11 June 2021

The Hon. Gabrielle Williams
Minister for Aboriginal Affairs

By email: gabrielle.williams@parliament.vic.gov.au

Dear Minister Williams

Residential development industry experience with cultural heritage management plans

I am writing to you about the residential development industry experience implementing Aboriginal cultural heritage management plans (CHMPs), and how this has changed over the past fourteen years.

The Urban Development Industry of Australia, Victoria Division (UDIA Victoria) is the peak body representing Victoria's urban development industry. UDIA Victoria is a non-profit advocacy, research and educational organisation supported by a membership of land use and property development organisations with a residential focus, across the private sector and Victoria's public service. We are committed to working with both industry and Government to deliver housing, infrastructure and liveable communities for all Victorians.

Overall, UDIA Victoria member feedback indicates that the requirements for on-site investigation and salvage under the provisions of CHMPs have increased significantly over this time which has resulted in a substantial time and cost impost.

Further, members have noted that the interpretation of Section 61 of the *Aboriginal Heritage Act 2006* (the Act) has changed over time as it is applied to CHMPs. More recent interpretations of the Act by RAPs typically significantly reduces the area of a site that is permitted to be developed for residential puposes, despite the entire site being zoned for residential use and development.

Time delays and cost imposts increase the cost of delivering titled residential lots to market. This impacts on the viability of residential development, and where the development remains feasible, the cost is passed onto the home buyer, thereby decreasing housing affordability and forcing more Victorians out of the private property market.

Further details of these issues are outlined below.

Issues with operationalising Cultural Heritage Management Plans

UDIA Victoria member feedback indicates there is a general view that insufficient archaeological testing is carried out at the Precinct Structure Plan (PSP) stage. The result is a lack of information to correctly inform the post-PSP requirements, and the associated timing and cost of the works required. In other states, the detailed analysis is done at the structure planning stage, therefore all heritage matters are resolved before a subdivision starts. The outcome of the system in Victoria is that the detailed investigation is managed as part of the CHMP.

CHMPs are generally prepared with a full field/surface investigation of the site to determine whether cultural heritage is present and whether there are areas likely to contain cultural heritage (areas of archaeological potential).Further testing can be performed via complex investigations (sub-surface testing) to determine whether any of the area of archaeological potential contains cultural heritage material. CHMPs are then finalised and approved with rigid management conditions such as salvage of known cultural heritage places to be impacted and multiple compliance visits (whether heritage is found or not in some cases).

More recently, Registered Aboriginal Parties (RAPs) are requiring extensive investigations across 100 per cent of an identified extent area, without regard to the actual archaeological potential determined by a Heritage Advisor or the significance of a place. In addition, the salvage methodologies in the conditions of CHMPs are becoming extremely onerous and expensive in relation the nature and significance of a heritage place and in many cases 100 per cent of a heritage place is required to be salvaged with no regard to the number or quality of artefacts being recovered. The management conditions provide no mechanism for variations to the salvage methodology in response to the salvage findings and site conditions.

Further, archaeological salvage of a heritage place commonly requires mechanised equipment to carry out this work over very large areas which also requires supervision from the local RAP representatives and Heritage Advisors. These requirements are creating a substantial cost increase and time delays compared with previously adopted processes which was more focused archaeological salvage that gathered a detailed sample of a heritage place that could reveal interesting and useful information about how people used the land and lived in the past. The more recent mechanised process over large areas appear to be about collecting artefacts en masse with limited archaeological context and as a result little information can be gathered compared to the first method described.

Typically, artefacts that are recovered (generally small stone chips or similar) are catalogued and then buried elsewhere on the site. The net result appears to be a largely academic effort that maximises the time the RAP representatives spend on site, with no consideration of the consequential cost and time impacts that flow through to lot pricing.

Compounding this, members note there is no ability to have a cost benefit discussion under the current arrangement and the RAP holds complete discretion over the scale and type of investigation required. The RAPs essentially act as a referral authority in the planning permit process, but without the legislative oversight and statutory timeframes other referral authorities, such as VicRoads and water authorities, are subject to. The unintended consequence of self-determination should not be unregulated forms of market control.

Issues with interpretation of the *Aboriginal Heritage Act 2006*

Feedback from members indicates that a revised interpretation of Section 61 of the *Aboriginal Heritage Act 2006* (the Act) is also being applied to CHMPs. Section 61 of the Act is outlined below. It essentially requires CHMPs to demonstrate how harm is being avoided:

> *ABORIGINAL HERITAGE ACT 2006 - SECT 61*
>
> ***Matters to be considered in relation to a plan***
>
> *The following matters are to be considered in assessing whether a cultural heritage management plan relating to an activity is to be approved—*

(a) whether the activity will be conducted in a way that avoids harm to Aboriginal cultural heritage;

(b) if it does not appear to be possible to conduct the activity in a way that avoids harm to Aboriginal cultural heritage, whether the activity will be conducted in a way that minimises harm to Aboriginal cultural heritage;

(c) any specific measures required for the management of Aboriginal cultural heritage likely to be affected by the activity, both during and after the activity;

(d) any contingency plans required in relation to disputes, delays and other obstacles that may affect the conduct of the activity;

(e) requirements relating to the custody and management of Aboriginal cultural heritage during the course of the activity.

