

FOCUS

ABORIGINAL CULTURAL HERITAGE



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A NEW ERA OF HERITAGE PROTECTION BEGINS IN VICTORIA

On 28 May 2007, a new system of Aboriginal heritage protection in Victoria will come into force. Cultural heritage management plans are a significant feature of the new regime, with draft regulations setting out when these plans will be required. Partner Chris Schulz and Senior Associate Penny Creswell take a look at the proposed requirements for Aboriginal heritage plans.

We explain a new system of Aboriginal heritage protection, which comes into force on 28 May 2007

HOW DOES IT AFFECT YOU?

- Cultural heritage management plans will become a crucial consideration in the early planning phase of a project. If a cultural heritage management plan is required for a project, other statutory authorisations, including planning permits and mining work plans, cannot be granted until the heritage plan is approved.
- The changes may increase costs for some projects, but will also likely reduce heritage-related delays during construction.
- Existing projects already in the planning phase may require Aboriginal heritage plans, unless they have approval by 28 May 2007. If an application for a permit has been lodged, but a decision is not due to be made by 28 May 2007, you should consider whether the activity will attract the mandatory cultural heritage management plan provisions discussed below.

- Stakeholders have until 18 May 2007 to comment on the draft regulations.

THE NEW VICTORIAN HERITAGE REGIME

Currently, Aboriginal cultural heritage in Victoria is protected under the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). The *Aboriginal Heritage Act 2006* (Vic) (the **Act**) and the proposed regulations will introduce a new regime aimed at integrating the protection of Aboriginal heritage with planning and land development approval processes. It provides clearer procedures than the current system and more structured participation for Aboriginal groups.



It requires proponents to incorporate Aboriginal heritage considerations into the early stages of project development. The intention is that by carrying out consultation and negotiation regarding cultural heritage before a project commences, delays caused by stop-works or disputes during the construction phase will be minimised, and incidents of inadvertent disruption of cultural heritage will be reduced.

WHEN ARE CULTURAL HERITAGE MANAGEMENT PLANS REQUIRED?

Cultural heritage management plans (*Aboriginal heritage plans*) are mandatory for activities:

- in an area of 'cultural heritage sensitivity' that has not previously been subject to 'significant ground disturbance', and where all or part of the activity is 'high impact' (these requirements are discussed below);
- where an Environment Effects Statement is required; or
- where the Minister directs a plan is required.

AREAS OF CULTURAL HERITAGE SENSITIVITY

The regulations set out descriptions of areas considered to be of cultural heritage sensitivity based on existing knowledge of where Aboriginal heritage is most likely to be found. Examples include ancient lakes, waterways and their surrounds, Ramsar wetlands, Victorian Volcanic Plains, coastal Crown land, parks, high plains, caves, sand sheets and dunes.

If the area has already been subject to 'significant ground disturbance' (disturbance by machinery in the course of grading, digging, excavating or dredging), it will not be considered to have cultural heritage sensitivity. Maps are to be developed to assist proponents assess whether an area is of heritage sensitivity.

Schedule 1 to the regulations contains a list of prescribed places of cultural heritage sensitivity. It is expected that, over time, municipal studies and assessments will enable more refined descriptions of areas of cultural heritage sensitivity within a particular municipality to be added to Schedule 1, to replace the more generic descriptions currently in the regulations.

HIGH-IMPACT ACTIVITIES

High-impact activities include, for example:

- building or works for specified uses (including service centres, freeways, industry and retail premises) that would result in significant ground disturbance;
- construction of specified infrastructure (such as roads, railways, airfields and telecommunications towers and lines) that would result in significant ground disturbance;
- activities requiring earth resource authorisations (such as work plans for mining or exploration) that would result in significant ground disturbance (drilling is not included in the definition of significant ground disturbance);
- use of land for extractive industry if a statutory authorisation is required;
- three or more dwellings on a lot;
- subdivision into three or more lots for use as dwellings or subdivision into two or more lots where at least one of the lots is for industry; and
- timber production over 40 hectares if a planning permit is required.

The terms used in the regulations have the same meaning as in the Victorian Planning Provisions.

EXEMPT ACTIVITIES

Aboriginal heritage plans are not required for exempt activities. Exempt activities include one or two dwellings, works ancillary to an existing building (such as pools, sheds, water tanks, fences and driveways), minor works, repair and maintenance works, demolition, consolidation of land, development of the sea-bed and emergencies.

