

# *Aboriginal Heritage Regulatory Impact Statement*

## Aboriginal Victoria

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Regulatory Impact  
Statement*

*March 2018*



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# *Abbreviations and terms*

<b>Abbreviation</b>	
ACHLMA	Aboriginal Cultural Heritage Land Management Agreement
Assessment	A desktop, standard or complex assessment for a CHMP
AV	Aboriginal Victoria / Aboriginal Affairs Victoria (former name for Aboriginal Victoria)
CHMP	Cultural Heritage Management Plan
CHA	Cultural Heritage Agreement
CHP	Cultural Heritage Permit
the Department	Department of Premier and Cabinet
<b>LGA</b>	Local government area
the Minister	Minister for Aboriginal Affairs
PAHT	Preliminary Aboriginal Heritage Test
RAP	Registered Aboriginal Party
RIS	Regulatory Impact Statement
Sponsor	In relation to a CHMP, the person seeking the preparation of the CHMP
the Secretary	Secretary to the Department of Premier and Cabinet
the Act	<i>Aboriginal Heritage Act 2006</i>
the Regulations	Aboriginal Heritage Regulations 2007
VAHC	Victorian Aboriginal Heritage Council
VAHR	Victorian Aboriginal Heritage Register

# Executive summary

The current Aboriginal Heritage Regulations 2007 (“the Regulations”) were due to sunset on 25 May 2017. Their operation was extended for 12 months, with the Regulations now due to expire in May 2018. Under the *Subordinate Legislation Act 1994*, a Regulatory Impact Statement (RIS) is required to assess the costs and benefits of the Regulations and options to replace them. This RIS proposes the re-making of the Regulations with some amendments to the triggers and guidelines for Cultural Heritage Management Plans (CHMPs).

## 1 Background

### The Aboriginal Heritage Act 2006

The Regulations are enabled by the *Aboriginal Heritage Act 2006* (“the Act”), which is Victoria’s principal legislation for the protection of Aboriginal cultural heritage, and the management of Aboriginal cultural heritage during land use and development activities. The Act legislates a central role for Traditional Owners in identifying, managing and protecting their cultural heritage. It does this by establishing registered Aboriginal parties (RAPs) – organisations with statutory decision-making responsibilities for protecting and managing Aboriginal cultural heritage in their appointed geographical area.

The Act establishes a number of key features relevant to the Regulations, as shown in Table 1.

**Table 1: Key regulatory mechanisms established in the Act**

Key regulatory mechanisms	Description
Victorian Aboriginal Heritage Council (VAHC)	A council of up to 11 Traditional Owners that appoints RAPs, advises the Minister for Aboriginal Affairs in relation to the protection of Aboriginal cultural heritage, and is a central coordinating body responsible for overseeing and managing the Aboriginal Ancestral Remains system in Victoria.
Registered Aboriginal Parties (RAPs)	Appointed by the VAHC as cultural heritage decision makers for areas in Victoria, in particular to evaluate CHMPs and determine Cultural Heritage Permits (CHPs) for their appointed area.
Cultural Heritage Management Plans (CHMPs)	A regulated process for managing cultural heritage, prepared by a sponsor where a listed high impact activity is proposed in an area of cultural heritage sensitivity
Preliminary Aboriginal Heritage Tests (PAHTs)	A voluntary process for the proponent of an activity to confirm whether a CHMP is required
Cultural Heritage Permits (CHPs)	An authorisation to excavate, research, harm, sell or remove Aboriginal cultural heritage from Victoria; to rehabilitate land in an Aboriginal place or to inter Aboriginal Ancestral Remains in an Aboriginal place
Cultural Heritage Agreements (CHAs)	These agreements are negotiated between landowners and the relevant RAP to manage and protect Aboriginal cultural heritage.
Aboriginal Cultural Heritage Land Management Agreements (ACHLMAs)	A voluntary agreement between a public land manager and a RAP for the purpose of managing and protecting Aboriginal cultural heritage during routine land management activities.
Aboriginal Intangible Heritage and Aboriginal Intangible Heritage Agreements	A mechanism for recognising and protecting Aboriginal intangible heritage from commercial exploitation.

Key regulatory mechanisms	Description
Victorian Aboriginal Heritage Register (VAHR)	The VAHR is a repository for details of known Aboriginal cultural heritage across Victoria. The Act creates an ongoing requirement for the VAHR.
Fees	The Act gives the power for Approval Bodies to charge fees for evaluations with fee levels prescribed in the Regulations.

The Act was amended in 2016 to introduce new provisions relating, but not limited, to Aboriginal intangible heritage, PAHTs, ACHLMAs, and the Aboriginal Cultural Heritage Fund.

### The current Regulations

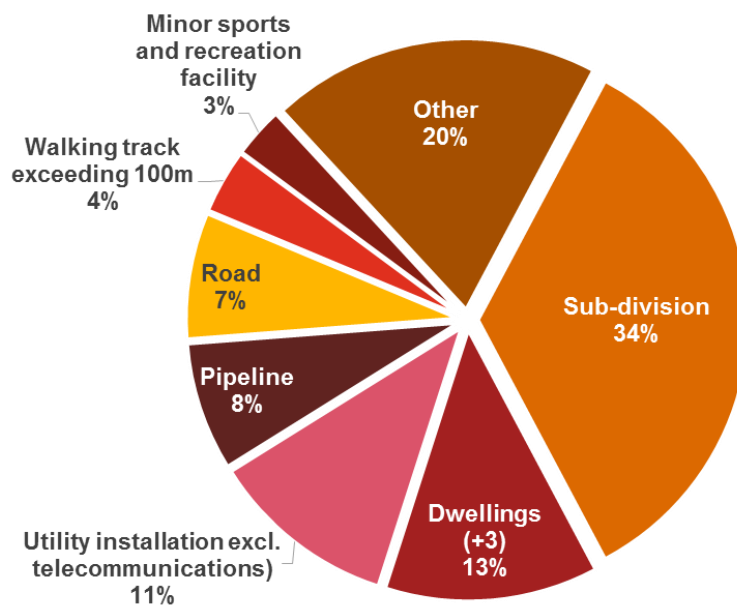
The Regulations support the implementation of the Act and include the following elements:

- The triggers for when a CHMP is required: If an activity or class of activity is a high impact activity and is to be conducted in an area of cultural heritage sensitivity, then a CHMP is required.
- The standards for preparing a CHMP: Including the type of assessment (desktop, standard or complex assessment) that are to be conducted and what the CHMP must include.
- The standards for preparing an ACHLMA.
- The standards for preparing maps for CHAs.
- A number of prescribed forms.
- Fee levels payable for particular applications.

### Activity under the Act and Regulations

The number of CHMPs prepared from 2009 to 2014 was relatively constant at around 400 to 500 per year, with an increase in 2015 and 2016 due to increased development activity. CHMPs are mostly prepared for subdivisions, utilities, roads and rail activities, pipelines and 3+ dwelling subdivisions as shown in Figure 1.

**Figure 1: Type of approved CHMP by activity type (2007-2016)**



Source: Data provided by AV, November 2017.

Nearly three-quarters of the total number of CHMPs are sponsored by industry, with the remainder sponsored by government bodies, particularly local government and water authorities.

## ***2 The nature and extent of the problem***

The Act specifies the requirement to prepare a CHMP in prescribed circumstances, however, does not specify the triggers or standards for a CHMP, which are prescribed by the Regulations. In the absence of the Regulations, and in particular, the triggers and standards for a CHMP, development activities in areas of cultural heritage sensitivity may occur without sufficient regard for Aboriginal cultural heritage. This would result in damage or destruction of Aboriginal cultural heritage.

Heritage is assigned significant sociocultural and economic value and is generally considered to be irreplaceable, particularly in the case of Aboriginal cultural heritage. Without government intervention, an unacceptably low level of Aboriginal cultural heritage would be protected. The value of Aboriginal cultural heritage is very much linked to the particular region and community. Other groups or individuals in the broader community may not always be aware of the presence or significance of Aboriginal cultural heritage in a location, or in relation to an object.

### **The problem addressed by the Regulations**

There are four key problems that the Regulations address:

- **Damage or destruction of Aboriginal cultural heritage:** The Regulations put in place two 'triggers' under which a CHMP must be prepared, which ensures that Aboriginal cultural heritage in the area proposed for an activity is identified and managed appropriately. CHMPs are needed because the nature and extent of Aboriginal cultural heritage in Victoria is unknown and each new development activity may uncover more heritage.
- **CHMPs not being prepared to an appropriate standard:** The standards for a CHMP required under the Regulations are in place to ensure that if a CHMP is prepared, Aboriginal cultural heritage is properly identified and appropriately managed. The standards in the Regulations provide for tiered levels of assessment based on the

probability and significance of Aboriginal cultural heritage occurring. This helps ensure that when there is a cost burden on land-users, it is justified.

- Services provided by RAPs would be unfunded: The Regulations specify fee levels to be charged for evaluations of CHP applications, CHMPs and advice. This enables RAPs to recover the cost of undertaking these activities.
- A lack of clear processes for local government authorities: The Regulations provide a regulatory framework for local governments to manage and monitor the protection of Aboriginal cultural heritage in their Local Government Area (LGA). Without this, there would be uncertainty as to what their role is in the protection and management of Aboriginal cultural heritage. In addition, the Regulations address the potential for a lack of clarity for developers and land-users, who may or may not continue to consult with Aboriginal stakeholders outside of the requirements in the Act.

### The base case

If the Regulations are allowed to lapse and no longer exist (the base case), the Act would still be in place. This would mean that:

- proponents wishing to undertake a high impact activity in an area of cultural heritage sensitivity (as presently prescribed) would not need to complete a CHMP unless one was required under the Act. It is estimated that 11 CHMPs per year would be required by the Act in the absence of the current Regulations<sup>1</sup>, meaning approximately 625 CHMPs per year would no longer be required (excluding 47 CHMPs that are undertaken voluntarily)
- the 11 CHMPs per year required under the Act would not be required to adhere to any standards (as these are prescribed in the Regulations), however may need to satisfy some non-regulatory requirements from AV or RAPs in order to be approved. Nonetheless, most of the cost of preparing the 11 CHMPs is attributable to the Regulations as they prescribe the standards required for a CHMP, but the cost of undertaking the management conditions are not attributable to the Regulations (as they are triggered by the action of preparing the CHMP itself)
- there would be no prescribed forms for a number of mechanisms specified in the Act (such as ACHLMAs, maps for CHAs, PAHT applications, etc.), however, it is likely that the Minister would specify approved forms that would be needed, or require similar content in applications as is currently prescribed
- no fee levels would be prescribed, meaning that funding for evaluation (and other compliance and enforcement) activities by RAPs would need to be found from other sources.

## 3 Objectives

The overarching objective of the *Aboriginal Heritage Act 2006* is to ensure the protection of Aboriginal cultural heritage in Victoria. The objectives of the Regulations are to provide processes, primarily through targeting the requirements of the Act at activities that may have a high impact in an area of cultural sensitivity, and facilitating the preparation of consistent and rigorous CHMPs and ACHLMAs to protect Aboriginal cultural heritage. In addition, the Regulations prescribe fee levels, application forms and standards to give effect to the Act.

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<sup>1</sup> PwC analysis based on information provided by AV.



## 4 Options

The Options presented in this RIS have been developed by AV based on input from stakeholders and considerations on how the current Regulations are performing. The development of the Options was based on the following process:

- Consult with stakeholders and within AV to obtain feedback on the current Regulations.
- Identify potential improvements to the Regulations based on stakeholder feedback or through AV internal processes.
- Determine whether the proposed change is feasible and in line with principles and objectives of the Act.
- Consider the potential impact, including using CHMP data, geospatial and geographic mapping, and data and information from other Departments (in particular, the Department of Environment, Land, Water and Planning).

The list of high impact activities is based on each development or land use activity's impact on the land and possible Aboriginal cultural heritage in the area. In particular, it reflects the extent of development or land use activity, including activity size, landforms usually associated with the activity type, the extent and depth of ground disturbance, and the number of each activity type per year.

All Options retain the broad, current regulatory framework. In addition to maintaining the existing Regulations (Option 1), Options 2 and 3 relate to two decision choices:

- Altering the triggers for when a CHMP is required to be prepared.
- Updating the standards for a CHMP (which affect the prescribed content of a CHMP and whether it involves a desktop, standard and/or complex assessment).

These two elements of the Regulations are the primary determinants of the extent to which Aboriginal cultural heritage is managed or protected through the regulatory framework, and as such, are the focus of the Options. They are also a key determinant of the costs created by the Regulations.

Importantly, these two elements are not mutually exclusive and could be implemented together if they were both found to provide net benefits.

### Options summary:

- Option 1: Re-make the existing Regulations.
- Option 2: Re-make the Regulations as in Option 1, and provide for targeted changes to the triggers for a CHMP to:
- amend, namely:
  - the definition of high impact activities (see Division 2 of Part 2 of the current Regulations) to also include:
    - the construction of residential villages
    - the construction of Residential Buildings
    - the construction of fuel breaks that require a permit to remove native vegetation
    - walking and cycling tracks less than 500 metres long

- update the areas of cultural heritage sensitivity (see Division 3 of Part 2 of the current Regulations), including:
  - expanding the definition to include parks and reserves managed for conservation purposes
  - the definition of waterways to ensure that channelised sections are included
  - relying on more current geological data.
- Option 3: Re-make the Regulations as in Option 1, but amend the CHMP guidelines to provide greater clarity to CHMP sponsors and RAs regarding the standards required for CHMPs to:
  - improve the explanation in a desktop assessment around the likelihood of finding Aboriginal cultural heritage in the assessment area
  - clarify when a CHMP should progress from a desktop assessment to a standard assessment, and onto a complex assessment
  - provide information on what a cumulative impacts statement must consider
  - ensure that the management conditions recommended are consistent with the conclusions of the assessment.

### **Impacts of the Options**

The practical implications of the proposed requirements under Options 2 and 3 (compared with the current Regulations) are:

- Option 2 will result in an increase in the number of CHMPs conducted each year due to the expansion of the triggers for preparing a CHMP.
- Option 3 will result in an improvement in the clarity of CHMP requirements, which is anticipated to reduce the proportion of CHMPs with complex assessments and the cost of management conditions.

AV anticipates that option 2 will result in approximately 2.9 per cent more Notices of Intention to prepare a CHMP (NOIs), amended CHMPs and incomplete CHMPs to be prepared by sponsors each year, and a modest reduction in the time taken to decide if a CHMP is required for areas of cultural heritage sensitivity associated with waterways.<sup>2</sup>

Option 3 is expected to result in a modest reduction in the number of CHMPs requiring a complex assessment, with a corresponding increase in the number which include a standard assessment. In addition, it is expected that this Option will result in a modest reduction in the time required to undertake a desktop assessment and approximately a five per cent reduction in the cost of management conditions, due to greater clarity provided in the guidance material.<sup>3</sup>

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<sup>2</sup> Based on analysis by PwC and AV using historical data and the results of the survey of heritage advisors.

<sup>3</sup> Based on analysis by PwC and AV using historical data and the results of the survey of heritage advisors.

## 5 Analysis

### Benefits of the options

The Regulations primarily protect Aboriginal cultural heritage by setting out the circumstances in which a CHMP must be prepared and the standards for the preparation of CHMPs.

#### Quantified benefits of the Regulations

Heritage is generally considered to be irreplaceable and therefore it could be argued that it is priceless. Nonetheless, for the purposes of this RIS, we have attempted to develop a proxy of the potential value of Aboriginal cultural heritage and the benefits of the Regulations. Using published research, we have estimated the quantified benefits of the Regulations are estimated to be \$296,739 per Aboriginal place in Victoria. This is based on a 2003 choice modelling study authored by John Rolfe and Jill Windle<sup>4</sup> on the stated values of Aboriginal cultural heritage to Aboriginal and non-Aboriginal people. This finding was primarily based on the value assigned by Aboriginal people, as the study premised that non-Aboriginal people in that study at that time did not value Aboriginal cultural heritage relative to other forms of land management.

Another choice modelling exercise by The Allen Consulting Group in 2005<sup>5</sup> indicated that Australians valued a tightening of development controls and an increase in the number of heritage listings at \$105.90 (\$146.27 in 2018 dollars) per person per year. As the Rolfe and Windle study focused specifically on Aboriginal cultural heritage, the results of that study should be given primary consideration. While the studies cannot be directly compared, The Allen Consulting Group's study provides a useful, broad-based check.

#### Non-quantified benefits

As indicated earlier, there are significant benefits of Aboriginal cultural heritage that cannot be readily quantified. These primarily relate to social benefits and tourism benefits:

- Improved social, psychological, educational and justice outcomes for Aboriginal people: Aboriginal and Torres Strait Islanders identify themselves through their land areas, or 'country', and heritage. According to Mike Dockery of Curtin University, Aboriginal Australians who are happiest, healthiest, have the lowest rates of contact with the corrections system, and have good educational outcomes are those with a strong attachment to their culture and a strong Aboriginal identity.<sup>6</sup>
- Tourism benefits: The protection of places of Aboriginal cultural heritage significance can bring direct benefits to the Victorian economy, if tourists choose to travel to or within Victoria as a result of the promotion of these places. In 2004, tourists spent an estimated \$7.8 billion (\$10.8 billion in 2017 dollars) nationwide on trips in which they visited at least one historic heritage site.<sup>7</sup>

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<sup>4</sup> John Rolfe and Jill Windle, 'Valuing the protection of Aboriginal cultural heritage sites', *The Economic Record*, Vol. 79, Special Issue, pp. 85-95.

<sup>5</sup> The Allen Consulting Group report prepared for the Heritage Chairs and Officials of Australia and New Zealand, 'Valuing the priceless: The value of historic heritage in Australia', Research Report 2, 2005.

<sup>6</sup> NSW Parliamentary Library Research Service, 'e-brief: Indigenous disadvantage: Can strengthening cultural attachment help to close the gap', 2011, [http://alc.org.au/media/74358/parliament%20e-brief%20aboriginal%20disadvantage\[2\].pdf](http://alc.org.au/media/74358/parliament%20e-brief%20aboriginal%20disadvantage[2].pdf)

<sup>7</sup> The Allen Consulting Group report prepared for the Heritage Chairs and Officials of Australia and New Zealand, 'Valuing the priceless: The value of historic heritage in Australia', Research Report 2, 2005.

## Quantified costs of the Options

The estimated costs of the Options are shown in Table 2.

**Table 2: Estimated costs of each Option (\$ million) over 10 years (Net Present Value at four per cent discount rate, per annum)**

Costs of each Option	CHMP processes	Management conditions	Government costs (excl transfers)	Government evaluation costs	RAP evaluation costs	Total costs
Option 1	116.3	44.8	5.0	16.6	3.2	185.9
Option 2	119.7	46.1	5.0	16.9	3.3	190.9
Option 3	113.5	45.6	5.0	16.5	3.1	183.7

### The cost of CHMP processes

The majority of the costs of the proposed Regulations under each Option relate to the cost of the CHMP process. These involve four categories:

- The cost of preparing a NOI to prepare a CHMP before a CHMP is submitted for approval. This generally comprises around one per cent of the total cost of the CHMP process.
- The cost of commissioning a heritage advisor to prepare a CHMP and the value of a CHMP sponsors' time coordinating this, comprising 87 per cent of the cost of the CHMP process.
- The cost of amending a CHMP following approval, comprising two per cent of the cost of the CHMP process.
- The cost of an incomplete CHMP partially prepared but not submitted for evaluation. These comprise around 10 per cent of the total cost of the CHMP process.

### The cost of management conditions

The other main cost of the Options relates to the cost of undertaking the management conditions recommended as part of a CHMP. These involve either avoidance or minimisation of harm to, or salvage of, Aboriginal cultural heritage places.

Management conditions resulting from CHMPs with complex assessments account for approximately 97 per cent of the cost of management conditions, while those resulting from standard assessments account for the remaining three per cent. CHMPs with desktop assessments generally do not include management conditions.

### Government and RAP costs

Government and RAP costs for each Option comprise:

- Government monitoring, compliance and enforcement costs incurred by AV, which are the same for each Option on the basis that AV will continue to allocate the same level of resources to these activities.

- Government costs to evaluate various applications, including for CHMP approvals, CHPs and PAHTs. These are recovered through the fees levied on applicants, who ultimately incur most of these costs.<sup>8</sup>
- RAP costs to evaluate various applications, primarily for CHMP approvals and CHPs. These are recovered through fees levied on applicants, who ultimately incur most of these costs.<sup>9</sup>

### **Non-quantified costs of the Options**

There are a range of costs that are difficult to quantify for two main reasons:

- There is insufficient data available.
- It is unclear whether the activity involved would fall under the base case.

AV considers that the non-quantified costs will be smaller compared with the quantified costs of the Options. This is discussed further below:

- **The cost of ACHLMAs:** The burden of ACHLMAs can be attributed largely to the Regulations as they prescribe the standards for preparing an ACHLMA. At present, two ACHLMAs are in progress and, over the 10 year period, a small number may be finalised each year.<sup>10</sup> However, the time and cost involved in negotiating and preparing them is not yet known. At a broad level, they involve a written notice of intention to enter into an ACHLMA and the completion of an approved form that states the parties to the agreement, the agreement area, the permissible land management activities, and an Aboriginal cultural heritage assessment of the area.
- **Prescribed forms:** Apart from CHMPs and ACHLMAs, the Regulations include the prescribed forms for a number of applications, agreements and mechanisms. Prescribed forms require the party completing the form to include details such as the information about the applicant, description of the Aboriginal cultural heritage in the relevant area or object, any consultation undertaken, academic evidence, and the conclusions of any assessments. Even if not prescribed in the Regulations, AV would provide an approved form for these applications, agreements or mechanisms, or that the party undertaking the evaluation (RAPs or AV). The approved form would require the contents of the applications or agreement to reflect similar content to the current content of the prescribed forms. If AV were not to provide guidance as to the appropriate content of these applications, agreements or mechanisms, the purpose of the Act would be diminished.
- **The cost of reduced development due to the Regulations:** The Regulations impose a burden on any land-user who wants to develop land, or change the current use of the land, even potentially to those not undertaking a high impact activity in an area of cultural heritage sensitivity. This is due to land-users needing to undertake research to determine whether these triggers apply to them. Land-users may choose not to undertake the development activity if the probable cost of preparing a CHMP outweighs the expected marginal benefit of the development activity. There may also be delay costs, however, they are difficult to estimate as there is limited data available on their incidence and scale. The potential impact of these costs is considered in the multi-criteria analysis below.

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<sup>8</sup> Applicants do not incur all costs as the cost recovery percentage for each fee option are below 100 per cent.

<sup>9</sup> As with government costs, applicants do not incur all costs as the cost recovery percentage for each fee option are below 100 per cent.

<sup>10</sup> Information provided by AV.

### Quantified net benefits

Aboriginal cultural heritage is considered priceless to many members of Victoria’s Aboriginal community. Each region of Victoria has significant places where Aboriginal people lived. In these places, they obtained sustenance, expressed themselves artistically, passed on creation stories and cultural values, engaged in conflict, established alliances and social networks, traded goods, celebrated rites of passage and committed the departed to their final resting places. Even apart from the cultural heritage value of places and objects, there are significant benefits of Aboriginal cultural heritage that cannot be readily quantified.

Nonetheless, using academic research conducted on the quantified value of Aboriginal cultural heritage, one can attempt to estimate the quantified net benefits of the Options based on the average weighted benefit of each CHMP conducted. This is based on the likelihood of a CHMP preserving Aboriginal heritage. It is estimated that approximately 44 per cent of all CHMPs<sup>11</sup> identify Aboriginal cultural heritage. Of these, 61 per cent mitigate harm through avoidance, minimisation or salvage, meaning that 27 per cent of all CHMPs preserve Aboriginal cultural heritage to some degree.<sup>12</sup> As it is not possible to know in advance whether a CHMP will result in the preservation of Aboriginal cultural heritage, the quantified benefits of each CHMP should be based on the probability it will identify and preserve Aboriginal cultural heritage and the value of this heritage if preserved.

As outlined above, the stated value of an Aboriginal place is estimated to be \$296,739. If for each CHMP prepared, there is a 27 per cent chance of significant Aboriginal heritage being identified and preserved, this implies the average benefit of a CHMP is around \$74,984. However, this average figure does not imply that every CHMP will provide this level of benefit. Clearly, some CHMP may provide no benefit if Aboriginal heritage is not present, while other CHMPs may provide greater than average benefits if significant Aboriginal cultural heritage is identified and preserved.

Using this average benefit, the quantified net benefit (average benefit minus cost) of each Option is shown in Table 3 below.

**Table 3: Quantified net benefits of the Options**

Net benefit of each Option	Cost per CHMP approved	Net benefit per CHMP approved	Total net benefit per year
Option 1	\$38,466	\$36,518	\$20,924,837
Option 2	\$38,382	\$36,602	\$21,586,487
Option 3	\$38,011	\$36,973	\$21,185,621

### Multi-criteria analysis

Arguably the most significant benefits of protecting and managing Aboriginal cultural heritage are those which cannot be easily quantified. These primarily relate to improved social, psychological, educational and justice outcomes for Aboriginal people. Accordingly, the options have been assessed using a multi-criteria analysis (MCA) to determine and compare the costs and benefits of each option.

MCA is an approach to comparing costs and benefits of policy options that brings a degree of structure, analysis and transparency to decision-making. MCA establishes preferences

<sup>11</sup> These CHMPs are generally those involving a complex assessment, as by definition, CHMPs with complex assessments are those that identify significant Aboriginal cultural heritage. However, it is important to note that CHMPs must progress through the desktop and standard assessment tiers in order to reach the complex assessment stage.

<sup>12</sup> PwC analysis based on information provided by AV.

between options by referring to an explicit set of objectives and measurable criteria to assess the extent to which the objectives have been achieved. MCA is particularly useful in circumstances where it is necessary to consider a range of economic, environmental and social benefits which cannot be readily quantified and/or valued. The estimate of those costs and benefits that can be quantified complement, and are reflected in, the MCA.

The preferred option identified through the use of MCA may not result in a quantifiable benefit in all instances, but is the option that produces the best overall outcomes in terms of a range of tangible and intangible costs and benefits. MCA is, therefore, an important tool for assessing policies to preserve Aboriginal cultural heritage, which is the overarching objective of this regulatory regime.

The CHMP process is the key mechanism of the Regulations. AV estimates that approximately 44 per cent of all CHMPs identify Aboriginal cultural heritage. Of these, 61 per cent mitigate harm through avoidance, minimisation or salvage, meaning that 27 per cent of all CHMPs preserve Aboriginal cultural heritage. In the other 73 per cent of cases, CHMPs are prepared, but do not identify or result in the preservation of cultural heritage. In those cases, there are costs to those preparing CHMPs without a clear tangible or intangible benefit in terms of preservation of cultural heritage. The analysis of the quantifiable costs and benefits of the regime, however, suggests that the total quantifiable benefits to the community exceed the total quantifiable costs to the sector. That is, although some parties bear the costs of preparing a CHMP without that specific plan resulting in the preservation of heritage, requiring all affected parties to prepare CHMPs yields total estimated benefits that are expected to outweigh the costs to the sector even without accounting for the intangible value of the benefits of preserving cultural heritage.

Further, although Aboriginal cultural heritage is not identified in more than half of the CHMPs prepared, AV considers that the CHMP process remains an effective heritage management tool. This is because CHMPs include contingencies for managing Aboriginal cultural heritage that may be uncovered during the development or land use activity. These contingencies allow the activity to continue alongside the proper management of that heritage. The sponsor would incur considerable cost and time delays in complying with the Act without the contingencies developed during the CHMP's preparation. Both the assessment and contingencies prepared as part of the CHMP provide land users, developers, local government and Traditional Owners certainty that Aboriginal cultural heritage will be identified and managed without imposing unforeseen costs and delays during development activities.

The analysis from both the MCA and the CBA returned positive scores for each option. This suggests that each option would result in effective Aboriginal cultural heritage management (relative to having no Regulations in place).

Table 4 shows the criteria and scoring for each of the Options.

**Table 4: Multi-criteria analysis scoring (-10 to +10)**

Criteria	Description	Option 1		Option 2		Option 3	
		Score	Weighted-score	Score	Weighted-score	Score	Weighted-score
Land-user costs (40%)	The cost to land-users of complying with the Regulations.	-6	-2.4	-7	-2.8	-5	-2
Government costs (10%)	The government incurs in monitoring and enforcing compliance.	-4	-0.4	-5	-0.5	-4	-0.4



Criteria	Description	Option 1		Option 2		Option 3	
		Score	Weighted-score	Score	Weighted-score	Score	Weighted-score
Protection of Aboriginal cultural heritage (40%)	The benefits experienced as a result of land-users preparing CHMPs before undertaking a high impact activity in an area of cultural heritage sensitivity.	+6	+2.4	+8	+3.2	+7	+2.8
Increased certainty (10%)	The benefits to land-users and RAPs from the presence of a regulatory framework to manage land use and development activities and Aboriginal cultural heritage.	+6	+0.6	+6	+0.6	+7	+0.7
<b>Totals (after weighting)</b>		<b>+0.2</b>		<b>+0.5</b>		<b>+1.1</b>	

Note: The costs to RAPs and Government recovered through fees are not included; as the costs are ultimately borne by land-users developers.

The options analysis indicates that Option 3 scores higher than Options 1 and 2. This is primarily because Option 3 increases clarity for land-users, RAPs and government, which reduces the burden of the Regulations compared to Option 1 and Option 2.

## 6 Preferred option

The combination of Options 2 and 3 are preferred because they are expected to provide a greater level of net benefit compared to Option 1. As Options 2 and 3 are not mutually exclusive, it is possible and preferable to put forward both sets of reforms. The total cost of the preferred options is estimated at around \$21.9 million per year, and \$184.4 million in NPV (Net Present Value) terms over 10 years, which is lower than the total cost of Option 2 and higher than the total cost for Option 3.

In summary, the preferred Options involve re-making the existing Regulations, with the following substantive changes:

- changes to the triggers for a CHMP, resulting in a net increase in the number of CHMPs prepared per year, to ensure better protection of Aboriginal heritage and better outcomes for sponsors. The specific changes are to amend the triggers for a CHMP, namely:
  - the definition of high impact activities (see Division 2 of Part 2 of the current Regulations) to also include:
    - the construction of residential villages
    - the construction of Residential Buildings
    - the construction of fuel breaks that require a permit to remove native vegetation
    - walking and cycling tracks greater than 500 metres long
  - update the areas of cultural heritage sensitivity (see Division 3 of Part 2 of the current Regulations), including:



- expanding the definition to include parks and reserves managed for conservation purposes
- the definition of waterways to ensure that tributaries of named waterways and channelised sections
- identifying more up-to-date geological data.
- amendments to CHMP guidance material to provide greater clarity to CHMP sponsors and RAPs regarding the standards required for CHMPs, including to:
  - improve the explanation in a desktop assessment around the likelihood of finding Aboriginal cultural heritage in the assessment area
  - clarify when a CHMP should progress from a desktop assessment to a standard assessment, and onto a complex assessment
  - provide information on what a cumulative impacts statement must include
  - ensure that the management conditions recommended are consistent with the conclusions of the assessment.

