

# Suspending, Revoking or Imposing Conditions on the Registration of a Registered Aboriginal Party

## Background

Sections 154A and 157 of the *Aboriginal Heritage Act 2006* (“the Act”) give the Victorian Aboriginal Heritage Council (“the Council”) the power to impose a condition upon, suspend, or revoke the registration of a Registered Aboriginal Party (RAP). This paper sets out Council’s policy and procedures with respect to the exercise of these powers.

Foremost in Council’s consideration in the exercise of any of these powers is the purpose of the Act: in particular “to empower [T]raditional [O]wners as protectors of their cultural heritage...”. The central vehicle established under the Act to bring about this empowerment is the RAP. Thus, while there may be circumstances that demand the revocation of a RAP’s registration, this action will only ever be taken as a last resort as it has the potential effect of disempowering affected Traditional Owners. Seen in this context, use of the power contained in the Act to suspend the registration of a RAP or to impose conditions upon that registration should be seen as mechanisms utilised to avoid any necessity to revoke registration and not as a sanction.

## 1 Imposition of Conditions

This power is found in section 154A of the Act. Subsection 154A(1) states that: “The Council may impose conditions on the registration of a [RAP] at any time”. The balance of section 154A sets out the procedure to be followed if Council proposes to impose a condition on a RAP’s registration.

### **Grounds**

Unlike the power to suspend or revoke the registration of a RAP found in section 157, the Act does not specify any particular grounds upon which the Council would decide to impose conditions on the registration of a RAP. The principles of administrative law and statutory interpretation though would suggest that a condition would only be imposed if a RAP had either failed to satisfy one of the criteria set out in section 151 which goes to the matters the Council must consider in appointing a RAP or if a RAP failed to appropriately undertake one (or more) of the functions of RAPs set out in s 148.

Reviewing the matters set out in s 151 shows most of them would be unlikely to create the basis for imposing a condition on a RAP that is already registered (for example if a RAP became a registered native title party or was granted land in fee simple subsequent to its registration as a RAP).



However, subsection 151(3)(c) requires that Council consider “whether the applicant is a body representing [T]raditional [O]wners of the area to which the applications relates”. It is conceivable that a RAP, at the application stage, represented Traditional Owners for the application area, but subsequently (for example through membership rule changes or the emergence of new evidence regarding traditional ownership of the area in question) ceased to do so. In such a case it would be open to Council to consider imposing a condition on the RAP to the effect that it takes steps to remedy its current unrepresentativeness.

Subsection 151(3)(d) may also provide the foundation for imposing a condition but does not pertain to any existing RAPs.

Section 148 sets out fourteen functions of a RAP. Section 149 requires that all these functions be carried out “in good faith”. Unlike s 151, it is conceivable that the manner of discharge (or failure to do so) of any of these functions could give rise to the consideration of the imposition of a condition. This can be illustrated using examples. To commence with the more obvious scenarios: if a RAP, having given notice of its intention to evaluate a CHMP, then failed to co-operate in the preparation of the plan (per s 55) or was negligent or displayed bad faith in its assessment (per s 63) of a CHMP then this would constitute a failure to discharge the functions of a RAP under s 148(d) and (fb). Beyond this though, it is also conceivable that a refusal by a RAP (without reasonable grounds) to provide advice when requested by the Minister pursuant to s 148(a) or (b) or a failure to discharge reporting requirements (per s 148(fe)) or under funding requirements) would also constitute the basis for consideration of the imposition of a condition. As discussed further below, whether a failure to perform a function (in good faith, competently, or at all) constituted a basis for consideration of the imposition of a condition would depend upon an assessment by the Council of matters such as the frequency, severity and intention of the RAP in respect of its actions. It is not to suggest that the imposition of a condition will be the inevitable result of every transgression.

### ***Nature of a Condition***

As noted above, the Act provides Council with a broad discretion as to the nature of any condition(s) imposed on a RAP’s registration. Consistent with the discussion above under background, in general terms a condition would only be utilised to assist in achieving the purpose of the Act through ensuring efficiently functioning, self-determining RAPs. To achieve this outcome, in the ordinary course when Council is considering imposing a condition on a RAP’s registration, the condition would be designed to:

- address and overcome an identified deficiency in a RAP’s discharge of its statutory function;
- allow the Council to monitor the effectiveness of the remedial measure contained in the condition;
- provide a defined time-period during which the effectiveness of the measure can be assessed; and
- contain provisions to provide for the termination of the condition once the deficiency has been assessed as addressed, or to provide for further remedial action, if this is not the case.



