> *effect, conducted by State parties for a trial before the Court. Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application.* The Act contemplates a more flexible process than is often undertaken in some cases. These comments relate to the requirements of s 87, and are not intended to reflect on the conduct of the State in this case.' (emphasis added).[21]

Conclusion

Native title is part of an on-going process of reconciling communities and building a relationship based on respect and acknowledgment. The Gunditjmara consent determination – long in the making and less, no doubt, than the applicants' original aspirations – provides a good example of the process.

ABORIGINAL HERITAGE ACT 2006 (VIC) – A PROTECTION SCHEME FOR THE NATIVE TITLE ERA*

The Need for Change

Less than 30 years ago, in *Onus v Alcoa of Australia,*[1] the High Court was asked to consider whether the acknowledged cultural and spiritual interests of two representatives of the Gunditjmara People would give them standing to seek an injunction under the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) (Relics Act) to prevent interference with Aboriginal relics. The High Court found in favour of the Gunditjmara women and it is now generally acknowledged that Indigenous people have the right to make decisions regarding Indigenous heritage. Most project proponents expect to engage with Indigenous groups in relation to activities with the potential to harm Indigenous heritage. However, until recently, this was not necessarily required by State legislative schemes.

Until Queensland introduced the *Aboriginal Cultural Heritage Act 2003* (Qld), Victoria's heritage protection scheme was the most progressive of any State.[2] In 1987, the Relics Act was supplemented by Pt IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (Commonwealth Act), which applied exclusively in Victoria. Under Pt IIA, the State was divided into regions and for each region a 'local Aboriginal community' was nominated as the heritage decision-maker. Their most important responsibility was approving (or rejecting) requests to disturb Aboriginal heritage.

Though current for 20 years, the old scheme had significant deficiencies. Decision making by 'local Aboriginal communities' lacked accountability and the system was poorly integrated into the State's planning processes. With the recognition of native title, the inadequacies became more acute. The rigid system of 'local Aboriginal communities' could not accommodate native claimants, nor Victoria's two groups of determined native title-holders.

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21 [2007] FCA 474 at [36]-[38].

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1 (1981) 149 CLR 27.

2 *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) probably provides the most extensive protection of Indigenous heritage.

For these reasons, commencement of the *Aboriginal Heritage Act 2006* (Vic) (new Act), and the repeal of the Relics Act and Pt IIA of the Commonwealth Act, has been welcomed. However, the mandatory processes introduced in the new Act represent a significant change and will require project proponents to review how they presently manage Aboriginal heritage protection in Victoria.

Aboriginal Parties as Decision-makers

The new Act does not change the fact that Aboriginal people are the primary decision-makers in relation to cultural heritage. The 'local Aboriginal community' is replaced by the 'registered Aboriginal party' (Aboriginal Party). An Aboriginal Party must be a body corporate representing Aboriginal people with links to a particular area. Once registered they have responsibility for heritage decision making. Registration of Aboriginal Parties is entrusted to the Aboriginal Heritage Council, which must also manage disputes between Aboriginal Parties.

In a break from the previous system, more than one Aboriginal Party can be registered for the same area. The new scheme will allow, for example, the registration of bodies representing registered native title claimants as well as groups with historical or cultural links to an area. However, where a registered native title-holder seeks to be registered, it will be the sole Aboriginal Party.

The first Aboriginal Party registered under the new Act is the Gunditj Mirring Traditional Owners Aboriginal Corporation, the prescribed body corporate for the Gunditjmara native title-holders. Their native title was formally determined in March this year, in Victoria's second native title consent determination. The Wotjobaluk People who, in 2005, were Victoria's first determined native title-holders, are also expected to gain formal recognition under the new Act.

The Key Offence Provision

The new Act contains provisions making it an offence to knowingly, recklessly or negligently harm Aboriginal cultural heritage or know you are likely to do so. Increased penalties of over $1 million can be imposed depending on the level of mental culpability. However, harm can be authorised by a 'cultural heritage permit' or approved cultural heritage management plan (Management Plan).

When is a Management Plan Required?

The obligation to prepare a Management Plan is the most significant change introduced by the new Act. Land users are required to prepare a Management Plan in accordance with prescribed processes in relation to activities considered to pose a significant risk to Aboriginal heritage. A Management Plan is required where:

- an Environment Effects Statement is required under the *Environmental Effects Act 1978*;
- the Minister directs; or
- prescribed by the *Aboriginal Heritage Regulations 2007* (Vic) (Regulations) which specify that a Management Plan is necessary for a 'high impact activity' to be carried out in an 'area of cultural heritage sensitivity' which has not been subject to 'significant ground disturbance'.