### **Implementation, compliance and enforcement, and evaluation**

The activities AV will undertake following the re-making of the proposed Regulations fall into the following categories:

- **Implementation:** This involves writing to and offering to meet with stakeholders, including RAPs, local government, public land managers, heritage advisors and industry representative bodies, as well as updating publicly available information, including on the AV website. It may also involve limited changes to IT infrastructure to capture new fees and requirements.
- **Compliance and enforcement:** AV will utilise a risk-based approach to undertake compliance activities, focusing in particular on activities that cause harm to Aboriginal cultural heritage, possession of Aboriginal Ancestral Remains, undertaking activities without a required CHMP or CHP and non-compliance with stop-work orders.
- **Evaluation:** Annual evaluation will be carried out internally, in the form of internal progress status reports against Key Evaluation Questions (KEQs). AV will use both qualitative and quantitative data to evaluate against the KEQs. This will include data collected in AV's cultural heritage management database; the Aboriginal Heritage Evaluation Management System (AHEMS).

## **7 Analysis of fees**

The re-making of the Regulations involves ensuring that the fees charged reflect costs incurred, in a way that ensures both efficiency and equity objectives are met.

Table 5 shows the estimated time incurred by government and RAPs to undertake evaluations relating to the fees. Data for the fees analysis are primarily sourced from AV and a survey of RAPs. These data were checked against previous reviews and reports.

**Table 5: Government and RAP time and volumes for each fee type**

Fee type	Government evaluation time (hours) <sup>13</sup>	Number undertaken by government each year (preferred options)	RAP evaluation time (hours) <sup>14</sup>	Number undertaken by RAPs each year (preferred options)
CHP application	38.0	22	38.0 <sup>15</sup>	4
Certification of a PAHT	6.5	37	N/A	N/A
NOI to prepare a CHMP	1.0	400	2.7	381
CHMP with a desktop assessment	14.5	22	4.7	19
CHMP with a standard assessment	16.5	72	8.3	62
CHMP with a complex assessment	23.5	284	14.8	243
Application to amend a CHMP	11.0	17	5.8	20
Application for access to the VAHR	0.2	636	2.7	N/A
Application for advice on information held in the VAHR	0.5	2,734	N/A	N/A

Note: All evaluation times are cumulative, ie include previous levels of evaluation.

### Fee options

The fee options have been formulated with regard to consultation with AV and RAPs as part of this RIS, as well as previous consultation by AV over the past year, including the publication of a Discussion Paper. The fee options are:

- Fee option 1: Re-make existing fees – this fee option maintains the existing fee regime, which gives stakeholders continuity and reduces uncertainty.
- Fee option 2: Single set of fees based on weighted average cost recovery – this fee option involves updating the fees based on information collected from stakeholders on their costs involved with undertaking evaluations, and estimating fee levels based on an average of Government and RAPs costs weighted by the number of evaluations they undertook. Fees to determine CHPs are maintained at current levels to ensure that non-compliance does not rise.
- Fee option 3: Variable fees by evaluator – this fee option splits the fee levels into different fees for Government and RAPs to reflect their different cost bases and are designed not to disadvantage the party with a higher cost base. Like Option 2, fees to determine CHPs are maintained at current levels.

<sup>13</sup> Information provided by AV (unless otherwise noted).

<sup>14</sup> Estimates based on survey of RAPs (unless otherwise noted). Note that RAP evaluation hours are based on a weighted average of reported time to undertake an evaluation, weighted by the number of CHMPs completed in the previous year, and excluding one set of outlier responses that were over 10 times larger than other responses.

<sup>15</sup> Based on AV estimate due to insufficient data received from RAPs.

Fees levels are expressed in Regulations as fee units. In the 2017-18 financial year, a fee unit in Victoria is set at \$14.22. The value for the 2018-19 financial year has not yet been set.

Using the data shown in Table 5, fee levels have been estimated for each fee option. Table 6 shows a comparison of the fee units for each fee option. The definitions of small, medium and large activity area can be found in Section 8.3.3.

**Table 6: Comparison of fee units for each fee option**

Fee	Option 1 actual fee units (current)	Option 2 implied fee units	Option 3 – implied Government fee units	Option 3 – implied RAP fee units
<b>CHP application</b>				
Discovery and research	8	8	8	8
Harm Aboriginal cultural heritage	46	46	46	46
Sell or remove Aboriginal object	13	13	13	13
<b>PAHTs</b>				
Small activity	40	24	24	N/A
Medium activity	80	47	47	N/A
Large activity	120	71	71	N/A
<b>NOI to prepare a CHMP</b>	8	10	7	13
<b>CHMPs - one authority only</b>				
Desktop assessment - small activity	10	27	41	11
Desktop assessment - medium activity	20	55	82	23
Desktop assessment - large activity	40	110	164	46
Standard assessment - small activity	40	39	56	20
Standard assessment - medium activity	80	79	111	40
Standard assessment - large activity	120	157	223	81
Complex assessment - small activity	60	63	85	36
Complex assessment - medium activity	120	125	171	72
Complex assessment - large activity	240	251	342	144
<b>CHMPs - two authorities</b>				
Desktop assessment - small activity	8	22	33	9
Desktop assessment - medium activity	15	41	62	17
Desktop assessment - large activity	30	82	123	34
Standard assessment - small activity	30	30	42	15
Standard assessment - medium activity	60	59	84	30
Standard assessment - large activity	160	118	167	61
Complex assessment - small activity	80	47	64	27
Complex assessment - medium activity	160	94	128	54
Complex assessment - large activity	320	188	256	108

Fee	Option 1 actual fee units (current)	Option 2 implied fee units	Option 3 – implied Government fee units	Option 3 – implied RAP fee units
<b>CHMPs - three or more authorities</b>				
Desktop assessment - small activity	7	19	29	8
Desktop assessment - medium activity	13	36	53	15
Desktop assessment - large activity	27	74	111	31
Standard assessment - small activity	27	27	38	14
Standard assessment - medium activity	53	52	74	27
Standard assessment - large activity	107	105	149	54
Complex assessment - small activity	53	41	57	24
Complex assessment - medium activity	107	84	114	48
Complex assessment - large activity	213	167	227	96
<b>Approval of an amendment to a CHMP</b>	32	53	80	28
<b>Application for access to the Register</b>	16	18	18	N/A
<b>Application for advice on the Register</b>	6	12	12	N/A

Note: The central estimates have been applied to the medium activity area fee for PAHT and CHMP evaluations, and adjusted up and down for the number of authorities and small and large activities based on the current relativities.

### Assessment of fee options

The fee options are assessed using multi-criteria analysis as they do not involve direct costs and benefits.

Under the base case, fees levels could not be set, which means fees would not be charged. RAPs may either not choose to undertake any evaluations, or their financial sustainability may be jeopardised if they cannot find other funding to cover the cost of undertaking evaluations.

Table 7 provides the MCA scoring of the fee options. These scores and their components provide an indication of the relative costs and benefits of each option.

**Table 7: Criteria and scoring of fee options (-10 to +10)**

Criteria	Description	Option 1		Option 2		Option 3	
		Score	Weighted-score	Score	Weighted-score	Score	Weighted-score
Full cost recovery (60%)	Ensuring that fees are sufficient and effective, and reflect the full costs of the activities	+4	+2.4	+5	+3.0	+5	+3.0
Preventing induced demand changes (20%)	Ensuring that high fees do not lead to an increase in non-compliance	-2	-0.4	-1	-0.2	-6	-1.2

Criteria	Description	Option 1		Option 2		Option 3	
		Score	Weighted-score	Score	Weighted-score	Score	Weighted-score
Simplicity (20%)	Providing simplicity for land-users, RAPs, government and other stakeholders	-2	-0.4	-4	-0.8	-8	-1.6
<b>Totals (after weighting)</b>		<b>+1.6</b>		<b>+2.0</b>		<b>+0.2</b>	

### Preferred fee option

The fee options analysis indicates that Fee Option 2 has the highest score and is therefore preferred. This is primarily because Fee Option 2 uses updated data on cost recovery activities to re-estimate fees levels, while minimising the level of induced demand changes, and maintaining the more simple structure of Fee Option 1 (compared with Fee Option 3).

Fee Option 2 involves re-making the Regulations using a single set of fees based on weighted average cost recovery. Fee Option 2 results in estimated annual revenue of approximately \$1.6 million for Government and \$300,000 for RAPs. These estimates equate to \$13.6 million and \$2.6 million respectively over 10 years in NPV terms.<sup>16</sup>

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<sup>16</sup> Note that this is an approximate estimate only, as the actual fee revenue will depend on the numbers and types of CHPs, PAHTs, CHMPs and applications to the Register that occur.



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## 2 Introduction

### 2.1 Scope of this RIS

This Regulatory Impact Statement (RIS) analyses the regulatory framework for the identification and protection of Aboriginal cultural heritage in Victoria, and proposes the re-making of the Aboriginal Heritage Regulations 2007 (“the Regulations”) with some amendments.

The purpose of this RIS is to:

- establish the nature and extent of the problems that would exist in the absence of the Regulations
- articulate the desired objectives of addressing the identified problem
- identify a set of viable options to address the established problem
- assess the costs and benefits of these options, and the expected effectiveness of each option in addressing the problem
- identify and describe a preferred option to achieve the desired objectives
- develop an implementation and review strategy for the preferred option.

In accordance with Section 5 of the *Subordinate Legislation Act 1994*, there is an automatic revocation of statutory rules ten years after they are made. The Regulations were due to sunset on 25 May 2017, but have been extended for 12 months until 25 May 2018. After this date, the Regulations will expire and its provisions will no longer apply.

This RIS is prepared in accordance with the Victorian Guide to Regulation (2016), which provides a step-by-step guide to preparing RISs.

### 2.2 Aboriginal cultural heritage

Throughout Victoria, even in the most intensively developed regions, the landscape holds the imprint of thousands of generations of Aboriginal people. Each region of Victoria has significant places where Aboriginal people lived. In these places, they obtained sustenance, expressed themselves artistically, passed on creation stories and cultural values, engaged in conflict, established alliances and social networks, traded goods, celebrated rites of passage and committed the departed to their final resting places.

Underpinning these material aspects of Aboriginal cultural heritage are places where there may be no physical evidence of past cultural activities. These include places of spiritual or ceremonial significance, places where traditional plant or mineral resources occur, or trade and travel routes. Information about such places may be passed down from one generation to the next or may survive in nineteenth century colonial documents and records.

Aboriginal cultural heritage includes ‘Aboriginal places’, ‘Aboriginal objects’ and ‘Aboriginal Ancestral Remains’.

An Aboriginal object may be either:

- an object in Victoria or the coastal waters of Victoria that relates to the Aboriginal occupation of any part of Australia; whether or not the object existed prior to the occupation of that part of Australia by people of non-Aboriginal descent and is of cultural heritage significance to Aboriginal people; or

- an object, material or thing in Victoria or the coastal waters of Victoria that is removed or excavated from an Aboriginal place, and is of cultural heritage significance to Aboriginal people.

An Aboriginal place is an area in Victoria that is of cultural heritage significance to Aboriginal people. An area includes – an area of land; an expanse of water; a natural feature, formation or landscape; an archaeological site, feature or deposit; the area immediately surrounding any of these things; land set aside for the purpose of enabling Aboriginal Ancestral Remains to be re-interred; and a building or structure.

Cultural heritage significance includes archaeological, anthropological, contemporary, historical, scientific, social or spiritual significance, and significance in accordance with Aboriginal tradition.

## **2.3 Previous legislation**

The main previous legislation relating to Aboriginal cultural heritage protection in Victoria are:

- the *Victorian Archaeological and Aboriginal Relics Preservation Act 1972*
- Part 2A of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

The *Aboriginal Heritage Act 2006* and Aboriginal Heritage Regulations 2007 largely superseded this legislation.<sup>17</sup> More detail on the previous legislation can be found in Appendix B.

## **2.4 Existing legislative framework**

### **2.4.1 The Aboriginal Heritage Act 2006**

The *Aboriginal Heritage Act 2006* (the Act) is Victoria's principal legislation for the protection of Aboriginal cultural heritage, and the management of Aboriginal cultural heritage during development and land use activities. The Act protects all Aboriginal cultural heritage in Victoria, and prescribes significant penalties to ensure Aboriginal cultural heritage is protected from harm.

The Act legislates a central role for Aboriginal people in identifying, managing and protecting their cultural heritage. It does this by establishing registered Aboriginal parties (RAPs) – organisations with statutory decision-making responsibilities for protecting Aboriginal cultural heritage in their appointed area. The responsibilities include the evaluation of Cultural Heritage Management Plans (CHMPs), determining Cultural Heritage Permits (CHPs), advising Government on matters relating to Aboriginal cultural heritage in their appointed area, and carrying out compliance and enforcement activities.

The Act sets out several key objectives including to:

- recognise, protect and conserve Aboriginal cultural heritage in Victoria in ways that are based on respect for Aboriginal knowledge and cultural and traditional practices
- recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage and accord appropriate status to Aboriginal people with traditional or familial links with Aboriginal cultural heritage in protecting that heritage

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<sup>17</sup> The Commonwealth legislation is still in place, however, is not the primary legislative protection for Aboriginal cultural heritage in Victoria.

- promote the management of Aboriginal cultural heritage as an integral part of land and natural resource management and promote public awareness and understanding of Aboriginal cultural heritage in Victoria
- establish an Aboriginal cultural heritage register to record Aboriginal cultural heritage
- establish processes for the timely and efficient assessment of activities that have the potential to harm Aboriginal cultural heritage
- promote the use of agreements that provide for the management and protection of Aboriginal cultural heritage
- establish mechanisms that enable the resolution of disputes relating to the protection of Aboriginal cultural heritage
- provide appropriate sanctions and penalties to prevent harm to Aboriginal cultural heritage.

Box 1 outlines the key features of the Act.

### **Box 1: Key features of the Act**

The Victorian Aboriginal Heritage Council (VAHC) – the Act establishes the VAHC, a council of up to 11 Traditional Owners with extensive knowledge and experience in cultural heritage management. VAHC members are Victorian Traditional Owners appointed by the Minister for Aboriginal Affairs. The VAHC's main roles are to appoint RAPs as cultural heritage decision makers for areas in Victoria, advise the Minister for Aboriginal Affairs (the Minister) about the exercise of powers under the Act and the protection of Aboriginal cultural heritage, and evaluates CHMPs when a RAP is the sponsor. The VAHC also has a role in educating Victorians about the importance of Aboriginal cultural heritage and how it can be protected and preserved.

Registered Aboriginal Parties (RAPs) – the Act establishes RAPs as incorporated Aboriginal groups appointed by the VAHC to be the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage relevant to their appointed area. RAPs act as a source of advice and knowledge for the Minister, the Secretary to the Department of Premier and Cabinet (the Secretary) and VAHC on Aboriginal cultural heritage for their appointed area, evaluate CHMPs, enter into cultural heritage agreements and Aboriginal cultural heritage land management agreements, determine cultural heritage permit applications, protection declarations and the repatriation of Aboriginal cultural heritage.

Cultural Heritage Management Plans (CHMPs) – the Act creates a regulated process for managing Aboriginal cultural heritage during land use and development activities. CHMPs must be prepared by a sponsor (for example, a developer) where a high impact activity is proposed in an area of cultural heritage sensitivity as prescribed in the Regulations. A CHMP identifies and assesses the potential impacts of a proposed development or land use activity on Aboriginal cultural heritage and makes recommendations about actions to be taken before, during and after the activity to manage and protect Aboriginal cultural heritage. Where a CHMP is required by the Regulations, it must be approved prior to a planning permit being issued.

Preliminary Aboriginal Heritage Tests (PAHTs) – A PAHT is a voluntary process for sponsors to apply to the Secretary for confirmation as to whether a CHMP is required for a proposed development. A certified PAHT can be provided to the relevant statutory authority to support a planning permit application.

Cultural Heritage Permits – the Act creates a regulated application and authorisation process for excavation, research, harm, selling or removing Aboriginal objects from Victoria. Cultural heritage permits to undertake an activity that will, or is likely to harm, Aboriginal cultural heritage are the most common type of permit applied for, often for discrete works in an area where Aboriginal cultural heritage is known to be present.

Cultural Heritage Agreements (CHAs) – CHAs are negotiated between landowners and the relevant RAP to manage and protect Aboriginal cultural heritage. Examples include rights of

access and the rehabilitation of Aboriginal objects and places.

Aboriginal Cultural Heritage Land Management Agreements (ACHLMAs) – A voluntary agreement between a public land manager and a RAP for the purpose of managing and protecting Aboriginal cultural heritage during routine land management activities. An ACHLMA may allow specified activities to proceed while removing the requirement to apply for CHPs for each activity in each instance.

Aboriginal Intangible Heritage and Aboriginal Intangible Heritage Agreements – A RAP can apply to have its Aboriginal Intangible Heritage registered on the Victorian Aboriginal Heritage Register (VAHR). Once included on the VAHR a person must make an agreement with the RAP for any commercial application of the Aboriginal Intangible Heritage.

Dispute resolution mechanisms – the Act grants the Victorian Civil and Administrative Tribunal the power to review the decision made by the RAP to refuse a CHMP if requested by the sponsor. If the Tribunal decides to approve the CHMP, the Act requires that it be satisfied that the CHMP makes sufficient provision to avoid or minimise harm to Aboriginal cultural heritage. The VAHC has a dispute resolution role where there is no agreement around the approval of a CHMP between RAPs appointed over the same area.

Penalties and enforcement – the Act sets penalties for harming Aboriginal cultural heritage without appropriate authorisation, and for non-compliance with the Act. There are a range of enforcement tools (stop orders, protection orders, audits), some new and some adapted from previous legislation.

The Victorian Aboriginal Heritage Register (VAHR) – the Act creates an ongoing requirement for the VAHR, which records known Aboriginal cultural heritage in Victoria.

Fees – the Act gives the power for Government and RAPs to charge fees for evaluations of particular applications.

Aboriginal Cultural Heritage Fund - Fees and charges collected under the Act , additional gifts and interest earned on investments, to go into an Aboriginal Cultural Heritage Fund, to be managed by the VAHC. On the VAHC's recommendation, funds will be used to facilitate Aboriginal cultural heritage management and protection projects. The fund also partially resources RAP operational costs.

Source: <https://www.vic.gov.au/aboriginalvictoria/heritage/>, material provided by AV, The Allen Consulting Group, 'RIS on Aboriginal Heritage Regulations', 2007.

## 2.4.2 *Aboriginal Heritage Amendment Act 2016*

The *Aboriginal Heritage Amendment Act 2016* (the Amendment Act) established new provisions and changes to the *Aboriginal Heritage Act 2006*. The Amendment Act was informed by the Victorian Government Response to the *Review of the Aboriginal Heritage Act 2006*, the *Parliamentary Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties*, the release of an *Aboriginal Heritage Amendment Bill Exposure Draft*, and widespread consultation with Traditional Owners, industry groups, local Government, State and Commonwealth Government and cultural industry heritage professionals.

The Amendment Act included new provisions into the principal Act, including those relating to Aboriginal Intangible Heritage, PAHTs, ACHLMAs, and the Aboriginal Cultural Management Fund. The Amendment Act required the introduction in the Regulations of:

- new prescribed forms (e.g. prescribed standards for an ACHLMA and the prescribed form for an application to register Aboriginal intangible heritage)
- new fees (e.g. the fee to accompany a NOI to prepare a CHMP)
- new and clarified definitions to be consistent with provisions of the Amendment Act.

Details of the changes included in the Amendment Act can be found in Appendix B.

## 2.5 Current Regulations

The existing Aboriginal Heritage Regulations 2007 (the Regulations) are made under sections 47 and 194 of the Act, and were amended in conjunction with the 2016 amendments to the Act. The Regulations specify the circumstances in which a CHMP is required, prescribe standards for the preparation of CHMPs and agreements, and prescribe a range of fees and forms.

On 25 May 2017 the Regulations sunset after 10 years of operation. The Subordinate Legislation (Aboriginal Heritage Regulations 2007) Extension Regulations 2017 came into effect on 25 May 2017 and will extend the operation of the Regulations for 12 months. AV is reviewing the operation of the Regulations and released a discussion paper in August 2017. The discussion paper was designed to help stakeholders have their say on the operation of the Aboriginal Heritage Regulations 2007 and to guide submissions for the review.

### 2.5.1 Cultural Heritage Management Plans

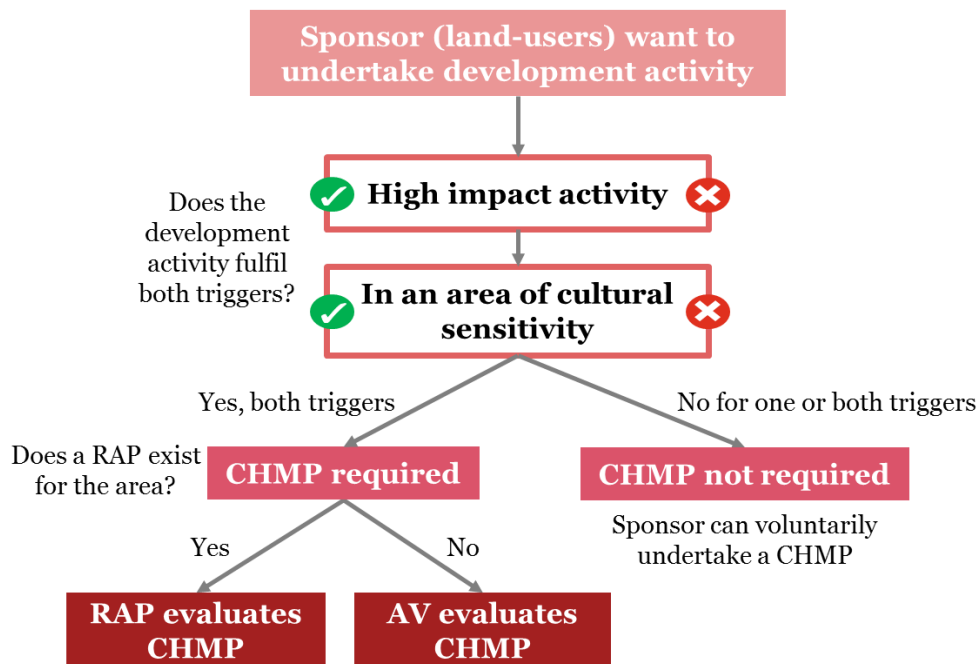
#### Circumstances in which a CHMP must be prepared

A Cultural Heritage Management Plan (CHMP) is required for an activity if:

- all or part of the activity is a high impact activity; and
- all or part of the activity area for the activity is in an area of cultural heritage sensitivity that has not previously been subject to significant ground disturbance.

The criteria for completing a CHMP is shown in Figure 2.

**Figure 2: Criteria to prepare a CHMP**



An area of cultural heritage sensitivity is an area in which Aboriginal cultural heritage is, or is likely to be, present. Division 3 of Part 2 of the Regulations sets out these areas, based on analysis of where known Aboriginal places are located in the VAHR. This VAHR has been developed over more than forty years, and includes information such as the proximity of an Aboriginal place to a waterway. The Regulations also make provision for prescribing areas of cultural heritage sensitivity in Schedule 1.

Numerous planning overlays affect similar parts of the state to the 'areas of cultural heritage sensitivity' in the Regulations. Most notable would be the suite of environment and landscape overlays (Environmental Significance Overlay, Vegetation Protection Overlay, Significant Landscape Overlay), which normally include planning controls for land near waterways, lakes or swamps, or in coastal environments. The areas covered by these overlays vary from council to council, may cover much larger or smaller areas than is appropriate for the protection and management of Aboriginal cultural heritage, and exist separately for a variety of different purposes.

A high impact activity is an activity that may have a high impact on Aboriginal cultural heritage. Examples of high impact activities under the current Regulations include varied construction or building works (such as for aquaculture, a corrective institution, an office, a warehouse or a bicycle track, road or walking track exceeding 100 metres if it would involve significant ground disturbance<sup>18</sup>); an activity for which an earth resource authorisation is required; certain timber production; and subdivisions into three or more lots if a dwelling may be constructed on each of the lots.

A CHMP is not required for exempt activities, such as building alterations, demolitions or removals; extensions to a dwelling; construction of one or two dwellings; construction of buildings ancillary to a dwelling such as a storage shed, garage, pool, fence or water tank; certain emergency works; subdivision of an existing building; sea-bed development and minor works.

These exempt activities were chosen because they were considered likely to have little or no impact on Aboriginal cultural heritage (minor works), are unavoidable (such as emergency activities), or are activities where cultural heritage issues should have been considered at an earlier stage (such as a single house development, where a plan is potentially required earlier at the subdivision stage).

Prior to preparing a CHMP, a land-user must submit a Notice of Intention (NOI) to prepare a CHMP, which is processed by the Department. NOIs help ensure that the Department has visibility over future CHMPs and that Aboriginal groups, including RAPs, are appropriately consulted.

### **Standards for conduct of an assessment**

The current Regulations prescribe the standards for the conduct of an assessment during the preparation of a CHMP, specifically:

1. The types of assessment, what they must include and when they are required; and
2. What the CHMP must include.

The types of assessments which may be carried out as part of a CHMP are specified in the Regulations:

- desktop assessment
- standard assessment
- complex assessment.

A CHMP must contain a desktop assessment documenting the results of research into existing information relating to the Aboriginal cultural heritage associated with the activity area. Current regulation 57 sets out what a desktop assessment must include.

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<sup>18</sup> A full list of the construction and building works defined as high impact activities can be viewed in Division 5, Part 2 of the Regulations.



A CHMP must include a standard assessment if the results of the desktop assessment show it is reasonably possible that Aboriginal cultural heritage is present in the activity area. The standard assessment must include a ground survey of the activity area to detect the presence of Aboriginal cultural heritage. Current regulation 59 of the Regulations sets out what a standard assessment must include.

Under the Regulations, a CHMP must include a complex assessment if it is likely Aboriginal cultural heritage is present in the activity area and the desktop or standard assessments were unable to identify the extent, nature and significance of the Aboriginal cultural heritage in the activity area. A complex assessment must include disturbance or excavation of all or part of the activity area to uncover or discover Aboriginal cultural heritage. Current regulation 61 of the Regulations sets out what a complex assessment must include.

### **Standards for content of a CHMP**

The current Regulations prescribe the content that a CHMP must include, see Box 2. This content is similar to what is set out in existing AV guidelines.

#### **Box 2: Content of CHMPs**

A CHMP must include:

- a statement about which section of the Act requires the plan to be prepared, or, if required to be prepared by the Regulations, a statement of the reasons why the Regulations required preparation of the plan;
- the name of the sponsor and heritage advisor, and the name of each relevant Registered Aboriginal Party and its representatives;
- a copy of the sponsor's notice of intention to prepare a CHMP, and a copy of the RAP's notice of intention to evaluate the plan;
- a description of the activity and the activity area including a map in a form approved by the Secretary;
- the results of the desktop assessment and, if it is not possible that Aboriginal cultural heritage may be found in the activity area, the reasons for that decision;
- if a standard assessment is undertaken, and the assessment is unable to identify Aboriginal cultural heritage in the area, the reasons for that decision;
- the method by which Aboriginal cultural heritage was assessed, and whether that method was agreed with the Registered Aboriginal Party;<sup>19</sup>
- the names of persons involved in the assessment;
- a summary of information, if any, provided by a member of a relevant Registered Aboriginal Party or other person;
- the results of the assessment, including a description and location of Aboriginal cultural heritage that is found, identification of any problems in completing the assessment, and recommendations to address any problems in completing the assessment;
- a statement of how matters required by the Act were considered;
- recommendations for measures to be taken to manage and protect Aboriginal cultural heritage identified in the assessment;

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<sup>19</sup> If the method to assess Aboriginal cultural heritage is not agreed, the RAP is not likely to approve the CHMP. Disputes in relation to CHMPs can be referred to the Chairperson of the VAHC for dispute resolution. Disputes are rare, and occur less than once a year.

- how the sponsor and the Registered Aboriginal Party will resolve any disputes in relation to implementation of an approved CHMP or the conduct of the activity; and
- if the activity is a subdivision, the sponsor's description of how each lot will be used or developed, or the use or development permitted by the planning scheme.

### **2.5.2 Other prescribed matters**

#### **Prescribed standards**

Prescribed standards detail what must be included in an application or other document for it to be complete. The Regulations also prescribe standards for a range of other mechanisms.

#### **Aboriginal Cultural Heritage Land Management Agreements**

The Regulations prescribe the standards for preparing an ACHLMA. The current Regulations prescribe standards for Aboriginal cultural heritage assessment similar to those required for a CHMP.

#### **Maps in Cultural Heritage Agreements**

A map included in a cultural heritage agreement must include the location of the boundaries of the land, a description of what the map represents, a legend, a scale, an arrow indicating north, topographic features and a diagram showing the location of the area in relation to the nearest town. If coordinates are shown, they must be standard coordinates. Standard coordinates are required to facilitate inclusion of the agreement on the VAHR and on the land title.

#### **Prescribed forms**

Similar to prescribed standards, prescribed forms detail what must be included in an application or document for it to be complete. The Regulations prescribe a number of forms:

- Reports to the Victorian Aboriginal Heritage Council regarding Aboriginal Ancestral Remains in custody of public entities and universities.
- Applications for certification of PAHTs.
- Applications for registration of Aboriginal Intangible Heritage.
- Form of Aboriginal Intangible Heritage Agreement.
- Application for registration as a RAP.

#### **Approved forms**

The Act specifies that CHMPs and ACHLMAs must be submitted in an approved form. An approved form is a form approved by the Secretary of the Department of Premier and Cabinet for use under the Act. An approved form provides greater detail of what must be included in an application or document in order to meet the requirements of the Act.

#### **Fees**

The Regulations set fees for:

- Cultural Heritage Permit applications (evaluated by AV or the relevant RAP).
- Preliminary Aboriginal Heritage Tests (evaluated by AV).
- Notices of intention to prepare a CHMP (administered by AV or the relevant RAP).
- CHMP applications for approval (evaluated by AV or the relevant RAP).



- Applications for approval of amendment to an approved CHMP (evaluated by AV or the relevant RAP).
- Access to the Victorian Aboriginal Heritage Register (VAHR) ( administered by the Department).
- Application to the Secretary for advice on whether a record exists on the VAHR (administered by the Department).

