

The background of the cover is a light cream color with several stylized black bird silhouettes scattered across it. The birds are depicted in various flight positions, some facing left and some facing right. They have a simple, graphic design with pointed wings and tails.

Aboriginal Cultural Heritage Victoria

DISCUSSION PAPER
SUMMARY

SUMMARY OF DISCUSSION PAPER

Front cover design : Emu tracks

OCTOBER 1985

NOTE TO THE READER

This Summary covers all of the points dealt with in the main Discussion Paper but in a shorter and hopefully more easily read form.

If the reader does not have access to the main Discussion Paper and would like to have a copy, please contact the Ministry for Planning and Environment, 9th Floor, 500 Collins Street, Melbourne 3000, Phone (03) 6170 211

Any written comment on the proposals in the paper should be sent to the Ministry for Planning and Environment at the above address.

The closing date for comments is Friday, 28 February 1986.

SUMMARY OF THE DISCUSSION PAPER

This Summary is written in the form of questions and answers which relate directly to the various Sections of the Discussion Paper itself.

INTRODUCTION

Question 1. Why has this Discussion Paper been produced?

The Paper has been produced following a request by the Victorian Government for a review of the existing legislation protecting Archaeological and Aboriginal Relics in the State.

Preparation of the Paper has been the responsibility of a committee known as the Relics Act Review Committee (RARC). It comprises ten people, six of whom are Aborigines (please see Appendix 1 for list of RARC members). The Committee is also responsible for taking into account the public comments that are expected to be received on this Paper.

SECTION 1 : PREAMBLE

Question 2. What is the main purpose of the Discussion Paper?

The Paper sets out the proposed contents for a new Act of State Parliament to identify, manage, maintain, restore and enhance the cultural heritage of Aboriginal people in Victoria.

The Paper recommends that the Act should complement Victoria's proposed Aboriginal Affairs legislation as well as that already covering the role and functions of the Museum of Victoria and any other legislation covering European Heritage in the State.

At present there are two Federal Acts and two State Acts which relate to the management and protection of Aboriginal Cultural Heritage in Victoria. However, the review of these Acts has shown that none of them is adequate in itself, or even when taken together, to provide the blanket legal cover believed to be necessary.

SECTION 2 : SCOPE OF THE PROPOSED ACT

Question 3. Will the proposed Act be able to provide a balance between the needs and interests of Aboriginal people and those of the community at large?

The management system that is discussed in this Paper recognises the need to involve both Aboriginal and non-Aboriginal people.

It is acknowledged and accepted that there are often differences between Aboriginal values and those of different interest groups in the community at large. It is also recognised that, despite the difficulties involved, it is in everyone's interest to try to find a workable acceptable balance of values within the proposed Act, even though in the end compromise solutions may need to be found.

The activities that are proposed to try to achieve this balance of values include Aboriginal custodianship of cultural properties wherever this can be arranged and a long-term education programme involving Aborigines, and which is designed to increase the general community's appreciation of Aboriginal Heritage.

Interlocking with this programme is the need to continue high quality research at universities and other institutions, the education and employment of Aborigines in many different fields of expertise, and overall, an ongoing public communication and consultation process.

SECTION 3 : GUIDING PRINCIPLES OF THE PROPOSED ACT

Question 4. What are the basic building blocks of the proposed Act?

Four principles or basic ideas have been outlined in the Paper as being the main guides for drafting the proposed Act.

These principles are:

- (a) Legal protection of the Aboriginal Cultural Heritage;
- (b) Consultation;
- (c) Management and Preservation;
- (d) Information Access and Education.

In discussing the principle of "legal protection", it is acknowledged at the outset that Aborigines have a priority interest in their culture which cannot be removed and that they should be recognised as the hereditary owners of their culture.

This is a statement of fact. What is also needed is to find a general legal basis for protecting all things associated with the Aboriginal Cultural Heritage in Victoria in a way which upholds the common law rights of anyone possessing examples of these things, including Aborigines themselves.

What is proposed is a form of general trusteeship by the Crown, with the power of possession and control being able, where appropriate, to be delegated, transferred, or left as is in the case of private or scientific collections and sites on private land.

In this, the proposed Act will recognise the significant role that individuals and private organisations, as well as public institutions have played in the careful curation of Aboriginal artefacts and sites over the last 150 years in Victoria and it will encourage them to continue to perform this role.