Section 4 of the Act defines 'harm' as follows:

"harm", in relation to Aboriginal cultural heritage, includes damage, deface, desecrate, destroy, disturb, injure or interfere with;

There is general agreement that the above has previously been interpreted having regard to the development rights associated with land zoned for residential use and development. That is, it is not possible to completely avoid 'harm' (clause (a)), or even minimise 'harm' (clause (b)), as defined above because residential development is both permitted and is considered the highest and best use of the land by the State Government.

Therefore clause (c) applies, and the purpose of the CHMP is to outline the management of the cultural heritage that is affected. This may require salvage of the artefacts, relocation of the artifacts, and so on.

However, RAPs have more recently been interpretating Section 61 of the Act such that 'harm' must be avoided, and that this can be achieved by substantially restricting development on the site, despite the land being zoned for residential use and development.

Compounding the issues of interpretation, UDIA Victoria members report a difference in costs, timeframes, and accountability between RAPs. These should be standardised for equity reasons and to assist with project planning and costs.

Case Studies

These issues are demonstrated by the case studies outlined below.

Case Study 1: Substantial cost increases

Site A (June 2020 - current)

Salvage requirements

- 100 per cent of the subject area containing a very large Aboriginal heritage place (with a relatively low number of artefacts) to be salvaged.
- An extensive number of 5m by 1m mechanical trench excavations required across the place.
- Total salvage areas of approx. 4,330 square metres.

- Mechanical excavation to date has yielded a density of half an artefact per square metre, with many of the 5m by 1m trenches containing no artefacts at all, however the RAP will not agree to reduce the percentage of the subject area to be salvaged.

  Concurrently, these works are delaying adjacent site activities for lots that have already been sold due to a blanket restriction on access across the property until all salvaging is completed even though the slavage area is 1 per cent of the total property area.

Salvage requirements: cost to date (reflecting completion of only approx. 20% of salvage requirements)

Period of Work	Advisor Costs	RAP Rep Costs	Belmara Machine Hire Costs (at a discounted rate for large project)	Total Costs
Sep-20 to Nov-20	$71,415	$69,200	$81,540	$222,155
Mar-21 to Apr-21	$24,220	$40,300	$52,260	$116,780
Total Cost	$95,635	$109,500	$133,800	$338,935

Salvage requirements: cost per lot when complete

Salvage Area (m2)	Salvage Duration (days) *1	Total Daily Cost for Advisors *2	Total Daily RAP cost *3	Daily Machine Hire Costs	Total Daily Salvage Costs	Cost per m2	Total Salvage Costs to Completion	Cost per lot (8 lots in the salvage area)
4,330	108	$5,520	$5,200	$5,130	$15,850	$396	$1,715,763	$214,470

- *1 Based on management conditions requiring a series of 5 x 1m mechanical salvage trenching over 4330m2.
- *2 Based on four Heritage Advisors (Archaeologists) present on site.
- *3 Based on four RAP represenatives present on site.
- Prior to the commencement of mechanical excavation, manual excavation was carried out over nine square metres which generated 1.89 artefacts per square metre.
- Since it was identified that the density of artefacts was less than 10 per square metre, mechanical excavation was able to commence at 5 by 1 metre trenches.
- Mechanical excavation to date on the large extent area AS4 has yielded a density of 0.49 to 2.50 artefacts per square metre.

Comparison Site B (2012-2014)

Salvage and complex assessment requirements

- Hand shovel probe hole testing across a 30m x 30m grid of the entire property (265 STP's).
- Additional nine 1m x 1m trenches were excavated within the activity area mainly within the stony rises.
- The two stony rises be preserved and the other areas could be destroyed due to lack of archaeological potential This required 1.3 ha of NDA to be retained as a heritage site.
- The requirements for Site B are substantially less than for Site A.

Case Study 2: Time delays due to inspections for each stage

Site C

- The current timing to obtain cultural heritage inspection and inductions is approximately six to ten weeks from the initial request, especially with the Wurundjeri RAP.
- All new ground breaking staff are required to be inducted under the site-specific CHMP therefore regular inductions need to occur for each stage. For discussion purposes assume one induction per stage.
- Since 2017, the majority of CHMPs require at least one inspection per stage. The induction associated with this must take place at the 'mid-point' of each stage. The 'mid-point' of a stage has recently been defined as once the stage has been stripped. The requirement of this condition then requires that no further works are to take place until the inspection has been undertaken by the RAP.
- If either of the above requirements are not properly adhered to, the Sponsor (land owner, developer etc) is in breach of the CHMP which requires the associated site to 'stop works' until the conditions of the CHMP are met.