## ***Process for Imposition of a Condition***

Section 154A specifies a straightforward process for the imposition of a condition upon registration of a RAP. Under the section Council is merely required to give 30 days' notice to a RAP of its consideration of the imposition of a condition. The RAP then has this notice period to respond to the Council and the response must be considered by the Council before reaching a decision.

Consistent with Council's obligations under the Act and to render procedural fairness in the consideration of the imposition of conditions, the process of consideration of the imposition of a condition will take one of two forms. The first is where consideration of the imposition of a condition arises from the outcome of the investigation of a complaint under the Complaints Procedure. The second is where consideration of the imposition of a condition arises in the absence of such a complaint.

### **A. Imposition of Condition Arising from a Complaint**

1. If the circumstances that may warrant the consideration of the imposition of a condition become known to Council as a result of an investigation into a complaint under the Complaints Procedure and Council believes that all the matters relevant to those circumstances have been fully investigated during the complaint process Council may proceed to issue a notice under s154A ("s 154A Notice") to the effect that:
  - Council intends to impose a condition on the registration of the RAP;
  - Sets out the terms of the condition that is contemplated;
  - Sets out the basis upon which Council has formed the view that the Condition may be desirable; and
  - Seeks a response to these matters from the RAP in not less than 30 days from the date of the notice.
2. Upon receipt of the response (if any) from the RAP, Council may determine to:
  - Take no further action;
  - Not proceed with the imposition of any Condition but to seek regular reports from the RAP in respect of the circumstances that gave rise to the consideration;
  - Seek further information from the RAP or another party;
  - Proceed with the imposition of a condition in the same or predominantly similar form as notified to the RAP in the s 154A notice; or
  - Give further notice to the RAP under s 154A of the consideration by Council of the imposition of a condition in a significantly different form to that originally notified.

The RAP will be advised in writing of any decision taken by the Council. If the Council determines to seek further information from another party, the RAP will also be given the opportunity to consider any such information that is obtained and provide a further response to Council in relation to it.



## B. Imposition of Conditions in the absence of a complaint

Council members are appointed based upon (in part) their experience or knowledge of Victorian Aboriginal Cultural Heritage matters. Council may become aware of circumstances that require consideration of the imposition of a condition through their own knowledge and experience (i.e. in the absence of a complaint under the complaints procedure).

When Council becomes aware of circumstances that warrant consideration of the imposition of a condition in the absence of a complaint, Council will:

1. If the matter is for some reason urgent, proceed immediately to issue a notice under s154A to the effect that:
  - Council intends to impose a condition of the registration of the RAP pursuant to s 154A;
  - Sets out the terms of the condition that is contemplated;
  - Sets out the basis upon which Council has formed the view that the Condition may be desirable; and
  - Seeks a response to these matters from the RAP in not less than 30 days from the date of the notice.
2. On receipt of the response from the RAP (if any) Council may determine to:
  - Take no further action;
  - Not proceed with the imposition of any Condition but to seek regular reports from the RAP in respect of the circumstances that gave rise to the consideration;
  - Proceed with the imposition of a condition in the same or predominantly similar form as notified to the RAP; or
  - Give further notice to the RAP under s 154A of the consideration by Council of the imposition of a Condition in a significantly different form to that originally notified.

The RAP will be advised in writing of any decision taken by the Council.

3. If the matter is not considered so urgent to warrant the immediate issuance of a s154A notice (as per 1. above), Council will write to the RAP and request information from the RAP relevant to the circumstances that warranted considering of the imposition of a condition. Council will request this information be provided at its next meeting.
4. On receipt of the further information from the RAP, Council may decide to:
  - Take no further action;
  - Not proceed with the imposition of any Condition, but to seek regular reports from the RAP in respect of the circumstances that gave rise to the consideration;
  - Seek further information from the RAP or another party; or
  - Issue a s 154A notice.

The RAP will be advised in writing of any decision taken by the Council. If the Council determines to seek further information from another party, the RAP will also be given the opportunity to consider any such information that is obtained and provide a further response to Council in relation to it.



5. In the event the Council determines to issue a notice under s154A, that notice will be to the effect that:
  - Council intends to impose a condition of the registration of the RAP;
  - Sets out the terms of the condition that is contemplated;
  - Sets out the basis upon which Council has formed the view that the Condition may be desirable; and,
  - Seeks a response to these matters from the RAP in not less than 30 days from the date of the notice.
6. Upon receipt of the response from the RAP Council may determine to:
  - Take no further action;
  - Not proceed with the imposition of any Condition but to seek regular reports from the RAP in respect of the circumstances that gave rise to the consideration;
  - Proceed with the imposition of a condition in the same or predominantly similar form as notified to the RAP; or
  - Give further notice to the RAP under s 154A of the consideration by Council of the imposition of a Condition in a significantly different form to that originally notified.

