



AUSTRALIAN ASSOCIATION OF CONSULTING ARCHAEOLOGISTS

PO Box 8382

ARMADALE

VIC 3143

25 November 2011

Re: Review of the Aboriginal Heritage Act 2006

Dear Sir/Madam,

Introduction

This submission to the Review of the *Aboriginal Heritage Act 2006* is made on behalf of the Australian Association of Consulting Archaeologists Incorporated (AACAI) through its Victorian Chapter on behalf of its members.

AACAI is a professional association for consulting archaeologists in Australia. Many of our members have a direct interaction with the *Aboriginal Heritage Act 2006* on a daily basis. AACAI welcomes the review of the *Aboriginal Heritage Act 2006*, and the opportunity to provide feedback from our members.

AACAI (Vic) is forwarding this submission on behalf of its full, associate and affiliate members who are engaged within the State of Victoria either as Cultural Heritage Advisors (CHAs) or in a capacity within the heritage industry.

AACAI members who work as cultural heritage advisors consult with clients and Registered Aboriginal Parties (RAPs) and Traditional Owners to prepare Cultural Heritage Management Plans (CHMPs) in accordance with the *Aboriginal Heritage Act 2006* and the *Aboriginal Heritage Regulations 2007*.

This submission document has arisen from discussions between AACAI (Vic) members on and following the review meeting of 9 May 2011 a second meeting on 12 September 2011 and circulated to Victorian members on the 23 November 2011.

The 'Act' refers to the *Aboriginal Heritage Act 2006*.

A. According respect and status to Aboriginal people

1. There was general agreement among AACAI members that the Victorian Aboriginal Heritage Council should be given a role to specifically advise which Aboriginal representative groups should be consulted and invited to participate in fieldwork when there is no RAP appointed. This would remove any ambiguity that currently exists.
2. It was agreed by AACAI that it was not able to specifically comment on the level of funding for RAPs and the level of support provided by AAV. However AACAI supports any initiative or funding that supports RAPs and particularly outlying rural RAPs that don't have income streams

derived from lots of CHMP work and that builds their capacity to fulfill their role and responsibilities under the Act. AACAI members have also expressed interest in whether the Act/regulations can facilitate training to lift skill levels and competency within the consulting industry and through the CHMP assessment process. With a young and generally inexperienced industry, this is a critical area if the regulator desires to lift standards.

3. Some members have noted the general lack of information provided by some RAPs/RAP applicants regarding cultural heritage significance and the desirability of RAPs to declaring their criteria for assessing cultural heritage significance through a formal significance statement. It would be beneficial for there to be a requirement for the RAPs to issue statements of significance for heritage places in order to assist in the protection of places.

B. Timely and efficient cultural heritage assessment

1. AACAI noted that the majority of issues relate to the Regulations and AAV policy, rather than the CHMP sections in the Act. The trigger mechanisms (s.46, s.47) were generally felt to be adequate except in respect to small-scale residential development (r. 45 and 46). It was noted that complex CHMPs for small suburban 3 lot subdivisions, where the land is generally disturbed and/or built up are frequently unnecessary with a considerable amount of money outlaid for minimal outcome. Where the general character of a suburban neighbourhood has been established (i.e. adjacent allotments have been subject to complex assessments, establishing a low level of archaeological potential) a complex CHMP should not be required as a matter of course. It is suggested that 3 Lot subdivisions not be included in the trigger for a CHMP and this be increased to a 4 Lot Subdivision.
2. AACAI members have also indicated that the Act could reduce the requirements for CHMPs that only just reach the trigger mechanisms and exclude land that is significantly disturbed from the CHMPs (with more flexibility than the current significant disturbance rules). Some members of AACAI have indicated that significant ground disturbance should be removed as a 'get-out' from the Act.
3. AACAI members have also expressed concern that the intensive subsurface testing often required to determine the extent of isolated artefacts and small scatters is considered unwarranted. The Act should reduce the amount of formal assessment required where there are only isolated artefacts or small scatters. It is suggested that sites of low significance not be tested using sub-surface techniques.
4. AACAI feels that the levels of assessment (desktop, standard, complex) undertaken are often determined by the need for approval by AAV, rather than through professional judgement. AACAI considers that is preferable to have a RAP assess a CHMP as any potential disagreements regarding methodology and/or appropriate levels of investigation towards the end of the project were avoided through early project establishment and consultation meetings, as well as fieldwork participation. AACAI feels that AAV could create greater certainty for the evaluation process if initial project meeting involvement from the regulator and agreement regarding methodology (as it is with the RAP) was required under the Act.
5. AACAI members would like clarification in the Act regarding guidance/requirements on what to do if no CHMP or CHP is required (aside from voluntary CHMP). This relates to the reporting of heritage investigations such as survey not contained within a CHMP.
6. AACAI strongly supports the idea of the development of regional models using register datasets in order to assist with desktop assessments and to refine cultural heritage sensitivity models. AACAI notes that funding is not currently available for this but hopes strong consideration will be given to enhancing the register dataset for this purpose. AACAI endorses any AAV development