<u>Issues</u>

- As a result of the requirements outlined above, there are significant delays to the continuation of stage works.
- Under the current timeframes, the timing of a typical stage is outlined below:
    - Civil Tender: 21st April
    - Tender awarded: 5th May (+2 weeks)
    - Request Site inspection: 5th May (once contractor is confirmed)
    - Start site stripping: 19th May
    - End site stripping: 26th May
    - Site Inspection: 16th June (+6 weeks from request and tender award)
    - Continuation of civil works: 18th June (+2 days)
- The total delay as a result of inspections is approximately three weeks. This assumes the best case scenario per stage and that the project properly adheres to the guidelines of the CHMP.

- There is a general undersupply of consultants and RAP resources to meet the current framework requirements including the increasingly extensive nature of the site work, cataloguing and reporting, as well as keep up with the current pace of urban development. This leads to further delays.

Impact Industry wide

- The above assumptions are based on current site start activity. Given the market conditions with greenfield lot sales rates, we anticipate a higher number of active sites over the coming six months.
- Land sales for the past 12 months in Melbourne Growth areas is ~20,000 lots (RPM).
- Average lot price in Melbourne $310,000 (RPM).
- Assumed stamp duty per lot $8,900 (SRO duty calculator).
- Assuming the above delay is seen across the growth areas of Melbourne we would expect to see a shifted delay of $178,000,000 in stamp duty revenue for the state.

Case Studies 3 and 4: Time delays due to approval time of CHMP

Site D

- The subject site is within an approved PSP area in Melbourne's greenfield areas.
- The planning permit for Stage 1 of the residential development was delayed due to the time it took to obtain an approved CHMP.
- Countless negotiations were required with the local RAPs over a twelve month period before the CHMP was approved, however the project is still not permitted to start until the salvage is completed which will cost $3 million.

Site E

- The CHMP took twelve months to be approved.
- Initial testing revealed an Aboriginall heritage place, being a stone artefact scatter site and two Low Density Artefact Distributions (LDADs). Additional testing was carried out to determine the extent of the sites.
- The stone artefact scatter area boundary was determined and it was agreed to split the planned open space to incorporate the stone artefact scatter site to ensure it was protected from harm. However, harm could not be avoided to one of the LDADs and it was agreed that salvage work was not required, which was a very reasonable outcome.
- As part of the CHMP conditions, the RAP insisted that compliance inspections be carried out for every stage despite extensive testing throughout the Activity Area revealing no additional artefacts. The RAP would not consider any other option and it became a condition of approval of the CHMP.
- The reasoning behind this compliance testing requirement was that as testing hadn't been done over 100 per cent of the site then there could be no guarantee that there weren't other artefacts, thus the need for compliance inspections.

Case Study 5: Avoiding harm

Site F

- The site is 14 hectares, located in the south-east and zoned for residential use.
- At the first meeting with the RAP, the extent of salvage required and management conditions were to be discussed.
- The RAP asked how harm was to be avoided, and informed the landowner they would be willing to compromise on avoiding harm and allow half the site to be developed assuming the other half was set aside as a cultural heritage reserve.
- This approach is unworkable. The State Government has designated and zoned residential land within the urban growth boundary to ensure there is a fifteen year supply of residential land. Setting aside half of every site as a cultural reserve will, at the extreme, halve the future residential land supply in growth areas. This is contrary to the strategic objectives of *Plan Melbourne* and will fundamentally distort the settlement patterns of metropolitan Melbourne.

Proposed reform to the *Aboriginal Heritage Act 2006*

In parallel with these experiences operationalising CHMPs, the Victorian Aboriginal Heritage Council released a discussion paper in 2020 – *Taking Control of Our Heritage* - calling for legislative reform to the *Aboriginal Heritage Act 2006*. This reform seeks, among other things, to:

- expand the legislative functions of a RAP;
- require that CHMPs be prepared and approved by RAPs;
- provide veto powers to RAPs in relation to CHMPs; and
- amend the prosecution powers.

UDIA Victoria lodged a detailed response to these proposals (refer to **Attachment A**).

Whilst we support appropriate legislative changes to the Act, the proposed reform would substantially exacerbate the issues previously outlined relating to the operationalisation of CHMPs and the interpretation of the Act.

Recommendations

In the context of the issues outlined above, we recommend the following:

1. That CHMPs include a provision to amend the extent of investigation and salvage in response to the density and quality of artefacts being recovered in the area of archaeological significance. This would provide greater flexibility to respond to larger sites with a scaled investigation if the density of artefact recovery is low or below a stated threshold.
2. That an industry-wide accreditation program be established for the relevant ground-breaking contractors so they can work across multiple sites without inductions for each CHMP (for example, a "CHMP Ochre Card" system (like the contractor White Card system) where contractors only need to sign onto new site CHMPs. This will reduce the number of individual

inductions required for each site and allow the RAPs to have input into the content of the training course for the card.