The RAP will be advised in writing of any decision taken by the Council.

#### *Publication of Decision to Impose a Condition*

If Council determines to impose a condition on the registration of a RAP, ordinarily, the terms and duration of the condition will be published on the Council's website. This publication is at the discretion of Council and a RAP may make submission to the Council in respect of a decision to publish the terms of the condition.

### **3 Suspension or Revocation of Registration**

#### ***Grounds and General Principles***

Unlike the imposition of a condition, the Act specifies the only circumstances in which Council can suspend or revoke the Registration of a RAP.

The registration of a RAP can only be suspended or revoked if the Council believes on reasonable grounds that the RAP has failed to act in good faith to:

- consider or advise on applications for cultural heritage permits;
- evaluate cultural heritage management plans;
- perform a cultural heritage agreement;
- undertake any of its functions and powers under the Act; or
- perform conditions placed on the RAPs registration by the Council under s 154A.

*(RAPs may also request Council to suspend or revoke their registration (per s 156(4)).*

As noted above, suspension or revocation of a RAP deprives affected Traditional Owners the opportunities to control their cultural heritage that the RAP system offers and thus will only



be a course adopted by Council when absolutely necessary. Council will usually see it as preferable to remedy any deficiency in a RAPs' cultural heritage activities through the imposition and monitoring of conditions rather than through suspension or revocation of registration.

The Act sets out the procedure for suspension or revocation of registration but does not suggest the differing circumstances where revocation would be considered as opposed to suspension. The nature of both measures, and the overall purposes of the Act, suggest that suspension would be appropriate in circumstances where it would be reasonable to consider that after some period of time with registration suspended the circumstances that gave rise to that suspension would come to an end. An example may be if the personnel involved in the cultural heritage functions of a particular RAP were shown to have undertaken their function in such bad faith that the RAP should be suspended while those persons held positions within the RAP (although even in these circumstances the imposition of conditions may be a more suitable regulatory approach).

By contrast revocation would only be contemplated if it were shown that there was some fundamental flaw in the constitution of a RAP. An example may be where Council had imposed a condition on a RAP arising from its lack of representativeness (as discussed above under grounds for imposing conditions) and the RAP had persisted in refusing to adhere to that condition. In these circumstances, revocation may be considered instead of suspension in order to facilitate the establishment of a new and truly representative RAP.

## **Process**

The process Council will adopt in considering the suspension or revocation of the registration of a RAP is (as with the process for considering the imposition of condition upon registration) informed by both the Council's obligations under the Act and the requirements of procedural fairness. As such the process for suspension or revocation of registration is similar to the process to be adopted in respect of the consideration of imposition of conditions and similarly influenced by whether the consideration is arising consequent upon the investigation of a complaint under the Complaints Procedure or in the absence of a complaint.

### **A. Suspension or Revocation Arising from a Complaint**

1. If the circumstances that may warrant the consideration of suspension or revocation become known to Council as a result of an investigation into a complaint under the Complaints Process and Council believes that all the matters relevant to those circumstances have been fully investigated during the complaint process Council may proceed and issue a notice under s157 ("s 157 Notice") to the effect that:
  - Council proposes to suspend or revoke the registration of the RAP;
  - Sets out whether suspension or revocation of registration is proposed and if suspension is proposed the terms of the suspension (i.e. for a defined period or until the fulfilment of a condition);
  - Sets out the basis upon which Council has formed the view that suspension or revocation of registration may be desirable; and



- States that the RAP has an opportunity to make oral and (or) written submissions to a Council meeting to consider the matter to be held not less than 28 days following the date of the notice.
2. Upon receipt of the submissions (if any) from the RAP, Council may determine to:
- Take no further action;
  - Not proceed with the suspension or revocation of registration, but to seek regular reports from the RAP in respect of the circumstances that gave rise to the consideration;
  - Seek further information from the RAP or another party;
  - Commence the process for imposition of a condition upon registration under s 154A; or
  - Proceed with the proposed suspension or revocation of registration of the RAP.

The RAP will be advised in writing of any decision taken by the Council. If the Council determines to seek further information from another party, the RAP will also be given the opportunity to consider any such information that is obtained and provide a further response to Council in relation to it. If a decision is taken to suspend or revoke the registration of the RAP, the Secretary (under the Act) will also be informed for the purpose of updating the Register.

