

16 December 2004

The Heritage Policy Team
Aboriginal Affairs Victoria
Department for Victorian Communities
GPO Box 2392V
Melbourne, Vic, 3001

Dear Sir,

Re: Developing an Aboriginal Cultural Heritage Management Strategy

The Minerals Council of Australia, Victorian Division welcomes the opportunity to comment on the plans for Aboriginal Affairs Victoria (AAV) to develop an Aboriginal Cultural Heritage Management Strategy.

In responding to the AAV Discussion paper “*Long Ago, Here Today – Developing an Aboriginal Cultural Heritage Management Strategy for Victoria*” we have attempted to answer four fundamental questions, namely: what is our involvement; what has been successful; what are the opportunities; and what do we want in the strategy.

1 WHAT IS OUR INVOLVEMENT

The Minerals Council of Australia (MCA) is the peak, national organisation representing the exploration, mining and minerals processing industry in Australia. The membership of the Council accounts for some 85 per cent of Australian minerals production and over 90 per cent of Australia’s mineral exports. The Minerals Council of Australia, Victoria is a Division of the MCA that represents the interests of members operating in Victoria. In June 2004 the Victorian Minerals & Energy Council merged with the MCA to become a Division of the MCA.

The MCA and its member companies are committed to the sustainable development principles of the International Council for Mining and Metals (ICMM). See **Attachment 1**. For the minerals industry, sustainable development defines our licence to operate and means that investments in minerals projects should be financially profitable, technically appropriate, environmentally sound and socially responsible. Importantly it’s about the interdependency of social, environmental and economic considerations. One of those principles is to “uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities” whilst another is to “contribute to the social, economic and institutional development of the communities in which we operate”.

It is through the implementation of these two principles in an Australian context and in particular a Victorian context that we consider that the minerals industry has a positive contribution to make to the development of a cultural heritage strategy.

One of the significant instruments that members of MCA are using to implement the principles for sustainable development is the “Australian Minerals Industry Indigenous Relations Statement” which was released as a public statement of values held by members of MCA. See **Attachment 2**. Those values include the recognition and respect for Aboriginal cultural heritage.

It is noted in the discussion paper that “industries such as mining, soil extraction, forestry and agriculture have the potential to damage Aboriginal cultural heritage”. Whilst not disputing this we would rather consider that the minerals industry understands and respects the value of Aboriginal cultural heritage and responsible miners will always seek to work with Aboriginal communities to ensure a positive outcome for all parties when seeking to convert natural capital into social capital.

2 WHAT HAS BEEN SUCCESSFUL

The members of MCA and in particular the Victorian members have been involved in several significant activities that have improved the understanding of the importance of Aboriginal cultural heritage and the application of the cultural heritage laws.

Firstly, in 2000 The Victorian Chamber of Mines (now MCAVic) in association with the Mirimbiak Nations Aboriginal Corporation (since replaced by Native Title Services Victoria) undertook an extensive cross cultural exercise over a 10 month period to produce a guide called “*Building Relationships – Working with the Indigenous People of Victoria – A Guide for Explorers and Miners, Nov 2000*” The author, Faith Irving, prepared the guide in close collaboration with Aboriginal elders across the State. It details the importance of building relationships with Aboriginal communities as an initial and integral part of any agreement making process between explorers and miners and Aboriginal communities.

As part of the lengthy development of proforma agreements between explorers and miners and native title claim groups in Victoria, a detailed “Cultural Heritage Management Procedure” was developed. These proforma documents were prepared jointly by MCAVic, Native Title Services Victoria and the Department of Primary Industries (DPI). They were reviewed by Aboriginal Affairs Victoria and the National Native Title Tribunal as being appropriate procedures for the identification, monitoring, reporting and management of Aboriginal cultural heritage when exploring or mining in Victoria. The procedures have proved practical in their application in the field and have been incorporated in the two Regional ILUA’s negotiated by MCA with the Dja Dja Wurrung people and the Wadi Wadi Barapa Barapa Wamba Wamba people.

On an individual company basis there are also several examples of cross cultural activities that have been very successful. For example, some companies have established formal cultural heritage protocols with traditional owners even though there are no native title claims in the areas concerned.

In addition, the Minerals and Petroleum inspectorate of DPI has incorporated strong Aboriginal heritage protection procedures into exploration and mining licence and work plan approval processes in Victoria. In these processes AAV are consulted by DPI as part of the rigorous assessments undertaken to establish licence conditions.