## 2.6 Reviews and reforms

There have been a number of reviews and reforms of the legislative framework over the past decade, including:

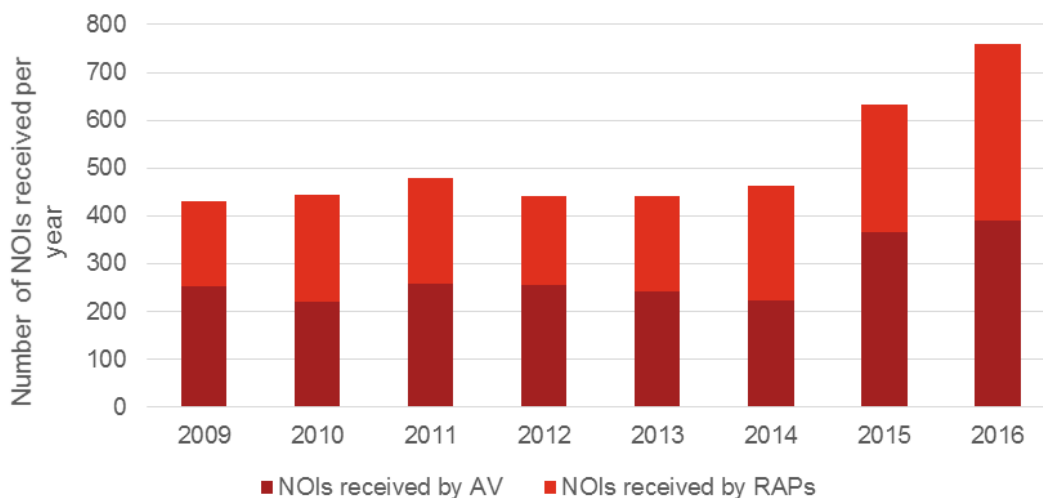
- the initial review of the Regulations in 2008, including the previous RIS
- the 2012 Parliamentary Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties
- the 2011-12 review of the *Aboriginal Heritage Act 2006*
- the 2015-16 and 2016-17 Victorian Government budgets (Victorian Aboriginal Cultural Heritage Management Strategy)
- the 2017 review of the Aboriginal Heritage Regulations 2007.

More detail is available on these reviews and reforms is available in Appendix B.

## 2.7 Activity under the Act and Regulations

Sponsors of activities requiring a CHMP must notify the relevant local government of their intention, through a Notice of Intention to prepare a CHMP (NOI). NOIs provide an indication of likely subsequent CHMP activity. There have been between 400 and 700 NOIs each year since 2009 (see Figure 3).

**Figure 3: Number of Notices of Intention to prepare a CHMP (2009-2016)**



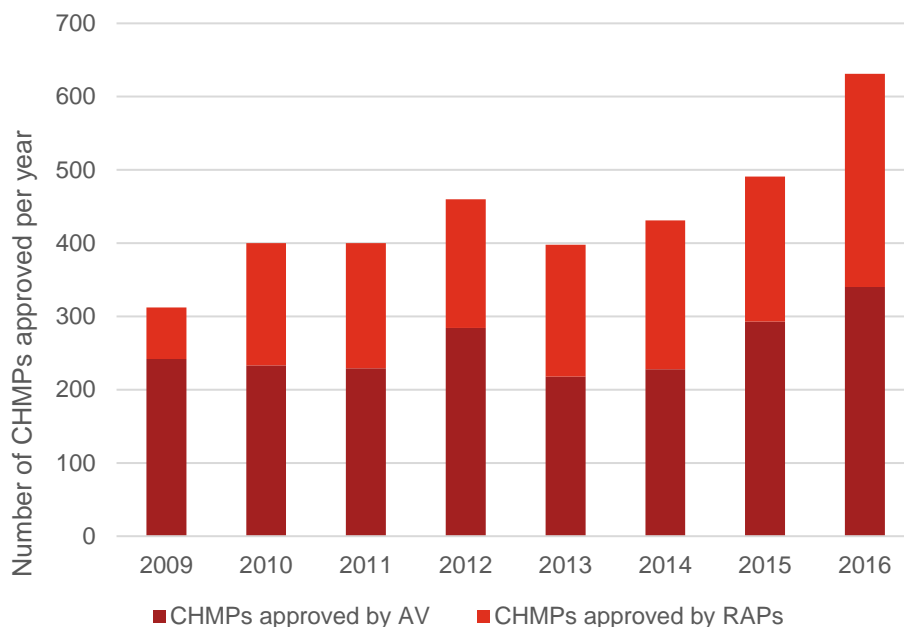
Source: Data provided by AV, November 2017

The rise in NOIs in 2015-2016 is as a result of a rise in development activity, in particular subdivisions, construction of dwellings and utility installation.<sup>20</sup> Trend data from 2017 indicate that some the numbers have plateaued somewhat in 2017. The local government areas with the highest number of NOIs are generally located in the growth corridors of Victoria, as well as in East Gippsland Shire.<sup>21</sup>

### Cultural Heritage Management Plans

Under the final year of operation of the previous legislative framework in 2006, AV received 380 Aboriginal cultural heritage assessments (precursors to what are now known as CHMPs) in relation to approximately 50,000 activities requiring planning permits under Victorian law. This equated to less than 1 per cent of such activities.<sup>22</sup> Since then, the number of CHMPs approved each year has risen from 156 in 2008 to 389 in 2011, and 631 in 2016, as shown in Figure 4, compared with approximately 31,000 applications for planning permits per year currently, down from around 50,000 for financial year 2015.<sup>23</sup> <sup>24</sup> Approximately 92 per cent of CHMPs evaluated by AV and RAPs are approved.<sup>25</sup>

**Figure 4: Number of CHMPs approved (2009-2016)**



Source: Data provided by AV, November 2017

As shown in Figure 5, from 2012 to 2017, 80 per cent of lodged CHMPs included a complex assessment, 14 per cent included only a standard assessment and 6 per cent included only a desktop assessment.

<sup>20</sup> PwC analysis of data provided by AV.

<sup>21</sup> PwC analysis of data provided by AV.

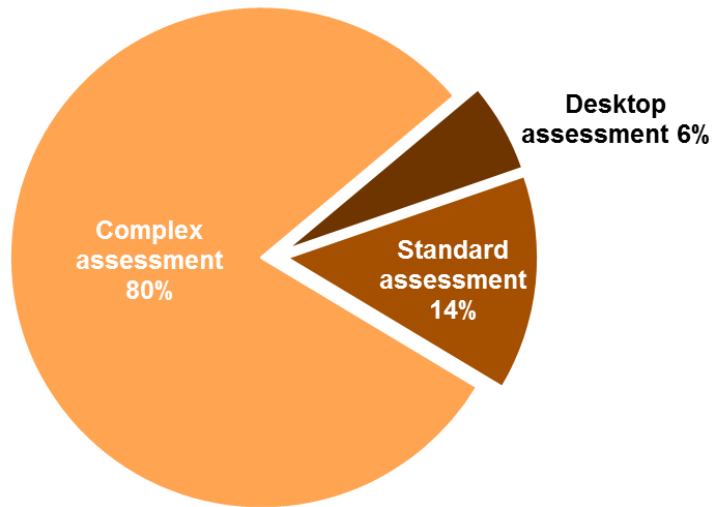
<sup>22</sup> The Allen Consulting Group, *Aboriginal Heritage Regulations 2007: Regulatory Impact Statement*, April 2007, page 9.

<sup>23</sup> This likely reflects the reduced level of development activity in the growth areas of Melbourne.

<sup>24</sup> Department of Environment, Land, Water and Planning, 'Planning Permit Activity Monthly Report', <http://pparsreporting.dpcd.vic.gov.au/Reporting/MonthlyReport?ra=100&date=1-2018>

<sup>25</sup> PwC analysis of data provided by AV.

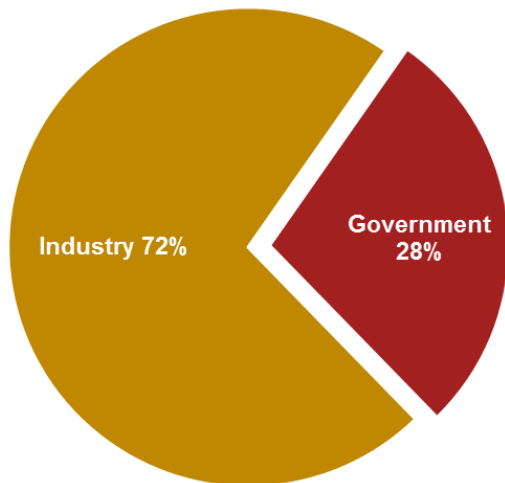
**Figure 5: Type of lodged CHMPs (2012-2017)**



Source: Data provided by AV, November 2017

As shown in Figure 6, the majority of CHMPs are sponsored by industry.

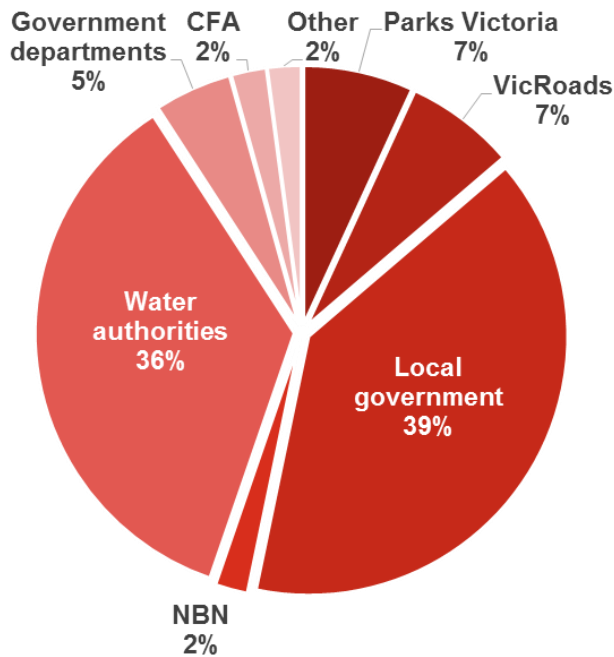
**Figure 6: Proportion of approved CHMPs by sponsor (2007-2016)**



Source: Data provided by AV, November 2017

Of approved CHMPs where government is the sponsor, these come from multiple agencies (see Figure 7) – including local government (39 per cent), various water authorities (36 per cent), Parks Victoria (7 per cent) and VicRoads (7 per cent).

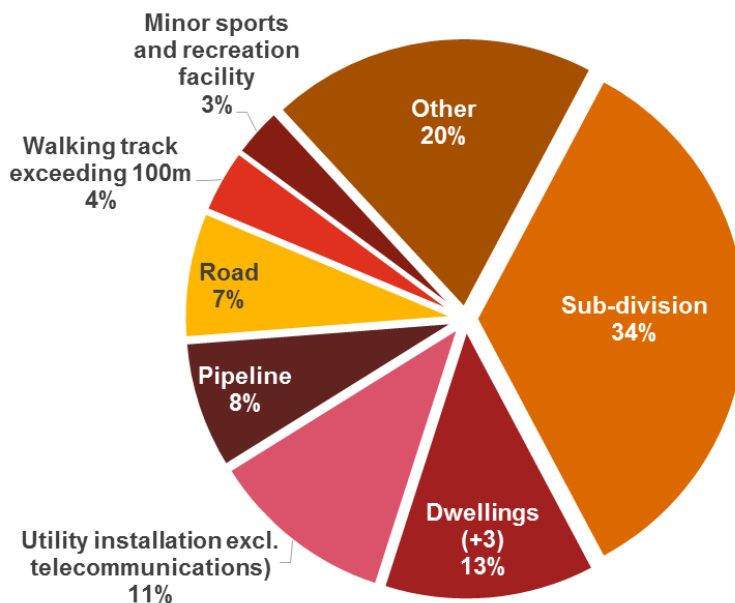
**Figure 7: Approved CHMPs sponsored by government (2007-2016)**



Source: Data provided by AV, November 2017

Since the introduction of the Act, approximately one third of all approved CHMPs have been for subdivisions. Other significant categories include utilities (15 per cent), roads and rail activities (8 per cent), pipelines (8 per cent), 3+ dwelling subdivisions (7 per cent) and mining and extractives (2 per cent), as shown in Figure 8.

**Figure 8: Type of approved CHMP by activity type (2007-2016)**



Source: Data provided by AV, November 2017.

## 2.8 About this report

This report is structured as follows:

- Chapter 3 discusses the nature and extent of the problem
- Chapter 4 sets out the Victorian Government's objectives
- Chapter 5 considers options to address the problem
- Chapter 6 analyses the identified options
- Chapter 7 provides an overall assessment of the proposed Regulations and includes the small business and competition assessments, as well as information on compliance and enforcement
- Chapter 8 presents an analysis of fees and fee options
- Appendices contain details of the stakeholder consultation process, further background information, and a copy of the proposed Regulations.

## **3 Nature and extent of the problem**

### **3.1 The need for government intervention**

The Act specifies the requirement to undertake a CHMP in prescribed circumstances, however, does not specify the triggers or standards for a CHMP, which are prescribed by the Regulations. In the absence of the triggers and standards for a CHMP, development activities in areas of cultural heritage sensitivity may occur without sufficient regard for Aboriginal cultural heritage.

#### **3.1.1 The value of heritage**

According to a research report by the Getty Conservation Institute,<sup>26</sup> the value of cultural heritage can be assigned to two non-mutually exclusive categories:

- Sociocultural value:
  - Historical: The capacity of the site to represent the past.
  - Cultural/symbolic: The value of heritage from its shared meaning.
  - Social: Where heritage represents social capital, that is, its value to enable and facilitate social connections.
  - Spiritual/religious: Where heritage is imbued with religious or sacred meaning.
  - Aesthetic: The visual qualities of heritage to each individual.
- Economic
  - Use (market) value: The value of heritage as assigned in a market.
  - Non-use (non-market) value
    - Existence: The value of the heritage existence.
    - Option: The value of being able to consume the heritage at some time in the future.
    - Bequest: The value of being able to bequeath heritage to future generations.

Heritage is generally irreplaceable once damaged or destroyed. This is particularly the case for Aboriginal cultural heritage, much of which has been lost since European settlement in Australia. For Aboriginal heritage, the concept of a use value mostly relates to the use of the land rather than the use of a building or other forms of heritage (such as a historic school or a bridge). As Rolfe and Windle noted in 2003:<sup>27</sup>

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<sup>26</sup> The Getty Conservation Institute, 'Assessing values of cultural heritage'. Research report, 2002.

<sup>27</sup> John Rolfe and Jill Windle, 2003, 'Valuing the Protection of Aboriginal Cultural Heritage Sites', *Economic Record*, Vol. 79, p85-95.

*Some 'spectacular' sites, such as art sites and burial caves that are normally associated with Aboriginal cultural heritage are well protected. However, the bulk of cultural heritage places and items relate to living patterns, such as camp sites, stone tools, stone working sites, marked trees, rock wells and middens along waterholes. Many of these items are not often recognised as Aboriginal sites by landholders and commercial developers, and hence, are susceptible to loss.*

Nonetheless, Aboriginal heritage can provide an economic benefit. Aboriginal people are employed in the cultural tourism industry, as well as to protect Aboriginal cultural heritage, for example, those in community-based programs and those involved in heritage assessment and monitoring of activities. Better awareness, management and protection of Aboriginal cultural heritage can support the sustainability of this market for Aboriginal people,<sup>28</sup> see Box 3 below.

### **Box 3: The market for Aboriginal tourism**

According to statistics published by Tourism Victoria, 703,400 international visitors to Australia aged 15 years and over undertook an Aboriginal experience during the year ending June 2013. This represents around one in eight international visitors overall. Of all international Aboriginal tourism visitors, 12 per cent undertook their activity in Victoria. This compares to 33 per cent in Queensland and 28 per cent in NSW.

Of all Aboriginal tourism visitors to and within Australia, half were international visitors, a third were domestic overnight visitors and the remainder were domestic daytrip visitors.

An estimated 73,800 (3.9 per cent) international visitors to Victoria participated in a local Aboriginal experience while in the state in the same period.

These numbers indicate that there is scope for Aboriginal tourism to grow in size. 45 per cent of international visitors who did not undertake an Aboriginal tourism experience would have liked to. There are a number of challenges to this however:

- Aboriginal tourism is primarily related to travel to a certain region, rather than a desire to seek out local Aboriginal cultures
- there is a perception that outback Australia is the home of authentic Aboriginal experiences
- most people in surveys cannot name Aboriginal experiences in city or coastal regions.

Source: Tourism Victoria, *Victorian Aboriginal Tourism Development Strategy 2013-2023*.

From an Aboriginal community perspective, cultural heritage is about the fundamental link between people, their environment, health and wellbeing, and their cultural identity. Many Aboriginal people consider their cultural heritage in a holistic sense – an accountability and responsibility to Country, and as something integral to their identity. In this sense, therefore, Aboriginal heritage has an inherently regional or local focus where the importance of the place or item is recognised by the local community.<sup>29</sup> Aboriginal cultural heritage also has national and global significance – for example, the Budj Bim Cultural Landscape in south west Victoria which has been recently nominated for UNESCO World Heritage listing,<sup>30</sup> and value for the broader community, including economic and educational value.

Cultural heritage, particularly Aboriginal cultural heritage, is often referred to as 'non-renewable' – and so it is difficult to put a monetary value on heritage loss. The cost of actions (such as fencing) that are taken in the wake of heritage loss, are actions to protect what remains rather than repair the damage.

<sup>28</sup> The Allen Consulting Group, 'RIS on Aboriginal Heritage Regulations', 2007.

<sup>29</sup> The Allen Consulting Group, 'RIS on Aboriginal Heritage Regulations', 2007.

<sup>30</sup> ABC News, 'Budj Bim Cultural Landscape: Ancient Aboriginal site a step closer to UNESCO World Heritage status', <http://www.abc.net.au/news/2017-01-20/budj-bim-ancient-aboriginal-site-closer-to-world-heritage-status/8197204>

### ***3.1.2 Market failures in heritage protection and conservation***

Without government intervention, an unacceptably low level of Aboriginal cultural heritage would be protected.

The value of Aboriginal cultural heritage is very much linked to the particular region and community. Other groups or individuals in the broader community may not always be aware of the existence of Aboriginal cultural heritage in a place, or in relation to an object. Those groups or individuals will not take the heritage into account when making decisions about whether to protect or destroy the place or object unless it is in their interests to do so, or they are required to do so. This problem can be compounded by differing – but equally valid – approaches by Aboriginal communities, and cultural heritage sensitivities about recording and acknowledging Aboriginal cultural heritage. These trends make understanding and recognition of Aboriginal cultural heritage less accessible for those outside of Aboriginal communities.

Private owners of heritage places will usually invest in conservation of the place up to the point where they can realise benefits from the investment. However, there are benefits from heritage places that may not accrue to the direct owners of those places. These benefits may include the contribution to cultural identity, the benefit from the place for a region, and the benefits to the community of knowing heritage places are being preserved.

Where a developer does not take into account the impact on Aboriginal cultural heritage, and that heritage is lost, there are flow on costs to both Aboriginal and non-Aboriginal people. For example, John Rolfe and Jill Windle provided evidence<sup>31</sup> that people value conservation of Aboriginal cultural heritage, and there is a loss to numerous third parties if the heritage is inappropriately destroyed or altered.

These observations indicate that there is justification for government involvement in the protection of heritage generally and for Aboriginal cultural heritage specifically. In Victoria, this intervention has taken the form of Aboriginal cultural heritage legislation.

## ***3.2 Problems addressed by the Regulations***

The Regulations enable the legislative framework to ensure strong and consistent protection of Aboriginal cultural heritage. Previously, poorly defined roles and responsibilities and inadequate processes led to uncertainty for land-users whilst places of Aboriginal cultural heritage were also damaged or destroyed.

This section provides a discussion of the following problems:

- Damage or destruction of Aboriginal cultural heritage.
- CHMPs not being prepared to an appropriate standard.
- Services provided by AV and RAPs without cost recovery.
- A lack of clear processes for government authorities.

### ***3.2.1 Damage or destruction of Aboriginal cultural heritage***

The most fundamental problem that the Regulations seek to address is damage or destruction of places and objects of Aboriginal cultural heritage. The Regulations put in place two ‘triggers’ under which a CHMP must be prepared. These are needed because the number of Aboriginal cultural heritage places or objects in Victoria is unknown. Those that have been identified and registered are estimated to be only a small proportion of the actual number (as

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<sup>31</sup> John Rolfe and Jill Windle, 2003, ‘Valuing the Protection of Aboriginal Cultural Heritage Sites’, *Economic Record*, Vol. 79, p85-95.



noted above, most places of Aboriginal cultural heritage have not yet been located). AV has a register which, prior to the current framework had approximately 28,000 entries (of places, objects, collections, literary references, destroyed sites and non-sites) with some 1000 new records being added each year.

An analysis was conducted as part of the Gippsland Coastal Towns Site Review 2006–2007. As part of this review, AV staff revisited fifty-seven sites that were recorded over the past thirty years. Twelve of these sites (21 per cent) had been disturbed or destroyed by development activities without approval. If the area reviewed is broadly representative of the rest of Victoria, this implies that at least 196<sup>32</sup> known sites were disturbed or destroyed by developments in Victoria each year without any assessment or consent.<sup>33</sup>

It is unknown whether the study area concerned is representative of the state (due to the extent of Aboriginal cultural heritage in each region being unknown until it is discovered), or whether any or all the sites disturbed or destroyed would have been saved if the Regulations were in place. As such, this study does not necessarily reflect what would happen in the base case (in the case that no Regulations were in place) as the Regulations prompt land-users to identify, assess and preserve new sites as well as protecting recorded sites. It does, however, give a sense of the potential size and nature of the problem the Regulations are attempting to address.

The Regulations fundamentally address the problem of CHMPs not being undertaken when Aboriginal cultural heritage is present and may be damaged or destroyed. If they were not in place, land-users would be able to undertake development without regard for possible places or objects of significant Aboriginal cultural heritage. Furthermore, there would not be a process for consulting Traditional Owner groups or heritage advisors. Prior to the current Regulations, an Aboriginal organisation gave the example of where they became aware of development activity in a culturally sensitive area only because the development occurred directly opposite their offices. Another Aboriginal group advised that one of their members felt the need to drive around development sites to look for instances of developments occurring without proper consideration of heritage issues or consultation with the local Aboriginal community.<sup>34</sup>

Sections 6.2.2 and 6.2.3 outline the specific benefits of protection of places of Aboriginal cultural heritage to the community.

### *3.2.2 CHMPs not being prepared to an appropriate standard*

If possible Aboriginal cultural heritage is identified and a CHMP triggered, this does not necessarily lead to its protection. The standards for a CHMP required under the Regulations are in place to ensure that if a CHMP is prepared, Aboriginal cultural heritage is identified and appropriately managed.

The standards in the current Regulations provide for tiered levels of assessment based on the probability and significance of Aboriginal cultural heritage. If all CHMPs were required to prepare the same level of assessment:

- too great a burden would be imposed on some land-users compared to the probability of Aboriginal cultural heritage being identified and the impact of the development, or
- some assessments would not be rigorous enough relative to the probability of Aboriginal cultural heritage being identified and the impact of development.

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<sup>32</sup> The 196 figure is calculated by dividing 21 per cent by 30 years to get 0.7 per cent, and then multiplying by 28,000 recorded sites.

<sup>33</sup> The Allen Consulting Group, 'RIS on Aboriginal Heritage Regulations', 2007.

<sup>34</sup> The Allen Consulting Group, 'RIS on Aboriginal Heritage Regulations', 2007.

Given that CHMPs with complex assessments make up around 80 per cent of all CHMPs, a uniform level of assessment means the latter point would be most likely to apply.

Conversely, if the standards for each tier of assessment for a CHMP were determined by a land-user themselves, it is unlikely that land-users would prepare CHMPs at a rigorous enough level for AV or RAPs to adequately review.

In addition to the standards for a CHMP, the Regulations also prescribe forms for other mechanisms such as CHPs and PAHTs. As with the standards, these aim to ensure consistency and rigour.

### *3.2.3 Services provided by AV and RAPs without cost recovery*

The Act assigns a role for AV and RAPs to undertake evaluations of various regulatory mechanisms such as CHP applications, PAHTs and CHMPs, which require expenditure (generally on staff costs) by AV and RAPs. The Regulations specify fees that to be charged for various applications. This enables AV and RAPs to cover the cost of providing the services required. AV would instead be required to rely on general revenue, and RAPs on private sources of funding or grants from Government.

### *3.2.4 A lack of clear processes for government authorities*

#### **Lack of a regulatory framework for local government and government authorities**

The Regulations provide a regulatory framework for local governments to manage and monitor the protection of Aboriginal cultural heritage. Under the base case, CHMPs would not be required in the majority of areas of cultural sensitivity where they are currently are defined. It is not clear whether local government and other government authorities would or would be expected to continue to ensure Aboriginal cultural heritage was protected and Aboriginal people consulted, however, the uncertainty resulting from a lack of a regulatory framework could lead to significant inefficiencies and delay costs. Under the previous regulatory regime, local government authorities were required to ensure that Aboriginal cultural heritage was considered in the planning process. It did not, however, establish a process for doing this, and different standards could be required for similar projects by Aboriginal groups on the Schedule of Local Aboriginal communities.<sup>35</sup>

#### **Uncertainty and delay for land-users**

A lack of clear processes would also create uncertainty for developers and other land-users, who may or may not continue to consult with Aboriginal stakeholders.

Aboriginal heritage places are neither immediately obvious nor identifiable as being of cultural value by those without specific knowledge or training. Many Aboriginal places are located below the surface of the ground, as a result of processes of ageing or ground soil movement, and may not be uncovered until significant ground disturbance commences.<sup>36</sup>

The Act specifies certain scenarios in which a CHMP must be prepared (see Section 2.4.1), however, these scenarios only cover a small number of the CHMPs conducted each year. The Regulations specify the triggers for most CHMPs, and thus, without the Regulations, developers may be uncertain as to when a cultural heritage assessment is required, with implications including that they may undertake assessments for more development sites than necessary, or not undertake them at all. Similarly, the CHMP standards contained in the Regulations provide guidance as to what should be contained in an assessment. Without these standards, the findings and recommendations of an assessment may not have

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<sup>35</sup> Specified in the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

<sup>36</sup> Advice provided by AV.

adequately addressed how to manage any Aboriginal cultural heritage that was discovered. The possible implications of inadequate assessments are that there is a greater risk of inadvertent damage to Aboriginal cultural heritage, and that Aboriginal communities may not be sufficiently consulted, which may in turn mean that they are less likely to ultimately consent to the activity in question or may take longer to provide consent than would otherwise be the case.

Uncertainty resulting from a lack of triggers and standards for an assessment may lead to costly delays in development. According to VicRoads,<sup>37</sup> one four week delay occurred on a major project every two years (based on an average delay penalty of \$250,000 per week (in 2001 dollars) on major contracts) due to Aboriginal cultural heritage regulations, which equated to a cost of \$4.3 million net present value over ten years. This was based on general estimates of operations in 'normal' weather conditions.

### **3.3 The base case**

The base case is the situation where the Regulations are allowed to sunset and are not re-made, however, the Act would still be in place.

#### **3.3.1 Cultural Heritage Management Plans (CHMPs)**

Under the base case, those wishing to undertake high impact activities in areas of cultural heritage sensitivity would not need to complete a CHMP unless one was required by:

- the Minister directed them to prepare a CHMP (assumed to be zero per year in the base case<sup>38</sup>)
- an environmental effects statement under the Environment Effects Act 1978 (assumed to be one per year under the base case<sup>39</sup>)
- an impact management plan or comprehensive impact statement under the Major Transport Projects Facilitation Act 2009 (assumed to be zero per year under the base case<sup>40</sup>)
- a certified PAHT (assumed to be 10 per year under the base case).<sup>41</sup>

Of the 683 CHMPs undertaken each year, an analysis of previous years' CHMP volumes suggests that in the absence of the current regulations, 11 CHMPs would have been required under the Act.<sup>42</sup> The 11 CHMPs that are triggered by the Act each year are attributed to the Regulations as follows:

- Most of the cost of preparing the 11 CHMPs required under the Act is attributed to the Regulations,<sup>43</sup> but the implementation of the management conditions are not.<sup>44</sup> This is because the management conditions are recommended through the preparation of the

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<sup>37</sup> The Allen Consulting Group, 'RIS on Aboriginal Heritage Regulations', 2007.

<sup>38</sup> Based on previous years' data on triggers for CHMPs provided by AV.

<sup>39</sup> Based on previous years' data on triggers for CHMPs provided by AV.

<sup>40</sup> Based on previous years' data on triggers for CHMPs provided by AV.

<sup>41</sup> Based on previous years' data on triggers for CHMPs provided by AV.

<sup>42</sup> PwC analysis based on data provided by AV.

<sup>43</sup> Based on information provided in the survey of heritage advisors (see Section 5). According to heritage advisors, 71 per cent of the cost of a CHMP is attributable to the standards in the Regulations.

<sup>44</sup> Based on information provided in the survey of heritage advisors (see Section 5).

CHMP itself (which is triggered by the Act) rather than through the standards within the Regulations.

In addition, approximately 47 CHMPs each year are prepared voluntarily. The entire cost of undertaking the CHMPs that are voluntary represents a cost under the base case.

### *3.3.2 Prescribed forms*

Under the base case, there would be no prescribed forms for the following:

- Maps in a Cultural Heritage Agreement.
- Aboriginal Cultural Heritage Land Management Agreements (ACHLMAs).
- Reports to the Aboriginal Heritage Council regarding Aboriginal Ancestral Remains in custody of public entities and universities.
- Applications for certification of a Preliminary Aboriginal Heritage Test.
- Applications for registration of Aboriginal Intangible Heritage.
- Application for registration as a Registered Aboriginal Party (RAP).

It is unclear whether this would prevent the functioning of all of these mechanisms, as it is likely the Minister or AV would specify approved forms that would be needed in the absence of prescribed forms in the Regulations.

### *3.3.3 Fees*

The head of power also exists for the Regulations to prescribe the following fees:

- Application for a CHP (assessed by the Department or the relevant RAP).
- Certification of PAHT (assessed by the Department).
- Notices of intention to prepare a CHMP (assessed by the Department or the relevant RAP).
- CHMP applications (assessed by the Department, the relevant RAP or the VAHC).
- Applications for approval of amendment to approved CHMP (assessed by the Department, the relevant RAP or the VAHC).
- Access to the Aboriginal Heritage Register (assessed by the Department).
- Application to the Secretary for advice on whether a record exists on the Register (processed by the Department).

Without the Regulations, no fees could be applied.

## 4 Objectives

The *Subordinate Legislation Act 1994* (section 10) requires a statement of the objectives of the proposed statutory rule or legislative instrument to be included in a RIS. The objective specified should be closely related to the objectives of the Act (primary legislation) authorising the statutory rule (or ‘regulations’) or legislative instrument.

