

Section 155 Requests for Variations of Registration Policy and Procedures

Variations of Registration Overview

Once a RAP is registered, section 155 of the *Aboriginal Heritage Act 2006* (the Act) gives the Council broad powers to make a variation of a RAP's registration, subject to the consent of the relevant RAP(s).

Section 155

(1) The Council may vary the registration of a Registered Aboriginal Party (**RAP**) with the consent of that party and, if there are other RAPs for that area, with the consent of each of those parties.

(2) A variation under this section may include a variation to the boundaries of the area for which the Registered Aboriginal Party is registered.

Council's power to make variations is a discretionary power

The power to make a variation may be exercised at Council's discretion:

- upon the request of an existing RAP; or
- by a determination of Council.

There are no time limitations to the Council's power to determine variations to registration

In considering a request to vary the registration of an existing RAP under s 155 the detailed matters and time frames applicable in determining applications under s 150 and 151 are not relevant.

Variation determinations come into effect:

1. Upon consent of the relevant RAP(s); or
2. At date or time stipulated by Council subject to the consent of relevant RAP(s)

Variations to registration

1. Variations to a RAP's registered boundaries (See: Parts 1-4)
2. All other variations (See: Part 5)

PART 1: REQUESTS FOR VARIATION OF REGISTERED BOUNDARIES

1.1 CHANGING RAP BOUNDARIES AFTER REGISTRATION BY S 155 APPLICATION

Variations may be made to extend or retract existing boundaries but cannot be made to include Country which does not connect to an existing RAP area.

1.2 REQUEST FOR BOUNDARY VARIATION MUST INCLUDE

A request made under section 155 for variation to a RAP's boundaries must be made in writing and include:

- a) The party's name address and other contact details;
- b) A description of the area in respect of which the application for variation is made, including details, in the form of a map or written description of the boundaries of that area;
- c) A statement from the applicant outlining the nature of-
 - i) The traditional links of the applicant to the variation application area;
 - ii) The representativeness of the applicant for Traditional Owners with interest in the application area; and
 - iii) The applicant's capacity to undertake statutory functions in the variation application area.

PART 2: PROCESS UPON RECEIPT OF REQUEST FOR VARIATION

Once a request for variation is received, the following process will be enacted prior to the Council's consideration of the variation.

2.1 PUBLIC NOTICE OF REQUEST FOR VARIATION OF REGISTRATION

After receiving a request for variation of registration, the Office of the Victorian Aboriginal Heritage Council will contact known interested parties and will issue a public notice of the application on the VAHC website and in major regional papers within the relevant application area.

This reflects Council's commitment to an open transparent process and ensures all interested parties have opportunity to comment on the request for variation.

2.1.1 Public comment period

Council will generally allow for 30 business days for public comment from the date the public notice appears in the abovementioned media.

To ensure procedural fairness the RAP requesting the variation will be notified of any public comment received by the OVAHC and of information received which contradicts or is otherwise detrimental to the party requesting the variation or the claims presented in the request for variation.

The RAP requesting the variation will then have an opportunity to provide the Council with their response to these comments.

Once appropriate, Council will consider the relevant comments.

2.1.2 Making changes to the boundary variation during the public comment period

Council may decide it necessary to complete a second public notice process if changes to the original boundary variation are substantial.

PART 3: CONSIDERATIONS IN DETERMINING BOUNDARY VARIATION REQUEST

In determining a request for variation under s 155 the Council will consider four main matters:

1. The overall scheme and purposes of the Act;
2. The workability of the Act and the RAPs organisational capacity to discharge statutory functions in respect to the application area;
3. Views of any party whose interests may be adversely affected by a variation decision; and
4. The human rights implications of a variation decision.

The weight given to each of these factors is a matter for the Council to decide in its determination.

3.1 THE OVERALL SCHEME AND PURPOSES OF THE ACT

Variations to an existing RAP's registration will be considered as to its affect upon the ability of relevant Traditional Owners to protect and manage their Aboriginal cultural heritage.