of (or tendering out the development of) regional models and sensitivity maps that tie together and summarise all the previous consulting work done within a region. This would provide many benefits - including a regional desktop assessment for everyone to utilise in their CHMP work, and could also provide revised (and more accurate) cultural heritage sensitivity zoning which removes landforms or previously developed or disturbed areas where it has become clear that there is low likelihood or low value in undertaking assessments.

7. Ultimately development of this regional work could tie in with RAP authorized 'country' statements or plans or a regional document online (with version control) that could be referenced in the CHMP much like an vegetation class (EVC) or regional geomorphology rather than the current process of rehashing desktop sections of CHMPs. This would reduce excessive report length and focus on the heritage evaluated.
8. Some members of AACAI have expressed concern about the general lack of detailed analysis in salvage reports and whether it was preferable to have the bulk of analysis conducted either as part of the CHMP (testing) process or once salvage works had been completed. This would result in one technical report for the activity.
9. AACAI also felt that the definition of a 'cultural heritage advisor (CHA) could be tightened or an accreditation process established under the Act to reduce the number of unskilled and unqualified individuals currently working without supervision. AACAI members have stated that the Act could say that any field work undertaken for a CHMP must be supervised by a qualified archaeologist with a minimum of a Honours Degree in Archaeology. It is noted that some Full Members of AACAI are not necessarily experienced in Aboriginal archaeology (e.g. Historical Archaeologists and Maritime Archaeologists) and therefore should not strictly be a 'cultural heritage advisor' under the Act that can supervise Aboriginal archaeological excavations.
10. The amount of data required in a CHMP is still seen as excessive and onerous. It is preferred that the bulk of the information in a CHMP (e.g. tables of data, background supporting data and photos etc) is held in appendices and only the Introduction, Discussion of activity, Consultation, Summary findings of the investigation and Significance of Sites followed by simple, easy to read recommendations that are client focused should be in the body of the CHMP report.
11. Significance of sites should be the guiding factor in regard to protection of cultural heritage.
12. AACAI has received member submissions indicating changes to the Act as follows:
 - Section 4 –“Aboriginal tradition” – Add 'known' before 'body' in (a) and before 'traditions' in (b). The term 'beliefs' is vague and too many 'may have, could have, would have's' are being included in traditional value statements from Aboriginal groups. Such statements are meaningless, baseless, unhelpful and unproductive. Traditional values must be known, not inferred.
 - Section 8 – Remove the word 'significance'. Aboriginal cultural heritage is what is addressed here, not its significance. Act to provide more detail on what this section means in relation to disputes and register records.
 - Section 39(2) – Include 'reasonable' before 'condition', otherwise anything can be demanded.
 - Section 59(2) & (3) – Needs to clarify what 'reasonable efforts' means.
 - Section 60 – Needs to clarify what consulting consists of and whether RAPs can or cannot demand methodology for the purpose of an archaeological assessment.

- Section 63(4) – Alter wording to “a registered Aboriginal party may otherwise only refuse to approve the plan if the matters set out in section 61 are considered” or similar. Currently, the use of the word ‘adequately’ is vague. Otherwise ‘adequately’ requires clarification.
- Sections 65(5) & 66(5) – same as above.
- Section 142(1) – Needs “or is perceived to have” added after ‘...Council has’.
- Section 188 – Needs to include a sub-section relating to conflict of interest similar to that presented in Section 142, including perceived conflict of interest.
- Section 189(1) (b) – Needs clarification of what ‘extensive experience’ means.
- Needs a section included for the purpose of scientific research of Aboriginal cultural heritage. Scientific research into Aboriginal sites has been essentially overlooked by the Act. Finding and generally recording sites does not add to the knowledge or understanding of Aboriginal culture other than identifying its presence. Including a requirement for research to, at least some degree, will likely add knowledge and understanding.
- View of AACAI members is that the Act/regulations requires clarification of who is to determine assessment methodology. For example AACAI members felt the qualified archaeologist in charge should be solely responsible for determining the archaeological methodology used to investigate an area.
- All contingency arrangements are covered in s.61 (d). This section needs to be expanded to include the range of contingency measures now required (at present only described vaguely as ‘other obstacles that may affect the conduct of the activity’).
- Division 4 should be changed so that there is a timeframe that the Secretary has to process a cultural heritage permit (CHP) application – This could be 60 days.
- Section 67 of the Act should be amended to 30 days.