Where regulation is in the form of primary and/or subordinate legislation, the objectives should be explicitly stated in the appropriate legislation. In formulating objectives, it is important to ensure that they accord with the objectives, principles, spirit and intent of the authorising Act (where relevant); and that they are consistent with the objectives of other legislation, statutory rules and government policies.

At a high level, the overarching objective of the *Aboriginal Heritage Act 2006* is to ensure the protection of Aboriginal cultural heritage in Victoria. For the Regulations, the stated objective is focused more on the specific measures being proposed. The objectives of these Regulations are to:

- enable the protection of Aboriginal cultural heritage by creating processes that:
  - target the requirements of the Act only at activities that may have a high impact in an area of cultural sensitivity; and
- facilitate the preparation of:
  - CHMPs that can be evaluated by Government and RAPs, without requiring significant re-work
  - consistent and rigorous ACHLMAs
- ensure the consistency and rigour of maps in CHAs and other applications
- maps in CHAs that are consistent and fit-for-use.
- recover costs i so that those parties that give rise to the need for government regulation pay the associated costs.

# 5 Options

## 5.1 Options development

### 5.1.1 Origin of proposed Options

The options in this RIS have been developed with AV with regard to AV data, evidence from academic sources, the experience of users with the Regulations to date, and extensive consultation by AV over the past year, in particular with input from:

- RAPs
- Sponsors
- Government agencies including Parks Victoria and VicRoads
- Representative peak bodies including the Urban Development Institute of Australia, Municipal Associations of Victoria, the Minerals Council of Australia, the Construction Material Processors Association, and the Australian Association of Consulting Archaeologists Incorporated.
- heritage advisors.

Perspectives regarding the Regulations, in particular the CHMP triggers and standards, differ between RAPs, heritage advisors and sponsors. RAPs generally considered the number of triggers for CHMPs to be inadequate, while most heritage advisors and sponsors considered them to be over-burdensome. There was some agreement that the standards for a CHMP were often unclear, too prescriptive and inflexible. There was also broad consensus that the regulatory framework provided a substantial improvement to what was in place prior to 2007. More information on the outcomes from consultation can be found in Appendix A.

Some aspects of the Regulations, for example Aboriginal Cultural Heritage Land Management Agreements and Aboriginal Intangible Heritage Agreements, have only been recently introduced and have experienced minimal activity to date.

### 5.1.2 Decision-making process to determine Options

The process that was used by AV to determine the Options is as follows:

- Identify potential improvements to the Regulations suggested by stakeholders or through AV internal processes.
- Determine whether change is feasible and in line with the principles and objectives of the Act.
- Consult resources to determine the potential impact, including:
  - CHMP data
  - geospatial and geographic mapping
  - data and information from other Departments (in particular, the Department of Environment, Land, Water and Planning).

- Develop a list of high impact activities based on each development activity's impact on the land and possible Aboriginal cultural heritage in the area. In particular, this list reflects the extent of development works, including:
  - activity size
  - landforms usually associated with the activity type
  - the extent and depth of ground disturbance
  - the quantity of each activity type per year.

## 5.2 Options

All Options retain the broad regulatory framework. In addition to maintaining the existing Regulations (Option 1), Options 2 and 3 involve two decision choices:

- Altering the triggers for a CHMP.
- Updating the standards for a CHMP (which affect the prescribed content of a CHMP and whether it involves a desktop, standard or complex assessment).

These two elements of the Regulations are the primary determinants of whether Aboriginal cultural heritage is protected through the regulatory framework, and as such, are the focus of the Options. In summary, the Options involve:

- Option 1: Re-make the Regulations as they are presently.
- Option 2: Re-make the Regulations as in Option 1 and provide for targeted changes to the triggers for a CHMP to ensure better protection of Aboriginal heritage and better outcomes for land-users and sponsors.
- Option 3: Re-make the Regulations as in Option 1, but amend the CHMP guide to provide greater clarity to CHMP sponsors and RAPs regarding the standards required for CHMPs.

The Options address the key elements of the Regulations – namely the triggers and standards for a CHMP – to improve the protection of Aboriginal cultural heritage and avoid unnecessary burden. There are some elements of the Regulations that AV has chosen not to significantly amend. In particular, some stakeholders have previously expressed concerns about the high proportion of CHMPs requiring complex assessments. Complex assessments are required if the desktop and standard assessments are unable to determine the extent, nature or significance of the Aboriginal cultural heritage in the area. Natural environmental processes bury objects deposited in the past and as Victoria has a long Aboriginal history, the majority of Aboriginal cultural heritage is located in a subsurface context. As such, AV considers that it is appropriate that most CHMPs involve a complex assessment as a ground survey alone cannot establish the extent of Aboriginal cultural heritage in an activity area. AV has committed to improving guidance as to when a complex assessment is required. Although this may marginally reduce the number of complex assessments prepared each year, it is still appropriate that complex assessment are prepared in most instances.<sup>45</sup>

### 5.2.1 Option 1: Re-make the Regulations

Option 1 involves re-making the Regulations as is (see Section 2.5).

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<sup>45</sup> Based on information provided by AV.



The existing Regulations are made under sections 47 and 194 of the *Aboriginal Heritage Act 2006*. As discussed, the objectives of the Regulations are to specify the circumstances in which a cultural heritage management plan is required, prescribe standards for the preparation of cultural heritage management plans and agreements, and prescribe a range of fees (fees are discussed in a subsequent chapter).

## **Cultural heritage management plans**

### **Circumstances in which a plan must be prepared**

A cultural heritage management plan is required for an activity if:

- all or part of the activity area for the activity is in an area of cultural heritage sensitivity that has not previously been significantly disturbed; and
- all or part of the activity is a high impact activity.

An area of cultural heritage sensitivity is an area in which Aboriginal cultural heritage is, or is likely to be, present. Division 3 of Part 2 of the Regulations sets out these areas, based on analysis of where known places are located in the database. This database has been developed over forty years, and includes information such as the proximity of an Aboriginal place to a waterway. The Regulations also make provision for prescribing areas of cultural heritage sensitivity in Schedule 1.

Numerous planning overlays affect similar parts of the state to the 'areas of cultural heritage sensitivity' in the Regulations. Most notable would be the suite of environment and landscape overlays (Environmental Significance Overlay, Vegetation Protection Overlay, Significant Landscape Overlay), which normally include planning controls for land near waterways, lakes or swamps, or in coastal environments. The areas covered by these overlays vary from council to council, may cover much larger or smaller areas than is appropriate for the protection and management of Aboriginal cultural heritage, and exist separately for a variety of different purposes.

A high impact activity is an activity that may have a high impact on Aboriginal cultural heritage. Examples of high impact activities under the Regulations include certain construction or building works; an activity for which an earth resource authorisation is required; certain timber production; and subdivisions into three or more lots if a dwelling may be constructed on each of the lots.

A cultural heritage management plan is not required for exempt activities, such as building alterations, demolitions or removals; extensions to a dwelling; construction of one or two dwellings; construction of buildings ancillary to a dwelling such as a storage shed, garage, pool, fence or water tank; certain emergency works; subdivision of an existing building; sea-bed development and minor works.

These exempt activities were chosen because they were considered likely to have little or no impact on Aboriginal cultural heritage (minor works), are unavoidable (such as emergency activities), or are activities where cultural heritage issues should have been considered at an earlier stage (such as a single house development, where a plan is potentially required earlier at the subdivision stage).

### **Standards for conduct of an assessment**

When a heritage advisor carries out an assessment of an area to determine the nature of any Aboriginal cultural heritage present in the area (for the purposes of a CHMP or ahead of a CHP application), the assessment must comply with the prescribed standards.

To perform a desktop assessment, the advisor must access relevant information in the Victorian Aboriginal Heritage Register, identify and determine the relevant geographic area, and review reports, published work, historical and ethno-historical accounts of Aboriginal occupation, the landforms or geomorphology, and the history of the use of the area.



If it is possible that Aboriginal cultural heritage could be found in the area, a standard assessment is required. To perform a standard assessment, a ground survey must be conducted.

If it is necessary to identify the extent, nature and significance of the Aboriginal cultural heritage in the area, a complex assessment is required. To perform a complex assessment, a disturbance or excavation of all or part of the area must be conducted, supervised by a person appropriately qualified in archaeology. Controlled manual excavation must be used before any other disturbance or excavation is carried out. If machinery is used, it must be conducted on a detailed stratigraphic basis. If the use of machinery results in the finding of occupation deposits or features, they must be uncovered and assessed by a controlled manual excavation.

### Standards for content of a cultural heritage management plan

A cultural heritage management plan must include certain content, see Box 3.1. This content is similar to previous Aboriginal Affairs Victoria guidelines.

#### **Content of Cultural Heritage Management Plans**

A cultural heritage management plan must include:

- a statement about which section of the Act required the plan to be prepared, or, if required to be prepared by the Regulations, a statement of the reasons why the Regulations required preparation of the plan;
- the name of the sponsor and heritage advisor, and the name of each Registered Aboriginal Party and its representatives;
- a copy of the sponsor's notice of intention to prepare a CHMP, and a copy of the RAP's notice of intention to evaluate the plan;
- a description of the activity and the activity area including a map in a form approved by the Secretary;
- the results of the desktop assessment, and if it is not possible that Aboriginal cultural heritage could be found in the area, the reasons for that decision;
- if a standard assessment is undertaken, and the assessment is unable to identify Aboriginal cultural heritage in the area, the reasons for that decision;
- the method by which Aboriginal cultural heritage was assessed, and whether that method was agreed with the Registered Aboriginal Party;
- the names of persons involved in the assessment;
- a summary of information, if any, provided by a member of a relevant Registered Aboriginal Party or other person;
- the results of the assessment including a description and location of Aboriginal cultural heritage that is found, identification of any problems in completing the assessment, and recommendations to address any problems, in completing the assessment;
- a statement of how matters required by the Act were considered;
- recommendations for measures to be taken to manage and protect heritage identified in the assessment;
- how the sponsor and the Registered Aboriginal Party will resolve any disputes in relation to implementation of an approved CHMP or the conduct of the activity; and
- if the activity is a subdivision, the sponsor's description of how each lot will be used or developed, or the use or development permitted by the planning scheme.

### Maps in Cultural Heritage Agreements

A map included in a cultural heritage agreement must include the location of the boundaries of the land, a description of what the map represents, a legend, a scale, an arrow indicating north, topographic features and a small diagram showing the location of the area in relation to the nearest town. If coordinates are shown, they must be standard coordinates. Standard coordinates are required to facilitate inclusion of the agreement on the Aboriginal Affairs Victoria Register and on land title.

### Fees

Fees are part of the Regulations are considered separately in Section 8 of this RIS.

### Approved forms

The Regulations set of a variety of approved forms.

## 5.2.2 Option 2: Targeted changes to triggers for a CHMP

Option 2 is to re-make the Regulations with the following changes to the triggers for a CHMP. The proposed changes, the rationale for making them, and decision-making process are shown in

Table 8.

**Table 8: Changes to CHMP triggers proposed in Option 2**

Reg. # <sup>46</sup>	Description of change	Rationale <sup>47</sup>	Decision-making process <sup>48</sup>
5	Expand the definition of an area of cultural heritage sensitivity to include other parks and reserves managed for conservation purposes.	AV identified the definition in the Regulations for Parks excludes nature conservation areas, which are more likely to be associated with intact Aboriginal cultural heritage.	Change based on stakeholder consultation. AV investigated several options for the definition of park, and determined the proposed definition sufficiently accounts for land conserved for its to minimal past land use.

<sup>46</sup> Based on the regulation numbers in the proposed Regulations.

<sup>47</sup> Information provided by AV.

<sup>48</sup> Information provided by AV.

Reg. # <sup>46</sup>	Description of change	Rationale <sup>47</sup>	Decision-making process <sup>48</sup>
5	Clarify the definitions of waterways to include channelised sections.	AV has noted that stakeholders, including land users and developers, have queried the definition of waterway included in the Regulations. Channelised sections generally follow the original alignment of the waterway, and so the associated area of cultural heritage sensitivity remains relevant.	Change based on a submission to the discussion paper and stakeholder consultation. As an alternative, AV considered clarifying that artificially manipulated sections of watercourses should not be areas of cultural heritage sensitivity. AV believes artificially manipulated sections should be areas of cultural heritage sensitivity, because: <ul style="list-style-type: none"> <li>artificially manipulated sections generally follow the natural alignment of the watercourse</li> <li>land within 200m of these sections remains more likely to be associated with Aboriginal cultural heritage irrespective of the impacts to the watercourse itself</li> <li>Land disturbed through the construction of channelised sections is not an area of cultural heritage sensitivity. This is because land that's been previously subject to significant ground disturbance is not an area of cultural heritage sensitivity under the Regulations.</li> </ul>
28, 34, 35, 36, 37, 39, 40, 41, 55	Rely on more recent geology data (from GeoVic map book) to update maps.	AV identified an opportunity to rely on more accurate geological mapping data to ensure that CHMPs are undertaken only when necessary.	Change based on AV's identification of an improvement, and a submission to the discussion paper. AV investigated options to rely on digital data which may be refined over time. AV identified such digital data is not suitable to be incorporated into the Regulations, and that the published map book is most appropriate.
46 (1) (b)	Include development of residential villages as a high impact activity.	In its submission to the discussion paper for the review of the Regulations, the MAV noted that residential village is not defined as a high impact activity in the Regulations.	Based on a submission to the discussion paper by the MAV, who considered that the current definition was inconsistent with other activities that are classified as high impact.

Reg. # <sup>46</sup>	Description of change	Rationale <sup>47</sup>	Decision-making process <sup>48</sup>
<b>46 (1) (b)</b>	Include Residential Building as a high impact activity.	Residential building includes residential hotels, residential aged care-facilities, boarding houses, and nursing homes. These activities would cause comparable ground disturbance as other similar development activities (such as dwellings and retirement villages) it is appropriate impact to Aboriginal cultural heritage is considered for these developments.	Members of the Victorian Civil Administrative Tribunal advised AV should consider including 'residential building' as a high impact activity to ensure consistency in listing those activities under the Victorian Planning Provisions most at risk of causing harm to Aboriginal cultural heritage.
<b>46 (1) (b)</b>	Include the construction of fuel breaks that require a permit to remove native vegetation.	In its submission to the discussion paper for the review of the Regulations, Parks Victoria noted the construction of fuel breaks was not a listed high impact activity although impacts to Aboriginal cultural heritage are likely.	Based on a submission to the discussion paper. AV considered the option that a CHMP is only required for fuel breaks of a certain size, however limiting the definition to fuel breaks which require a permit to remove native vegetation provides the best outcome for heritage while ensuring the Regulations are practical. A native vegetation removal permit is required for any impact, including lopping of limbs, to native vegetation, although some exemptions apply.
<b>44 (1) (f)</b>	Exempt walking and bicycle tracks less than 500 metres long from requiring a CHMP.	In its submission to the discussion paper for the review of the Regulations, Parks Victoria argued a CHMP should not be required for small walking tracks which are unlikely to cause harm to Aboriginal cultural heritage. AV determined a similar exemption for small bicycle tracks would be reasonable, and that activities of type do not impact Aboriginal cultural heritage.	This change is based on a submission to the discussion paper, to reduce burden for land custodians such as Parks Victoria. The 500 metres threshold, proposed by Parks Victoria, is based on exempting smaller-length tracks and is chosen to ensure simplicity for land-users.

### **5.2.3 Option 3: Re-make the Regulations with updates to the standards for CHMP assessments**

Option 3 involves non-regulatory changes to further clarify the standards for CHMP assessments. This will involve amendments to various approved forms, practice notes and guides, as shown in Table 9. The process used by AV to formulate the changes in Option 3 is shown in Section 5.1.

**Table 9: Changes to CHMP standards proposed in Option 3**

Where	Regulation, Part or Schedule number	Description of change	Rationale <sup>49</sup>	Decision-making process
<b>Approved forms, practice notes and guide to preparing a CHMP</b>	<b>Part 3</b>	Amend practice notes and guides to provide greater clarity to ensure that the information included in the desktop assessment explains what the information may mean for the likelihood of Aboriginal cultural heritage in the activity area.	A submission to the discussion paper for the review of the Regulations queried the relevance of information detailed in some desktop assessments in determining likelihood of finding Aboriginal cultural heritage in the activity area.	The prescribed form for content of a CHMP is appropriately limited, with more detailed requirements presented in the approved form. AV considered that updating the content of the approved form and guide to preparing a CHMP, would best address this concern.
<b>Guide to preparing a CHMP</b>	<b>Part 3</b>	Amend the CHMP guide to provide greater clarity around when a CHMP should progress to the next tier of assessment (from a desktop to a standard assessment, or from a standard assessment to a complex assessment)	In submissions to the discussion paper for the review of the Regulations, key stakeholders noted inconsistencies in advice from heritage advisors when a CHMP should progress through assessment tiers in the interpretation of Regulation 60, particularly when a standard assessment should progress to a complex assessment.	AV investigated the prescribed form for the content of a CHMP and determined the thresholds for progressing through assessments was clear and appropriate. AV therefore determined improvements to the guide to preparing a CHMP would provide greater clarity as to the expected considerations in deciding to progress to a higher assessment.

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<sup>49</sup> Information provided by AV.

Where	Regulation, Part or Schedule number	Description of change	Rationale <sup>49</sup>	Decision-making process
<b>Guide to preparing a CHMP</b>	<b>Sch. 2</b>	Provide greater clarity in the CHMP guide as to what the cumulative impacts statement should include. This will be detailed in the guide to preparing a CHMP, and will include reasoning behind its inclusion in the approved form, and examples of what is required.	Key stakeholders requested greater clarity regarding the cumulative impacts statement which must form part of a CHMP. The requirement for a cumulative impact statement in the CHMP was introduced in 2016.	AV determined the guide to preparing a CHMP is the most appropriate resource for outlining the expected considerations in developing the cumulative impacts statement, allowing more detailed explanation, and examples, than could be presented in the Schedules of the Regulations.
<b>Guide to preparing a CHMP</b>	<b>Sch. 2</b>	Provide greater clarity in the CHMP guide to ensure that management conditions are not inconsistent with the conclusions of the assessment. Justification of management conditions using the conclusions of the assessment will result in more relevant management conditions and potentially a reduction in management costs in some instances.	In submissions to the discussion paper for the review of the Regulations, key stakeholders noted management conditions can sometimes appear inconsistent (ie the rationale was not clear) with the results of the assessment.	Management conditions in a CHMP should account for the unique impacts to heritage proposed by the activity. In making its decision, the approval body must consider whether the management conditions are appropriate to the impact. AV will provide greater clarity in the guide to preparing a CHMP regarding how management conditions should be justified using the conclusions of the CHMP, and that this justification should be detailed in the CHMP.

## 6 Analysis

This chapter looks at the costs and benefits of the options discussed in the previous chapter. The costs and benefits of each option are calculated in comparison to the no regulation base case.

The focus of the RIS is on the higher impact requirements around CHMPs rather than more minor requirements around prescribed forms, for which the burden is likely to be either incorporated into other requirements, or be insignificant compared to the key mechanisms.

As this RIS is assessing Regulations that are ‘sunsetting’, all options (including remaking the current Regulations) must be compared to the base case; that is, situation where the Aboriginal Heritage Regulations were not remade, however, the *Aboriginal Heritage Act 2016* would still be in place. See Section 3.3 for more detail on the base case.

### 6.1 Data

Data was primarily collected from AV or through consultations with key stakeholders such as RAPs, heritage advisors, sponsors and local government, conducted over late-2017. Consultation with stakeholders was primarily undertaken via surveys. 270 stakeholders were surveyed, and 15 responded in sufficient detail to consider those responses complete. Further detail on the consultation is provided in Appendix A.

#### 6.1.1 Key assumptions

A number of assumptions were needed to undertake the cost-benefit analysis and fee estimates:

- Sponsor time is costed at average weekly earnings.
- For the purposes of the cost benefit analysis, 2016 volumes of CHMPs have been used where the available 2017 data does not show a significant increase. Where the 2017 volumes are meaningfully different (i.e. as a result of the amendments to the Act and Regulations in mid-2016), 2017 data have been used. (NB. This is only the case for amendments to CHMPs.)
  - In both cases, the cost-benefit analysis has modelled a constant number of CHMPs taking place over 10 years. There have been fluctuations in the number of CHMPs over the past 10 years and as such, modelling any increase or decrease in numbers would represent false precision. None of the Options involve changes that are anticipated to systematically cause CHMP numbers to vary from the Year 1 volume over the 10 year period.<sup>50</sup>
- There was significant variation in the 15 responses regarding the time and cost of activities, in particular, the cost of engaging a heritage advisor to prepare a CHMP and the cost of management conditions. The results of the survey to councils and sponsors were used to ‘sense-check’ data points with significant uncertainty. As an indication, the lowest cost of a CHMP with a complex assessment observed was \$2,200, while the highest was \$80,000.
- The specific case with the highest cost was considered by AV to be unusually complex and resource intensive, and so not representative of the typical cost of preparing a CHMP.

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<sup>50</sup> PwC analysis based on advice and data from AV.



Therefore, while it is feasible that in some relatively infrequent circumstances, such as for large infrastructure projects such as construction of freeways and public transport infrastructure, these costs could be up to around \$2 million, the analysis in this RIS excludes this outlier and uses a simple average of the costs noted in the remaining 14 responses.

- The resulting estimate is intended to provide a more credible estimate of the typical cost of an individual CHMP, and of the expected annual costs to the sector of complying with the Regulations (on the assumption that large outliers such as the one noted above are rare).

## **6.2 Benefits of the options**

### **6.2.1 Benefits of the regulatory framework**

The Regulations primarily protect Aboriginal cultural heritage by setting out the circumstances in which a CHMP must be prepared and the standards for the preparation of CHMPs. How directly this translates into the protection of Aboriginal cultural heritage is hard to determine. In their assessment of the benefits of the Regulations, both heritage advisors and RAPs ranked 'ensuring a consistent approach is taken to managing Aboriginal cultural heritage' higher than 'avoiding or reducing inadvertent damage to Aboriginal cultural heritage' or 'providing appropriate heritage management recommendations'. This was reflected in the responses to the qualitative questions, which stated that the CHMP process was often more focused around paperwork. Options 2 and 3 attempt to address this by closer linking the recommendations from a CHMP to the assessments.<sup>51</sup>

The CHMP process means that assessment occurs before the planning permit can be issued, providing an opportunity to avoid harm (through re-design), to minimise impacts or establish an agreed process to manage harm. No further monitoring or consents are required. Assessment is targeted at high impact activities in areas where there is likely to be Aboriginal cultural heritage. The 'triggers' for a CHMP are designed to target developments involving high impact activities in areas where Aboriginal cultural heritage is most likely to be present.

The CHMP process seeks to steer the management of Aboriginal cultural heritage towards protection by enshrining the hierarchy of 'avoid, minimise, salvage'. The Act states that, when assessing whether a CHMP relating to an activity is to be approved, consideration must be given to:

- whether the activity will be conducted in a way that avoids harm to Aboriginal cultural heritage
- if it does not appear to be possible to conduct the activity in a way that avoids harm, whether the activity will be conducted in a way that minimises harm to Aboriginal cultural heritage, and
- any specific measures required for the management of Aboriginal cultural heritage likely to be impacted by the activity, both during and after the activity. This may include salvage, however Aboriginal cultural heritage is to be salvaged only when it is not possible for that cultural heritage to be preserved in situ.

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<sup>51</sup> Based on surveys of heritage advisors and RAPs.



### 6.2.2 Quantified benefits of the Regulations

When the CHMP process is successful in identifying and preserving Aboriginal cultural heritage, the benefits are often indirect. One way to quantify these benefits is through the stated values of Aboriginal cultural heritage.

#### Stated values of Aboriginal cultural heritage

Heritage is generally considered to be irreplaceable and therefore it could be argued that it is priceless. Nonetheless, for the purposes of this RIS, we have attempted to develop a proxy of the potential value of Aboriginal cultural heritage and the benefits of the Regulations. Using a 2003 study authored by John Rolfe and Jill Windle<sup>52</sup> on the stated values of Aboriginal cultural heritage to Aboriginal and non-Aboriginal people, a current implied value per place of \$296,739 can be derived. This is primarily based on the value assigned by Aboriginal people, as the study estimated that non-Aboriginal people did not value Aboriginal cultural heritage relative to other forms of land management. The methodology and assumptions behind these findings are discussed further in Appendix C.

Another choice modelling exercise by The Allen Consulting Group in 2005<sup>53</sup> indicated that Australians valued a tightening of development controls and an increase in the number of heritage listings at \$105.90 (\$146.27 in 2018 dollars) per person per year.

As the Rolfe and Windle study focused specifically on Aboriginal cultural heritage, the results of that study should be primary. However, The Allen Consulting Group's study provides a useful check.

### 6.2.3 Non-quantified benefits

There are significant benefits of Aboriginal cultural heritage that cannot be easily quantified. These primarily relate to improved social, psychological, educational and justice outcomes for Aboriginal people.<sup>54</sup> In addition, there are some tourism benefits resulting from the protection of Aboriginal cultural heritage.

#### Societal benefits of Aboriginal cultural heritage

Land is fundamental to Aboriginal people, and is at the core of all spirituality. Aboriginal and Torres Strait Islanders identify themselves through their land areas, and cultural heritage. This is made up of their relationships, stories, language, sacred sites, music, songs, dance, ceremony and visual arts.<sup>55</sup>

The Australian Human Rights Commission noted in 2008 that:<sup>56</sup>

*Maintaining Australia's cultural heritage, in all its many forms, has both a human capital and an economic capital dividend. Respecting, nurturing and supporting intangible cultural heritage has clear social benefits (happy, better functioning, more vibrant*

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<sup>52</sup> John Rolfe and Jill Windle, 'Valuing the protection of Aboriginal cultural heritage sites', *The Economic Record*, Vol. 79, Special Issue, pp. 85-95. While this study is more than a decade old, given the scarcity of other studies examining the preferences of Victorians towards the value of Aboriginal cultural heritage, AV considers it is reasonable to consider the results of this study as a useful indication of the value of Aboriginal cultural heritage.

<sup>53</sup> The Allen Consulting Group report prepared for the Heritage Chairs and Officials of Australia and New Zealand, 'Valuing the priceless: The value of historic heritage in Australia', Research Report 2, 2005.

<sup>54</sup> The stated value approach to quantifying benefits may capture some level of social, psychological, education and justice outcomes, however, these aspects were not directly mentioned by participants in Rolfe and Windle's choice modelling exercise.

<sup>55</sup> australia.gov.au, 'Australia's Indigenous cultural heritage', <http://www.australia.gov.au/about-australia/australian-story/austn-indigenous-cultural-heritage>

<sup>56</sup> Australian Human Rights Commission, 'Submission – Ratification of 2003 UNESCO Convention for Safeguarding of Intangible Cultural Heritage', 2008, <https://www.humanrights.gov.au/submission-ratification-2003-unesco-convention-safeguarding-intangible-cultural-heritage-2008>

*communities) as well as health benefits (freedom of cultural expression and to practice aspects of traditional life builds social and emotional well-being, which directly improves population-level health outcomes – an important economic saving to the health system).*

According to Mike Dockery of Curtin University, Aboriginal Australians who are happiest, healthiest, have low rates of contact with the corrections system, and good educational outcomes are those with a strong attachment to their culture and a strong Aboriginal identity.<sup>57</sup> An ABS publication showed that in remote areas, Aboriginal young people (aged 15-24) who spoke an Aboriginal language were less likely than other Aboriginal youth to have engaged in risky alcohol use (8 per cent compared to 18 per cent) and illicit substance use (16 per cent compared to 26 per cent).<sup>58</sup> While this finding is most directly relevant for Aboriginal people in remote areas, it indicates the positive impacts of connection with culture, heritage and language.

### **Tourism benefits of Aboriginal cultural heritage**

The protection of places of Aboriginal cultural heritage significance protected can bring direct benefits to the Victorian economy, if tourists choose to travel to or within Victoria as a result of these places. For example:

- in 2004, tourists who visited a heritage place spent an estimated \$7.8 billion (\$10.8 billion in 2017 dollars) on trips in which they visited at least one historic heritage site<sup>59</sup>
- in the year ending in June 2013, 73,800 international visitors and 66,000 domestic overnight visitors to and within Victoria participated in a local Aboriginal experience in the state<sup>60</sup>
- according to the Department of Economic Development, Jobs, Transport and Resources, in the year ending September 2017, international tourists each spent around \$2,700 on average per person in Victoria,<sup>61</sup> interstate domestic tourists spent \$556 on average per person, and day-trip tourists spent \$98 on average per person.<sup>62</sup>

It is difficult to determine how much tourism spending is attributable to the presence of Aboriginal cultural heritage places. Of those international and interstate visitors that participated in a local Aboriginal experience, some may choose not to visit Victoria if these experiences weren't available, while others may choose to go to another attraction in Victoria instead.

While the direct impacts of these benefits are difficult to rigorously quantify, they are real and should be considered as part of the assessment of the Options.

## **6.3 Costs of each option**

The significant costs of each option are set out below in relation to four main cost categories:

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<sup>57</sup> NSW Parliamentary Library Research Service, 'e-brief: Indigenous disadvantage: Can strengthening cultural attachment help to close the gap', 2011, [http://alc.org.au/media/74358/parliament%20e-brief%20aboriginal%20disadvantage\[2\].pdf](http://alc.org.au/media/74358/parliament%20e-brief%20aboriginal%20disadvantage[2].pdf)

<sup>58</sup> ABS, 'Aboriginal and Torres Strait Islander Wellbeing: A focus on children and youth', Cat. 4725.0, 2011

<sup>59</sup> The Allen Consulting Group report prepared for the Heritage Chairs and Officials of Australia and New Zealand, 'Valuing the priceless: The value of historic heritage in Australia', Research Report 2, 2005.

<sup>60</sup> Tourism Victoria, Victorian Aboriginal Tourism Development Strategy 2013-2023.

<sup>61</sup> Department of Economic Development, Jobs, Transport and Resources, 'Victoria's international tourism performance, [http://www.business.vic.gov.au/\\_data/assets/pdf\\_file/0007/1597525/Tourism-International-Infographic-September-2017-FINAL.pdf](http://www.business.vic.gov.au/_data/assets/pdf_file/0007/1597525/Tourism-International-Infographic-September-2017-FINAL.pdf)

<sup>62</sup> Department of Economic Development, Jobs, Transport and Resources, 'Victoria's domestic tourism performance, [http://www.business.vic.gov.au/\\_data/assets/pdf\\_file/0009/1551753/Tourism\\_Domestic\\_Infographic\\_YEJun17\\_FINAL.PDF](http://www.business.vic.gov.au/_data/assets/pdf_file/0009/1551753/Tourism_Domestic_Infographic_YEJun17_FINAL.PDF)

- The cost to land-users to undertake a CHMP, including providing an NOI to prepare a CHMP, and then conducting a CHMP with desktop, standard or complex assessments.
- The cost to land-users of implementing the management conditions (avoidance, minimisation and salvage) from a CHMP.
- Government costs to monitor and enforce the Regulations, and to conduct evaluations.
- RAP costs to conduct evaluations.
- Costs that have not been quantified in the RIS, such as to undertake ACHLMAs, the burden imposed by prescribed forms, and the costs of reduced or delayed development as a result of the requirement to undertake a CHMP. See Section 6.4 for further discussion of these costs, and why they have not been quantified.