The Acts purposes are set out below:

Section 1

- (a) to provide for the protection of Aboriginal cultural heritage and Aboriginal intangible heritage in Victoria; and
- (b) to empower Traditional Owners as protectors of their cultural heritage on behalf of Aboriginal People and all other Peoples; and
- (c) to strengthen the ongoing right to maintain the distinctive spiritual, cultural, material and economic relationship of Traditional Owners with the land and waters and other resources with which they have a connection under traditional laws and customs; and
- (d) to promote respect for Aboriginal cultural heritage, contributing to its protection as part of the common heritage of all peoples and to the sustainable development and management of land and of the environment.

Fundamentally, the Act aims to ensure that as far as possible Traditional Owners exercise control over the protection and management of their cultural heritage- both tangible and intangible. The Scheme of the Act is built upon this purpose.

In exercising their discretion to consider the effect a proposed variation will have upon the ability of relevant Traditional Owners to protect and manage their Aboriginal cultural heritage in line with the overall scheme and purposes of the Act, the Council may have regards to the factors outlined below in 3.1.1- 3.1.3.

3.1.1 Traditional links

The Council may consider the traditional links of the RAP applicant to the area over which the boundary variation request is made.

This consideration accords with the objectives and scheme of the Act in particular to “accord appropriate status to Aboriginal People with traditional or familial links to Aboriginal cultural heritage in protecting that heritage.”

Section 7

For the purposes of this Act, a person a person is a Traditional Owner of an area if:

- (a) the person is an Aboriginal Person with particular knowledge about traditional, observances, customs or beliefs associated with the area; and
- (b) The person:
 - (i) Has responsibility under Aboriginal tradition for significant Aboriginal places located in, or significant Aboriginal objects originating from, the area; or
 - (ii) Is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for significant Aboriginal objects originating from, the area.

Set against the objectives of the Act and its overall purpose and direction, the Council gives significant weight to traditional or familial links and considers it an important factor.

In considering Traditional Ownership over an area, amongst other matters Council will consider:

1. The material provided by existing RAP applicants as to extent and relationship to Country
2. Information resulting from the public notification process
3. The group’s recognition as a Traditional Owner group by other Traditional Owner communities
4. The Council’s own cultural knowledge as Traditional Owners of the State;
5. Available secondary material; and
6. Reports commissioned by the Council and undertaken by independent experts

The Council requires RAPs to be inclusive of Traditional Owners of the determination area. Where Traditional Ownership is claimed the Council considers it important that the RAP group is, an inclusive, cohesive and representative group of Traditional Owners of the determination area.

3.1.2 Representativeness

Council requires RAPs to be inclusive of Traditional Owners of the application area. The Council will consider whether the RAP is, representative and inclusive of the Traditional Owners with interests in the area.

Along with their own expertise and knowledge, Council will consider:

1. The material provided by existing RAP applicants
2. The applicant RAP’s Membership criteria;
3. Comments from the public notification process and the applicant’s responses
4. Evidence of engagement with Traditional Owners with interests within the proposed varied boundary area. Evidence of engagement may include but is not limited to:

- a. Comments received from the public comment process;
- b. A written overview of discussions or attempts to hold discussions regarding the variation with interested or affected Traditional Owners including a description of outcomes if any outcomes are reached; and
- c. Signed statements from the interested or affected Traditional Owner Groups.

3.1.3 Any other relevant matters

In determining a boundary variation the Council will consider any other matter it considers relevant.

3.2 WORKABILITY OF THE ACT AND THE RAP'S CAPACITY TO UNDERTAKE STATUTORY FUNCTIONS IN THE APPLICATION AREA

Council has an obligation to ensure its decisions enhance the workability of the Act. In this respect, Council will consider evidence of the RAP's organisational capacity to discharge its statutory functions of a RAP regarding the proposed registration variation area.

To support its request for a boundary variation, a RAP may provide information as to:

1. Structural and operational plan for undertaking statutory functions in the application area,
2. Cultural heritage operations/consultation its staff or members undertake in respect to the application area.

3.3 HUMAN RIGHTS IMPLICATIONS OF THE VARIATION

Section 38 of the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**) requires the Council to give proper consideration to relevant human rights in its decision making and to make determinations that are compatible with those human rights.