  Importantly, if a project attracts the obligation to complete a Management Plan, other statutory authorisations, including planning permits and mining work plan approvals, must not be granted until the Management Plan has been approved. For those projects, Aboriginal heritage will become the priority authorisation.

Decisions to approve a Management Plan (or recommend the grant of a permit) are made, in the first instance, by the Aboriginal Party for the relevant area. However, in a significant change, an adverse decision can now be reviewed by the Victorian Administrative Appeals Tribunal.

'High impact activity'

As noted above, the requirement for a Management Plan arises under the Regulations, if two factors are present: the activity in question is a 'high impact activity' and it is to be carried out in an 'area of cultural heritage sensitivity'. 'High impact activities' include:

- works associated with numerous land uses including electricity generation, and industry, which would result in significant ground disturbance;
- the construction of certain infrastructure including rail, roads and airfields;
- activities requiring an 'earth resource authorisation' (eg work plans for mining and exploration, certain approvals under petroleum and pipelines legislation) and which cause significant ground disturbance; and
- the use of land for an extractive industry where a statutory authorisation is required.

'Significant ground disturbance' is a key definition in the scheme. It means 'disturbance of the topsoil or surface rock layer of the ground, or a waterway, by machinery in the course of grading, excavating, digging, dredging or deep ripping'. The same term is also used in the definition of 'area of cultural heritage sensitivity'.

'Area of cultural heritage sensitivity'

The definition of 'area of cultural heritage sensitivity' is intended to cover places where heritage is most likely to exist based on a review of the Aboriginal Heritage Register developed over the past 30 years. Aboriginal Affairs Victoria estimates that about 20 percent of the State comes within the classification, which includes:

- a registered Aboriginal site and land within a 50 m radius;
- land within 200 m of a named waterway or natural lake;
- land within 200 m of the coastal high water mark;
- a range of geographical features identified by reference to Geological Survey maps, including ancient lakes, lunettes, prior waterways, stony rises, volcanic cones etc; and
- Coastal Crown lands, national parks, and 'high plains'.

However, sites already subject to 'significant ground disturbance' are not regarded as sensitive. Aboriginal Affairs Victoria has prepared extensive mapping and other details of 'areas of cultural heritage sensitivity'.[3]

Transitional provisions

The Regulations exempt activities which would otherwise require a Management Plan if a statutory authorisation is in place or an application for an authorisation had been received, as at 28 May 2007.

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[3] Available at http://www1.dvc.vic.gov.au/aav/heritage/index.htm.

Enforcement

The new Act includes a formidable array of enforcement tools. These include inspectors appointed under the Act, stop orders, interim and ongoing protection declarations and substantial penalties. The new Act also introduces the 'cultural heritage audit' which is directed at monitoring compliance with the terms of Management Plans and permits.

Looking Forward

Native title has raised the profile of Indigenous land issues, leaving the Indigenous heritage protection legislation across the States looking inadequate. Like Queensland before it, with Tasmania to follow shortly, Victoria has overhauled its protection scheme. The principal objective of the new Act is to provide better protection for Aboriginal heritage. It seeks to achieve this, for the most part, through the mechanism of the Management Plan. The Government is likely to achieve its objective. The principal criticism of the new Act by some project proponents is that it goes too far; that the burden of the obligation does not, in many cases, match the level of risk. The scheduled May 2008 review of the Regulations promises to be a lively discussion.

WESTERN AUSTRALIA

MISCELLANEOUS LICENCE APPLICATIONS: NON-COMPLIANCE WITH MINING ACT AND MINING REGULATIONS*

Pilbara Iron Ore Pty Ltd v BHP Billiton Minerals Pty Ltd and Hancock Prospecting Pty Ltd [2005] WAMW 25, Karratha Warden's Court, Warden Temby SM, 3 January 2007

Miscellaneous licence – Objection – Non-compliance

Background

Pilbara Iron Ore (Applicant) marked out and applied for two miscellaneous licences for the purpose of roads (L47/132 and L47/134). The miscellaneous licences affected exploration licences held by BHP Billiton Minerals Pty Ltd (Objector). L47/132 also overlapped a Crown lease held by the Objector for the purposes of its railway.

The hearing was confined to objections in relation to the Applicant's purported non-compliance in six respects with the *Mining Act 1978* (WA) (Act) and the *Mining Regulations 1981* (WA) (Regulations).

Decision

Permit to enter a railway lease on private land

L47/132 completely overlapped a section of, and was divided in half by, the Objector's railway lease. L47/134 did not include the railway lease land but the evidence was that the Applicant crossed that land for the purposes of marking out L47/134. The Applicant accepted that the railway lease land was private land for the purposes of the Act.

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