The cost data is primarily based on the responses of 15 heritage advisors who responded to a survey (out of a total of approximately 200 active heritage advisors), with responses from a separate survey of sponsors being used as a check.

### *6.3.1 Option 1: Re-make the Regulations*

#### **The cost to land-users to prepare a CHMP**

This section shows the estimated costs to land-users to prepare a CHMP. As discussed in Section 3.3, these costs do not include the costs of those CHMPs prepared voluntarily, however, do include the cost of preparing the 11 CHMPs required by the Act (as the standards in the Regulations dictate most of the cost of the CHMP).

Note that the estimated costs to Government and RAPs to undertake the evaluation of CHMPs are shown in the Fees section, and are considered as transfers as they are paid (through the fees) by sponsors.

#### **Notice of Intention to prepare a CHMP**

If a sponsor believes that they are conducting a high impact activity, in an area of cultural heritage sensitivity, they provide a NOI to prepare a CHMP to the RAP (or in the case of areas with no RAP assigned), to AV. According to surveys of heritage advisors and sponsors undertaken for this RIS, the Regulations impose a cost of approximately \$299 for a sponsor to commission an NOI. The number of NOIs per year is anticipated to be similar to current levels at around 759 NOIs per year,<sup>63</sup> implying a total attributable cost per year of \$161,102 per annum.

#### **CHMPs with desktop, standard and complex assessments**

If the Sponsor decides to proceed with the CHMP, the first step is to conduct a desktop assessment. If it is possible that Aboriginal cultural heritage could be found in the area, a standard assessment is required as part of a CHMP. If, following a standard assessment, it is necessary to identify the extent, nature and significance of Aboriginal cultural heritage in an area, a complex assessment is required.

The number and costs of CHMPs by type are summarised in Table 10.

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<sup>63</sup> PwC analysis based on advice and data from AV.

**Table 10: Number and cost of CHMPs, by type (2018 dollars)**

CHMP type	Desktop assessment	Standard assessment	Complex assessment
Anticipated number completed annually due to the Regulations <sup>64</sup>	37 (6% of the total)	88 (14% of the total)	511 (80% of the total)
Average cost of commissioning a heritage advisor <sup>65</sup>	\$5,264	\$15,104	\$28,319
Total sponsor time required <sup>66</sup>	14.5 hours	20.6 hours	32.8 hours
Value of sponsor's time	\$664	\$943	\$1,502
Percentage attributable to the Regulations <sup>67</sup>	71%	71%	71%
Attributable total annual cost	<b>\$155,248</b>	<b>\$1.0 million</b>	<b>\$10.8 million</b>

#### Amendments to CHMPs

A sponsor may apply to amend a CHMP within five years of the CHMP's original approval date. Approximately 36 CHMPs are anticipated to be amended each year.<sup>68</sup> It is estimated that amendments to CHMPs cost approximately 36 per cent of a full CHMP,<sup>69</sup> equating to a weighted (by type) attributable cost of an amended CHMP of \$6,779,<sup>70</sup> and \$244,031 per year.

#### Cost of incomplete CHMPs

It is estimated that for every five CHMPs prepared and completed by land-users, nearly one is abandoned,<sup>71</sup> totaling 123 partially completed CHMPs per year. Assuming that land-users typically reach a standard level of assessment,<sup>72</sup> the average cost of an incomplete CHMP is estimated to be \$11,393 per year, equating to a total cost of \$1.4 million per year. This estimate does not include any construction-related sunk costs from land-users ceasing their development activity (this is addressed in Section 6.4.3).

<sup>64</sup> PwC analysis of advice and data from AV. Note that CHMPs can be conducted voluntarily, and the costs of these CHMPs have not been attributed to the Regulations. Numbers are rounded.

<sup>65</sup> Estimate based on surveys of heritage advisors and sponsors. Note that these costs do not include government or RAP fees.

<sup>66</sup> Estimate based on surveys of heritage advisors and sponsors. Sponsor time for CHMPs with standard assessments and complex assessments includes time taken for desktop assessments (and standard assessments as applicable).

<sup>67</sup> Estimate based on surveys of heritage advisors and sponsors.

<sup>68</sup> Based on the number that have been amended since the introduction of these provisions.

<sup>69</sup> Estimate based on surveys of heritage advisors and sponsors.

<sup>70</sup> Calculation based on weighting the attributable cost of a CHMP by the proportion of CHMPs that are desktop, standard or complex assessments.

<sup>71</sup> Estimate based on survey of heritage advisors.

<sup>72</sup> This is a conservative assumption as it is possible that most incomplete CHMPs would end at the desktop assessment stage. It is unlikely that they would progress past the standard assessment stage, as this involves costly disturbance or salvage of the activity area. If a CHMP is discontinued but an assessment (desktop, standard or complex) has been carried out, the incomplete CHMP must be submitted to the Register.

### Total cost of preparing CHMPs

In total, the attributable cost of preparing CHMPs equates to approximately \$13.8 million per year.

### The cost to implement the management conditions of a CHMP

A CHMP can contain conditions and recommendations for managing and protecting Aboriginal cultural heritage that the sponsor must implement if the CHMP is approved. There are three common categories of recommendations:

- **Avoid harm:** If the sponsor can avoid any harm to the Aboriginal cultural heritage in the activity area, this is the best scenario.
- **Minimise harm:** Where the sponsor conducts the activity in a way that minimises harm to Aboriginal cultural heritage.
- **Salvage:** A salvage excavation may be required where it is not possible to avoid or minimise harm to Aboriginal cultural heritage in the activity area. This may include controlled surface collection or salvage excavation.

Management conditions are not usually put in place if a CHMP only involves a desktop assessment, as this generally indicates that Aboriginal cultural heritage is unlikely be found in the activity area. Table 11 shows the frequency and cost of management conditions imposed by CHMPs.

**Table 11: Frequency and cost of CHMP management conditions (2018 dollars)**

Management condition type	Frequency in total CHMPs <sup>73</sup>	Cost of management conditions <sup>74</sup>		
		Desktop assessment <sup>75</sup>	Standard assessment	Complex assessment
Average cost of avoiding harm	10%	N/A	\$3,825	\$3,889
Average cost of minimising harm	12%	N/A	\$3,315	\$5,929
Average cost of salvage	16%	N/A	\$6,885	\$63,183
Average weighted cost of management conditions <sup>76</sup>	-	N/A	\$1,882	\$11,210
<b>Total annual cost of management conditions</b>	-	<b>N/A</b>	<b>\$149,888</b>	<b>\$5.2 million</b>

<sup>73</sup> PwC analysis based on information provided by AV.

<sup>74</sup> Estimate based on surveys of heritage advisors and sponsors.

<sup>75</sup> Management conditions are not relevant for desktop assessments, as this level of assessment indicates that Aboriginal cultural heritage is unlikely to be found in the activity area.

<sup>76</sup> Calculation based on weighting how often each management condition type occurs.

Note: The number of CHMPs with standard assessments and complex assessments is slightly lower than in Table 10 as management conditions are assumed to only occur for CHMPs that are approved. 92 per cent of CHMPs are estimated to be approved.<sup>77</sup>

The average costs of management conditions are derived from a survey of heritage advisors, and cross-checked against data from the survey of councils. The survey of CHMP sponsors did not provide sufficient responses to include, however, based on the submissions to AV's 2017 discussion paper, some land-users stated that the cost of management conditions could exceed \$100,000.<sup>78</sup>

The data shown in Table 11 excludes one outlier set of responses, which was significantly higher than other responses. Although these costs may not be representative of most projects, it may be typical of the costs of management conditions that are incurred in major infrastructure projects (eg for a freeway, NBN infrastructure or a pipeline), which tend to occur in approximately one in fifteen CHMPs.<sup>79</sup> Thus, the actual total cost of management conditions will be higher than in Table 11.

### Government costs

The costs to government include those relating to monitoring and enforcing compliance with the Regulations, eg ensuring a CHMP is prepared when required. These total approximately \$598,583 per year.

In addition, the government incurs costs conducting evaluations of mechanisms such as CHP applications, PAHTs and CHMPs. These are to be passed on through fees included in the proposed Regulations (which are discussed in Section 8 ) to land-users. Based on the anticipated volumes under Option 2, government evaluation costs total approximately \$2.0 million per year.

### RAP costs

RAPs incur costs conducting evaluations of CHP applications and CHMPs. As with the government costs of evaluation, these are to be recovered through fees included in the proposed Regulations (shown in Section 8), and are ultimately paid by land-users. Based on current volumes, RAP assessment costs total approximately \$376,798 per year.

The total costs of Option 1 over 10 years are shown in Table 12.

**Table 12: Breakdown of the costs of Option 1 (\$ million, 2018 dollars)**

Option 1	10 year total (NPV)	10 year total (nominal)	Annual cost for Years 1 – 10
CHMP processes	116.3	137.9	13.8
Management conditions	44.8	53.1	5.3
Government costs (excl. transfers)	5	6	0.6
Government evaluation costs	16.6	19.7	2.0
RAP evaluation costs	3.2	3.8	0.4

<sup>77</sup> PwC analysis based on information provided by AV.

<sup>78</sup> Urban Development Institute of Australia submission to the AV discussion paper, September 2017.

<sup>79</sup> CHMPs relating to pipelines, roads and the NBN make up eight, seven and less than one per cent of all CHMPs respectively.

Option 1	10 year total (NPV)	10 year total (nominal)	Annual cost for Years 1 – 10
Total	185.9	220.4	22.0

### 6.3.2 Option 2: Re-make the Regulations with targeted improvements to the triggers for a CHMP

The changes proposed as part of Option 2, and their impacts are shown in Table 13.

**Table 13: The effect of changes proposed in Option 2**

Reg. # <sup>80</sup>	Description of change	Effect
5	Expand the definition of an area of cultural heritage sensitivity to include other parks and reserves managed for conservation purposes.	The effect of the proposed change on the number of CHMPs prepared each year will be approximately <b>1.7 more</b> CHMPs prepared per year on average. <sup>81</sup>
5	Clarify the definitions of waterways to include channelised sections.	The proposed change is unlikely to significantly affect the number of CHMPs prepared each year. Clarification of the definition of waterway may reduce the time of CHMP sponsors and heritage advisors in determining whether a CHMP is required for the 429 NOIs to prepare a CHMP triggered by proximity to a waterway each year, however, the actual impact is unknown. <sup>82</sup>
28, 34, 35, 36, 37, 39, 40, 41, 55	Rely on more recent geology data (from GeoVic map book) to update maps.	<b>8.4 more</b> CHMPs per year on average. <sup>83</sup>
46 (1) (b)	Include development of residential villages as a high impact activity.	<b>2 more</b> CHMPs per year on average. <sup>84</sup>
46 (1) (b)	Include Residential Building as a high impact activity.	<b>6 more</b> CHMPs each year on average. <sup>85</sup>
46 (1) (b)	Include the construction of fuel breaks that require a permit to remove native vegetation.	<b>0.5 more</b> CHMPs per year on average. <sup>86</sup>
44 (1) (f)	Exempt walking and bicycle tracks less than 500 metres long from requiring a CHMP.	Minimal impact, as few CHMPs per year have historically been prepared for this activity. <sup>87</sup>

The costs of Option 2 have been estimated using the same methodology as Option 1. Compared to Option 1, there will be 18.6 more CHMPs undertaken in total, as shown in

<sup>80</sup> Based on the regulation numbers in the proposed Regulations.

<sup>81</sup> Based on analysis of historical development activity data by AV.

<sup>82</sup> This is a conservative assumption due to a lack of data. Based on analysis of heritage advisor survey responses, it is probable that there would be a reduction in time required, but the quantum of time reduction is difficult to estimate.

<sup>83</sup> Based on analysis of geospatial and geographic data by AV.

<sup>84</sup> Based on analysis of historical development activity data by AV.

<sup>85</sup> Based on analysis of historical development activity data by AV.

<sup>86</sup> Based on analysis of historical development activity data by AV.

<sup>87</sup> Based on analysis of historical development activity by AV.



Table 8. It is anticipated that under Option 2, there will be a 2.9 per cent growth in the number of CHMPs. This means that:

- 781 NOIs to prepare a CHMP will be undertaken
- 655 CHMPs will be evaluated as a result of the Regulations
- 590 CHMPs will be approved as a result of the Regulations
- 37 CHMPs will be amended each year as a result of the Regulations.<sup>88</sup>

AV also estimates that Option 2 will result in a 2 per cent reduction in the time required to undertake approximately 429 NOIs to prepare a CHMP relating to waterways each year, due to the clarification of the definition of a waterway.<sup>89</sup>

### The cost to land-users to prepare a CHMP

#### Notice of Intention to prepare a CHMP

The cost of commissioning a NOI to prepare a CHMP is anticipated to fall for all 428 NOIs triggered by proximity to a waterway each year, however, the precise effect is unknown, and to be conservative, it has been assumed that there is no quantified reduction in cost, meaning that the cost for all 781 NOIs that are estimated to occur under Option 2 equates to \$165,814 per year.

#### CHMPs with desktop, standard and complex assessments

Compared to Option 1, the proportion of CHMPs with desktop, standard and complex assessments and cost to commission and undertake the assessments is anticipated to stay the same as Option 1 (see Table 10). The costs relating to each type of assessment are shown

**Table 14: Number and cost of CHMPs, by type (2018 dollars)**

CHMP type	Desktop assessment	Standard assessment	Complex assessment
Anticipated number completed annually due to the Regulations <sup>90</sup>	38 (6% of the total)	91 (14% of the total)	526 (80% of the total)
Attributable total annual cost	<b>\$159,789</b>	<b>\$1.0 million</b>	<b>\$11.1 million</b>

#### Amendments to CHMPs

Compared to Option 1, one more CHMP is anticipated to be amended each year, at a cost of approximately 36 per cent of a full CHMP, equating to a weighted (by type) attributable cost of an amended CHMP of \$6,779,<sup>91</sup> and \$251,168 per year.

<sup>88</sup> Based on analysis by PwC and AV using historical data and geospatial mapping.

<sup>89</sup> Based on analysis of heritage advisor survey responses and historical CHMP data by PwC and AV.

<sup>90</sup> PwC analysis of advice and data from AV. Note that CHMPs can be conducted voluntarily, and the costs of these CHMPs have not been attributed to the Regulations. Numbers are rounded.

<sup>91</sup> Calculation based on weighting the attributable cost of a CHMP by the proportion of CHMPs that are desktop, standard or complex assessments.



### Cost of incomplete CHMPs

Compared to Option 1, land-users are anticipated to abandon four more CHMPs before completion each year, totaling 127 partially completed CHMPs per year,<sup>92</sup> at a cost of \$11,393 for each one. This equates to a total cost of \$1.4 million per year.

### Total cost of preparing CHMPs

In total, the attributable cost of preparing CHMPs equates to approximately \$14.2 million per year.

### The cost to implement the management conditions of a CHMP

Compared to Option 1, the per-CHMP cost of management conditions has not changed, however, the number of CHMPs approved each year is anticipated to rise by 2.9 per cent each year to 590 (refer to the start of Section 6.3.2), resulting in an increase in the total attributable cost of management conditions from \$5.3 million to \$5.5 million.

### Government costs

Compared to Option 1, the costs of monitoring and enforcing compliance with the Regulations is unchanged at approximately \$598,583 per year.

The per-assessment cost to government of undertaking assessments does not change compared to Option 1, however, the number of assessments the government is anticipated to undertake rises by approximately 2.9 per cent (see the start of 6.3.2) in relation to the total number of CHMPs prepared, leading to minimal increase in cost, however, remaining at around \$2.0 million per year.

### RAP costs

Compared to Option 1, RAPs' per assessment cost would be unchanged, but the number of assessments that are anticipated to be conducted increases by approximately 2.9 per cent, leading to a higher total cost of approximately \$387,222 per year.

The total costs of Option 2 over 10 years are shown in Table 12.

**Table 15: Breakdown of the costs of Option 2 (\$ million)**

Option 2	10 year total (NPV)	10 year total (nominal)	Annual cost for Years 1 – 10
CHMP processes	119.7	141.9	14.2
Management conditions	46.1	54.6	5.5
Government costs (excl. transfers)	5	6	0.6
Government assessment costs	16.9	20.0	2.0
RAP assessment costs	3.3	3.9	0.4
<b>Total</b>	<b>190.9</b>	<b>226.4</b>	<b>22.6</b>

<sup>92</sup> This is based on the assumption that the same proportion of CHMPs will be abandoned before completion each year as currently, combined with the updated number of CHMPs undertaken each year (see the start of Section 6.3.2).

### 6.3.3 Option 3: Re-make the Regulations with updates to the standards for CHMPs

The changes proposed in Option 3, and their anticipated impacts are shown in Table 16.

**Table 16: The effect of changes proposed in Option 3**

Where	Relating to Reg. #	Description of change	Effect <sup>93</sup>
<b>Approved forms, practice notes and guide to preparing a CHMP</b>	<b>Part 3</b>	Amend practice notes and guides to provide greater clarity to ensure that the information included in the desktop assessment explains what the information may mean for the likelihood of Aboriginal cultural heritage in the activity area.	A reduction in the time heritage advisors need to prepare a desktop assessment, however, the quantitative effect is uncertain. <sup>94</sup> In addition, CHMPs prepared will be clearer, increasing the confidence in the system.
<b>Guide to preparing a CHMP</b>	<b>Part 3</b>	Amend the CHMP guide to provide greater clarity around when a CHMP should progress to the next tier of assessment (from a desktop to a standard assessment, or from a standard assessment to a complex assessment)	Reduction in the number of CHMPs which require a complex assessment from 80 per cent to 75 per cent compared to Option 1. <sup>95</sup>
<b>Guide to preparing a CHMP</b>	<b>Schedule 2</b>	Provide greater clarity in the CHMP guide as to what the cumulative impacts statement should include. This will be detailed in the guide to preparing a CHMP, and will include reasoning behind its inclusion in the approved form, and examples of what is required.	Better management outcomes for Aboriginal cultural heritage, however, no quantifiable impact.
<b>Guide to preparing a CHMP</b>	<b>Schedule 2</b>	Provide greater clarity in the CHMP guide to ensure that management conditions are not inconsistent with the conclusions of the assessment. Justification of management conditions using the conclusions of the assessment will result in more relevant management conditions and potentially a reduction in management costs in some instances.	Provide sponsors greater clarity around the CHMP process, resulting in a five per cent reduction in the cost of management conditions for half of CHMPs undertaken. <sup>96</sup>

The costs of Option 3 have been estimated using a similar methodology to Options 1 and 2. As shown in the table above, the key quantifiable impacts of Option 3 compared to Option 1 are:

- a reduction in the proportion of CHMPs involving complex assessments from 80 per cent to 75 per cent, and a corresponding increase in the number involving a standard assessment

<sup>93</sup> Based on PwC analysis of survey results and AV analysis of historical data.

<sup>94</sup> There is likely to be a reduction of around 30 minutes per desktop assessment for a proportion of CHMPs, however, as the quantitative impact is uncertain, the conservative assumption has been made that there is no impact.

<sup>95</sup> Based on PwC analysis of the results of the survey of heritage advisors, historical data provided by AV, and submissions from stakeholders.

<sup>96</sup> Based on analysis by PwC and AV using historical data of CHMPs assessed by RAPs and the results of the survey of heritage advisors. The issue of inconsistent recommendations relates to those CHMPs assessed by certain assessors.

- a five per cent fall in the cost of implementing CHMP recommendations for around half of CHMPs undertaken due to the change to ensure management conditions are not inconsistent with the conclusions of the assessment.

### The cost to land-users to prepare a CHMP

#### Notice of Intention to prepare a CHMP

The cost of commissioning a NOI to prepare a CHMP is anticipated to stay the same as for Option 1, at a total cost of \$161,102 per year.

#### CHMPs with desktop, standard and complex assessments

Compared to Option 1, the proportion of CHMPs complex assessments is anticipated to fall five per cent to 75 per cent, with the proportion involving a standard assessment anticipated to rise by five per cent.

The cost of undertaking a CHMP involving a standard or complex assessment is anticipated to stay the same as Option 1 (see Table 10). The costs relating to each type of assessment are shown in Table 17.

**Table 17: Number and cost of CHMPs, by type (2018 dollars)**

CHMP type	Desktop assessment	Standard assessment	Complex assessment
Anticipated number completed annually due to the Regulations <sup>97</sup>	37 (6% of all CHMPs)	122 (19% of all CHMPs)	478 (75% of all CHMPs)
Attributable total annual cost	<b>\$155,248</b>	<b>\$1.4 million</b>	<b>\$10.1 million</b>

#### Amendments to CHMPs

The cost of amendments to CHMPs is anticipated to fall compared to Option 1 due to the change in the composition of CHMP assessment types, however, the total number of amendments is anticipated to stay the same at 36, equating to a total cost per year of \$237,440 per year.

#### Cost of incomplete CHMPs

Compared to Option 1, AV does not anticipate that there will be any material change in the number of incomplete CHMPs each year,<sup>98</sup> equating to a total cost of \$1.4 million per year.

#### Total cost of preparing CHMPs

In total, the attributable cost of preparing CHMPs equates to approximately \$13.5 million per year.

### The cost to implement the management conditions of a CHMP

Compared to Option 1, the per-CHMP cost of management conditions is anticipated to fall by five per cent for around half of CHMPs.<sup>99</sup> In addition, the change in the composition of CHMP assessment type changes the likely type of management conditions recommended by each CHMP. These changes result in a total attributable cost of \$5.4 million.

<sup>97</sup> PwC analysis of advice and data from AV. Note that CHMPs can be conducted voluntarily, and the costs of these CHMPs have not been attributed to the Regulations. Numbers are rounded.

<sup>98</sup> It is likely that the number of incomplete CHMPs will fall, however, as the impact is uncertain, a conservative assumption has been made that there is no material change.

<sup>99</sup> See Table 16.

### Government costs

Compared to Option 1, the costs of monitoring and enforcing compliance with the Regulations is unchanged at approximately \$598,583 per year.

The per-evaluation cost to government of undertaking evaluations should not change compared to Option 1, and the total cost of evaluations is anticipated to stay around the same level, at \$2.0 million per year.

### RAP costs

Compared to Option 1, RAPs' per evaluation costs are not anticipated to change, however as with government costs, the total evaluation cost is anticipated to fall due to the change in composition of CHMPs,<sup>100</sup> to approximately \$369,428 per year.

The total costs of Option 2 over 10 years are shown in Table 12.

**Table 18: Breakdown of the costs of Option 3 (\$ million)**

Option 2	10 year total (NPV)	10 year total (nominal)	Annual cost for Years 1 – 10
CHMP processes	113.5	134.6	13.5
Management conditions	45.6	54	5.4
Government costs (excl. transfers)	5	6	0.6
Government evaluation costs	16.5	19.6	2.0
RAP evaluation costs	3.1	3.7	0.4
<b>Total</b>	<b>183.7</b>	<b>217.8</b>	<b>21.8</b>

## 6.4 Non-quantified costs

There are a range of costs that are difficult to quantify due to two main reasons:

- There is insufficient data available.
- It is unclear whether the activity involved would be undertaken in the absence of the Regulations.

The non-quantified costs are considered to be smaller than the quantified costs of the Options.

### 6.4.1 Aboriginal cultural heritage land management agreements

The burden of ACHLMAs can be attributed largely to the Regulations as they prescribe the standards for preparing an ACHLMA. At present, however, no ACHLMAs have been finalised

<sup>100</sup> See Table 18.

as they are a new process.<sup>101</sup> Two ACHLMAs are currently being prepared. Over the 10 year period, a small number may be finalised each year, however, the time and cost involved in undertaking them is not yet known. At a broad level, they involve a written notice of intention to enter into an ACHLMA and the completion of an approved form that states the parties to the agreement, the agreement area, the permissible land management activities, and an Aboriginal cultural heritage assessment of the area. AV will evaluate the impact of ACHLMAs as part of its evaluation strategy (see Section 7.6).

### **6.4.2 Application forms**

Apart from CHMPs and ACHLMAs, the Regulations include the prescribed forms for the following applications, agreements and mechanisms:

- Cultural Heritage Agreements.
- Applications for certification of a preliminary Aboriginal heritage tests.
- Reporting and transfer of Aboriginal Ancestral Remains in custody of public entities and universities.
- Aboriginal intangible heritage agreements.
- Registered Aboriginal Party applications.
- Cultural Heritage Permits.

In the absence of the Regulations, AV would provide an approved form for these applications agreements or mechanisms, or that the party undertaking the evaluation (RAPs or AV) would require the contents of the applications or agreement to reflect similar content to the current content of the prescribed forms. If AV were not to provide guidance as to the appropriate content of these applications, agreements or mechanisms, the purpose of the Act would be diminished.

### **6.4.3 The costs of reduced development due to the Regulations**

The Regulations impose burden on any land-user who wants to develop land, even those not undertaking a high impact activity in an area of cultural heritage sensitivity. This is due to land-users needing to undertake research to determine whether these triggers apply to them.

For those land-users whose development does meet the two criteria for to conduct a CHMP, it is likely that a number would choose not to undertake development, as the probable cost of a CHMP could outweigh the marginal benefit of the development. Parks Victoria stated in its submission to the AV discussion paper that activities and projects are often cancelled due to inadequate resources for cultural heritage management expenses.<sup>102</sup> The overall cost of this to the economy is difficult to quantify, as land-users do not generally indicate whether they are not developing their land due to Regulations.

## **6.5 Results of cost-benefit analysis**

### **6.5.1 Option 1: Re-make the Regulations**

AV estimates that approximately 44 per cent of all CHMPs identify significant Aboriginal cultural heritage. Of these, 61 per cent mitigate harm through avoidance, minimisation or

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<sup>101</sup> AV discussion paper: Review of the Aboriginal Heritage Regulations 2007.

<sup>102</sup> Parks Victoria, 'Submission to AV Discussion Paper', 2017.

salvage, meaning that 27 per cent of all CHMPs preserve Aboriginal cultural heritage.<sup>103</sup> Many CHMPs will not result in the preservation of Aboriginal cultural heritage, however, prior to the completion of a CHMP, it is impossible to know in advance whether that CHMP will result in preservation. Complex CHMPs are, by definition, much more likely to identify and preserve Aboriginal cultural heritage, but the desktop and standard assessment stages must be completed before reaching this stage. The benefits of each CHMP should be based on the probability it will identify and preserve Aboriginal cultural heritage and the value of this heritage if preserved.

As outlined in Section 6.2.2, the stated value of a place of Aboriginal cultural heritage is estimated to be \$296,739. If for each CHMP prepared, there is a 27 per cent chance of significant Aboriginal heritage being identified and preserved, this implies the average benefit of a CHMP is around \$74,984.

The quantified cost of the Regulations per CHMP can be approximated by dividing \$22.0 million (see Table 12) by 573, the number of CHMPs approved each year that are attributable to the Regulations, equating to \$38,466. The costs of some CHMPs exceed this (and may even exceed the cost of undertaking the work involved as in the case highlighted by Parks Victoria – see Appendix A), however, on average, the benefit of the regulatory framework to the protection of Aboriginal cultural heritage is considered to outweigh the costs of undertaking a CHMP.

This implies that Option 1 delivers quantifiable net benefits of \$36,518 per attributable CHMP approved, and \$20.9 million in total per year.

### ***6.5.2 Option 2: Re-make the Regulations with targeted improvements to the triggers for a CHMP***

The quantified cost of Option 2 is estimated to be \$38,382 for each of the 589 CHMPs that are anticipated to be approved and attributable to the Regulations each year. Using the \$74,984 benefit per approved CHMP calculated above,<sup>104</sup> this gives a net benefit of \$36,602 per CHMP approved, and a total benefit of \$21.6 million per year.

### ***6.5.3 Option 3: Update standards for CHMPs***

Option 3 is estimated to incur a \$38,011 quantified cost for each of the 573 CHMPs that are anticipated to be approved and attributable to the Regulations each year. Using the \$74,984 benefit per approved CHMP calculated for Option 1,<sup>105</sup> this gives a net benefit of \$36,973 per CHMP approved, and a total benefit of \$21.2 million per year.

## ***6.6 Multi-criteria analysis***

Many of the costs and benefits of the Regulations have not been able to be quantifiably estimated. As such, a qualitative assessment of the options has been undertaken using a multi-criteria analysis (MCA).

### ***6.6.1 Method for assessing options***

An MCA is an approach to compare the costs and benefits of policy options that brings a degree of structure, analysis and openness to decision-making. MCA establishes preferences

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<sup>103</sup> Based on information provided by AV.

<sup>104</sup> The impact of Option 2 on the likelihood of the preparation of a CHMP resulting in the identification and preservation of Aboriginal cultural heritage is uncertain, as Aboriginal cultural heritage relating to the new triggers has not previously been examined. As such, the likelihood has assumed to be the same as Option 1.

<sup>105</sup> It is probable that Option 3 will improve the likelihood of the preparation of a CHMP resulting in the identification and preservation of Aboriginal cultural heritage due to the increase in clarity of the Standards. However, to be conservative, the likelihood has been assumed to be the same as Option 1.

between options by reference to an explicit set of objectives and measurable criteria to assess the extent to which the objectives have been achieved.

An MCA is particularly useful in circumstances where it is necessary to consider a range of economic, environmental and social benefits which cannot be satisfactorily quantified and/or valued.

#### **Box 4: Why use an MCA?**

MCA provides a way of:

- disaggregating a complex problem into more manageable pieces to allow data and judgements to be brought to bear on the pieces
- assessing the extent to which options achieve objectives against selected criteria
- weighting the criteria (if appropriate)
- re-assembling the pieces to present a coherent overall picture to decision-makers.

The reasons for including the selected criteria (and how they are defined) should be clearly outlined. Broadly, the criteria selected should be:

- closely linked to the identified problem/s and objectives
- specified in a way that avoids overlap between them
- in the case of cost criteria, defined as ‘cost’ (and not ‘cost minimisation’), so that an option that is more costly than the base case will receive a negative score.

Source: Filip Mussen, Sam Salek and Stuart Walker, ‘Benefit-risk appraisal of medicines: A systematic approach to decision-making’, Wiley-Blackwell, 2009.