The human rights impact of the decision must be assessed and evaluated by the Council. There is no precise formula for doing this. As such, the Council will take a practical and common-sense approach to the analysis of the relevant human rights.

Council will give careful consideration to the Charter by taking into account the distinct cultural rights of Aboriginal persons recognised in s 19(2).

Section 19 (2)

Aboriginal persons hold distinct cultural rights and must not be denied, with other members of their community to:

- (a) Enjoy their identity and culture;
- (b) Maintain the use of their language;
- (c) Maintain their kinship ties; and
- (d) Maintain their distinctive spiritual material and economic relationship with the land, waters and other resources with which they have a connection under traditional laws and customs

Council will consider:

- That international human rights law and case law on cultural rights suggests that only a substantial interference with the enjoyment of cultural rights will amount to a violation of that right.
- Council will consider the purpose (the end) of any limitation (means) upon a right. The goal or purpose of any limitation needs to be identified and the Council must consider whether the limitation has an important purpose and whether the means which are sought to be

achieved are suitable for achieving that end. There needs to be a rational and proportionate relationship between the limitation and its purpose.

- Whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
- That the Act sets out several considerations to reasonably balance competing cultural rights and interests as they exist in applications for registration. In particular, the Act:
 - Expressly confirms it is not intended to affect native title rights and interests;
 - Gives preference to native title holders and recognised Traditional Owner group entities by granting these groups exclusive rights to be appointed as RAPs;
 - Has the objective of according appropriate status to Traditional Owners in protecting cultural heritage; and
 - Allows for the appointment of two or more RAPs over an area, but only where this will not affect the effective functioning of the Act.

3.4 SEEKING FURTHER INFORMATION

Whilst the Council will draw on its own knowledge and expertise, the Council is able to seek further information from the RAP or from any other person who might have relevant knowledge or expertise.

The Council may choose to consult experts such as anthropologists, lawyers and genealogists from time to time. However, the Council is not obliged to do so and may instead request the RAP or other interested party provide this information.

Where relevant, it is practice for Council to enter into a confidentiality agreement with external experts engaged to provide further information.

If Council decides to consult, to ensure fair process Council will notify the RAP of the substance of the information obtained or advice received, and give the RAP an opportunity to respond prior to making a determination.

PART 4: BOUNDARY VARIATION DETERMINATIONS

4.1 Notice of boundary variation determinations

Where the Council makes a determination to vary a RAP's registered boundaries it is Council's practice to inform the RAP applicant of a decision of variation, by telephone as soon as possible after the decision is made.

The Council will also give written notice to the relevant RAP(s) as soon as practicable after the determination to make a variation to seek the RAP's consent to the variation.

The decision to vary subject to relevant consents will then be published on Council's web site and circulated by email to a range of stakeholders.

4.2 When does a boundary variation determination come into effect?

Variation determinations come into effect:

1. Upon consent of the relevant RAP(s); or
2. At date or time stipulated by Council subject to the consent of relevant RAP(s).

The Act does not specify as to when a determination of a variation under section 155 comes into effect. However, as per s 155(2) for a variation to occur, the Council must have the consent of the relevant RAP(s) to which the variation will affect.

As the power to make a variation to registration is discretionary, the Council may determine the time/date as to which their determination of variation is to come into effect. Though this will be subject to the consent of the applicant RAP and any if there are other RAP(s) within the area to which the variation is to occur, a written statement or evidence from the other relevant RAPs outlining their consent to the boundary variation.

4.3 What constitutes “Consent of relevant RAP(s)”

Council will require written evidence that the relevant consents have been given by the relevant RAP(s).

4.4 Notice of variation to registration

Once consent to variation is received, and the Council will make a variation to a RAP’s registration the Council must give written notice to the RAP and the Secretary as soon as practicable after the variation is made (s 155 (3)).

The variation to a RAP’s registration will be published on Council’s web site and circulated by email to a range of stakeholders.