3. That additional resources be provided to the Wurundjeri RAP in particular to manage the current short to medium-term workload as they are extremely backlogged by weeks for meetings and by months for field based work.
4. That a consistent interpreptation of both Section 61 of the Act, and the definition of 'harm', be adopted that balances the strategic objectives of *Plan Melbourne*, has regard to the development rights associated with land zoned for residential use and development, and the management of the cultural heritage that will be affected by the permitted residential development. This should include a defined process for how to deal with artefacts revealed during construction.
5. Further to the recommendation above, a standardised approach to costs, timeframes, and accountability should be established between RAPs.

Next steps

We request the opportunity to discuss the issues raised in this letter in more detail. Please contact Dr Caroline Speed, UDIA Victoria Policy and Research Director by emailing caroline@udiavic.com.au to arrange a suitable time to do so.

Yours sincerely

Matthew Kandelaars
Chief Executive Officer
Urban Development Institute of Australia, Victoria

cc *The Hon. Tim Pallas MP, Treasurer of Victoria*
The Hon. Jaclyn Symes MLC, Attorney-General
The Hon. Richard Wynne MP, Minister for Planning

UDIA VICTORIA SUBMISSION

October 2020

1. Theme One – Furthering self-determination for Registered Aboriginal Parties

Proposal One: Registered Aboriginal Parties (RAPs) Nomination of Council Members

Discussion points and questions:

- Are the above models viable? What are other alternatives?
- Who should make up the College of RAPs?
- What proportion of Council members should be elected by RAPs? - One proposal is that five members would be RAP-nominated, and the other six members would not be RAP-nominated. This could be a balanced approach.
- How should the nomination process work in practice? - One proposal is that a College of RAPs would involve a meeting of RAP representatives (from all RAPs) who would propose a list of potential RAP representative nominees. This list would then go before the Minister in selecting the RAP-nominated Council members.
- This could result in certain Aboriginal groups having both a RAP-nominated representative and non-RAP nominated representative(s) on Council. Is this an issue?
- Aboriginal people and (Traditional Owner) representative bodies, not currently recognised as a RAP or affiliated with a RAP, should continue to have access to representation on the Victorian Aboriginal Heritage Council (VAHC). This appears to be considered and possible with the proposed changes.

UDIA Victoria supports the notion of Aboriginal persons continuing to enjoy representation.

However, UDIA Victoria also considers it necessary that such a representative body is balanced in relation to RAP representation. While we do not prescribe the composition of representatives, UDIA Victoria considers it essential and a feature of fair and equitable governance that all interests are taken into account when undertaking administrative duties and powers as part of the process to which the VAHC appoints its members.

UDIA Victoria supports this proposal as Traditional Owner representative bodies should continue to have access to representation on the VAHC. This appears to be considered and possible with the proposed changes.

Proposal Two: Expansion of the Legislative Functions of a RAP

Discussion points and questions:

- Should RAPs be prescribed as the primary source of advocacy and advice to government on matters relating to Aboriginal affairs that are outside the ambit of Aboriginal Cultural Heritage?

  If so, what should constitute these matters? Some proposed matters are:

  - Health
  - Housing

- Social services

- What other legislative functions of a RAP should be included in s148?
- Could this proposal cause friction between RAPs and other organisations who are servicing Aboriginal communities?
- Would this proposal interfere with each individual RAP's choice to decide on how and when they wish to communicate with local government?
- How would this proposal interact with RAPs who have agreements under the Traditional Owner Settlement Act 2010, which already provides established frameworks for engagement with local, state and federal governments?

UDIA Victoria opposes prescribing advocacy and advice powers to RAP's on matters outside the ambit of the Act. Furthermore, it is not the purpose or intent of the Act to serve any broader function than those objectives set out in the Act.

It is difficult (if not impossible) to see how the skills of recognising, protecting and conserving Aboriginal Cultural Heritage are linked in any way to the proposed matters of health, housing and social services, or indeed any other platforms not directly associated with Aboriginal Cultural Heritage.

It would be irresponsible and unprecedented to provide such legislative advocacy power to a group where such a group does not have the requisite skill, knowledge or expertise to provide opinions. The suggested areas of health, housing and social services (or indeed any industry outside of Aboriginal Cultural Heritage) are regimes with detailed statutory frameworks applying and a matrix of stakeholders and issues.

To introduce a legislative function empowering RAPs in the manner sought would be unwarranted. UDIA Victoria has grave concerns about this proposal where the public benefit for such significant change or the purpose driving the change (under the review of this Act) is not demonstrated. It is beyond the remit of the review of the primary Act and should not be entertained.

Proposal Three: Enabling Council to Approve RAP Applications with Conditions

Discussion points and questions:

- Does this proposal potentially limit the functions of new RAPs to an extent that it outweighs the benefits?
- What types of conditions would be beneficial for new RAPs?
- Is this amendment necessary considering that there are already procedures and policies in place that make it easier for newly appointed RAPs to carry out their functions? These procedures and policies include:

  -The power under s 55(2) of the Act for RAPs to decide within 14 days whether or not to evaluate a CHMP, in which case it defers to the Secretary upon their refusal.