C. Cultural Heritage Agreements

We have no comment.

D. Dispute resolution

The Act includes provisions allowing for referral of disputes between RAPs to the Council and for appeal to the Tribunal following a refusal to approve a CHMP by a RAP or the Secretary (Part 8, Division 1). These provisions should also be available when there has been a failure to make a decision within the statutory timeframe (30 days), as well as when there has been a refusal. This would expedite the approval of CHMPs.

In addition to the provisions in relation to audits of CHMPs (Part 6, Division) the following is requested:

- a requirement (in section 82) for the Minister to provide the reasons for ordering an audit under section 81;
- a requirement (in section 82) for the Minister to specify the time period within which the audit report (in addition to the audit itself) must be completed;
- a right of appeal against the ordering of an audit;

- a statutory timeframe (30 days would be suitable) for the Minister to decide whether or not to approve the audit report under section 85; and
- a right of appeal in relation to the Minister's decision under section 86(3) to amend the CHMP in accordance with the findings of an approved audit report.

It would also be appropriate for similar amendments to be made to the Act in relation to Aboriginal heritage permits and having a set time period in which they must be decided.

E. Penalties and enforcement

AACAI members noted that AAV are undertaking a number of enforcement actions but only one prosecution commenced since the Act was introduced.

There is also no indication of auditing results since the Act was introduced and what results were available for compliance achieved for approved contingency plans under the Act. Perhaps greater opportunity could be given to accredited RAP members with appropriate experience or training to undertake the inspector role in light of s.3 of the Act.

In relation to audits (s.84) should there be a recommendation on legal action if harm to Aboriginal places is greater than that allowed by a CHMP or CHP?

F. Maintaining the Victorian Aboriginal Heritage Register

AACAI members generally agreed that the online register (ACHRIS) was a vast improvement on the previous system but strongly urges that more funding be made available to develop further stages of the system as proposed by the regulator. AACAI members have noted that the data should be able to be queried for statistical/reporting and site contents (e.g. lithic data) should also be able to be queried.

G. Integrating cultural heritage management with other land use planning systems

It would be beneficial to see information about the location of Aboriginal sites on Heritage Overlays. Please see comment in H below as well on restriction of Aboriginal heritage.

H. Public Awareness of Aboriginal Cultural Heritage

Is it necessary to restrict the locations of all Aboriginal sites/places? Maybe only a certain category of Aboriginal sites should be restricted. The aim is ultimately for all Australians to appreciate and value our Aboriginal cultural heritage. By keeping Aboriginal cultural heritage separate and "hidden" the broader Australian community feel separated from Aboriginal heritage and may not value it as much as they may value other cultural heritage sites and places in Australia.

Some AACAI members have noted that the Act could provide a more formal process for CHMP inductions. AAV have raised this idea previously. Heritage inductions could be tied to statutory training approved by AAV/government and involve accredited RAP members under the Act.

Concluding Statement

AACAI would like to state that the *Aboriginal Heritage Act 2006* has been giving greater certainty in regard to protecting cultural heritage as compared to the previous legislation. The Act has also allowed for the development industry, local Council and the public to gain a better appreciation for Aboriginal cultural heritage.

However AACAI submits that there are opportunities to improve the process, particularly those outlined in this submission.

We would be pleased to meet with you to discuss this submission in greater detail as part of the review process.

Yours faithfully
AACAI

Sincerely

A handwritten signature in black ink, appearing to read 'Oona Nicolson'. The signature is fluid and cursive, with a large initial 'O' and a long, sweeping tail.

Oona Nicolson MAACAI
Chairperson Victorian Chapter

A handwritten signature in black ink, appearing to read 'Matt Schlitz'. The signature is cursive and includes a small flourish at the end.

Matt Schlitz MAACAI
Secretary Victorian Chapter