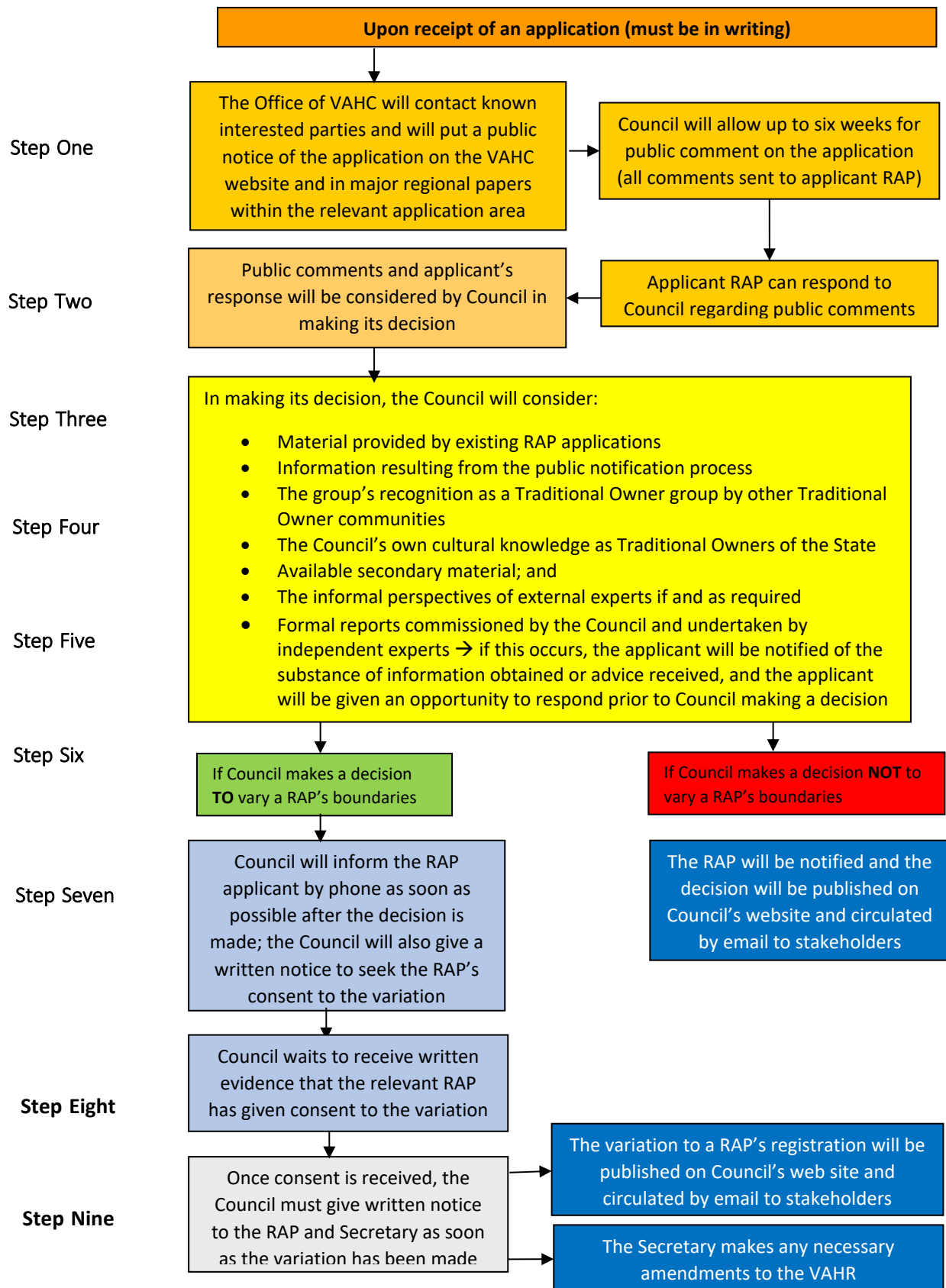
4.5 Amendments to the Victorian Aboriginal Heritage Register (VAHR)

The Secretary must make any necessary amendments to the VAHR as soon as practicable upon notice of the variation to registration.

PART 5: APPLICATIONS FOR OTHER TYPES OF VARIATION

Applications for other variations (other than boundary variations) will be considered by Council on a case by case basis.

Attachment 1: Flow chart of s 155 application for boundary variation process



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