  -The development of CHMP evaluation checklists and CHP application forms.

UDIA Victoria considers Proposal Three unnecessary. To this end, we submit the procedures, practices and policies already in place are adequate.

Proposal Four: RAP Preparation of CHMPs

Discussion points and questions:

- Could a RAP realistically be positioned as the preparer and the approver of a CHMP, or is the risk of conflict too great?
- The way that RAPs could be structured in accordance with this proposal is to have both a research arm (to conduct CHMPs) and a regulatory arm (to evaluate CHMPs).
- If this amendment was put in place, RAPs could potentially work on each other's country in a RAP peer review process.
- Would resourcing this proposal be too difficult for RAPs?
- What would this proposal mean for disputes that arise between Sponsors and RAPs?
- Is this proposal better suited to only include work over Crown land or public lands where the Sponsor is the State?

UDIA Victoria vigorously oppose Proposal Four.

In short, we set out the reasons below:

1. There is a serious conflict of interest in this proposal which lacks transparency, fairness, equity, recognition of the rights of the landowner and any provision for dispute resolution. In effect, a RAP entity cannot properly perform its functions and responsibilities under the Act and be an impartial and fair decision maker and be the proponent of a CHMP.
2. The proposal lacks a strategic basis as to the need or purpose of this legislative change.
3. Any financial imperative on the part of the RAP does not outweigh the imperative for objectivity, and to ensure procedural fairness, equity and the absence of conflict of interest in decision making.
4. Even if this proposal was to be entertained seriously (which we say it should not), this proposal lacks underlying policies or procedures to ensure necessary independence, transparency and fairness and separation of decision making.
5. This proposal denies the proponent the ability to operate in an open and free market and to appoint its own appropriately qualified expert person to independently and objectively prepare a CHMP.
6. The absence of independence raises serious concerns about appropriate mechanisms to enable dispute resolution.
7. This proposal undermines the intent of the Act and principles of good governance. It should be struck out.

Proposal Five: RAP Veto Power in Relation to CHMPs

Discussion points and questions:

- Is a veto power for CHMPs feasible?
- Should the veto power be at the approval stage, or should it be relevant to the preliminary stages of the CHMP preparation process?
- What form could a veto power take?

- If a site was found during a CHMP assessment to be of Local, State, National or International significance, could this provide the foundation for veto powers?

UDIA Victoria strongly opposes Proposal Five.

This is for the following reasons:

8. UDIA Victoria recognises the role and importance of all parties in this process, particularly the knowledge and understanding of the landowners and the complex legislative regimes applying when developing land. UDIA Victoria also recognises the importance of an independent expert's advice and role to play in achieving the objectives of the Act.

9. As a matter of principle, no body exercising administrative law functions should be empowered with a 'veto' power. To do so, would be contrary to the principles of good governance and open to abuse of power and failure to provide procedural fairness (a right also embodied in the common law and legislative instruments including the Charter).

10. Consistent with the principles of the rule of law and good governance, the only body that should be lawfully provided with such 'powers' should be independent and subject to law such as the Victorian Civil and Administrative Tribunal (VCAT).

11. The need for a 'veto' power is not strategically justified. UDIA Victoria's experience bears out very few disputes about CHMP's have been brought before VCAT for determination.

12. A 'veto' power is inconsistent with notions of transparency and participation by all affected parties. Instead, UDIA Victoria supports alternative dispute resolution mechanisms and open and active negotiation with VCAT as a last resort.

2. Theme Two - Increasing the Autonomy of the Victorian Aboriginal Heritage Council

Proposal Six: Transferring Responsibility of the Register from AV to Council

Discussion points and questions:

- How should this transfer of responsibility work in practice? Is the above proposal workable?
- What specific aspects of Registration need to be considered when discussing the transfer of the Register's operations from AV to Council?
- Note that s 145, s 146, s 146A, s 147 and s 147A would also need to be amended to take out Secretary functions.
- If this proposal was accepted, Council would create standards and policies relating to the Register by listening to the 'on ground' experiences of RAPs and Traditional Owners.

UDIA Victoria does not support any change to the Registry's main functions which is to act as a repository of information.

Proposal Seven: Amending the Procedures for Dispute Resolution under the Act

Discussion points and questions:

- Is it correct for Council, or the Office of the Council, to have the role as a mediating body in these dispute processes?

- If not, then what other authority could have this role? Or should the role be eliminated as a possibility altogether?

- Which parties should be eligible for ADR under the Act?
- Which parties should be liable for the costs of paying for these dispute resolution processes?

UDIA Victoria supports alternative dispute resolution mechanisms in addition to dispute resolution at VCAT. In our experience, alternate dispute resolution can be very effective in resolving, or partially resolving the issues at hand in a cost effective and timely way.

It is not clear, however, how effective the alternative dispute resolution mechanism at section 113 of the Act is, or the degree of 'take up' by the parties to a dispute. We consider more can be done to ensure disputes are resolved in a timely and effective way.

