

18 May 2007

Ms Angela Jurjevic
Executive Director
Aboriginal Affairs Victoria
GPO Box 2392V
Melbourne, Vic, 3001

Dear Angela,

Re: Submission on the draft Aboriginal Heritage Regulations and Regulatory Impact Statement

The Minerals Council of Australia (MCA) is the peak industry association that represents the corporate minerals companies in Australia. The members of the MCA are engaged in mineral processing, mining, exploration, or the provision of services to the industry and account for more than 85 percent of mineral industry output in Australia. The Victorian Division of the MCA represents the interests of members operating in Victoria.

The MCA is pleased to have the opportunity to formally comment on the exposure draft Aboriginal Heritage Regulations and the Regulatory Impact Statement¹.

Victoria's minerals and petroleum sector accounts for \$3.5 billion of the Gross State Product (GSP) or about 2 per cent². Investment in the Victorian minerals sector is at a record high and increasing. The investments are in the brown coal sector, the gold sector and the mineral sands sector. In addition, private industry expenditure on exploration is at a record high of \$84.5 million per annum to December 2006.

As with elsewhere, further investment in the minerals industry in Victoria is influenced by the identification of viable mineral resources, access to the land occupied by those mineral resources, financial resources, the support of the community, and the availability of a skilled workforce. Consequently, the new Aboriginal Heritage Act and Regulations will have a direct and immediate impact on the minerals industry in Victoria.

Sustainable Development

The minerals industry's commitment to continuous improvement in minimising and remediating its environmental and social impact is a fundamental plank of the industry's broader commitment to sustainable development. This is demonstrated by the MCA's requirement that member companies are signatories to *Enduring Value – the Australian Minerals Industry's Framework for Sustainable Development*³.

¹ The Allen Consulting Group, Aboriginal Heritage Regulations 2007 and Regulatory Impact Statement, April 2007.

² ABS Catalogue No. 5220.0, Australian National Accounts, 2005/06.

³ Enduring Value, The Australian Minerals Industry Framework for Sustainable Development, Minerals Council of Australia, June 2005.

Enduring Value provides a program of continuous improvement and encourages companies to achieve sustainable development performance outcomes beyond the minimum standard set by regulation. The overall strategic objective is for continuous improvement in financial, social and environmental performance in exploration and mining projects that is attuned to community expectations and, hopefully in the future, recognised and rewarded in statutory approval processes that are nationally consistent and efficient.

Background

The Victorian Parliament passed the new Aboriginal Heritage Act in 2006 to replace outdated State and Federal laws governing the protection and management of Aboriginal cultural heritage across Victoria. The new Act is due to come into operation on 28 May 2007.

New regulations to support the new Act have been drafted to enable the Act to operate. The new Regulations are due to commence on 28 May as well. The draft Regulations and Regulatory Impact Statement were released for public comment on 19 April 2007.

Minerals Industry Consultation

In late 2006 the MCA's Indigenous Affairs Working Group met with Aboriginal Affairs Victoria (AAV) to discuss issues related to the drafting of the Regulations to support the new Aboriginal Heritage Act. The meeting was very positive with both parties happy with the interchange. The MCA put the view that the Regulations should be risk based rather than prescribing the classes of business activity to be covered. The MCA was also concerned to ensure that exploration companies were not put in the position of being the agents for cultural heritage surveys on private land.

The MCA Working Group met again with representatives of AAV, including the Deputy Director in early 2007. Our issues were discussed and the critical issue of the inclusion of exploration as a "high impact activity" identified. Further meetings were held with AAV and the MCA Secretariat and agreement reached on the treatment of exploration and in particular drilling.

On 21 March 2007 MCA met with the Minister for Aboriginal Affairs, the Hon. Gavin Jennings. We advised the Minister that we were in fundamental accord with the new Regulations on the understanding that exploration and drilling were not prescribed "high impact activities" and we discussed our concern to reduce red tape by integrating the new procedures for cultural heritage into the native title agreement making process. The Minister gave an undertaking that the Government would work with us in achieving that goal.

Minerals Industry Intersection with Aboriginal Cultural Heritage

The minerals industry takes the view that it is simply good business to have improved Aboriginal cultural heritage legislation including regulations in Victoria. The old Aboriginal heritage laws were flawed; they were a combination of Victorian and Commonwealth law and superimposed administrative boundaries that were inconsistent with native title boundaries. They led to confusion and unnecessary conflict.

We believe that the new Act and Regulations will:

- > more closely align cultural heritage with native title,
- > eventually create more certainty for businesses wishing to develop land, and
- > offer formal processes for the resolution of disputes.

The minerals industry expects implementation difficulties with the new Act and Regulations but anticipates that eventually there will be greater certainty as heritage sites are identified and recorded and as clarity is provided through guidelines.

There are two key points of intersection between the new Aboriginal Heritage Act and minerals industry activity.