The expected costs and benefits of each option form the criteria for the MCA. These criteria are assessed in comparison to the status quo (in this case, Option 1).

### **6.6.2 Assessment criteria**

The following relevant criteria have been identified to assess the costs and benefits:

Cost related criteria:

- Business costs to comply with the Regulations.
- Government costs to review and monitor compliance with the Regulations.

Benefit related criteria:

- The protection of Aboriginal cultural heritage from being damaged or destroyed.
- Increased certainty for businesses.

Further details on the criteria for assessment and how they are defined are set out in Table 19. In a MCA, equal weighting (50 per cent) is given to cost related criteria and benefit related criteria to enable a transparent, balanced assessment.



**Table 19: Criteria for multi-criteria assessment of Options**

Criterion	Weighting
<p><b>Land-user costs</b> – This criterion captures the costs a land-user (business or public entities) would incur in complying with the Regulations. These include administrative costs such as identifying and understanding the Regulations relevant to their project, contracting a heritage advisor (as necessary) to prepare a CHMP, and complying with the management conditions of CHMPs. In addition, land-users may incur a range of costs related with delayed or cancelled development activity as a result of preparing a CHMP, including sunk construction costs, the opportunity cost of the capital invested in the project, and discouragement costs due to possibly not undertaking similar projects in the future</p> <p>As the greatest number of land-users are affected by the Regulations and most of the regulatory burden imposed by the Regulations is on land-users, land-user costs have been given 80 per cent of the cost-related criteria weighting (equating to 40 per cent of the total).</p>	25%
<p><b>Government and RAP costs</b> – This criterion relates to the costs that the Victorian Government occurs in monitoring and enforcing compliance with the Regulations. The costs to Government and RAPs of evaluating CHMP and other applications are included here as the current level of cost recovery isn't yet known. (However, they will ultimately be recovered through fees, as the fees are paid by land-users.) Any regulatory costs to Government incurred under planning laws (including, for example, the Planning and Environment Act) that are not directly related to the Regulations are not included.</p>	25%
<p><b>Protection of Aboriginal cultural heritage</b> – This criterion relates to the cultural, social and economic benefits experienced by both the Aboriginal and non-Aboriginal population as a result of land-users preparing CHMPs before undertaking a high impact activity in an area of cultural heritage sensitivity. This also includes the benefits resulting from the implementation of the management conditions by the sponsor. As the protection of Aboriginal cultural heritage is the primary objective of the regulatory framework, this benefit criterion is given 80 per cent of the benefit-related criteria weighting.</p>	40%
<p><b>Certainty for land-users and RAPs</b> – This criterion reflects the benefits to land-users and RAPs from the presence of a regulatory framework to manage Aboriginal cultural heritage in Victoria. Prior to the forming of the Regulations, neither land-users nor RAPs had certainty of the process to consult with Aboriginal groups, or that Aboriginal cultural heritage would be protected.</p>	10%

Land-user costs and Government and RAP costs are each given an equal weighting of 25 per cent as costs are considered equally important to the policy design, regardless of who initially bears those costs. However, the magnitude of the economic costs is more than seven times larger for land-users as for Government and RAPs. This magnitude difference is reflected in the size of the scores against the relevant criterion. That is, if one cost is double the size of another cost, the MCA scoring of the first cost is generally double the scoring of the second cost. . Aboriginal cultural protection benefits receive greater weighting than other benefits given the main objective of the Regulations is to protect Aboriginal cultural heritage from damage or destruction.

### Scoring

For each criterion, each option is scored on a scale of -10 to +10 in comparison to the base case (where positive numbers reflect a benefit compared with the base case. The overall score for each option is the sum of the score for each criterion multiplied by that criterion's weighting. The overall scores are compared to determine the preferred option.



### 6.6.3 Scoring assessments

The baseline for the MCA is the base case, ie the scenario where the Regulations are not re-made. As it is the baseline no scoring has been undertaken against the base case.

Nonetheless, in terms of evaluating other options against it, the base case has the following characteristics:

- Land-users in areas of cultural heritage sensitivity who are undertaking high impact activities will not, in most cases, be required to undertake any assessment of the possibility and significance of Aboriginal cultural heritage in that place.
  - This could lead to the damage and destruction of places and objects of significance to Aboriginal people, causing cultural, social and economic harm to Aboriginal people, as well as the Victorian tourism industry.
- It is possible that some land-users, particularly in the public sector may choose to continue to prepare CHMPs voluntarily. This could lead to a mismatch in costs between those land-users who are respectful of Aboriginal cultural heritage and those who disregard it.
- The government may be forced by public opinion to explore some alternative regulatory mechanism to protect Aboriginal cultural heritage, for example, purchasing or ‘reserving’ places with highly significant Aboriginal cultural heritage for use by Aboriginal people, possibly in a similar way to what occurs with the formation of a state park or national park.

#### Scoring of land-user costs criterion

- Option 1: Land-users undertaking high impact activities in areas of cultural heritage sensitivity incur costs to determine whether a CHMP is required, and if so, to commission a CHMP and implement its recommendations. In addition, some land-users will incur some level of delay costs as a result of the CHMP being prepared. (Score: -7)
- Option 2: Compared to Option 1, land-users will be required to prepare more CHMPs per year on average due to the increases in the number of triggers. This will be offset to a small degree by a minor reduction in costs from engaging a heritage advisor to determine whether a CHMP is required, due to added clarity in the Regulations. (Score: -8)
- Option 3: Compared to Option 1 and Option 2, land-users should see a fall in costs under Option 3, due to a greater level of clarity leading to potentially fewer CHMPs with complex assessments. In addition, the overall cost of management conditions may fall somewhat as the updated guidance provides improved information around when each management condition is required. (Score: -6)

#### Scoring of Government and RAP costs criterion

- Option 1: Government is required to monitor and enforce compliance with the Regulations, as well as conduct evaluations. However, the Regulations gives the power to recover fees for conducting the evaluations (including the 11 CHMPs that would be required under the base case), offsetting some of its cost. (Score: -1)
- Option 2: The increase in the number of CHMPs will require greater government resources to monitor and enforce compliance compared to Option 1. (Score: -1)
- Option 3: Government costs will be similar to Option 1 given similar amounts of CHMPs are anticipated. Given the increase in clarity of standards for the preparation of a CHMP, it is possible that other aspects of regulatory effort (eg communications, monitoring and enforcement) will fall in cost, however, the conservative assumption has been made that costs will not fall significantly. (Score: -1)

### Scoring of benefits from the protection of Aboriginal cultural heritage criterion

- Option 1: For each place protected by the CHMP process under Option 1, cultural, social and economic benefits accrue to Victoria due to Option 1. This includes the stated values to Aboriginal people (discussed in Section 6.2.2), the economic value of heritage from tourism and the justice and health benefits of heritage. (Score: +6)
- Option 2: A greater number of CHMPs prepared will mean that more places of Aboriginal cultural heritage are protected than Option 1.<sup>106</sup> (Score: +8)
- Benefits from the protection of Aboriginal cultural heritage: The change to provide greater clarity of management conditions should lead to improved preservation of places and objects of significance to Aboriginal people. (Score: +7)

### Scoring of benefits from increased certainty criterion

- Option 1: Option 1 provides a framework for land-users and Aboriginal people to manage the development of land, and for Aboriginal groups to be consulted. (Score: +6)
- Option 2: Like Option 1, Option 2 provides a framework for land-users and Aboriginal people to manage the development of land, and for Aboriginal groups to be consulted. (Score: +6)
- Option 3: Compared to the other options, Option 3 enhance the framework for land-users and Aboriginal people to management development activity by providing improved guidance as to the level of information required in a CHMP (separate to the clarity around when management conditions are required). (Score: +7)

### Summary of MCA scores

Table 20 provides the initial MCA scoring of the Options. These scores and their components provide an indication of the relative costs and benefits of each option.

**Table 20: MCA scoring against the Options**

Criteria	Option 1		Option 2		Option 3	
	Score	Weighted-score	Score	Weighted-score	Score	Weighted-score
Land-user costs (25%)	-7	-1.75	-8	-2.0	-6	-1.55
Government costs (25%)	-1	-0.25	-1	-0.25	-1	-0.25
Protection of Aboriginal cultural heritage (40%)	+6	+2.4	+8	+3.2	+7	+2.8
Increased certainty (10%)	+6	+0.6	+6	+0.6	+7	+0.7
<b>Totals (after weighting)</b>		<b>+1.0</b>		<b>+1.55</b>		<b>+1.75</b>

<sup>106</sup> This assumes that the same proportion of CHMPs prepared identify and preserve Aboriginal cultural heritage as in Option 1. Given the increased clarity of the CHMPs standards in Option 3, it is possible that there will be a higher likelihood of identification and preservation of Aboriginal cultural heritage, however, the conservative assumption has been made that it will stay the same as Option 1.

## Analysis

The options analysis indicates that all Options have positive scores, with Option 3 scoring higher than Options 1 and 2. This is primarily because Option 3 increases clarity for land-users, RAPs and government, which reduces the burden of the Regulations compared to Option 1 and Option 2. It should be noted that the results may be sensitive to the weightings applied to each criterion as well as the assumptions underlying the scores assigned.

# 7 Preferred option

## 7.1 Summary of preferred option

The combination of Options 2 and 3 are preferred because they are expected to provide a greater level of net benefit compared to Option 1. As Options 2 and 3 are not mutually exclusive, it is possible and preferable to adopt both sets of reforms.

In summary, the preferred options involve:

- targeted changes to the triggers for a CHMP to ensure better protection of Aboriginal heritage and better outcomes for land-users and sponsors.
- amendments to the CHMP guide to provide greater clarity to CHMP sponsors and RAPs regarding the standards required for CHMPs.

Box 5 outlines what land-users will need to do to comply with the preferred options.

### Box 5: Requirement under the preferred options

The preferred option requires a land-user to:

- preparing a CHMP if undertaking a development activity:
  - involves a high impact activity (see Division 2 of Part 2 of the current Regulations), the definition of which are proposed to change as part of Option 2, including:
    - the development of residential villages
    - the development of Residential Buildings
    - the construction of fuel breaks that require a permit to remove native vegetation
    - walking and cycling tracks less than 500 metres long
  - takes place in areas of cultural heritage sensitivity (see Division 3 of Part 2 of the current Regulations), which are proposed to change as part of Option 2, including:
    - expanding the definition to include parks and reserves managed for conservation purposes
    - the definition of waterways to ensure that tributaries of named waterways and channelised sections
    - relying on more up-to-date geology data
- comply with the standards for the preparation of a CHMP included in the Regulations as well as approved forms, practice notes and the CHMP guide. These have been amended as part of Option 3 to improve clarity. More detail on the changes can be found in Section 5.2.3
- comply with prescribed standards and forms for other regulatory mechanisms, including CHMPs, ACHLMAs, CHAs (including maps in CHAs), applications for PAHTs, application for registration of Aboriginal Intangible Heritage, applications for registration as a RAP.
- Pay prescribed fees, including for evaluation of CHPs, PAHTs, NOIs to prepare a CHMP,

CHMPs, applications to amend a CHMP, and access to, and advice on the Aboriginal Heritage Register.

Further information on the current Regulations can be found in Section 2.5. Further detail on the Options can be found in Section 5.2.

The remainder of this chapter presents the small business, competition, implementation and enforcement, and evaluation aspects of the preferred options.

## 7.2 *Impact on small businesses*

As shown in Section 2.7, the triggers that require the preparation of a CHMP mean that most CHMPs are conducted by government authorities, large infrastructure companies (eg in telecommunications and utilities) or residential housing developers. Nonetheless, there are some small businesses that are affected by the proposed regulations, mostly in the construction sector, although the number affected is not known. The preferred options attempt to address this by:

- providing greater clarity around what is intended to be included in a CHMP
- providing greater clarity to ensure that the management conditions in a CHMP are not inconsistent with the results of the CHMP assessment
- refining the list of high impact activities so that it does not include unnecessary activity types.

AV does not consider it likely that the impact on small businesses is proportionally greater than that on larger-sized businesses. This is because small businesses are less likely to be involved in development activities over large activity areas, which would require a more costly CHMP. In addition, smaller providers (eg smaller building companies, tradespeople) often aren't involved in projects that would trigger a CHMP in the first place.

## 7.3 *Competition assessment*

Considerations of national competition policy include identifying any restrictions to competition in the preferred option, showing that the restriction is necessary to achieve the objective, and assessing whether the benefits of the restriction outweigh the costs in each particular case.

Any new legislation in Victoria must not restrict competition unless it can be demonstrated that:

- the benefits of the restriction, as a whole, outweigh the costs
- the objectives of the legislation can only be achieved by restricting competition.

A legislative amendment is considered to have an impact on competition if any of the following questions in the table below can be answered in the affirmative. Table 21 shows the rationale and significance of those areas where there is an impact on competition.

**Table 21: Criteria for determining adverse competition impacts**

Question	Answer	Significance
Are the proposed measures likely to affect the market structure of the affected sector(s) – i.e. will it reduce the number of participants in the market, or increase the size of incumbent firms?	No, the changes will affect existing and new land-users, heritage advisors and RAPs equally and proportionally to the size of their activities.	None.

Question	Answer	Significance
Would it be more difficult for new firms or individuals to enter the industry after the imposition of the proposed measure?	No, the changes do not involve the imposition of any barriers to entry, and they provide further clarity, which should benefit new entrants.	None.
Would the costs/benefits associated with the proposed measure affect some firms or individuals substantially more than others (e.g. small firms, part-time participants in occupations, etc.)?	Possibly, as the cost of a CHMP may be more significant for smaller firms. However, the cost of a CHMP is generally proportional to the size and type of the development.	Minimal, as the cost of a CHMP is a small part of the cost of large developments.
Would the proposed measure restrict the ability of businesses to choose the price, quality, range or location of their products?	Yes. The proposed changes provide clarification on processes for the protection and management of Aboriginal cultural heritage. Developers and landowners must follow those processes and not intentionally harm Aboriginal cultural heritage unless there is agreement.	Minimal as the impact is similar to that of the previous requirements.
Would the proposed measure lead to higher ongoing costs for new entrants that existing firms do not have to meet?	No, the changes do not involve the imposition of new barriers to entry.	None.
Is the ability or incentive to innovate or develop new products or services likely to be affected by the proposed measure?	No, the services provided are not significantly affected by innovation.	None.

Source: Government of Victoria (2014), Victorian Guide to Regulation. Available at: <http://www.dtf.vic.gov.au/publications/victoria-economy-publications/victorian-guide-to-regulation>

The preceding chapters and analysis have generally demonstrated that based on the quantified costs and benefits the proposed measures represent a net benefit, and that the government's objectives can only be achieved by restricting competition in this way.

## 7.4 Implementation

The proposed Aboriginal Heritage Regulations 2018, and the regulatory approach, are substantially similar to the sunseting Regulations. The implementation plan will ensure regulated parties and key stakeholders are sufficiently engaged regarding the proposed changes and are reasonably supported in transitioning to the new arrangements, through written communication and meeting with organisations.

### Communications

The Aboriginal Heritage Regulations 2018 will make changes to Victoria's Aboriginal cultural heritage management system. These changes must be communicated to key stakeholders, namely:

- RAPs
- local government agencies
- Public land managers (including Parks Victoria and the Department of the Environment, Land, Water and Planning)

Preferred option

- heritage advisors
- land users and developers.

It is critical the changes to regulatory processes are communicated to stakeholders in advance of the new Regulations taking effect. This will ensure stakeholders are able to transition to the new Regulations with minimal disruption to existing processes. The communications for key stakeholders is outlined in the table below:

**Table 22: AV stakeholder engagement strategy**

Relevant stakeholder	Regulatory changes	Communications strategy
Land users and developers	<p>Land users and developers must be aware of changes to the defined high impact activities, so they know whether a proposed development activity will require the preparation of CHMP.</p> <p>Land users and developers must also be aware of changes to the defined areas of cultural heritage sensitivity, including changes to parks, geological definitions, and clarification to the definition of waterway.</p>	<ul style="list-style-type: none"> <li>• Updates to the AV website, including informative guidance material.</li> <li>• Write to and offer to meet with with peak industry bodies including the Urban Development Industry of Australia (Victoria).</li> </ul>
RAPs	<p>RAPs are responsible for approving CHMPs and regularly advice land users and managers of their responsibilities under the Act.</p> <p>RAPs must be aware of changes to the defined high impact activities and areas of cultural heritage sensitivity, and any changes to, or clarification of, the standards for preparing CHMPs and other regulated heritage assessments.</p>	<ul style="list-style-type: none"> <li>• Write to and offer to meet with the Registered Aboriginal Party Working Group.</li> <li>• RAP Forum (May 2018).</li> <li>• AV will provide informative guidance material.</li> </ul>
Local government agencies	<p>Local Government Agencies must be aware of changes to the defined high impact activities and areas of cultural heritage sensitivity to ensure statutory authorisations are not issued for activities which require a CHMP.</p>	<ul style="list-style-type: none"> <li>• Write to and offer to meet with the MAV.</li> <li>• Engage directly with local government agencies.</li> </ul>
Public Land Managers	<p>Public Land Managers must be aware of changes to the defined areas of cultural heritage sensitivity, particularly regarding changes to the definition of parks</p>	<ul style="list-style-type: none"> <li>• Write to and offer to meet with public land managers, including Parks Victoria, Department of the Environment, Land, Water and Planning, water corporations, and catchment management authorities.</li> </ul>
Heritage advisors	<p>Heritage advisors regularly advise land users and developers of their responsibilities under the <i>Aboriginal Heritage Act 2006</i>.</p>	<ul style="list-style-type: none"> <li>• Heritage advisor information session (April 2018).</li> </ul>

Relevant stakeholder	Regulatory changes	Communications strategy
	<p>Further, Heritage Advisors are responsible for preparing CHMPs.</p> <p>Heritage Advisors must be aware of changes to the defined high impact activities and areas of cultural heritage sensitivity to ensure accurate advice is provided to land users and managers. Further, Heritage Advisors must be aware of changes to, or clarification of, the standards for preparing CHMPs and other regulated heritage assessments.</p>	<ul style="list-style-type: none"> <li>• Meet with the Australian Association of Consulting Archaeologists Incorporated.</li> <li>• Write to and offer to meet directly with Heritage Advisers and cultural heritage management consultancies.</li> <li>• Updates to the AV website</li> </ul>

Source: Information provided by AV.

## 7.5 Compliance and enforcement

AV will be responsible for administration of the proposed 2018 Regulations, primarily through its Heritage Services unit. Enforcement and compliance with the proposed Regulations will be coordinated by the State-wide Enforcement and Compliance Coordinator (SECC).

### 7.5.1 Compliance philosophy

AV engages in a risk based compliance and enforcement strategy. A risk-based approach allows the AV Compliance and Enforcement Program to focus on areas where the relative risks associated with non-compliance with the Act are greatest. This does not mean areas of low risk are neglected. Rather, tools employed in these areas are less time and resource intensive, allowing AV to direct a larger proportion of resources to high risk non-compliance issues. The four offences have been selected as the primary focus for AV compliance and enforcement activities based on available resources and the greatest perceived threat:

- Harm to Aboriginal cultural heritage.
- Possession of Aboriginal Ancestral Remains.
- Undertaking activities without an approved CHMP or CHP- or not in accordance with the conditions of an approved CHP or CHMP.
- Non-compliance with a Stop Order, 24 Hour Stop Order or non-compliance with an Improvement Notice.

Promoting compliance with the Act and the appropriate and respectful protection and management of Aboriginal cultural heritage through a threefold approach:

1. Information and education
2. Compliance monitoring and auditing; and
3. Enforcement.

### 7.5.2 Programs to promote compliance

AV undertakes a number of programs aimed to promote compliance. Such programs include awareness and information campaigns as well as education programs. AV will continue to work in partnership with Registered Aboriginal Parties (RAPs), industry groups and the broader community to achieve compliance with the proposed Regulations.



### *7.5.3 Monitoring compliance*

Authorised officers and Aboriginal heritage officers appointed under the Aboriginal Heritage Act 2006 (the Act) will support compliance monitoring and enforcement of the proposed Regulations. A dedicated team of authorised officers and Aboriginal heritage officers are already in place to assist with enforcement and compliance monitoring.

Appointed by the Minister, authorised officers and Aboriginal heritage officers undergo ongoing and regular training to a high standard comparable to other authorised officers operating under similar Victorian legislation. The SECC provides support and resources to all Aboriginal heritage officers and authorised officers. The proposed Regulations will be incorporated into the training program and resources updated.

Authorised officers are responsible for directing and overseeing Cultural Heritage Audits and have powers under the Act to assist with the investigation of offences such as breach of CHMP conditions or harm to Aboriginal cultural heritage. The Act and AV's Investigations Manual provides clear guidance for authorised officers and Aboriginal heritage officers regarding the exercise of their powers when undertaking enforcement and compliance duties.

### *7.5.4 Enforcement measures*

Where there is a breach under the Act, a range of regulatory responses will be employed in line with AV's Compliance and Enforcement Policy. These approaches escalate from education, advice and warnings to stop orders and prosecutions according to the severity or continuation of a contravention and in accordance with the criteria for determining appropriate response outlined in Aboriginal Victoria's Investigation Manual.

### *7.5.5 Engagement with stakeholders*

The aim of engaging in partnerships is to reduce risk of harm to Aboriginal cultural heritage by building capacity within and strengthening relationships between Aboriginal communities, industry groups and other stakeholders to identify and manage their Aboriginal cultural heritage obligations.

AV encourages the voluntary adoption of compliance and 'best practice' approaches to managing and protecting Aboriginal cultural heritage through a responsive regulatory approach and by raising knowledge and awareness of Aboriginal cultural heritage and the Act, including:

- interacting formally and informally with community group industry representatives and stakeholders to increase awareness
- providing advice and making presentations on the Act
- preparing and distributing guidelines, information sheets and policies;
- encouraging stakeholders to undertake self-regulation by continually assessing and monitoring their activities. A range of tools are available to assist in the identification and management of Aboriginal cultural heritage (eg the Aboriginal Cultural Heritage Register Information System (ACHRIS))
- facilitating investigations to identify, interpret and protect Aboriginal cultural heritage
- promoting partnerships with Traditional Owners and RAPs in the management of Aboriginal cultural heritage.

## 7.6 Evaluation strategy

The evaluation strategy should confirm whether the Aboriginal Heritage Regulations 2018 provide better outcomes for Aboriginal cultural heritage without imposing unnecessarily high costs on land users and developers.

Annual evaluation will be carried out internally by AV, in the form of internal progress status reports against Key Evaluation Questions (KEQ) (below).

AV will use both qualitative and quantitative data to answer the KEQ. This will include data collected in Aboriginal Victoria's cultural heritage management database; the Aboriginal Heritage Evaluation Management System (AHEMS). AHEMS manages the statutory timeframes for CHMPs, PAHTS, and CHPs, and records data across various fields including CHMP size and assessment type, proposed activity, the number of submissions, and relevant local government authority.

AV will also collect stakeholder feedback gathered through survey and consultation with stakeholder representative bodies, such as the Australian Association of Consulting Archaeologists Incorporated. Together with the

AV will review the CHMP data collected over a 12 month period from the of the making of the new Regulations. Qualitative data will also be collected through a survey of key stakeholders at this time.<sup>107</sup>

Evidence will be gathered under the following KEQs provided below. AV will use the KEQs to guide evaluation of the Regulations:

1. To what extent do the Regulations provide better protection for Aboriginal cultural heritage?
  - a. To what extent do CHMPs prepared for each high impact activity result in the protection of Aboriginal cultural heritage?
  - b. To what extent do CHMPs prepared in each category of cultural heritage sensitivity protect Aboriginal cultural heritage?
  - c. To what extent do CHMPs which include a complex assessment better define the extent, nature and significance of Aboriginal cultural heritage than CHMPs which include only a desktop and standard assessment?
  - d. To what extent are CHMP costs proportionate relative to the risks posed to heritage and the value of the work being undertaken?
2. To what extent does the CHMP guide reduce the regulatory burden to proponents of development activities?
  - a. To what extent has amendments to the CHMP guide reduced the number of CHMPs that include a complex assessment?
  - b. To what extent has amendments to the CHMP guide reduced the number of CHMPs refused, or additional information requested, by the Secretary's delegate?
3. To what extent are the fees prescribed by the Regulations appropriate?

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<sup>107</sup> Information provided by AV.

- a. To what extent are Sponsors of development activities satisfied with the fees they pay as prescribed by the Regulations?
- b. To what extent are RAPs satisfied with the fees they charge as prescribed by the Regulations?
- c. To what extent is the activity area size the best determinate of evaluation complexity and cost?

**Table 23: Evaluation indicators**

Intended outcome	Indicator	Measure
Better protection for Aboriginal cultural heritage	CHMPs provide effective protection measures for defined high impact activities.	Number of CHMPs approved for newly defined high impact activities, which include identification and management of Aboriginal cultural heritage.
		Number of CHMPS prepared in each category of cultural heritage sensitivity which result in the identification of Aboriginal cultural heritage.
		Number of CHMPs prepared for each category of high impact activity which result in the identification of Aboriginal cultural heritage.
	Prescribed triggers result in the preparation of CHMP costs that are proportionate relative to the risks posed to heritage and the value of the activity	Number of CHMPs prepared for each category of high impact activity and activity area size which do not result in the identification of Aboriginal cultural heritage.
	CHMPs do not unnecessarily include a complex assessment.	Proportion of CHMPs which include a complex assessment.
Reduced regulatory burden for land users and developers.	More CHMPs prepared according to the standards.	Number of CHMPS refused, or additional information requested, by the Secretary's delegate.
Improved guidelines for CHMP standards	Stakeholder satisfaction with fee structure.	Number of complaints Sponsors and Registered Aboriginal Parties, and stakeholder feedback.
Application of evaluation fee structure	Prescribed evaluation fee categories are the most appropriate determinate of evaluation complexity.	CHMP evaluation times in relation to activity area size and other potentially relevant factors.

# 8 Analysis of fees

## 8.1 Criteria to assess fee options

The re-making of the Regulations involves ensuring that the fees charged reflect costs incurred to ensure both efficiency and equity objectives are met. The principles of cost recovery are generally that:<sup>108</sup>

- fees should be set on a full cost recovery basis, where possible, to ensure that the objectives of efficiency and equity are met, ie ensure that those parties that give rise to the need for government regulation pay the associated costs
- full cost represents the value of all the resources used in the provision of an output or activity
- there are situations where full cost recovery may be impractical, such as where:
  - practical implementation issues make cost recovery infeasible
  - there are benefits to third parties (‘positive externalities’) that should be considered
  - social policy or vertical equity considerations outweigh the efficiency benefits related to full cost recovery
  - high fees may lead to a material reduction in compliance.

In the case of the Regulations, there are some reasons why full cost recovery may not be appropriate. These include:

- the relatively small size of RAPs and the external benefits they bring to Victorian Aboriginal communities
- the fee revenue paid to AV not directly covering the costs of .evaluations.

The criteria to assess the fee options are shown below:

**Table 24: Criteria to assess fee options**

Criterion	Weighting
Full cost recovery – ensuring that fees are efficient and effective, reflect the full costs of the activities, and recover specific costs from specific users. Ie land-users activities’ give rise to the need for regulation, and the cost of this oversight is reflected in the fees charged. This criterion has the highest weighting as efficient and equitable fees align with government fiscal goals, ensure resources are allocated in an efficient manner, and that people are treated in a consistent way.	60%
Preventing induced demand changes – ensuring that high fees do not lead to an increase in non-compliance. This criterion is given a 20 per cent weighting as it should not outweigh the objective of full cost recovery, however, is important to avoid perverse outcomes such as non-compliance.	20%

<sup>108</sup> Department of Treasury and Finance ‘Cost recovery guidelines’, 2013.

Criterion	Weighting
Simplicity – providing simplicity for land-users, RAPs, government and other stakeholders. This criterion is also given a 20 per cent weighting as it should not outweigh the objective of full cost recovery, however, is important to ensure that the regulatory complexity for land-users, Government and RAPs is minimised where possible.	20%

## 8.2 The base case

The base case for the fees prescribed by the Regulations is that no fees can be charged for the evaluations as shown in Table 25.

**Table 25: Evaluation type and processes**

Evaluation type	Evaluation process
Cultural Heritage Permits applications (evaluated by the Secretary or RAPs).	Process involves desktop research, consultation with Traditional Owners, communications with the applicant, preparation of mapping requirements (as required), and sign-off by senior management.
Preliminary Aboriginal Heritage Tests (evaluated by the Secretary).	Process involves an initial assessment by the Heritage Assessments team.
Notices of intention to prepare a CHMP (processed by the Department).	Process involves assessment by the Heritage Assessments team.
CHMP applications (evaluated by the Secretary or RAPs).	Process involves assessment by the regional team to evaluate the CHMP, then assessed by the Heritage Assessments team and signed off by the Heritage Manager and Director, then registered as an Aboriginal place.
Applications for approval of amendment to approved CHMP (evaluated by the Secretary or RAPs).	Similar process to a full CHMP.
Access to the Victorian Aboriginal Heritage Register (processed by the Secretary).	Process involves assessment by Registry staff (including to confirm whether the applicant has the right of access under the Act), and then requiring sign-off by a more senior staff member. Application may need escalation depending on whether it relates to possible damage or destruction of Aboriginal cultural heritage.
Application to the Secretary for advice on whether a record exists on the Register (processed by the Secretary).	Process involves assessment by Registry staff (including to confirm whether the applicant has the right of access under the Act), and then requiring sign-off by a more senior staff member. Application may need escalation depending on whether it relates to possible damage or destruction of Aboriginal cultural heritage.

Apart from CHMPs, all mechanisms would still need to be undertaken under the Act, however, as fees could not be charged, government and RAPs would need to fund the cost of their assessment activities through other revenue.

## 8.3 Fee options

### 8.3.1 Options summary

The fee options have been formulated with regard to consultation with AV and RAPs as part of this RIS, as well as previous consultation by AV over the past year, including the publication of a discussion paper. In summary, the fee options examined in detail in this section involve:

- Option 1: Re-make existing fees – this fee option maintains the existing fee regime, which gives stakeholders continuity and reduces uncertainty.
- Option 2: Single set of fees based on weighted average cost recovery – this fee option involves updating the fees based on information collected from stakeholders on their costs involved with undertaking evaluations, and estimating fee levels based on an average of Government and RAPs costs weighted by the number of evaluations they undertook.
- Option 3: Variable fees by evaluator – this fee option splits the fee levels into different fees for Government and RAPs to reflect their different cost bases and do not disadvantage the party with a higher cost base.

Other fee options were considered but not included in the final list of options because AV considered the above to be the most feasible based on the fee criteria and cost recovery implications. For example, it is often appropriate to differentiate fees by different types of user to reflect differences in the regulatory costs they impose or in their ability to pay. In this case, however, AV considers it would be impractical to set such differentiated fees because the diversity of land users means it is not possible to define distinct broad categories of users with similar characteristics to use as a basis to structure fees in this way.