UDIA Victoria does not consider Council members should have a role to play in mediating disputes. Again, this is principally for reason of conflict. To ensure fairness for all parties and efficacy in the process, a mediator must be an independent party to the mediation and is engaged to assist the parties to resolve the dispute. The mediator should not necessarily express an opinion about the merits of the matter or give legal advice or a make a decision, but rather assist the parties to resolve it among themselves.

At present, the Chairperson of the Council must arrange for a dispute to be either mediated by a mediator, or by a suitably qualified person. We consider the present statutory arrangement adequate. Importantly, the present arrangement ensures the mediator or suitably qualified person is independent and has no interest in the outcome or the process. This is essential in order to ensure fairness, independence and achieving negotiated outcomes without the need for a contested hearing.

UDIA Victoria consider the requirements for costs of alternative dispute resolution as set out in section 114(2) of the Act are reasonable, proportionate and fair. For these reasons, we consider the present costs arrangements are satisfactory and there is no basis to depart from this position.

Proposal Eight: Amending the Prosecution Powers

Discussion points and questions:

- Should the power to prosecute sit with the Council?
- Which offences under the Act would be appropriate to issue an infringement notice as a penalty?
- Should RAPs be given powers to issue infringement notices?
- What are other issues with the current prosecution process that could be amended?

UDIA Victoria considers any enforcement or prosecution powers should be exercised independently, in the public interest and with integrity and professionalism.

The following principles should govern all enforcement and prosecution action:

1. Accountability – to ensure governance processes and actions can be reviewed by a range of agencies and the courts;
2. Transparency – to ensure no private deals are done and all enforcement or prosecution matters are finalised by litigation or other formal resolution are made public;
3. Confidentiality – to ensure conduct investigations are in confidence and no comment is made on matters under investigation;

4. Timeliness – ensuring investigations and resolving enforcement activity are done as efficiently as possible to avoid costly delays and uncertainty for business;
5. Proportionality – to ensure enforcement responses are proportionate to the conduct and the resulting or potential harm;
6. Fairness – to ensure investigations and other activities are conducted to:
    - 6.1 balance voluntary compliance with enforcement activity,
    - 6.2 while responding to many competing interests,
    - 6.3 take into account an approach in one matter when deciding how to pursue another, and
    - 6.4 balance fairness to individuals and developers of land with informing the public about achieving the objectives of the Act and being transparent about what action is being taken and why.

At present, section 186 of the Act deals with who may prosecute. UDIA Victoria submits there is no reason to depart from the position set out under this section. No evidence or data is advanced demonstrating the need to empower the Council to prosecute where a conflict of interest arises. The power to prosecute is a very serious power and should be done sparingly and in accordance with the principles set out above.

UDIA Victoria considers an infringement notice could be issued where there has been a contravention of the Act that requires a more formal sanction but where the matter may be resolved without legal proceedings. Again, any power to issue an infringement notice should be exercised by independent persons not having an interest in the outcome and generally in accordance with the principles set out above. To this end, we do not favour the Council exercising infringement powers.

Legal action in the courts should only be taken where, having regard to all of the circumstances, litigation is the most appropriate way to achieve compliance. In some matters, it will be more appropriate to draw the issue to the relevant parties' attention and provide information to help gain a better understanding of the Act and ensure rectification and future compliance.

Proposal Nine: Extension of Chairperson Terms

Discussion points and questions:

- What are appropriate term lengths for the Chairperson and Deputy Chairperson?
- How many times should the Chairperson and Deputy Chairperson be eligible for re-election?

UDIA Victoria understands Proposal Nine seeks to amend section 138 of the Act to allow the election of Chairpersons and Deputy Chairperson holding office from one year to two-year terms. However, we agree the Chairperson and Deputy Chairperson should only be eligible for one further term of election. This would result in the total amount of time a Council member could hold office is four years.

UDIA Victoria supports Proposal Nine.

Proposal Ten: Empowering Council to Employ its Own Staff

Discussion points and questions:

- Should Council be permitted the ability to employ its own staff?

UDIA Victoria understands the Office of the VAHC is a branch of Aboriginal Affairs Victoria and presently its staff are employed by the Department of Premier and Cabinet.

UDIA Victoria does not support empowering the Council to employ exclusively its own staff. It is to be recalled the Council is a statutory body exercising statutory duties and responsibilities under the Act. Person employed should be employed based on their skill and expertise for the particular position. It is an imperative decision-makers are employed based on the right skill set leading to robust and considered decision making.

Proposal Eleven: Transfer of Various Secretarial Functions to Council

Discussion points and questions:

- What functions of the Secretary should be transferred to Council?
- Looking at section 143 of the Act, are there any functions of the Secretary that should be transferred directly to RAPs?
    - Should RAPs keep their own Registers?

In large part, UDIA Victoria opposes Proposal Eleven.

This is for reasons already advanced elsewhere in this submission. In particular, there remains a grave concern about a conflict of interest and consequent potential for abuse of power and ensuring enforcement is independent.