The first key point of intersection is the requirement for cultural heritage management plans (CHMP). Mining projects will be required to undertake a CHMP in areas of “cultural heritage sensitivity”; a requirement that is consistent with current practice and is considered responsible. Exploration, including low impact activities and drilling are not prescribed in the Regulations and can proceed without the need for a CHMP. Naturally, exploration works that involve “significant ground disturbance” by machinery in the course of grading, excavating, digging or dredging will require a CHMP.

The second key point of intersection is with the agreed cultural heritage management schedules incorporated into the native title proforma agreements and a large number of completed native title agreements that include cultural heritage management undertakings.

Integration with Native Title Agreements

The new Act and Regulations introduce the requirement for a CHMP for certain works in certain areas. This requirement is additional to and separate from the native title legislation (C’wth Native Title Act).

The native title right-to-negotiate and Indigenous Land Use Agreements (ILUA) proforma templates prepared jointly by MCA, Native Title Service Victoria (NTSV) and the Victorian Government include a CHMP schedule, which becomes part of the native title agreement when signed. The current CHMP will be out of date when the new Act comes into effect.

Consequently, to ensure the integrity of the proforma templates and to meet the obligations of the new Aboriginal Heritage Act it will be necessary to review the existing proforma templates and determine the possibility for amendment to accommodate the new legislation and to reduce red tape.

The Victorian Government has agreed to a process of review. NTSV are yet to respond to this request.

The Department of Primary Industries (DPI) has responsibility for the administration of native title agreements when they relate to exploration and mining tenements but unfortunately has no financial resources allocated for native title and only very limited human resources with a knowledge of native title. The Native Title Act requires exploration and mining licence applicants to reach agreement with native title holders or claimants for access to Crown land prior to a licence being granted.

The proforma native title templates were prepared to rationalise native title agreement making in Victoria. The templates were launched by the Attorney General in 2004 and two regional ILUAs for exploration were registered in 2006.

It is understood that since 2005 the only native title agreements to be concluded are those reached by companies signing onto the registered ILUAs. The ILUA process does not require Government approval and hence is not constrained by the lack of resources.

Therefore, given the limited resources of DPI and the Minister for Aboriginal Affairs' commitment to work with industry on integrating the procedures of the new Aboriginal Heritage Regulations into the proforma templates we recommend that a suitably qualified native title lawyer be engaged by Government to:

- > work with MCA and NTSV to revise the native title proformas so that they conform with the new Regulations, and then to
- > work with claimants and companies with existing agreements to revise those agreements in line with the new proformas.

Implementation Issues

The introduction of the new Act and Regulations will invariably create a raft of implementation issues that will require resolution. Many of these are obvious, such as, the establishment of the Aboriginal Heritage Council and its operational procedures and the identification and rationalisation of the Registered Aboriginal Parties (RAPs).

However, the implementation issue identified as most critical to the minerals industry is the need for operational guidelines for the mining tenement administration and regulatory processes of DPI.

The DPI has very limited resources and skills for the assessment of the impacts of the new Aboriginal Heritage Regulations when processing exploration and mining licence applications and work plan approvals.

The concern of industry is that the Officers of DPI will simply refer all applications and approvals to AAV without considering if the action is warranted. We are concerned that this will be inefficient and ineffective by adding an unnecessary layer of red tape to the normal approvals process.

We are also aware that DPI has limited resources for preparing effective guidelines or procedures in a timely manner.

To avoid unnecessary referrals, we recommend that AAV engage an appropriate consultant with relevant Aboriginal heritage, native title and mining law experience to assist AAV and DPI prepare a guideline for the referral of exploration and mining licence applications and work plan approvals regarding Aboriginal cultural heritage.

Cost of Regulatory Services

MCA has concerns with the quantum of the fees to be charged for regulatory services under the new Regulations. Whilst the principle of user pays is acknowledged it is a concern that these fees are larger than those charged by other jurisdictions for similar services. Apart from the cost burden on mining companies we are concerned with the impact that these fees will have on the competitiveness of Victoria in attracting minerals industry investment.

However, if the fee structure and quantum is to stand then we would expect high quality resources, both human and procedural, to be applied to the regulatory function such that it is both efficient and effective. This will require a significant investment by AAV.

Summary of Recommendations

In summary, MCA recommends that:

- > The new Regulations be proclaimed.
- > An appropriate consultant be engaged to prepare a guideline for DPI.
- > An appropriate consultant be engaged to integrate the new heritage regulations into the proforma native title agreements.
- > AAV provide adequate resources for the administration of the new Act and Regulations.

We would be pleased to discuss our submission should you wish and to work with AAV and the Victorian Government on the effective implementation of the arrangements necessary for the new Regulations.

Yours sincerely,



Chris Fraser
Executive Director, Victoria

Copy:

Mr Travis Ahearn, The Allen Consulting Group.

Mr Ben Hart, Chief of Staff, Office of the Minister for Aboriginal Affairs.

Dr Richard Aldous, Executive Director, Minerals and Petroleum, DPI.