It must be perfectly clear that this principle of Trusteeship by the Crown does not imply that collections and sites in private hands are in danger of being taken over or confiscated by the Crown. It must be openly acknowledged and plain to all that if this were seen to be the case, it is possible that many collections and sites would soon disappear or be destroyed without trace.

- (b) The principle of "Consultation" in all aspects of Aboriginal Cultural Heritage management is seen as being essential if Aboriginal values and interests are to be accepted and balanced fairly with those of the wider community.

Within this process of consultation, the role and importance of Aboriginal Co-operatives and other Aboriginal community based and controlled organisations and bodies in Victoria will need to be acknowledged and utilised.

Overall, it is believed that the process of consultation must make sure that Aborigines and non-Aboriginal people alike are involved in positive, effective and acceptable ways.

- (c) "Management and Preservation" is probably the most obvious guiding principle as there is a clear need to manage and preserve as much as possible of Victoria's Aboriginal Heritage. However, within this principle it is important to remember that it is not physically possible to manage and preserve all examples of Aboriginal culture.

In most cases it will be those items that are known or shown to be of special significance to the Aboriginal Cultural Heritage that will be the most important in terms of management and preservation.

This will require a system of management and control that emphasises Aboriginal involvement, consultation, and approval as well as encouraging Aboriginal education and employment in the identification, collection, investigation, curation and interpretation of material evidence and information.

It is also especially important to reiterate the significance of the role that public education has to play in ensuring the preservation and enhancement of Aboriginal Cultural Heritage in Victoria. In this, the idea of "Aboriginal Keeping Places" is seen as an essential concept that will become increasingly important in the future.

- (d) "Information Access and Education" are recognised as two parts of the same principle. As with the other three principles, this one must be placed on as positive a footing as possible if it is to be accepted both by Aboriginal people and the wider community.

This will require close ties between the education, management and control system mentioned above and the needs of Aboriginal people and others to access Aboriginal cultural information and use it to enhance everyone's general understanding and appreciation of the Aboriginal Cultural Heritage in Victoria.

Scientific research and reference materials will need to be maintained for educational purposes and it is recommended that, where it can be arranged, collections of cultural material should be under the control of Aborigines and kept in Keeping Places.

It is intended that the proposed Act should ensure that reference collections can be accessed for scientific and educational purposes as well as ensuring that the cultural materials involved can be properly managed and preserved.

SECTION 4 : MAIN OBJECTIVES OF THE PROPOSED ACT

Question 5. What is the proposed Act principally designed to achieve?

This Paper recommends that the proposed Act should:

- (a) replace the Archaeological and Aboriginal Relics Preservation Act 1972;
- (b) ensure suitable changes are made to the Museums Act and other relevant Acts and new legislation is drawn up to protect those parts of Victoria's European heritage now covered by the 1972 Relics Act;
- (c) provide a better way of identifying, preserving, protecting, restoring and enhancing the Aboriginal Heritage in Victoria;
- (d) emphasise the role of education in encouraging public awareness and appreciation of the Aboriginal Cultural Heritage in Victoria.

SECTION 5 : DEFINITIONS AND KEY TERMS

Question 6. What are the main words that are likely to be used in the proposed Act to explain the different things which make up the Aboriginal Heritage in Victoria?

The most important words and terms used in the paper are defined in Section 5. These are:

- Aborigine
- Aboriginal place or area
- Aboriginal Objects
- Aboriginal Folklore
- Aboriginal Remains
- Aboriginal Cultural Property
- Facsimile of Aboriginal Cultural Property

The principal focus in each of the definitions is as follows:

"Aborigine" means a member or descendent of the Aboriginal race of Australia.

"Aboriginal Place or Area" means any place or area of special significance to Aborigines, including places and areas which are of cultural importance to them and those which may be important for broader scientific and educational reasons as well.

"Aboriginal Object" means any object of cultural importance or special significance to Aborigines, including objects of historic importance made originally for use or sale by Aborigines living on missions after European settlement of Australia.

"Aboriginal Folklore" means all Aboriginal oral histories and legendary traditions, including totemic relationships, songs, art, rituals, ceremonies, dances, spiritual beliefs and customs connected with the cultural life of Aborigines.

"Aboriginal Remains" means all the bodily remains of Aborigines, including skeleton remains.

"Aboriginal Cultural Property" means any and all of the above Aboriginal places, areas, objects, folklore, and remains.