3. Theme Three - Recognising, protecting and conserving Aboriginal Cultural Heritage

Proposal Twelve: Regulation of Heritage Advisors

Discussion points and questions:

- What other elements should a regulation system for Heritage Advisors include?
- What rules should be listed in the Heritage Advisors code of conduct?
- What pre-existing body should act as a regulator for Heritage Advisors? Should it be Council, or a different body?
- What sanctions against Heritage Advisors should be available?

At present, section 58 of the Act requires the sponsor of a CHMP to engage a heritage advisor to assist in preparing a CHMP. It is proposed to amend the Act to create a regulation system for heritage advisors.

UDIA Victoria does not support Proposal Twelve.

The regulation of Heritage Advisors should be carried out by Industry specific bodies such as the Australian Association of Consulting Archaeologists Inc. (AACAI). This is because these bodies already have in place established codes of conduct that are consistent.

Furthermore, it is unclear from the Discussion Paper what, if any, conduct presently experienced that is poor or unacceptable requiring this legislative amendment.

In UDIA Victoria's view, there is scope for Aboriginal Victoria or the Secretary to develop a non-binding practice note setting out the standards expected for Heritage Advisors and a code of conduct in relation to Aboriginal Cultural Heritage.

Proposal Thirteen: Compulsory Consultation of RAPs During the CHMP Process

Discussion points and questions

- Do RAPs see an advantage in being given the opportunity to forge a relationship with prospective Sponsors?

Section 59 of the Act sets out the obligations between a sponsor and a RAP during the CHMP process. At present, the sponsor must make reasonable efforts to consult with the RAP before and during the CHMP preparation.

The Discussion Paper seeks to amend the Act to require sponsors to consult with the RAP from the outset.

While UDIA Victoria considers participation and the opportunity to comment is important, UDIA Victoria also considers this is secured in section 59. UDIA Victoria has some concern that the strategy for consultation from the outset can have the very real potential to adversely impact on timelines and issues of transparency. This is particularly relevant where no legislative obligations are sought to be built into the statutory framework providing timelines and necessary checks and balances.

Proposal Fourteen: Amending the Power of Entry for Authorised Officers and Aboriginal Heritage Officers

Discussion points and questions:

- Encroaching on occupiers' rights, particularly on residential premises, is a significantly serious proposal. Is this a workable amendment?
- What alternative proposals could enable AOs and AHOs to have a greater power to enter premises when there is a potential threat of harm to Aboriginal Cultural Heritage, and yet still uphold occupiers' rights of consent?

We understand the Act is sought to be amended to allow Authorised Officers (AO) and Aboriginal Heritage Officers (AHO) to enter land or premises without the consent of the owner or occupier of the land.

UDIA Victoria vigorously opposes this legislative change. There are very few acts or legal instruments allowing authorised officers to enter land without consent. In fact, we can only think of the police having such power and even then, only in certain circumstances, such as obtaining a warrant. It would be a disproportionate abuse of power to almost all conceivable breaches of the Act to allow an AO or AHO to enter land without consent. It would also be a breach of the right to privacy under the Charter. In our view, the distinction between residential premises and land is irrelevant, as the power being sought is in excessive and without proper foundation.

Proposal Fifteen: Amending the Evidentiary Provisions Regarding Aboriginal

Discussion points and questions:

- Noting that a guiding principle for Council is that Traditional Owners of the lands in which certain objects originate should make the call. How should Council best work with Traditional Owners in non-RAP areas where there may be multiple interests?
- Should Council create a Sub-Committee that could act as a mechanism to determine specific matters in relation to Secret or Sacred Objects?

UDIA Victoria understands Proposal Fifteen seeks to include a new provision in the Act essentially allowing Council to sign certificates to the effect that an object referred to in the certificate is an

Aboriginal Object or Secret or Sacred Object to be evidence of that fact. If allowed, this would give authority to Council to deem the particular object as such.

UDIA Victoria further understand a sub-committee is being considered as the mechanism to determine these types of objects.

We oppose this legislative change. While we think such objects should be protected, certificates should only be made by independent persons. We also have concerns about how any sub-committee would operate, transparency of decision making and accountability. The issue of how Council works with Traditional Owners of lands with certain objects is real. However, this issue is best responded and addressed by working with all key stakeholders and relevantly, independent persons to ensure robust and fair consideration of the applicable objects.

Proposal Sixteen: Introducing Civil Damages Provisions

Discussion points and questions:

- Should civil damages be introduced for every offence?

UDIA Victoria recognises that civil damages are a form of legal remedy paid by one side to the other. There may be a case for some offences to attracts civil damages. However, UDIA Victoria is concerned that not all offences are of the same order or the same harm. It would be unfair and punitive to introduce a blanket approach of civil damages for all offences.

We consider a more nuanced and proportional approach is warranted depending on the severity and harm. In our view, this requires much greater consideration, and in the absence of such consideration, this proposal should be abandoned.

