural heritage in geographical areas also defined under the Act. Both the statutory authorities and the associated cultural heritage areas are administrative units with no basis in Aboriginal law. Cooperatives comprise a mix of traditional owners and those with post-contact connection to geographical areas whose boundaries do not conform to traditional landholdings. In some cases non-indigenous people sit on the boards of these cooperatives.

The Commonwealth Act does not provide any criteria for membership, consultation or exercise of powers by cooperatives and in particular does not require that traditional owners be consulted in relation to activities on their traditional lands. This can be contrasted by the strict membership and decision-making requirements for Prescribed Bodies Corporate under the *Native Title Act 1993* (Cth).

In practice, third parties seeking to develop Crown land tend to consult both native title claim groups and cooperatives, but on all other land consult only the administrative body or statutory authority known as the local Aboriginal community. This is an ongoing source of concern to traditional owners as it does not reflect the primary responsibility of traditional owners under Aboriginal law to speak for their traditional country.

2.3 Primary responsibility is held by traditional owners

As stated above, under traditional law and custom culture and connection to country are inextricably linked. Traditional owners need to be at the centre of the cultural heritage regime because:

- (a) it is traditional owners who have knowledge of their country and of significant places on that country. Their involvement will be necessary to ensure that those places are protected;
- (b) to the extent that traditional owners have native title rights and interests, they have legally enforceable interests (including the right to protect cultural heritage) which are required to be protected;
- (c) to the extent that traditional owners have native title rights and interests, procedural rights under the NTA are required to be observed and compensation may be payable for interference with those interests. Any difficulties this may cause for the State can be avoided if the land and resource management mechanisms that are introduced – including the cultural heritage regime - adequately accommodate those interests and are introduced with their consent;

- (d) ignoring traditional owners only serves to compound dispossession and their disenfranchisement from decisions affecting their country.

Recognising the rights of traditional owners in relation to cultural heritage need not occur by reference only to native title holders. Indeed such an approach would be unduly restrictive given the limitations on native title. Statutory definitions could be developed in consultation with traditional owners to ensure that they are appropriately respected. For example, the New South Wales *Aboriginal Land Rights Act 1983* provides for a register of traditional owners. That register considers traditional owners to be Aboriginal people who:

- “(a) are directly descended from the original Aboriginal inhabitants of the cultural area in which the land is situated, and
(b) have a cultural association with the land that derives from the traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the land.” (s.171(2) ALRA)

A similar scheme in Victoria might be a useful part of the process of identifying the traditional owners for the purposes of the cultural heritage regime.

2.3.1 Another model for consideration

NTSV is aware that AAV is considering other models where native title and cultural heritage regimes have been successfully integrated. One such example is the Queensland *Aboriginal Cultural Heritage Act 2003* which:

- Recognizes registered native title claimant groups as the primary guardians, keepers and knowledge holders of their cultural heritage;
- Provides blanket protection of significant sites (areas where there is culturally, historically, or archaeologically significant evidence of occupation), places (where no physical evidence of occupation exists) and objects;
- Does not affect existing native title rights or rights of ownership of cultural heritage by Aboriginal people;
- Recognizes Aboriginal ownership of:
 - Human remains wherever held;
 - Secret and sacred material currently held in State Collections (such as the QLD museum); and
 - Cultural heritage removed from the land.
- Provides ownership (custodianship) of any residual cultural heritage in the State (to ensure protection of heritage on freehold land).

This includes cases where native title is not recognized by the courts or where native title is found to be extinguished.

In the absence of a native title party, the Aboriginal Party is the person recognized in accordance with tradition or law as having responsibility for the area or object.

Alternatively, if Aboriginal Parties agree, they can seek State recognition of an Aboriginal cultural heritage body to act as a 'post box' for identifying the traditional owners in particular areas⁵.

This is a useful model in that it provides registered native title claim groups (those who have already demonstrated a reasonable level of connection to a particular area) with control over cultural heritage resources originating from that area. Further, it provides flexibility for involvement of other Indigenous heritage bodies in the absence of a registered claimant group or with the agreement of the native title claimants.