AV also did not consider charging different fees for CHMPs with complex assessments to be appropriate given it is difficult to assess the complexity of a CHMP prior to conducting it, and variable fees would introduce further uncertainty.

### 8.3.2 Analysis

The costs incurred by Government and RAPs relate primarily to staff time costs, apart from the overhead costs of maintaining the Register (discussed further below). The input data for each evaluator is shown in Table 26. Estimating the appropriate fees is difficult for this RIS given that there are a diverse array of organisations that will undertake evaluations, ranging from AV to small-sized RAPs.

Data for the fees analysis are primarily sourced from AV and the survey of RAPs. These data were checked against previous reviews and reports. While there are differences in data, these could be explained by the changes in the regulatory framework in 2016.<sup>109</sup> It is important to note that RAPs have previously stated that an increase in fees would be desirable, however, the data provided indicated that fees are largely in line with current activities.

**Table 26: Inputs for fee recovery (2018 dollars)**

Evaluator inputs	AV <sup>110</sup>	RAPs <sup>111</sup>	VAHC <sup>112</sup>
Evaluator staff level	Mix of VPS 4 and VPS 5 (for CHMPs)	72% Cultural Heritage Officer, 20% Admin Support Officer, 8% Executive Officer (or equivalent positions)	VPS 3

<sup>109</sup> For example, a drop in the number of CHMPs not approved, the introduction of amendments to CHMPs and an increase in the number of CHMPs being assessed by RAPs.

<sup>110</sup> PwC analysis based on information provided by AV.

<sup>111</sup> Estimates based on survey of RAPs.

<sup>112</sup> PwC analysis based on information provided by AV.

<b>Evaluator inputs</b>	<b>AV<sup>110</sup></b>	<b>RAPs<sup>111</sup></b>	<b>VAHC<sup>112</sup></b>
<b>Oncosts</b>	10% <sup>113</sup>	16.5% <sup>114</sup>	10%
<b>Overheads</b>	50% <sup>115</sup>	13% <sup>116</sup>	50%
<b>Weighted average hourly cost including on-costs and overheads</b>	\$103.35	\$69.23	\$80.50

Table 27 shows the time involved in the evaluations for each fee type and implied fee.

**Table 27: Government time and costs for each fee type (2018 dollars)**

<b>Fee type</b>	<b>Government evaluation time (hours)<sup>117</sup></b>	<b>Implied Government cost per evaluation</b>	<b>Number undertaken each year (preferred options)</b>	<b>Total cost to AV per year</b>
<b>CHP application</b>	38.0	\$3,927	22	\$86,399
<b>Certification of a PAHT</b>	6.5	\$672	37	\$24,855
<b>NOI to prepare a CHMP</b>	1.0	\$103	400	\$41,378
<b>CHMP with a desktop assessment</b>	17.0	\$1,369	22	\$25,643
<b>CHMP with a standard assessment</b>	19.0	\$1,826	72	\$114,687
<b>CHMP with a complex assessment</b>	21.0	\$2,170	284	\$690,837
<b>Application to amend a CHMP</b>	9.5	\$982	17	\$19,896
<b>Application for access to the Register</b>	0.2	\$258 <sup>118</sup>	636	\$164,353
<b>Application to provide advice on information</b>	0.5	\$297 <sup>119</sup>	2,734	\$813,355

<sup>113</sup> Based on information provided by AV.

<sup>114</sup> Based on the Victorian Guide to Regulation

<sup>115</sup> Based on the Victorian Guide to Regulation

<sup>116</sup> Estimate based on survey of RAPs.

<sup>117</sup> Information provided by AV (unless otherwise noted).

<sup>118</sup> In addition to the direct staff time cost of \$13, this figure also includes \$245 of overhead costs per application. This is based on cost recovery for the IT infrastructure (based on annual costs of \$150,000) and the staff cost of maintaining the Register (four full-time-equivalent VPS staff, which equates to \$675,729 per year). These fixed costs are spread across the 3,370 applications to access or obtain advice from the Register.

<sup>119</sup> In addition to the direct staff cost of \$52, this figure also includes \$245 of overhead costs per application, as stated above.



held in the Register

Note: All assessment times are cumulative, ie include previous levels of assessments.

In total, AV's costs are estimated to amount to \$749,813 per year under the preferred options.

**Table 28: RAP time and costs for each fee type (2018 dollars)**

Fee type	Weighted average RAP evaluation time (hours) <sup>120</sup>	Implied RAP cost per evaluation	Number undertaken each year (preferred options)	Total cost to RAPs per year
CHP application	38.0 <sup>121</sup>	\$2,631	4	\$10,523
NOI to prepare a CHMP	2.7	\$185	381	\$70,393
CHMP with a desktop assessment	4.7	\$325	19	\$6,118
CHMP with a standard assessment	8.3	\$575	62	\$35,579
CHMP with a complex assessment	14.8	\$1,025	243	\$249,449
Application to amend a CHMP	5.8	\$402	19	\$7,862

Note: All assessment times are cumulative, ie include previous levels of assessments.

RAPs costs total \$378,683 per year for all evaluations under the preferred options. It is possible that their proportion of evaluations may go up in the medium-term as existing RAPs areas are expanded, and/or and new RAPs are appointed.

### 8.3.3 Option 1: Re-make existing fees

Option 1 involves re-making the current fees at the present fee unit level. A fee unit is valued at \$14.22 for 2017-18 by the Department of Treasury and Finance.<sup>122</sup> These are shown in Table 29. For the purposes of the fee levels, the activity sizes are defined as follows:

- Small activity: Means an activity with an activity area of one hectare or less, or that is a linear project with a length of one kilometre or less.
- Medium activity: Means an activity with an activity area of more than one hectare but not more than 40 hectares, or that is a linear project with a length of more than one kilometre but not more than five kilometres.

<sup>120</sup> Estimates based on survey of RAPs (unless otherwise noted). Note that RAP evaluation hours is based on a weighted average of reported time to undertake an evaluation, weighted by the number of CHMPs completed in the previous year, and excluding one set of outlier responses that were over 10 times larger than other responses. The survey captured results from 10 of 11 RAPs so the results can be seen as representative.

<sup>121</sup> Based on AV estimate due to insufficient data from RAPs.

<sup>122</sup> Department of Treasury and Finance, 'Fees and fines factsheet', <http://www.dtf.vic.gov.au/Publications/Victoria-Economy-publications/Fees-and-fines-fact-sheet>



- Large activity: Means an activity with an activity area of more than 40 hectares, or that is a linear project with a length of more than five kilometres.

Evaluation costs for different sized activity areas were estimated in the previous 2007 RIS. The prescribed fees were intended to reflect the cost to the Approval Body in evaluating the CHMP, rather than any potential damage to Aboriginal cultural heritage that may occur. The estimate was informed by consultation with two Aboriginal groups that had responsibilities for the evaluation of Aboriginal cultural heritage management reports about the processes involved, and the time required to evaluate a CHMP involving a medium-sized activity involving a standard assessment. This provided the basis for estimating the remaining fees, which differ according to the number of RAPs involved in the evaluation, the complexity of the assessment and the size of the activity area.

The size of the activity area positively correlates to the extent of archaeological testing required in the CHMP assessment. Consequently, CHMPs which include greater and more complex archaeological testing will take longer to be evaluated by approval bodies. Other factors which may influence the CHMP evaluation time cannot be known until completion of the assessment (for example, the nature, extent, and significance of Aboriginal cultural heritage present in the activity area). Therefore, no changes to the definitions of activity area sizes are proposed.

**Table 29: Fee levels for Option 1**

Fee	Current fee units	Value for 2017-18
<b>CHPs<sup>123</sup></b>		
Discovery and research	8	\$113.76
Harm Aboriginal cultural heritage	46	\$654.12
Sell or remove Aboriginal object	13	\$184.86
<b>PAHTs</b>		
Small activity	40	\$568.80
Medium activity	80	\$1,137.60
Large activity	120	\$1,706.40
<b>NOI to prepare a CHMP</b>	8	\$113.76
<b>CHMPs - one authority only</b>		
Desktop assessment - small activity	10	\$142.20
Desktop assessment - medium activity	20	\$284.40
Desktop assessment - large activity	40	\$568.80
Standard assessment - small activity	40	\$568.80
Standard assessment - medium activity	80	\$1,137.60
Standard assessment - large activity	120	\$1,706.40
Complex assessment - small activity	60	\$853.20
Complex assessment - medium activity	120	\$1,706.40
Complex assessment - large activity	240	\$3,412.80
<b>CHMPs - two authorities</b>		
Desktop assessment - small activity	8	\$113.76
Desktop assessment - medium activity	15	\$213.30
Desktop assessment - large activity	30	\$426.60
Standard assessment - small activity	30	\$426.60
Standard assessment - medium activity	60	\$853.20
Standard assessment - large activity	160	\$2,275.20

<sup>123</sup> The ability to charge fees for of CHPsevaluation of CHP applications to inter Aboriginal Ancestral Remains and to rehabilitate land at an Aboriginal place exists in the Regulations, but is currently set at nil. This is proposed to continue under all fee options as any fee would adversely discourage this activity from occurring.

Fee	Current fee units	Value for 2017-18
Complex assessment - small activity	80	\$1,137.60
Complex assessment - medium activity	160	\$2,275.20
Complex assessment - large activity	320	\$4,550.40
<b>CHMPs - three or more authorities</b>		
Desktop assessment - small activity	7	\$99.54
Desktop assessment - medium activity	13	\$184.86
Desktop assessment - large activity	27	\$383.94
Standard assessment - small activity	27	\$383.94
Standard assessment - medium activity	53	\$753.66
Standard assessment - large activity	107	\$1,521.54
Complex assessment - small activity	53	\$753.66
Complex assessment - medium activity	107	\$1,521.54
Complex assessment - large activity	213	\$3,028.86
<b>Approval of an amendment to a CHMP</b>	32	\$455.04
<b>Application for access to the Register</b>	16	\$227.52
<b>Application for advice on the Register</b>	6	\$85.32

Note: A CHMP may be evaluated by multiple authorities (eg two RAPs and the Secretary) if the activity is across different activity areas or if there are multiple RAPs appointed for one activity area.

The cost recovery for Option 1 (based on current activity levels rather than the original evaluation times) is estimated to be approximately 82 per cent. This is driven by under-recovery for evaluations of CHPs, NOIs, CHMPs that involve desktop assessments only, and applications to access or obtain advice from the Register, and over-recovery for PAHTs and CHMPs with standard and complex assessments.

### *8.3.4 Option 2: Single set of fees based on weighted average cost recovery*

Under Option 2, fees are set by recovering the full costs of undertaking the activity, using the current cost categories. These costs were estimated using the following steps:

- Identifying the types of costs involved in undertaking each activity.
- Collecting data on the time involved in undertaking the activity, and any on-costs.
- Determining whether there were any additional costs involved in undertaking the activity.
- Applying the central estimates to the medium activity fee for PAHT and CHMP assessments, and adjust the central estimate up and down for the number of authorities and small and large activities based on the current relativities.<sup>124</sup>
- Where there are discrepancies between the cost of an activity to different parties (ie AV and RAPs), a weighted average cost is calculated using the weightings calculated from the number of activities undertaken each year. This weighting helps ensure that the fee level for each activity is reflective of the single typical cost of undertaking that evaluation activity. This is in contrast to fee option 3, where there are different fees for different parties.

<sup>124</sup> Stakeholders were not able to provide sufficiently detailed level of data to estimate the precise relativities for CHMPs with small, medium and large activities and those assessed by two authorities and three or more authorities. However, these relativities are nonetheless important to reflect the varying levels of effort involved in assessment, and as such the relativities from the current fee regime have been used. Larger activity areas involve a greater level of time to evaluate as the geographic mapping may be over a larger area, and the CHMPs themselves will be longer in length with more content.

- The fee levels for CHPs have been kept at current levels, which are 90 per cent below full cost. Unlike CHMPs, CHPs often relate to activities which do not require a statutory authorisation, such as some low-cost land management activities. CHPs are an effective method of protecting Aboriginal cultural heritage during ground-disturbing works, and should therefore be encouraged. AV is concerned that an increase in fees compared to the current levels would lead to a significant increase in the incidence of non-compliance.<sup>125</sup> The difference between the fee level and full cost will be recovered through consolidated revenue.
- The fee level for applications to obtain advice from the Register is 37 per cent below full cost recovery. An application for advice is voluntary and provides the applicant with limited information as to the presence, or absence, of Aboriginal cultural heritage on the nominated property and generally includes a list of any registered Aboriginal places. AV is concerned a significant increase in current fee level would lead to a significant increase in the incidence of non-compliance. Consolidated revenue will cover the difference between the fee level and the full cost to AV.

The estimated fee levels are shown in Table 30.

**Table 30: Estimated fee levels for Option 2 (2018 dollars)**

Fee	Weighted average cost recovery	Implied fee units
<b>CHPs<sup>126 127</sup></b>		
Discovery and research	\$113.76	8
Harm Aboriginal cultural heritage	\$654.12	46
Sell or remove Aboriginal object	\$184.86	13
<b>PAHTs</b>		
Small activity	\$335.88	24
Medium activity	\$671.76	47
Large activity	\$1,007.64	71
<b>NOI to prepare a CHMP</b>	\$143.08	10
<b>CHMPs - one authority only</b>		
Desktop assessment - small activity	\$389.51	27
Desktop assessment - medium activity	\$779.02	55
Desktop assessment - large activity	\$1,558.04	110
Standard assessment - small activity	\$559.60	39
Standard assessment - medium activity	\$1,119.20	79
Standard assessment - large activity	\$2,238.41	157
Complex assessment - small activity	\$890.58	63
Complex assessment - medium activity	\$1,781.16	125
Complex assessment - large activity	\$3,562.31	251
<b>CHMPs - two authorities</b>		
Desktop assessment - small activity	\$311.61	22
Desktop assessment - medium activity	\$584.26	41
Desktop assessment - large activity	\$1,168.53	82
Standard assessment - small activity	\$419.70	30

<sup>125</sup> Information provided by AV. Based on prior stakeholder feedback, AV is concerned that any rise in the fee levels for CHPs would result in a material increase in non-compliance.

<sup>126</sup> The ability to charge fees for evaluation of CHPs applications to inter Aboriginal Ancestral Remains and to rehabilitate land at an Aboriginal place exists in the Regulations, but is currently set at nil. This is proposed to continue under all fee options as any fee would adversely discourage this activity from occurring.

<sup>127</sup> The current fee levels for CHPs have been maintained as previously noted.

Fee	Weighted average cost recovery	Implied fee units
Standard assessment - medium activity	\$839.40	59
Standard assessment - large activity	\$1,678.81	118
Complex assessment - small activity	\$667.93	47
Complex assessment - medium activity	\$1,335.87	94
Complex assessment - large activity	\$2,671.74	188
<b>CHMPs - three or more authorities</b>		
Desktop assessment - small activity	\$272.66	19
Desktop assessment - medium activity	\$506.36	36
Desktop assessment - large activity	\$1,051.67	74
Standard assessment - small activity	\$377.73	27
Standard assessment - medium activity	\$741.47	52
Standard assessment - large activity	\$1,496.94	105
Complex assessment - small activity	\$590.01	41
Complex assessment - medium activity	\$1,191.15	84
Complex assessment - large activity	\$2,371.17	167
<b>Approval of an amendment to a CHMP</b>	\$749.15	53
<b>Application for access to the Register</b>	\$255.96	18
<b>Application for advice on the Register</b>	\$170.64	12

Cost recovery for fee option 2 is approximately 81 per cent. This is due to cost recovery for CHPs and applications to obtain advice from the register being less than 100 per cent (10 per cent and 57 per cent respectively, due the reasons stated above Table 30). All other fees recover at full cost recovery.

### *8.3.5 Option 3: Variable fees by assessor*

Under Option 3, fees are updated to reflect better data on costs. They are set by recovering the avoidable costs of undertaking the activity, using the current cost categories. These costs were estimated using the following steps:

- Identifying the types of costs involved in undertaking each activity.
- Collecting data on the time involved in undertaking the activity, and any oncosts.
- Determining whether there were any additional costs involved in undertaking the activity.
- Making a variable fee by the party that is assigned to undertake the activity. A CHMP is assigned to be assessed by either the Secretary or RAPs based on the following criteria:
  1. If the activity falls within a RAP's designated area, the RAP assesses it in the first instance.
  2. If the RAP does not choose to assess a CHMP, it is instead assessed by the Secretary.
  3. If the CHMP has been prepared by either the Secretary or a RAP, it is assessed by the VAHC.
- Applying the central estimates to the medium activity fee for PAHT and CHMP evaluations, and adjust the central estimate up and down for the number of authorities and small and large activities based on the current relativities.

## Analysis of fees

- As with fee option 2, the fee levels for CHPs have been maintained at current levels to reduce the incidence of non-compliance and encourage CHPs to be conducted.<sup>128</sup>

The advantage of this approach is that it provides for a more precise and therefore equitable cost recovery than Option 2. Given that CHMP sponsors generally are not able to choose which party assesses their CHMP, the scope for substitution between the Government and RAPs is minimal. The estimated fee levels for Option 3 are shown in Table 31.

**Table 31: Estimated fee levels for Option 3 (2018 dollars)**

Fee	AV cost recovery	Implied AV fee units	RAP cost recovery	Implied RAP fee units
<b>CHPs<sup>129 130</sup></b>				
Discovery and research	\$113.76	8	\$113.76	8
Harm Aboriginal cultural heritage	\$654.12	46	\$654.12	46
Sell or remove Aboriginal object	\$184.86	13	\$184.86	13
<b>PAHTs</b>				
Small activity	\$335.88	24	N/A	N/A
Medium activity	\$671.76	47	N/A	N/A
Large activity	\$1,007.64	71	N/A	N/A
<b>NOI to prepare a CHMP</b>	\$103.35	7	\$184.85	13
<b>CHMPs - one authority only</b>				
Desktop assessment - small activity	\$583.64	41	\$162.69	11
Desktop assessment - medium activity	\$1,167.28	82	\$325.38	23
Desktop assessment - large activity	\$2,334.55	164	\$650.77	46
Standard assessment - small activity	\$792.65	56	\$287.31	20
Standard assessment - medium activity	\$1,585.31	111	\$574.61	40
Standard assessment - large activity	\$3,170.62	223	\$1,149.23	81
Complex assessment - small activity	\$1,214.33	85	\$512.31	36
Complex assessment - medium activity	\$2,428.67	171	\$1,024.61	72
Complex assessment - large activity	\$4,857.34	342	\$2,049.23	144
<b>CHMPs - two authorities</b>				
Desktop assessment - small activity	\$466.91	33	\$130.15	9
Desktop assessment - medium activity	\$875.46	62	\$244.04	17
Desktop assessment - large activity	\$1,750.91	123	\$488.08	34

<sup>128</sup> See Option 2 explanation.

<sup>129</sup> The ability to charge fees for of CHP evaluations of CHP application to inter Aboriginal Ancestral Remains and to rehabilitate land at an Aboriginal place exists in the Regulations, but is currently set at nil. This is proposed to continue under all fee options as AV considers that any fee would adversely discourage this activity from occurring.

<sup>130</sup> The current fee levels for CHPs have been maintained as previously noted.

Fee	AV cost recovery	Implied AV fee units	RAP cost recovery	Implied RAP fee units
Standard assessment - small activity	\$594.49	42	\$215.48	15
Standard assessment - medium activity	\$1,188.98	84	\$430.96	30
Standard assessment - large activity	\$2,377.96	167	\$861.92	61
Complex assessment - small activity	\$910.75	64	\$384.23	27
Complex assessment - medium activity	\$1,821.50	128	\$768.46	54
Complex assessment - large activity	\$3,643.00	256	\$1,536.92	108
<b>CHMPs - three or more authorities</b>				
Desktop assessment - small activity	\$408.55	29	\$113.88	8
Desktop assessment - medium activity	\$758.73	53	\$211.50	15
Desktop assessment - large activity	\$1,575.82	111	\$439.27	31
Standard assessment - small activity	\$535.04	38	\$193.93	14
Standard assessment - medium activity	\$1,050.27	74	\$380.68	27
Standard assessment - large activity	\$2,120.35	149	\$768.55	54
Complex assessment - small activity	\$804.50	57	\$339.40	24
Complex assessment - medium activity	\$1,624.17	114	\$685.21	48
Complex assessment - large activity	\$3,233.17	227	\$1,364.02	96
<b>Approval of an amendment to a CHMP</b>	\$1,137.08	80	\$402.05	28
<b>Application for access to the Register</b>	\$255.96	18	N/A	N/A
<b>Application for advice on the Register</b>	\$170.64	12	N/A	N/A

Cost recovery for fee option 3 is approximately 81 per cent (the same as fee option 2, as both fee options are based on the same data).

## 8.4 Evaluation of fee options

Table 32 shows a comparison of the fee units for each fee option.

**Table 32: Comparison of fee units for each fee option**

Fee	Option 1 actual fee units	Option 2 implied fee units	Option 3 – implied Government fee units	Option 3 – implied RAP fee units
<b>CHPs</b>				
Discovery and research	8	8	8	8
Harm Aboriginal cultural heritage	46	46	46	46

Analysis of fees

<b>Fee</b>	<b>Option 1 actual fee units</b>	<b>Option 2 implied fee units</b>	<b>Option 3 – implied Government fee units</b>	<b>Option 3 – implied RAP fee units</b>
Sell or remove Aboriginal object	13	13	13	13
<b>PAHTs</b>				
Small activity	40	24	24	N/A
Medium activity	80	47	47	N/A
Large activity	120	71	71	N/A
<b>NOI to prepare a CHMP</b>	8	10	7	13
<b>CHMPs - one authority only</b>				
Desktop assessment - small activity	10	27	41	11
Desktop assessment - medium activity	20	55	82	23
Desktop assessment - large activity	40	110	164	46
Standard assessment - small activity	40	39	56	20
Standard assessment - medium activity	80	79	111	40
Standard assessment - large activity	120	157	223	81
Complex assessment - small activity	60	63	85	36
Complex assessment - medium activity	120	125	171	72
Complex assessment - large activity	240	251	342	144
<b>CHMPs - two authorities</b>				
Desktop assessment - small activity	8	22	33	9
Desktop assessment - medium activity	15	41	62	17
Desktop assessment - large activity	30	82	123	34
Standard assessment - small activity	30	30	42	15
Standard assessment - medium activity	60	59	84	30
Standard assessment - large activity	160	118	167	61
Complex assessment - small activity	80	47	64	27
Complex assessment - medium activity	160	94	128	54
Complex assessment - large activity	320	188	256	108
<b>CHMPs - three or more authorities</b>				
Desktop assessment - small activity	7	19	29	8
Desktop assessment - medium activity	13	36	53	15



Fee	Option 1 actual fee units	Option 2 implied fee units	Option 3 – implied Government fee units	Option 3 – implied RAP fee units
Desktop assessment - large activity	27	74	111	31
Standard assessment - small activity	27	27	38	14
Standard assessment - medium activity	53	52	74	27
Standard assessment - large activity	107	105	149	54
Complex assessment - small activity	53	41	57	24
Complex assessment - medium activity	107	84	114	48
Complex assessment - large activity	213	167	227	96
<b>Approval of an amendment to a CHMP</b>	32	53	80	28
<b>Application for access to the Register</b>	16	18	18	N/A
<b>Application for advice on the Register</b>	6	12	12	N/A

#### 8.4.1 Scoring of fee options

The fee options are assessed using multi-criteria analysis. The fee options are scored against each criterion between -10 and +10 relative to the base case. Each score is then weighted according to the weightings shown in Table 24.

Under the base case, fees levels would not be set, which means fees would not be able to be charged. RAPs may either not choose to undertake any evaluations, or their financial sustainability may be jeopardised if they cannot find other funding to cover the cost of undertaking evaluations.

#### Full cost recovery

- Fee option 1: Using the current fees means that the data used to estimate the fee levels will be out-of-date, would lead to under-recovery from some regulated parties and over-recovery from others. This is likely to lead to an inefficient and/or inequitable allocation of resources. However, compared to the base case scenario, Option 1 does provide for approximately 82 per cent cost recovery, due to the fee levels being based on different estimates of evaluation costs. *(Score: +4)*
- Fee option 2: Option 2 represents an improvement on Option 1 as the fee levels have been updated using current data. Importantly, there is no longer over-recovery from regulated parties, however, total cost recovery is similar to fee option 1. The weighted average cost does provide some level of cross-subsidisation (mostly from Government to RAPs), which, along with under-recovery for CHP and applications for advice on the Register, reduces the extent of full cost recovery to 81 per cent. *(Score: +5)*
- Fee option 3: Option 3 achieves a greater level of precision in cost recovery by providing for variable fees by assessor. This ensures that less cross-subsidisation occurs and the fees



are closer to the actual cost of the activity for each party,<sup>131</sup> however, also means that an applicant may face higher fee levels if they plan work in a high fee area (compared with an otherwise identical applicant undertaking work in a low fee area), which may be considered unfair. This fee option also ensures that RAPs receive appropriate funding for their evaluations. The proportion of cost recovery is the same as fee option 2, at 81 per cent.<sup>132</sup> (Score: +5)

### Preventing induced demand changes

- Fee option 1: The fee levels in Option 1 would provide a level of consistency with the current fee levels. As the current level of non-compliance is not estimated to be significant, Option 1 is not likely to cause large induced changes in demand. (Score: -2)
- Fee option 2: Option 2 scores better than Option 1 as CHMP fees mostly fall. Fees for PAHTs are substantially higher, however, there are far fewer conducted. (Score: -1)
- Fee option 3: Option 3 could cause land-users to try and switch to the cheaper assessor for each fee type, causing over-crowding for the cheaper assessor. In practice however, the scope for land-users to be able to switch assessor without changing the location of their activity is extremely limited.<sup>133</sup> (Score: -6)

### Simplicity

- Fee option 1: There are a large number of fee levels provided for in Option 1. While the definitions of small, medium and large activities are defined in the Act, the number of fee levels could cause confusion if land-users switch between different sized activity areas. (Score: -2)
- Fee option 2: As with Option 1, there are a large number of fees that could cause confusion relative to the base case. As Option 2 changes the current fee levels, this may cause increased confusion compared to Option 1. (Score: -4)
- Fee option 3: Option 3 adds an extra layer of complexity to Options 1 and 2 by varying the fees by assessor type. This would cause uncertainty for land-users who could not be certain which fee they were to be charged (eg if RAPs declined to assess a CHMP due to capacity constraints). (Score: -8)

### Summary of MCA scores

Table 33 provides the initial MCA scoring of the fee options. These scores and their components provide an indication of the relative costs and benefits of each option.

**Table 33: MCA scoring against the fee options (-10 to +10)**

Criteria	Fee option 1		Fee option 2		Fee option 3	
	Score	Weighted-score	Score	Weighted-score	Score	Weighted-score
Full cost recovery (60%)	+4	+2.4	+5	+3.0	+5	+3.0

<sup>131</sup> Note that this is the same proportion as for fee option 2 as the fee levels in fee option 2 are based on a weighted average of the disaggregated fees used in fee option 3.

<sup>132</sup> This is as both fee options are based on the same cost data. Fee option 2 is merely a weighted average of the fees levels in fee option 3.

<sup>133</sup> A CHMP sponsor could only attempt to switch assessor by submitting an application to RAPs when they know a RAP is unable to assess it, in which case it would be assessed by Government.

Preventing induced demand changes (20%)	-2	-0.4	-1	-0.2	-6	-1.2
Simplicity (20%)	-2	-0.4	-4	-0.8	-8	-1.6
<b>Totals (after weighting)</b>	<b>+1.6</b>		<b>+2.0</b>		<b>+0.2</b>	

The options analysis indicates that fee options 2 has the highest score. This is primarily because the fee option 2 uses updated data on cost recovery activities to re-estimate fees levels, while minimising the level of induced demand changes, and maintaining the more simple structure of fee option 1.

The percentage in the proposed change to fees is detailed in Table 34.

**Table 34: Percentage change in current and proposed fees**

Fee	Option 1 actual fee units (current)	Option 2 implied fee units	Change in fees (%)
<b>CHP application</b>			
Discovery and research	8	8	0
Harm Aboriginal cultural heritage	46	46	0
Sell or remove Aboriginal object	13	13	0
<b>PAHTs</b>			
Small activity	40	24	-40
Medium activity	80	47	-41.3
Large activity	120	71	-40.8
<b>NOI to prepare a CHMP</b>	8	10	25
<b>CHMPs - one authority only</b>			
Desktop assessment - small activity	10	27	170
Desktop assessment - medium activity	20	55	175
Desktop assessment - large activity	40	110	175
Standard assessment - small activity	40	39	-2.5
Standard assessment - medium activity	80	79	-1.3
Standard assessment - large activity	120	157	30.8
Complex assessment - small activity	60	63	5
Complex assessment - medium activity	120	125	4.2
Complex assessment - large activity	240	251	4.6
<b>CHMPs - two authorities</b>			
Desktop assessment - small activity	8	22	175
Desktop assessment - medium activity	15	41	173.3
Desktop assessment - large activity	30	82	173.3
Standard assessment - small activity	30	30	0
Standard assessment - medium activity	60	59	-1.7
Standard assessment - large activity	160	118	-26.3

Analysis of fees

<b>Fee</b>	<b>Option 1 actual fee units (current)</b>	<b>Option 2 implied fee units</b>	<b>Change in fees (%)</b>
Complex assessment - small activity	80	47	-41.3
Complex assessment - medium activity	160	94	-41.3
Complex assessment - large activity	320	188	-41.3
<b>CHMPs - three or more authorities</b>			
Desktop assessment - small activity	7	19	171.4
Desktop assessment - medium activity	13	36	176.9
Desktop assessment - large activity	27	74	174.1
Standard assessment - small activity	27	27	0
Standard assessment - medium activity	53	52	-1.9
Standard assessment - large activity	107	105	-1.9
Complex assessment - small activity	53	41	-22.6
Complex assessment - medium activity	107	84	-21.5
Complex assessment - large activity	213	167	-21.6
<b>Approval of an amendment to a CHMP</b>	32	53	65.6
<b>Application for access to the Register</b>	16	18	12.5
<b>Application for advice on the Register</b>	6	12	100



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# *Appendices*

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# Appendix A Consultation summary

## 1 Consultation participants

Consultation was conducted over late-2017 to gather the views of key stakeholders and collect data on the costs and benefits of the Regulations. The consultation primarily was conducted via online surveys aimed at heritage advisors, RAPs, councils and CHMP sponsors:

- **Heritage advisors:** A survey was sent to all the heritage advisors on a list maintained on the AV website in mid-November 2017 (with a reminder sent a week later). It was received by approximately 270 heritage advisors and received 49 responses, of which 15 were considered complete. Heritage advisors' responses were used to inform the formation of the options, the cost-benefit analysis for options and the re-making of fees. It should be noted that to protect the anonymity of survey responses, survey respondents' details were not collected and it is possible that a heritage advisor could have filled out a survey multiple times. However, there is no indication to suggest that this occurred.<sup>134</sup> Furthermore, the variation in response data<sup>135</sup> indicates that not all heritage advisors worked in the same firm or undertook the same types of work. However, it is difficult to work out whether the sample is representative.
- **RAPs:** In conjunction with the RAP forum in late-November, a survey was sent to email addresses provided by AV for the 10 currently active RAPs. It received 10 complete responses. RAPs' responses were used to inform the formation of the options and the re-making of fees. As with the heritage advisor survey, it is possible for RAPs to have filled out the survey multiple times, however, there is no indication that this occurred.<sup>136</sup>
- **Councils and sponsors:** Initially, engagement with councils and other CHMP sponsors had been intended to be conducted in focus groups. However, in engagement with the UDIA and MAV, some 'consultation fatigue' was reported following the discussion paper in mid-2017, and instead a survey was distributed to UDIA and MAV members. This received 6 complete responses in total. These responses were used primarily to check against the data provided by other stakeholders.