Amendments to existing statutory authorisations will only be exempt where the original authorisation was granted before 28 May 2007 and the area has been subject to significant ground disturbance, or if the activities are consistent with an approved Aboriginal heritage plan. In other cases, consideration should be given to whether the amendment might trigger the Aboriginal heritage plan requirements.

OVERVIEW OF THE ABORIGINAL HERITAGE PLAN PROCESS

Under the new system, if an Aboriginal heritage plan is required, the 'sponsor', likely to be the project proponent, is required to engage a cultural heritage adviser and notify relevant registered Aboriginal parties (who are the registered cultural decision-makers for an area)



and give them the opportunity to be involved in the development of the plan, and to evaluate the finalised plan (for a prescribed fee payable by the sponsor).

The regulations prescribe the contents of an Aboriginal heritage plan. In addition to descriptions of the activity and the heritage assessment, they are to include agreed processes to enable the management of heritage issues as they arise and contingency plans in relation to any disputes, delays and other obstacles that may affect the conduct of the activity.

Once the Aboriginal heritage plan is finalised, relevant registered Aboriginal parties who have elected to evaluate the proposal have 30 days to approve or refuse the plan.

An Aboriginal party can refuse a plan if it is not satisfied that the plan adequately addresses the assessment criteria, but not otherwise. Where the registered Aboriginal parties elect not to evaluate the Aboriginal heritage plan, or there are no registered Aboriginal parties (which is likely to be the case for many areas initially), the plan must be approved or refused by Secretary of the Department for Victorian Communities.

A significant change from the existing system is that refusals of Aboriginal heritage plans can be appealed to the Victorian Civil and Administrative Tribunal (**VCAT**). This will also enable disputes to be determined in the planning phase rather than during construction.

THE NEED FOR APPROVAL BEFORE OTHER STATUTORY AUTHORISATIONS ARE GRANTED

The new regime embeds the consideration of Aboriginal heritage into the early stages of the planning process. Aboriginal heritage plans, where mandatory, must be approved before other statutory authorisations are granted. For example, where a project requires an Aboriginal heritage plan, a planning permit or a work plan under a mining or exploration licence cannot be granted until the Aboriginal heritage plan is approved. The decision-maker must not authorise an activity that is inconsistent with the approved plan.

TRANSITIONAL PROVISIONS

The proposed transitional provisions will exempt activities that would otherwise require an Aboriginal heritage plan if:

- the project has a statutory authorisation in place on 28 May 2007;
- an appeal application has been made, or can still be made, to VCAT in relation to a decision that was made prior to 28 May 2007;
- an appeal has been made to VCAT prior to 28 May 2007 to review a failure to decide an application;
- an archaeological survey has been finalised and submitted to the Department for Victorian Communities, in accordance with the Archaeological and Aboriginal Relics Preservation Act; or
- a consent under the Aboriginal and Torres Strait Islander Heritage Protection Act is in place.

If a statutory authorisation has been applied for prior to 28 May 2007, but a decision has not been made by that date, compliance with the new regime is required. As discussed above, amendments to existing approvals may also trigger the Aboriginal heritage plan requirements.

Approvals for preliminary aspects of a development in force on 28 May 2007 will not exempt the broader activities from the new requirements. If, for example, an approval is in place for works in relation to a waterway, which is part of a broader activity of subdividing land near the waterway into numerous lots for industry, but the approval for the broader activity has not been granted by 28 May 2007, that broader approval will be subject to the new regime and may not be able to be granted until an Aboriginal heritage plan is approved.

Some mining interests have negotiated with native title claimants, over many years, native title agreements that cover cultural heritage issues. These agreements may not be readily used as Aboriginal heritage plans and, if works approvals have not yet been obtained for development activities, Aboriginal heritage plans may also have to be negotiated to meet the new standards.

CONCLUSION

The changes are likely to result in increased costs for project proponents in developing Aboriginal heritage plans and possibly some time delays at the planning stage. However, the risks of delay during construction as a result of stop-works or disputes over managing discovered heritage are likely to be reduced. The increased clarity of processes for Aboriginal heritage plans, timeframes for approvals, prescribed fees and appeal rights should result in increased certainty for project proponents, as well as better protection of cultural heritage.

Whether local councils, other decision-makers, government departments and registered Aboriginal parties are adequately resourced to implement the new system efficiently remains to be seen. The Department for Victorian Communities has committed to reviewing the operation of the regulations 12 months after commencement.

The regulatory impact statement and the draft regulations are available on the Department for Victorian Communities website. Submissions on the draft regulations can be made until 18 May 2007.



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