"Facsimile of Aboriginal Cultural Property" means any exact copy or likeness of any example of Aboriginal cultural property.

A number of other key words and terms have been used in this Discussion Paper. These are explained in Appendix 3 at the back of the Paper and include such words and terms as: Aboriginal religion, Aboriginal tradition; custodian; totemic relationships; archaeology; etc.

SECTION 6 : ADMINISTRATION

Question 7. How is the proposed Act to be administered?

Currently, three State Government departments are involved in managing aspects of the Aboriginal Cultural Heritage in Victoria. These departments and their main Aboriginal heritage functions are:

<u>Department</u>	<u>Function</u>
1. Planning & Environment	Policy, permits, approvals. Administering Relics Act, including research and education in Aboriginal archaeology, and policing Aboriginal sites and relics.

- | | |
|----------------------------------|---|
| 2. Museum of Victoria | Management, research, and education re Aboriginal artefact collections. |
| 3. Conservation, Forests & Lands | Management and interpretation of sites on public land. |

In each case the department involved has established ways of liaising with the Aboriginal community on their activities, through committees involving Aborigines and by educating and employing Aboriginal people in the actual work functions.

Each department has also established resources, expertise and funding to support these functions. This means that it would not be practical to hand over immediately all aspects of Aboriginal heritage management to one department or Government agency.

However, it is possible that such a shift could occur in the longer term and to achieve this a number of interim steps would be needed. These steps include some rationalization of the current spread of departmental functions through the proposed Act and amendments to other relevant legislation such as the Museums Act, and a build up in Aboriginal education, employment and expertise in heritage management techniques.

The Paper does not address the detailed administrative arrangement that would be needed between Departments to make use of the powers of the proposed Act. However, it assumes that the Minister for Planning and Environment will be given responsibility for Aboriginal Cultural Heritage in the first instance.

It also proposes that an Aboriginal Heritage Council be set up under the new Act, which would have direct access to the Minister. The Council would be responsible, through the Minister, for the management and administration of Aboriginal Cultural Heritage in Victoria.

Question 8. How will the work or duties of the Council be carried out on a daily basis?

As the Council will probably meet at regular intervals of say two months throughout the year, it will need a servicing body of some sort to actually administer the provisions of the Act day to day.

So it is proposed that, at least in the short to medium term, the Council would be serviced by the Victoria Archaeological Survey. The VAS is an agency of the Ministry for Planning and Environment and its work is already largely to do with protecting Aboriginal cultural materials in the field.

As part of this short to medium term servicing proposal the Director of the VAS would take on the responsibilities of Registrar of the Aboriginal Heritage. In this role he would be directly responsible to the Council for all administration and operational matters to be handled under the new Act.

Question 9. How will the Aboriginal Heritage activities of the VAS fit in with the work of other Government departments and agencies?

In a general way the Council would have the responsibility for coordinating the Aboriginal Heritage management activities of the VAS, the Museum's Division of Human Studies, and those of the Department of Conservation, Forests and Lands.

To help it do this, the new Act would have powers in it to ensure that departments consulted with the Council on significant issues before taking any actions. These powers would also be reflected in changes to the Museums Act and other relevant Acts.

At the day to day operations level, it is proposed that the Council would delegate its coordination role to the Registrar of the Aboriginal Heritage.

Because of this, and because of some confusion in the past over the role of the Museum and the VAS, there will need to be some clarification and rationalising of the activities of these two bodies.

SECTION 7 : STANDING AND STRUCTURE OF THE ABORIGINAL HERITAGE COUNCIL

Question 10. What will be the legal status of this Council?

This Paper recommends that the Council should be a legally-established independent body. Its members would be appointed under the proposed Act by the Governor of Victoria on the recommendation of the Minister responsible for the Act.

Question 11. Will it be an all-Aboriginal Council, and how will it be structured?

Given that it would be considered logical and probably essential by many people for an Aboriginal Heritage Council to be made up of Aborigines, it is proposed for the purposes of the Discussion Paper that the Council should be all Aboriginal.

Council members would be nominated by Aboriginal communities and organisations from around Victoria in a similar way to that now used to elect members to existing peak Aboriginal organisations such as the Victorian Aboriginal Education Association, the Aboriginal Health Resources Consultative Committee, and the Aboriginal Housing Board.