Proposal Seventeen: Changing the Definition of Waterways

Discussion points and questions:

- What other issues arise with either of these Proposals?
- In what other ways could the 'unnamed waterways' issue be resolved?

UDIA Victoria understands this proposal seeks to expand the definition of 'waterway' at section 26 of the Regulations to include all courses of water in Victoria, regardless of whether they are named or unnamed, whether they are current or prior, whether they are diverted or original, or whether they are permanent or seasonal. It is also sought to remove all references to the *Geographic Places Names Act 1998*.

UDIA Victoria does not support Proposal Seventeen, or at least not all of it. We consider the effect will be disproportionately unfair and unduly restrictive of developing land, particularly where no evidence can be adduced of Aboriginal heritage.

The ambit of all water courses proposed is too open and vague and will capture unnecessary land not accommodating Aboriginal Cultural Heritage. We observe not all 'unnamed waterways' are historic. The cost to the community and delays are significant and need to be balanced against the need for this legislative change.

In all, we do not consider there is an issue (or one that has been properly ventilated and demonstrated) from 'unnamed waterways'. There is no case to unilaterally alter the legislation definition and doing so may directly contravene other legislative frameworks and definitions such as those in the *Water Act 1989*.

Proposal Eighteen: Changing the Definition of Significant Ground Disturbance

Discussion points and questions:

- How to ensure areas of Cultural Heritage Sensitivity that have experienced a degree of disturbance, but still may contain Cultural Heritage, are not exempt from the CHMP process whilst retaining the existing threshold for defining a high impact activity.
- It is noted that the definition of 'high impact' will likely also need to be amended if the definition of SGD is amended.

UDIA Victoria understands Proposal 18 seeks to review the definition of 'significant ground disturbance' (SGD) with the term 'culturally relevant stratigraphy'.

Because this definition is very broad, vague, ambiguous and therefore open to too great a diverse opinion, we oppose this legislative proposal.

We recognise there was some debate in applying the term SGD. However, it is now well accepted by the industry and archaeological experts, decision makers and VCAT. More importantly, the definition has been the subject of a great deal of VCAT commentary providing meaningful guidance on its meaning and application. Importantly, this provides certainty to all stakeholders, including municipal councils, developers and archaeological experts.

The present definition has struck the necessary balance between achieving the objective of the Act (in recognising, protecting and conserving Aboriginal Cultural Heritage where the activity is a high impact activity and not subject to SGD) while also facilitating necessary development to accommodate housing growth, affordable housing and infrastructure.

This balance is inherent in the principles of the Act and essential in securing the economic viability and a sustainable future for all Victorians. The notion of seeking to preserve all Aboriginal Cultural Heritage (irrespective of the object or place) on land that has been disturbed would have the effect of sterilising large amounts of developable land. This is untenable and contrary to State policy and other legislative frameworks regulating planning and the environment and managing growth and development in Victoria.

Proposal Nineteen: RAP Consultation in the Due Diligence / PAHT Process

Discussion points and questions:

- Is a Due Diligence still an acceptable management tool for LGAs to make decisions on matters of Cultural Heritage?
- What would be a RAP's desired degree of consultation in the preparation of a Preliminary Aboriginal Heritage Test (PAHT)?
- Would RAPs accept that there may be a different fee structure to CHMP work compared with work undertaken in the preparation of a PAHT? I.e., lower fees?
- Should RAPs also be consulted when Heritage Advisors undergo their Desktop Assessment during the CHMP process?

UDIA Victoria understand Proposal Nineteen seeks to amend the Act to require 'all buildings and construction' triggered by a planning permit to be referred to the Traditional Owners for consultation. Even where a planning permit application does not trigger the need to prepare a CHMP, a PAHT would be sought.

We are gravely concerned this is an unworkable overreach and not required having regard to the purposes and objectives of the Act.

We are also gravely concerned that if this legislative change is adopted, it would result in a lack of independence and a conflict of interest. We have already raised these concerns earlier in our submissions about these matters, which we rely on in advancing our reasons for not supporting this proposal.

There are also a number of serious issues to be properly considered about the timing of such consultation, the way in which the local government municipal council receives any comments and review rights at VCAT. We do not support introducing changes that add to the complexity of the planning system and delays and costs where such changes are not necessary and not achieving the objectives under the Act.

Having regard to the very grave concerns we express above; we consider a due diligence tool remains an acceptable management tool for LGAs to make decisions on matters of Cultural Heritage. We oppose the following:

- the requirement for RAPs to be consulted in preparing a PAHT;
- any fee structure for services by a RAP where a CHMP is not required under the Act or Regulations; and
- the requirement for a RAP to be consulted when Heritage Advisors undergo their Desktop Assessment during the CHMP process.

We support the independence, integrity and professionalism of expert heritage advisors with the requisite skills, experience and qualifications identified in the Department of Environment, Land, Water and Planning as people who can provide specialist advice or technical assistance to owners and managers of land with heritage values.

4. Contact

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