On a national basis we are aware that the new Queensland heritage legislation has many features that are effective and yet practical enough to enable developers to work with Aboriginal communities to find solutions. The Queensland legislation is proving to be applicable to all people and all land regimes. It was drafted on the principle that it had to have workable and efficient processes that apply not only to large developers such as miners, but also to small community not-for-profit organisations that may want to undertake activities that could potentially affect Aboriginal cultural heritage, such as a local scout troop wanting to build a scout hall. It achieved this by offering several processes for managing Aboriginal cultural heritage including through satisfying a duty of care which could be met by complying with regulatory guidelines. These guidelines have a number of categories related to level of potential impacts on Aboriginal cultural heritage and the existing and proposed level of land disturbance.

3 WHAT ARE THE OPPORTUNITIES

In considering the opportunity to revisit Aboriginal cultural heritage in the development of a new whole of government strategy we believe that the following should be included:

- Designated Aboriginal groups or Aboriginal heritage committees are required for all of Victoria as the single point of contact when dealing with Aboriginal cultural heritage. This will require rationalisation of the relative roles of native title claimants registered under the *Native Title Act* and the regional heritage committees formed under Part 11A of the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act* so that there is a single contact point irrespective of whether native title is involved.
- Inter-government discussions are required between Victoria and the Commonwealth to determine if the current Commonwealth Government is still considering an accreditation regime. This was a feature of the proposed amendments to the Commonwealth Act that have been stalled in the Senate for the last several years. If the Commonwealth is still considering a State accreditation scheme, Victoria should draft legislation with accreditation in mind.
- Close examination of the Queensland cultural heritage legislation is required as the Queensland model where cultural heritage responsibilities fall first, to the native title party for the particular area, and then to Aboriginal people with particular knowledge etc. has merit. In this example cultural heritage responsibilities are linked with registered native title claims where applicable.
- Any new legislation should cover all land tenures, not just Crown land.

Many of the above opportunities would be realised by the reform of the *Archaeological and Aboriginal Relics Preservation Act, 1972* legislation and consequential amendments to the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* legislation. Legislative reform is essential to resolving the inconsistencies between Commonwealth and State cultural heritage

legislation, and the *Native Title Act, 1993*. Having cultural heritage boundaries incorporated in legislation which conflict with native title determination application boundaries is not sustainable.

It is also noted that the discussion paper rightly seeks to encourage a “whole of government’ strategy for Aboriginal cultural heritage. Whilst we support this goal we believe that it should not be achieved at the expense of considering the “whole economy and community”. There is a risk that the exclusion of parts of the economy and community from the strategy will lead to a sub-optimal outcome. We note that the discussion paper is very government centric and could lead to outcomes that are entirely dependent on government intervention or Aboriginal people focused on government for outcomes rather than realising the potential of the whole economy and community. When considering a “whole of government” approach it is important that native title and indigenous affairs are dealt with in government as a 'one-stop shop/point of contact' under one Minister. Until this is achieved industry and the general public will continue to have to address all the various issues in a fractured way.

4 WHAT DO WE WANT IN THE STRATEGY

In considering the development of an Aboriginal cultural heritage strategy for Victoria the minerals industry recommends that as a high priority the strategy address the overlaps that currently exist between native title claimants, Aboriginal cooperatives charged with cultural management under the Commonwealth Act, and cultural heritage programmes including ILUAs being developed between the Victorian Government and various Aboriginal communities.

The current arrangements create confusion and increase costs for explorers and miners, who are currently required by law to deal with the local Aboriginal community organisations on cultural heritage matters, but are also required to participate in ILUA or ‘right to negotiate’ native title negotiations, which always involve cultural heritage considerations. The unnecessary tension between these two groups/processes creates big problems for explorers and miners, by increasing costs, delaying approvals processes and making it difficult to establish harmonious relationships with the ‘relevant’ Aboriginal community.

In addition to the above we would expect that the strategy would:

- lead to the establishment of new legislation that would replace existing State and Commonwealth legislation, that is Part 11A of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act, 1984* would be repealed along with the Victorian *Archaeological and Aboriginal Relics Preservation Act, 1972*;
- contain clear definitions of what Aboriginal cultural heritage is, and what is to be protected and managed. These definitions should be aligned with those of the Commonwealth;
- be confined to Aboriginal cultural heritage and not include matters outside heritage. For example, it should not include environmental issues where not related to heritage etc.;

- recognise that where exploration and other low impact activities are involved the process for managing heritage would be less onerous than where mining or other high impact development activities are proposed;
- include clear and defined procedures for resolving any disputes arising from the processes in the strategy;
- ensure that any new requirements do not add significantly to the cost and time burden of explorers and miners. Processes need to be designed with these principles in mind; and
- ensure that the strategy and any new legislation that follows is applicable to all people and all sectors of the economy and Victorian community.