In addition, short teleconferences were conducted with a small number of heritage advisors and sponsors, who provided qualitative feedback. Submissions to the AV discussion paper in mid-2017 were also used as inputs into the document.

## 2 Findings from consultation

### CHMP numbers and standards

The views on the optimum number of CHMPs that should be conducted varied among stakeholders. Most of the RAPs were in favour of a reduction in the number of exemptions and increase in triggers (i.e. the number of high impact activities and areas of cultural

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<sup>134</sup> Based on PwC analysis of diagnostic data provided by the survey tool.

<sup>135</sup> Including the number of CHMPs they conducted the year previously, the cost they charged to undertake a CHMP, the estimate of the cost of management conditions.

<sup>136</sup> Based on PwC analysis of diagnostic data provided by the survey tool.

heritage sensitivity) for a CHMP. Most sponsors thought that there were too few exemptions for a CHMP and fewer triggers. The views of heritage advisors were mixed, with most responding that the definition of high impact activities was “about right”, however, varied responses on the number of areas of cultural heritage sensitivity. Parks Victoria, in its submission to the discussion paper, stated that 95.8 per cent of the Parks Victoria estate is currently defined as an area of cultural heritage sensitivity, and raised concerns that the required resources to prepare CHMPs and CHPs was prohibitive and provided minimal benefit given Parks Victoria’s role in conserving its estates. It gave the example of a boat ramp costing \$10,000 to construct, however, requiring a CHMP costing \$60,000.

When asked to rank their opinion of the prescribed content of a CHMP, both heritage advisors and RAPs both generally thought it was too prescriptive and required too much time and effort to comply with, but also that it provided a useful structure and ensured that RAPs were provided with consistent material. Suggestions for improvement included generally focused around providing greater clarity around the triggers for a CHMP, when a CHMP should progress to a complex assessment, and how to determine the appropriate management conditions.

Another issue that was identified in by heritage advisors and sponsors was the perceived lack of consistency in the evaluation of a CHMP by AV or RAPs. AV will be amending its practice notes to attempt to improve this.

### **Management conditions resulting from a CHMP**

A number of sponsors and heritage advisors raised concerns around the cost of management conditions. The cost of salvage was a particular concern raised in submissions to the AV discussion paper. The UDIA commented that the cost of recommendations from CHMPs appeared to have increased over time, and could not be predicted. The Construction Material Processors Association stated that RAPs dictate their standard management conditions into a CHMP without regard for the circumstances of the area and activity.

Heritage advisors indicated that the cost of management conditions to sponsors was highly variable by project, and that avoidance and minimisation costs in particular were difficult to quantify. Some stated that defining the appropriate level of salvage was often difficult, as there was no strict criteria for when it should be undertaken. Sponsors stated that the cost of management conditions was often prohibitively high, particularly given the material salvaged often stayed on site.

### **Fees and forms**

Stakeholders had fewer views on fees and forms than on issues relating to CHMPs. Some heritage advisors commented that RAPs had a financial incentive through the fees they received to push for a complex CHMP to be undertaken (as this increased their gross revenue<sup>137</sup>), or for compliance inspections to be required. One heritage advisor stated that more than half the cost of a CHMP was as a result of RAP fees. RAPs, in their joint submission to the AV discussion paper, stated that an increase in fees was needed, particularly for a small CHMPs, which could require nearly the same amount of work as a large CHMP. The quantitative data collected as part of the survey of RAPs did not bear this out however. RAPs also pointed out that they did not receive payment for assessing or providing comment on a CHMP outside their RAP area.<sup>138</sup>

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<sup>137</sup> There is a significant amount of literature (for examples, see [https://www.bkd.com/docs/pdf/wp\\_outcome\\_measures.pdf](https://www.bkd.com/docs/pdf/wp_outcome_measures.pdf), <https://www.mckinsey.com/industries/social-sector/our-insights/measuring-what-matters-in-nonprofits>, [https://kuscholarworks.ku.edu/bitstream/handle/1808/22474/Myser\\_ku\\_0099D\\_14901\\_DATA\\_1.pdf?sequence=1](https://kuscholarworks.ku.edu/bitstream/handle/1808/22474/Myser_ku_0099D_14901_DATA_1.pdf?sequence=1)) that indicates that many organisations, in particular, community organisations, often measure success in terms of revenue (which is related to other, non-financial goals such as exposure and impact), even when ‘profit’ stays the same

<sup>138</sup> This is a voluntary activity, and is not part of the legislative framework. The funds provided to RAPs by AV help to recover some of this cost.

A related issue raised by heritage advisors and sponsors was RAPs experiencing capacity constraints,<sup>139</sup> resulting in significant time delays for evaluations of CHMPs.

### 3 Responses to common stakeholder feedback

AV has carefully considered the feedback given by stakeholders. Based on this, it has made a number of changes, however, also maintained a number of commented-upon aspects in the current Regulations. Table 35 shows the common suggestions from stakeholders and AV's rationale for addressing the issues through non-regulatory measures or potential future changes to the Act or Aboriginal Heritage Regulations 2018.

**Table 35: Responses to common stakeholder feedback**

Suggestion or problem	Source	Decision	Justification	How will AV address this outside of the Regulations
Introduce a size threshold for the definition of significant ground disturbance	Submission to the discussion paper	No change to the definition	Introducing a size threshold to the definition of significant ground disturbance would unnecessarily complicate the triggers for CHMPs	AV will develop better information regarding the application of significant ground disturbance
The Regulations should address the difficulty for Sponsors in providing evidence of significant ground disturbance	Submission to the discussion paper	No change to the Regulations	AV believes the interpretation and application of significant ground disturbance is better addressed in improved guidance material	AV will develop better information regarding the application of significant ground disturbance
Misconceptions regarding the definition and application of significant ground disturbance	Submissions to the discussion paper, stakeholder consultation	No change to the Regulations	Several stakeholders noted there is confusion as to the definition and application of significant ground disturbance. AV believes these concerns are best addressed by improving guidelines	AV will develop better information regarding the application of significant ground disturbance
Define 'management vehicle roads' as a high impact activity	Submission to the discussion	Do not include as a high impact activity	AV determined heritage management during the construction of management vehicle roads was better addressed through discussions with public land managers	AV will communicate with relevant public land managers to identify risks to heritage in the construction of management vehicle roads and advise accordingly

<sup>139</sup> Likely due to the increase in the number of CHMPs following the 2016 amendments to the Act, and the increase in development activity in Victoria in recent years.



<b>Suggestion or problem</b>	<b>Source</b>	<b>Decision</b>	<b>Justification</b>	<b>How will AV address this outside of the Regulations</b>
Amend the Regulations so that only the area of cultural heritage sensitivity is investigated in assessments for CHMPs	Submission to the discussion paper	No change to the Regulations	The defined areas of cultural heritage sensitivity are indicative only and it is known Aboriginal cultural heritage will be more likely identified in greater densities on land outside but immediately adjacent to defined areas of cultural heritage sensitivity. It is therefore appropriate these areas are investigated as part of the assessment for a CHMP	AV will develop better information regarding the purpose of the defined areas of cultural heritage sensitivity
Access to the Victorian Aboriginal Heritage Register is too limited for heritage advisors	Submission to the discussion paper	No change to the Regulations	Access to the Victorian Aboriginal Heritage Register is set out in the Act	AV will investigate options for including more information on the Aboriginal Victoria public map to assist heritage advisors
The Regulations should address the significant costs associated with archaeological salvage operations	Submission to the discussion paper	No change to the Regulations	Archaeological salvage can be a condition of a CHMP and a regulatory regime is not set-out in the Act	Aboriginal Victoria will consult with key stakeholders to address any concerns regarding archaeological salvage operations. The outcomes of this consultation may result in amendments to legislation, regulation, or better guides and forms
The definition of 'harm' in the Act	Submission to the discussion paper, stakeholder consultation	No changes to the Regulations	AV believes clarification to the definition of harm is better addressed in improved guidance material	AV will investigate opportunities to clarify the practical application of the definition of harm

<b>Suggestion or problem</b>	<b>Source</b>	<b>Decision</b>	<b>Justification</b>	<b>How will AV address this outside of the Regulations</b>
Land developers are carrying out their activity in stages so as to avoid the need to prepare a CHMP	Submission to the discussion paper, stakeholder consultation	No changes to the Regulations	AV believes the staging of development activities to avoid CHMP requirements is better addressed in improved guidance material	AV will develop better guidance material regarding the interpretation of the definition of activity and how it relates to staged developments
It is not clear in the Regulations when a CHMP should include a complex assessment	Submission to the discussion paper, stakeholder consultation	No changes to the Regulations	AV believes the reasons when a CHMP should include a complex assessment would be better explained in improved guidance material	AV will develop better guidance material regarding the CHMP preparation process
Geotechnical investigations should be exempt from requiring a CHMP	Submission to the discussion paper	No changes to the Regulations	AV notes a Practice Note exists for geotechnical investigations	AV will investigate opportunities to improve advice regarding geotechnical investigations
The requirement for a cumulative Impacts statement as part of a CHMP needs to be better explained and should be prescribed in the Regulations	Submissions to the discussion paper, stakeholder consultation	No changes to the Regulations	The cumulative impacts statement is already required by the CHMP approved form	AV will develop better guidance material regarding the need for and expectations of the cumulative impacts statement in a CHMP
The fees charged by heritage advisors and Registered Aboriginal Parties are too high and should be prescribed in the Regulations	Submission to the discussion paper	No change to the Regulations	The Act establishes which fees can be prescribed in the Regulations.	AV will investigate opportunities to develop general advice for Sponsors seeking the services of a heritage advisor
Management conditions detailed in CHMPs are often unclear and difficult to enforce	Submission to the discussion paper, stakeholder consultation	No change to the Regulations	Management conditions are prepared by the sponsor	AV will prepare guidelines writing enforceable conditions for CHMPs

<b>Suggestion or problem</b>	<b>Source</b>	<b>Decision</b>	<b>Justification</b>	<b>How will AV address this outside of the Regulations</b>
The area of cultural heritage sensitivity associated with waterways should be reduced	Submission to the discussion paper	No change to the Regulations	AV's recent analysis of the proximity of Aboriginal places to waterways indicates a 200m buffer is appropriate	AV will develop better information regarding the purpose of the defined areas of cultural heritage sensitivity.
It is not clear what constitutes minor works, and what process Sponsors should follow when their activity is exempt from requiring a CHMP	Submission to the discussion paper	No change to the definition of minor works in the Regulations	AV believes clarification to the definition of minor works is better addressed in improved guidance material	AV will prepare guidance material for minor works and responsibilities of Sponsors outside of the CHMP process
Some activities which are not defined high impact activities should require the preparation of a CHMP if Aboriginal places are present in the activity area	Submission to the discussion paper, stakeholder consultation	No change to the Regulations	AV notes a cultural heritage permit is required for activities which may harm an Aboriginal place	AV will develop better information regarding responsibilities of Sponsors outside of the CHMP process
The definition of cultural heritage sensitivity should be broadened to apply to a greater area of Victoria	Submission to the discussion paper, stakeholder consultation	No change to the Regulations	AV investigated options to broaden the definition of cultural heritage sensitivity and concluded the current definition achieves the right balance in protecting Aboriginal cultural heritage while ensuring the Regulations do not impose a significant burden to land users and developers	AV will develop better information regarding the purpose of the defined areas of cultural heritage sensitivity
CHMP conditions are not clearly presented in the CHMP document	Stakeholder consultation	No change to the Regulations	AV believes presenting the management conditions towards the front of the CHMP would improve compliance	AV will make improvements to the guide for preparing a CHMP, amendments to the approved form, and will prepare advice for writing enforceable conditions

<b>Suggestion or problem</b>	<b>Source</b>	<b>Decision</b>	<b>Justification</b>	<b>How will AV address this outside of the Regulations</b>
Amendments should not be made to approved CHMPs when additional assessment is required to prepare the amendment	Stakeholder consultation	No change to the Regulations	The Act determines the circumstances under which an approved CHMP can be amended	AV will make improvements to the guide for preparing a CHMP to clarify in what circumstances an amendment is appropriate
Aboriginal places which have been destroyed should no longer generate an area of cultural heritage sensitivity	Stakeholder consultation	No change to the Regulations	Aboriginal Victoria believes it is appropriate an area of cultural heritage sensitivity remains for destroyed Aboriginal places. This is because it is likely nearby Aboriginal places exist and these should be protected and managed through the CHMP process	AV will develop better information regarding the purpose of the defined areas of cultural heritage sensitivity

Source: Information provided by AV.

# Appendix B Further background

## 1 Previous legislation

The main previous legislation relating to Victorian Aboriginal cultural heritage protection are:

- the Victorian Archaeological and Aboriginal Relics Preservation Act 1972
- Part 2A of the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

The *Aboriginal Heritage Act 2006* and Aboriginal Heritage Regulations 2007 superseded this legislation.

Victoria has almost a 40 year history of laws protecting Aboriginal cultural heritage. Prior to 2007, Aboriginal cultural heritage in Victoria was managed under the Victorian *Archaeological and Aboriginal Relics Preservation Act 1972* and Part 2A of the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

The 1972 Act was the first in Australia, along with the still-operating 1972 Western Australian *Aboriginal Heritage Act 1972*. It was an early attempt to provide protection of Aboriginal heritage, but it included no roles for Aboriginal people. The 1972 Act established the Victorian Aboriginal Heritage Register (the Register), which now holds records of over 30,000 places, and introduced penalties for damaging 'relics'. It also established a permit system, controlled by the State. According to AV, during this period few developments were assessed for heritage impacts, and destruction of Aboriginal heritage was common.

In the early 1980s, the State attempted to pass updated heritage legislation, failed, and asked the Commonwealth to pass legislation on its behalf. Part 2A of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* was enacted in 1984, which pertained exclusively to Victoria and operated concurrently with the *Archaeological and Aboriginal Relics Preservation Act 1972*.

The 1984 Commonwealth Act enabled the Victorian Government to pass limited heritage responsibilities to Aboriginal organisations nominated by the Minister. Most of these were community based organisations (often referred to as co-operatives), established for purposes other than cultural heritage management, such as providing community health and housing services to the local population. These organisations were not necessarily Traditional Owner organisations. Under the Commonwealth legislation, the decisions these organisations made could be an effective veto over development, creating a deadlock in some cases and conflict and high costs in others.

Under this system, there was minimal pro-active assessment of Aboriginal heritage. If a statutory authority identified a potential heritage issue, the matter could be referred to AV to determine whether a heritage assessment was required. In these cases, heritage was generally dealt with through monitoring of construction works and consents to disturb and destroy sites. Where sites were identified, the developer needed to seek consent to disturb or destroy sites from the local Aboriginal organisation which could often stop works during construction.

Some of the issues associated with this framework included a lack of clear processes for statutory authorities, confusion about who spoke for cultural heritage on behalf of the Aboriginal community, uncertainty for industry about how to manage impacts on heritage and inadequate assessment, management and protection of Aboriginal cultural heritage.

## **2 Aboriginal Heritage Amendment Act 2016**

The Aboriginal Heritage Amendment Act 2016 (the Amendment Act) established new provisions and changes to the *Aboriginal Heritage Act 2006*. The Amendment Act was informed by the Victorian Government Response to the *Review of the Aboriginal Heritage Act 2006*, the *Parliamentary Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties*, the release of an *Aboriginal Heritage Amendment Bill Exposure Draft*, and widespread consultation with Traditional Owners, industry groups, local Government, State and Commonwealth Government and cultural heritage professionals. The Amendment Act included new provisions into the principal Act, including those relating to Aboriginal Intangible Heritage, PAHTs, ACHLMAs, and the Aboriginal Cultural Heritage Management Fund. The changes included:

- empowering Registered Aboriginal Parties (RAPs) to determine cultural heritage permit applications;
- the introduction of the Preliminary Aboriginal Heritage Test (PAHT) system – a voluntary process allowing certification by the Secretary as to whether a cultural heritage management plan (CHMP) is required;
- enabling the Secretary to establish an Activity Advisory Group (AAG) of Traditional Owners for a project in an area where there is no appointed RAP, to advise on the proposed activity and its impact on Aboriginal cultural heritage;
- establishing Aboriginal Cultural Heritage Land Management Agreements (ACHLMAs), which are a written agreement between a public land manager and a Registered Aboriginal Party (RAP) for the purposes of managing and protecting Aboriginal cultural heritage during low-medium impact land management activities;
- Aboriginal Heritage Officers to be employed by RAPs to monitor sponsor compliance with CHMPs and with the power to issue improvement notices and 24-hour stop orders;
- the Victorian Aboriginal Heritage Council (VAHC) to coordinate the management, return and protection of Aboriginal Ancestral Remains within Victoria;
- introducing the concept of Aboriginal Intangible Heritage and Aboriginal Intangible Heritage Agreements (AIHAs). AIHAs can be formed by a RAP or Traditional Owner group applying to register Aboriginal Intangible Heritage, including:
  - oral and expressions (including language, songs and stories)
  - performing arts (vocal and instrumental music, dance and performance)
  - social practices, rituals and festive events
  - knowledge and practices concerning nature and the universe (including environmental and ecological knowledge) and/or
  - visual arts and craftsmanship (skills and knowledge involved in their production).
- Fees and charges collected under the Act, relevant Government appropriation such as funds allocated to support RAPs, additional gifts and interest earned on investments, to go into an Aboriginal Cultural Heritage Management Fund, to be managed by the VAHC. On the VAHC's recommendation, funds will be used to facilitate Aboriginal cultural heritage management and protection projects.

Other amendments:

- the ability to amend cultural heritage management plans (CHMPs) after approval;
- removing the requirement for a CHMP for certain small developments in urban areas;

- strengthened offences and penalties and new offences to improve the enforceability of the Act and strengthen its deterrent effects;
- a new cultural heritage permit (CHP) to rehabilitate land at an Aboriginal place, including land containing burial grounds for Aboriginal Ancestral Remains;
- a new CHP to inter Aboriginal Ancestral Remains at an Aboriginal place,
- introducing a 30-day CHP application consideration period;
- removing the requirement for a CHP to buy an Aboriginal object;
- additional roles and reporting functions for RAPs and the VAHC;
- a power for the VAHC to establish and call upon its own advisory committees as required;
- new fees to support the administration of the Act, for example, for NOIs to prepare a CHMP;
- additional RAP application provisions; and
- additional persons and organisations able to access the Victorian Aboriginal Heritage Register;
- a new offence related to the misuse of VAHR information;
- new and clarified definitions.

### **3 *Reviews and reforms of the legislative framework***

There have been a number of reviews and reforms of the legislative framework over the past decade, including:

- the initial review of the Regulations, including the previous RIS
- the 2012 Parliamentary Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties
- the 2011-12 review of the *Aboriginal Heritage Act 2006*
- the 2015-16 and 2016-17 Victorian Government budgets
- the 2017 review of the Aboriginal Heritage Regulations.

#### **Initial review of the Regulations**

Given the substantial change to the legislation, it was accepted that a period of operation was required before some aspects of the Regulations could be reasonably evaluated. Firstly, the RIS process had highlighted that the cost of the Regulations could only be accurately assessed after the Regulations had been in operation for a period. Secondly, the then Minister for Aboriginal Affairs wanted to ensure that the list of High Impact Activities in the Regulations was sufficiently targeted, and considered that an operational period may be needed to identify corrections (if any) in this list. In addition to these issues, a review was considered beneficial in assessing the effectiveness of the Regulations in meeting the aims of the Act.

Consequently, the RIS included an evaluation strategy, and the Minister commenced operation of the Act in 2006 with a commitment that the Regulations would be reviewed after twelve months operation.

The evaluation concluded that the Regulations have:

- been effective in protecting Aboriginal cultural heritage:



- based on reports to AV, there has been a significant reduction in developments occurring without assessment or approvals compared to the previous system
- those CHMPs that have been prepared have consistently related to developments potentially impacting on Aboriginal cultural heritage, as was intended
- ensured a reasonably consistent CHMP system:
  - there has been a greater reduction in the number of unnecessary assessments than was estimated, suggesting that the new system is providing ever greater clarity around obligations to protect Aboriginal cultural heritage
  - although it is difficult to be definitive based on the data available, the indications are that CHMPs are being prepared across the State, in relation to developments with the potential to harm heritage, and that local government areas that should have comparatively more CHMPs generally do have more
- generally resulted in consistent and appropriate assessment methodologies and CHMP recommendations. It was too early to evaluate the fees being paid to RAPs, as there is insufficient data to draw meaningful conclusions.

The RIS estimated that the Regulations would lead to an increase in the administrative burden of \$5.7 million, driven by estimated additional costs of preparing plans, and the cost of additional plans that it was estimated would need to be prepared because of the Regulations. After further consultations with heritage consultants, and based on actual data in relation to the number of plans after commencement, the overall increase in the administrative burden was not as great as that estimated in the RIS. This is because the increase in the cost of preparing CHMPs was largely offset by a reduction in the number of plans required (from 380 per annum to 271).

### **Parliamentary Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties**

The Environment and Natural Resources Committee Inquiry into the establishment and effectiveness of Registered Aboriginal Parties was initiated in September 2011. Registered Aboriginal Parties are appointed by the Victorian Aboriginal Heritage Council pursuant to the *Aboriginal Heritage Act 2006*. The Committee received 70 submissions and conducted six public hearings across Victoria. The Committee handed down its report on 14 November 2012.

### **Review of the Aboriginal Heritage Act 2006**

The Victorian Government concurrently conducted a review of the *Aboriginal Heritage Act 2006*. The review was a legislated requirement under section 193 of the *Aboriginal Heritage Act 2006*, and was required to be conducted before the fifth anniversary of its commencement (28 May 2012).

The review involved widespread consultation and 140 written submissions were received. A range of materials were developed as part of the review, including:

- A Discussion Paper
- Summary of Submissions and Consultations (first round)
- Issues and Options paper
- A PwC report on the social and economic impacts of the Act; and
- A Summary Report responding to the Issues and Options Paper.



## **2015-16 and 2016-17 Victorian Budget**

The 2015-16 Victoria Budget provided over \$10 million in operational funding for RAPs:

- Between \$200,000 - \$300,000 in funding per RAP for a Cultural Heritage Officer, and part funding for an administration officer, an executive officer, and office & vehicle costs
- Approximately \$1.5 million for the Victorian Aboriginal Heritage Council for expanded functions
- Over \$1 million for an Aboriginal Ancestral Remains Unit. Further approximately \$500,000 for an Aboriginal Ancestral Remains Consultation and Return Fund
- Senior enforcement officer position funded to spearhead a greater focus on enforcement and compliance.

The 2016-17 Budget provided \$1.0 million for Aboriginal cultural heritage management and protection, as well as \$3.8 million for Aboriginal self-determination and strong Aboriginal culture.<sup>140</sup>

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<sup>140</sup> Victorian Government, Budget files, [www.budget.vic.gov.au](http://www.budget.vic.gov.au)

# Appendix C Estimating quantifiable benefits

Further detail on the assumptions and methodology to calculate the quantifiable benefits of the Regulations is shown below.

## 1 Methodology

Estimating the quantifiable benefits of the Regulations means trying to capture as much of the above value as possible. Fortunately, sociocultural value can generally be captured within economic value, which is easier to quantify. For example, the economic value that an individual will place on a place of cultural heritage will, consciously or unconsciously, take into account the historical significance to them. One set of methods to estimate economic value is stated preference. This involves survey respondents participating in hypothetical markets to make hypothetical choices.<sup>141</sup> These choices may then be transformed into values. Two studies that have used stated value to estimate the value of heritage are described below.

## 2 Studies on stated values of cultural heritage

### Rolfe and Windle (2003)

The protection of Aboriginal heritage has typically been inconsistent across states in Australia, according to a study by John Rolfe and Jill Windle in 2003.<sup>142</sup> This is due largely to significant differences in the subjectively assessed quality of different places or assets which may range from areas that are nationally and internationally renowned (ie cave paintings, art galleries and burial grounds) through to places of more localised importance, such as camping areas, rock-working sites and marked trees. The authors conducted a study to establish what values are held within the Australian community for protecting places. They used a choice modelling valuation approach to assess the values held by both the Aboriginal community and the general community for the protection of places of Aboriginal cultural heritage in Central Queensland, Australia.

While the study does not specifically concern itself with the willingness to pay for the protection of places of Aboriginal cultural heritage, this inference can be drawn from their model estimates so that it is possible to estimate a willingness to pay (derived from a representation of proposed increased annual local government rates in the Rockhampton and greater Brisbane area) for increasing levels of protection over these cultural places.

Firstly, it is important to note that the non-Aboriginal respondents (in Rockhampton and Greater Brisbane) indicated that they would, in a trade-off, prefer an improvement to all other attributes in the model to the increased protection of places of Aboriginal cultural heritage. Their multinomial logit parameters were negative, indicating they did not place a positive value on the increasing of protection over places of Aboriginal cultural heritage compared to other aspects like vegetation protection and river health within the study area. At the time the research was conducted (2002-03), around 15% of places of Aboriginal cultural heritage were protected in the study area, The Bowen Basin, as a result of being in national parks and timber reserves. The remaining 84.5% of places of Aboriginal cultural

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<sup>141</sup> The Getty Conservation Institute, 'Assessing values of cultural heritage'. Research report, 2002.

<sup>142</sup> John Rolfe and Jill Windle, 'Valuing the protection of Aboriginal cultural heritage sites', *The Economic Record*, Vol. 79, Special Issue, pp. 85-95.

heritage were on private or crown land and their protection was at the discretion of the landholder.

Unlike the non-Aboriginal respondents who, through their choices indicated they would not be prepared to pay an increased household based tax to protect more places of Aboriginal cultural heritage, the Aboriginal respondents of Rockhampton did indicate they would be prepared to pay to increase the level of protection through their household taxation. The Aboriginal respondents in the study area indicated through their choices that they would pay \$3.40 annually per incremental increase in the amount of protected Aboriginal heritage land.<sup>143</sup> This ranged from 25 to 55 per cent protection in 10 per cent increments. Assuming that the relationship between price and cultural heritage protection is linear, for each 10 per cent increase in the amount of heritage land protected Aboriginal households would be willing to accept an increase to their annual household rates of \$3.40 (\$4.97 in 2018 dollars). Further, the paper confirms that Aboriginal households would prefer the highest level of protection available (55 per cent in the study), implying that they would be prepared to pay \$13.60 (\$19.87 in 2018 dollars) per year per household for the protection of the maximum suggested protection level.<sup>144</sup> In essence this means that each protected place at the highest level of protection would be worth \$19.87 per household per year in 2018 terms.

In 2016, there were 47,788 Aboriginal and Torres Strait Islander people in Victoria according to the ABS Census. Average household size for Indigenous people is estimated to be 3.2 persons, which gives 14,934 Victorian Indigenous households.<sup>145</sup> Using the choice modelling value of \$19.87 per household per year, this gives an implied value per place of \$296,739. This result rests on a number of assumptions:

- The Aboriginal population in Rockhampton and Victoria have similar valuations for Aboriginal cultural heritage.
- Aboriginal people's valuation of Aboriginal cultural heritage has not changed over the past 15 years.
- The relationship between price and cultural heritage protection is linear (ie that for each 10 per cent increase in the amount of heritage land, Aboriginal households are willing to pay the same amount to protect Aboriginal cultural heritage). The above modelling has used a relatively conservative approach, as it would be possible to increase the proportion of the Aboriginal places towards 100 per cent, and therefore increase the implied value per site.
- That the stated values of Aboriginal cultural heritage are similar to the actual values, that is, each Aboriginal household would be prepared to pay \$13.60 per year per place of Aboriginal cultural heritage in practice.
- There is no reduction in the value of Aboriginal cultural heritage as proximity to the place diminishes. For example, it is possible that Aboriginal people in Rockhampton might value significant sites in that town highly, but might not value a site further away as highly.

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<sup>143</sup> This figure was determined as the ratio of cultural heritage beta and the (absolute) value of the negative beta for the linear coded cost function (a negative beta is generally expected for cost parameters, as people generally prefer options or products less as the price increases). These estimates were obtained from the Indigenous respondents' multinomial logit model in the study.

<sup>144</sup> This is calculated by multiplying \$3.40 by four, representing the four increments of 10 per cent from 15 per cent (the current level of Aboriginal cultural heritage protection) to 55 per cent (the maximum level of Aboriginal cultural heritage protection modelled).

<sup>145</sup> ABS, 2071.0 - Census of Population and Housing, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/2071.0Main+Features852016?OpenDocument>

The use of the Rolfe and Wolfe study involves accepting the assumptions outlined above. Nonetheless, given the scarcity of other studies examining the preferences of Victorians towards the value of Aboriginal cultural heritage, AV considers it is reasonable to consider the results of this study as a useful indication of the value of Aboriginal cultural heritage.

### **Valuing the priceless: The value of historic heritage in Australia by the Allen Consulting Group (2005)**

A choice modelling exercise undertaken by the Allen Consulting Group in 2005<sup>146</sup> indicated that Australians value heritage highly. Only 3 per cent of survey respondents believed “too much is being done [to protect historic heritage across Australia]” in comparison to 62 per cent of survey respondents who believed that “No, too little is being done”, and 32 per cent believed “Yes, about right”.

A scenario involving tightening of development controls and an increase in the number of heritage listings prompted a willingness-to-pay of \$105.90 (\$146.27 in 2018 dollars) per person per year.

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<sup>146</sup> The Allen Consulting Group report prepared for the Heritage Chairs and Officials of Australia and New Zealand, ‘Valuing the priceless: The value of historic heritage in Australia’, Research Report 2, 2005.