2.3.2 Primary and secondary rights

The Queensland model touches upon the most controversial aspect of the Victorian cultural heritage regime – namely, who, within the indigenous community, should have primary control of cultural heritage. As outlined above, at present a division exists between traditional owners and those with historical residential links to an area. A solution to this conflict may possibly be found within principles of traditional Aboriginal society that apply across Australia.

Traditional Aboriginal law accords individuals primary rights to an area (landholding rights) and secondary rights (rights accorded to individuals by those core landholders). Secondary rights give individuals the right to reside and use the resources of the land but not make decisions about the management of the land.

A similar concept could be incorporated into the proposed Victorian legislation. This could manifest as separating control of cultural heritage from service delivery. Primary rights holders, namely traditional owner groups, could be accorded primary control over the management of cultural heritage bodies and resources within their traditional lands. Secondary rights holders, namely cooperatives, could continue to play an important role in the management of cultural heritage as service providers⁶.

Such a solution would restore inherited rights to traditional owners and allow for the continuation of the cooperatives as service providers.

2.4 Maintaining existing levels of protection

The strength of the current regime is the provisions for control by Aboriginal people via Consents to Disturb and Emergency Declarations, which is built into the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

As indicated above, NTSV supports the retention of these protections, while ensuring that they are exercisable primarily by traditional owners rather than cooperatives.

2.5 What should be protected?

⁵ Queensland Government-Natural Resources and Mines, Aboriginal Cultural Heritage Act: Summary, (http://www.qld.gov.au/cultural_heritage/legislation/summary.html).

⁶ ANTA, Draft Policy Discussion Paper, An Interim Policy Option Towards Resolving the "Traditional-Historic" Divide Vis-à-vis Cultural Heritage and Service Provision Issues, 28 August 2003.

At present the Commonwealth Act is in much broader terms than the Victorian legislation. The Victorian Act focuses on archaeological relics which are preserved for the overall benefit of the public. NTSV supports a broad definition of cultural heritage.

2.6 Repatriation

Another concern to Victoria's Indigenous population is protection of skeletal remains and other cultural heritage resources held in various repositories throughout the world including Australia. It is NTSV's clear position that these materials should be returned to the relevant traditional owner groups. The power of the current legislation to enforce this, however, appears to be lacking.

The current scenario involving the Museum of Victoria and the Dja Dja Wurrung native title claim group has had the unfortunate effect of damaging the previously strong relationship between the Museum of Victoria and Victoria's traditional owner groups. It is NTSV's submission that the new cultural heritage regime should provide clarity in relation to ownership of human remains and a clear process for enforcement.

2.7 Gender

Victoria's traditional owners retain a strong sense of men's and women's business which informs their relationship to places and objects. Traditional owners have requested that NTSV ensure that this aspect of Aboriginal law be acknowledged by, and incorporated into, the proposed legislation.

3. SUMMARY OF KEY FEATURES FOR NEW VICTORIAN ABORIGINAL CULTURAL HERITAGE LEGISLATION

In this submission, NTSV has identified a range of key features that should inform the new Victorian Aboriginal cultural heritage legislation. They are that the legislation:

1. Reflects an understanding of cultural heritage protection as a native title right and a right primarily of traditional owners;
2. Provides traditional owners with control over cultural heritage within the boundaries of their traditional country;
3. Considers ways of accommodating cooperatives in the cultural heritage regime through service delivery arrangements;
4. Retains at least the existing levels of protection for heritage currently provided by the *ATSIHPA* 1984;
5. Contains a broad definition of 'cultural heritage';
6. Supports the return of portable cultural heritage resources to their people and place of origin; and

7. Ensures that the legislation supports traditional gender based access to places and objects.

This proposed legislation is an important aspect of the State Government's land, resource and cultural heritage management strategies for Victoria's Aboriginal peoples. In order for the legislation to be successfully implemented, it is crucial that it be consistent with other aspects of the strategies - in particular, the recognition of traditional ownership as the source of responsibility for land and culture.

We appreciate the opportunity to make a submission at this stage of the development of the strategy and welcome any comments or feedback.

**NATIVE TITLE SERVICES VICTORIA
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