Another issue of concern to the minerals industry is to ensure that explorers, miners and other developers are not used as agents to enable third parties to gain access to other peoples land. Any processes that require developers to be responsible for securing access for Aboriginal heritage surveys etc on private land owned by another party will be doomed for failure. The strategy and any subsequent legislation should ensure that the legislation applies to all land regimes and include a process for access for surveys etc by appropriately authorised Aboriginal people. It is inappropriate for developers to be the agents for AAV or Aboriginal communities.

Guidelines that support the strategy are required to provide clear and concise guidance to Aboriginal communities and developers on the terms, timelines and qualifications of people required to be consulted on cultural heritage matters. These guidelines are required to avoid the auction system that occurs with some communities at present and open-ended timeframes that can lead to expensive plant and work crews being stood down.

5 CONCLUSION

The Victorian based members of the MCA recognise the need for a comprehensive whole of government strategy for Aboriginal cultural heritage. They also appreciate the need for reform to the current Victorian legislation. The comments above are directed at ensuring an effective strategy that protects and enhances our Aboriginal cultural heritage whilst at the same time ensuring exploration and mining activities can proceed in line with our commitment to the ICMM's principles for sustainable development.

We would be please to discuss with you the points we have raised above and we look forward to participating further in the development of the management strategy.

Yours faithfully,



Chris Fraser
Executive Director, Victoria

Attachment 1

ICMM Sustainable Development Framework:

On May 29th 2003, the International Council on Mining & Metals (ICMM) approved ICMM's Principles and resolved that ICMM corporate membership includes a commitment to measure corporate performance against these principles.

The Principles are central to ICMM's sustainable development framework. They are based on the objectives set by the minerals industry in Toronto in 2002 and draw on the landmark MMSD report. They reflect the values and the policy directions that will help ensure that the industry continually improves the sustainability of its operations. They will also guide the design of the industry's performance measurement processes.

ICMM Principles

As members of ICMM or as companies that have otherwise agreed to take on the same performance obligations as ICMM members, we seek continual improvement in our performance and contribution to sustainable development so as to enhance shareholder value. In striving to achieve this, we will:

1. Implement and maintain ethical business practices and sound systems of corporate governance.
2. Integrate sustainable development considerations within the corporate decision-making process.
3. Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.
4. Implement risk management strategies based on valid data and sound science.
5. Seek continual improvement of our health and safety performance.
6. Seek continual improvement of our environmental performance.
7. Contribute to conservation of biodiversity and integrated approaches to land use planning.
8. Facilitate and encourage responsible product design, use, re-use, recycling and disposal of our products.
9. Contribute to the social, economic and institutional development of the communities in which we operate.
10. Implement effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders.

ICMM corporate membership includes a commitment to measure corporate performance against these principles.

Attachment 2

MINERALS COUNCIL OF AUSTRALIA

Australian Minerals Industry Indigenous Relations Statement

Vision

A thriving minerals industry working in partnership with Indigenous communities for the present and future development of mineral resources and establishment of vibrant, diversified and sustainable regional economies and Indigenous communities.

Values

Recognising that the present and future operations of minerals companies are inextricably linked to building and enhancing our strong relationships with Indigenous communities, we commit to carrying out our operations and activities in ways that embody the following values:

- Acknowledge, respect and support the recognition and protection of Indigenous Australians rights in law, interests and special connections to land and waters in Australia.
- Acknowledge, respect and support the desire and rights of Indigenous Australians to practice their many and varied cultures and customs.
- Recognise that for effective engagement to occur between minerals companies and Indigenous communities, the communities require adequate and culturally appropriate information with enough time to consider proposals and make decisions.
- Promote, support and facilitate the development and implementation of cross cultural understanding that provides minerals industry representatives with greater awareness of Indigenous cultures and customs, and Indigenous representatives with greater awareness and understanding of the minerals industry, including the international, national and local business environment in which minerals companies operate.
- Recognise, support and facilitate the capacity of Indigenous Australians to more effectively engage in the broader economy, including through wealth creation and the establishment of vibrant, diversified and sustainable regional economies.
- Promote, support and facilitate Indigenous communities engagement with minerals companies operations, including the promotion of education, training, employment, contracting, joint ventures and local business diversification including post mining options.
- Promote the negotiation of mutually beneficial and sustainable agreements as an effective mechanism through which to achieve the intended outcomes of sustainable relationships and partnerships between minerals companies and Indigenous communities.