#### B. Suspension or Revocation of Registration in the absence of a complaint

Council members are appointed based upon (in part) their experience or knowledge of Victorian Aboriginal Cultural Heritage matters. Council may become aware of circumstances that require consideration of suspension or revocation of registration of a RAP through their own knowledge and experience (i.e. in the absence of a complaint under the complaints procedure).

When Council becomes aware of circumstances that warrant consideration of suspension or revocation of registration of a RAP in the absence of a complaint, Council will:

1. If the matter is for some reason urgent, proceed immediately to issue a notice under s157 to the effect that:
  - Council proposes to suspend or revoke the registration of the RAP;
  - Sets out whether suspension or revocation of registration is proposed and if suspension is proposed the terms of the suspension (i.e. for a defined period or until the fulfilment of a condition);
  - Sets out the basis upon which Council has formed the view that suspension or revocation of registration may be desirable; and
  - States that the RAP has an opportunity to make oral and (or) written submissions to a Council meeting to consider the matter to be held not less than 28 days following the date of the notice.



2. Upon receipt of the submissions (if any) from the RAP, Council may determine to:
  - Take no further action;
  - Not proceed with the suspension or revocation of registration, but to seek regular reports from the RAP in respect of the circumstances that gave rise to the consideration;
  - Commence the process for imposition of a condition upon registration under s 154A; or
  - To proceed with the proposed suspension or revocation of registration of the RAP.

The RAP will be advised in writing of any decision taken by the Council. If a decision is taken to suspend or revoke the registration of the RAP, the Secretary (under the Act) will also be informed for the purpose of updating the Register.

3. If the matter is not considered so urgent as to warrant the immediate issuance of a s157 notice, Council will write to the RAP and request information from the RAP relevant to the circumstances that warrant consideration of suspension or revocation of registration of the RAP. Council will request this information be provided at its next meeting.
4. On receipt of the further information from the RAP, Council may decide to:
  - Take no further action;
  - Not proceed with the suspension or revocation of registration of registration but to seek regular reports from the RAP in respect of the circumstances that gave rise to the consideration;
  - Seek further information from the RAP or another party;
  - Commence the process for imposition of a condition upon registration under s 154A; or
  - Issue a notice under s 157.

The RAP will be advised in writing of any decision taken by the Council. If the Council determines to seek further information from another party, the RAP will also be given the opportunity to consider any such information that is obtained and provide a further response to Council in relation to it.

5. In the event the Council determines to issue a notice under s157, that notice will be to the effect that:
  - Council proposes to suspend or revoke the registration of the RAP;
  - Sets out whether suspension or revocation of registration is proposed and if suspension is proposed the terms of the suspension (i.e. for a defined period or until the fulfilment of a condition);
  - Sets out the basis upon which Council has formed the view that suspension or revocation of registration may be desirable; and
  - States that the RAP has an opportunity to make oral and (or) written submissions to a Council meeting to be held to consider the matter to be held not less than 28 days following the date of the notice.





6. Upon receipt of the submissions (if any) from the RAP, Council may determine to:
- Take no further action;
  - Not proceed with the suspension or revocation of registration, but to seek regular reports from the RAP in respect of the circumstances that gave rise to the consideration;
  - Commence the process for imposition of a condition upon registration under s 154A; or
  - To proceed with the proposed suspension or revocation of registration of the RAP.

The RAP will be advised in writing of any decision taken by the Council. If a decision is taken to suspend or revoke the registration of the RAP, the Secretary (under the Act) will also be informed for the purpose of updating the Register.

#### **Automatic Revocation or Suspension**

The Act also sets out certain circumstances (s 156(2)-(3A)) in which revocation of the registration of a RAP occurs automatically without any action from the Council.

These circumstances include if:

- there is a native title determination or Traditional Owner Settlement Act agreement inconsistent with the terms of a RAP's appointment;
- a RAP ceases to be registered under CATSI; or
- a RAP is placed under administration or goes into liquidation.

In addition, Council *must* suspend or revoke registration of the RAP if requested to do so by the RAP (s 156(4)).

## **4 Appeals**

Under s 158 a decision by Council to suspend or revoke the registration of a RAP can be appealed to the Victorian Civil and Administrative Tribunal. The Act sets out no such provision in relation to the imposition of conditions. Thus, there is no appeal against Council's decision to impose conditions upon registration, however, a decision of this nature could be subject to judicial review in the Supreme Court.