The Council's structure should be big enough to reflect the geographic distribution of the many Aboriginal groups involved and, at the same time, be of a size that will allow it to carry out its duties effectively. To these two ends, it is proposed that the Council should have fifteen members, all with a vote. Eight members would be a quorum and the term of office would be four years, with office bearers being elected each year.

Question 12. Given the proposal for an all-Aboriginal Council, in what ways will the departments and non-Aboriginal scientists, educators, lawyers and other interested people be able to assist the Council and remain involved in Aboriginal Heritage management?

Three methods to ensure formal input to the Council have been included in the Council's procedural powers. They allow it to:

- (i) nominate any person to be present at any meeting to sit with the Council and advise it on any matter. Such a person would not have a vote;
- (ii) invite government and non-government organisations to be represented at Council meetings as "Observers" with an ability to comment, where appropriate, on any matters relevant to the organisations concerned; and,
- (iii) form sub-committees and advisory committees in a similar manner to that now allowed under the Museums Act.

Another method is also presented; it is to include in the proposed Act a provision for the Minister to have an Advisory Committee similar to that now existing under the current Relics Act.

This method recognises the fact that at least the three departments involved would remain responsible for giving advice directly to their Ministers as well as needing to interact closely with the Council.

If this method were used, three questions would need to be answered:

- (i) how the Ministerial Advisory Committee's advice could best be interlocked with the work of the Council. This may be achieved by having Council members on the Advisory Committee;
- (ii) besides department representatives, whether to also include on the Advisory Committee representatives of other interested public and private bodies, as is now the case under the Relics Act; and,
- (iii) assuming these other bodies were included, what range of interests and skills should be looked for in a committee whose purpose would be to give advice only. It would have no executive functions, such as those proposed for the Council.

SECTION 8 : POWERS AND DUTIES OF THE ABORIGINAL HERITAGE COUNCIL

Question 13. How will the proposed Act enable the Council to effectively carry out the work of managing the Aboriginal Cultural Heritage in Victoria?

The Council will need to be given a wide range of powers and duties if it is to do its job well from the start. Many of these powers and duties will be administered on a daily basis, at the Council's instructions, by the Registrar of the Aboriginal Heritage. But all of them will remain the responsibility of the Council, which will be directly accountable to the Minister.

In broad terms the powers and duties that are recommended for the Council will cover:

- evaluating the importance or special significance of places, areas, objects, folklore and remains;
- establishing a "Register of the Aboriginal Heritage in Victoria", including a record, that can be confidential where necessary, of all claims lodged by Aborigines or others in relation to Aboriginal Cultural Properties located in the State and a record of the decisions made about these claims;
- developing scientific research, education, and Aboriginal employment programs designed to improve Aboriginal Cultural Heritage management in Victoria;
- "Aboriginal Heritage Agreements" with private land holders and collectors so that, for example, assistance can be given to ensure that a site or artefact collection can continue to be protected and maintained, or to allow a site or collection to be accessed by Aborigines and researchers, or so that the site or artefacts can be bequeathed to or purchased by the Crown in due course and returned to Aboriginal people for safekeeping;
- advising the Minister on all matters associated with Aboriginal Cultural Heritage in the State, including making recommendations about declaring protected particular places or areas shown to be of special significance, about the need to investigate proposed works, and about prohibiting the exhibition or sale of artefacts and restricting or prohibiting the possession, exhibition or display of skeleton remains, etc.;
- recommending to the Minister the negotiated purchase of a place, area, or object where such things are in private hands and where it has been established that they are of special significance to the Aboriginal Cultural Heritage of Victoria;
- advising the Minister, in those rare cases where no other alternative exists to ensure the on-going protection of an example of the Aboriginal Cultural Heritage which is considered irreplaceable as well as under threat of destruction, that he should compulsorily acquire the item and make suitable compensation arrangements;

- co-ordinating with the Museum Council on any matters, actions, and functions of the Museum of Victoria associated with its handling or looking after items of Aboriginal cultural property and similarly co-ordinating the activities of any other Government departments or agencies involved;
- regularly communicating and consulting with Aborigines and the general community on the Council's activities.

SECTION 9 : DUTIES OF THE REGISTRAR OF THE ABORIGINAL HERITAGE

Question 14. What would be the main duties of the Registrar?

Broadly, the responsibilities of the Registrar of the Aboriginal Heritage, would involve:

- (a) ensuring on a day to day basis that the Aboriginal Cultural Heritage in Victoria was being managed and preserved in the most effective ways possible, including through the use of inspectors and honorary wardens;
- (b) keeping the Council's Register, including where necessary a confidential record of all Aboriginal areas and places, portable objects, folklore, and remains where such things are known to exist in Victoria and may be available for recording;
- (c) encouraging people and institutions possessing private collections or sites to permit the Council to record the collections or sites and then leave them with the people concerned;
- (d) developing educational programmes and services that employ Aboriginal people wherever possible to increase the public's appreciation and understanding of the Aboriginal Heritage in Victoria.

SECTION 10 : MINISTERIAL POWERS UNDER THE PROPOSED ACT

Question 15. What are the main powers that will be given to the Government Minister or Ministers made responsible for Aboriginal Cultural Heritage under the proposed Act?

Ministerial powers under the proposed Act will continue to be shared for the time being as explained in the answer to Question 7 above.

This situation however, does not greatly influence the legal powers the responsible Minister or Ministers will need. In large part these will over-lock with the powers of the Aboriginal Heritage Council and should cover:

- (a) recommending people for appointment by the Governor of Victoria as members of the Aboriginal Heritage Council;
- (b) acting upon advice received from the Council;

- (c) recommending to the Governor of Victoria that a place or area be declared a "protected Aboriginal Place or Area" under the Act;
- (d) entering into an arrangement with the person whose consent is required for land to be declared a "Protected Aboriginal Place or Area";
- (e) declaring a "Temporary Protected Aboriginal Place or Area" where the Minister has been shown that a place or area is under threat of injury or interference;
- (f) withdrawing or varying an Emergency Declaration made by an Inspector under the proposed Act;
- (g) negotiating the purchase of a place, area or object known to be of special significance to the Aboriginal Heritage in Victoria;
- (h) compulsorily acquiring an example of the Aboriginal Cultural Heritage which is under threat of destruction and which can be demonstrated to be of such special significance that it is considered by the Council to be irreplaceable and where no other arrangements can be made to ensure its proper on-going protection;
- (i) consulting with the Federal Minister of Aboriginal Affairs on protective measures that might otherwise be enforced under Federal legislation;
- (j) giving conditional consent, with the advice of the Council, to actions which may or would endanger or destroy Aboriginal Cultural Property;
- (k) entering into property "lease-back" agreements with Aborigines;
- (l) paying compensation to people disadvantaged by actions taken under the Act, and/or arranging to lower rates and taxes etc, for example under an "Aboriginal Heritage Agreement";
- (m) delegating duties and powers to the Council;
- (n) restricting or prohibiting public exhibition or display of secret sacred objects and Aboriginal skeletal remains and other bodily remains of Aborigines;
- (o) recommending to the Governor of Victoria the names of people suitable for appointment as inspectors under the proposed Act and the power, by delegation from the Governor, to terminate such appointments;
- (p) appointing a person to be an honorary warden for the purposes of the proposed Act and the power to terminate the appointment of such a person;
- (q) issuing identity cards to inspectors and honorary wardens;
- (r) taking legal action against any person who has committed an offence under the the Act.

SECTION 11 : INSPECTORS AND HONORARY WARDENS OF THE ABORIGINAL HERITAGE

Question 16. What is the difference between inspectors and honorary wardens under the proposed Act?

It is intended that there will be distinct difference between the powers and duties of an inspector and the role of an honorary warden. The distinction needs to be made plain for three reasons:

- (i) there are likely to be many more honorary wardens than there are inspectors;
- (ii) a person appointed only as an honorary warden could not assume the powers and duties of an inspector; and,
- (iii) an inspector's powers and duties would only be given to persons who had been trained in the legal responsibilities of that job and appointed by the Governor of Victoria. This would apply to any member of the Aboriginal Heritage Council as well.

Inspectors

The primary purpose of an inspector is to guard against the illegal taking, holding, retaining and transporting of Aboriginal Cultural Properties.

To this end the proposed Act would allow an inspector, who has reasonable grounds for believing an offence against the Act has been or is being committed, to enter any land, structure, vehicle or building, other than a private dwelling, to ensure the protective provisions of the Act could be applied.

It should be carefully understood that this power is not intended to apply to artefactual collections and sites already in the good care of private individuals, family groups, organisations and institutions. It is the job of the Registrar to positively encourage people possessing these sort of things to permit the Council to record them and then leave them with the people concerned.

Where an inspector has reasonable ground for believing that there is Aboriginal Cultural Property that is under threat of injury or interference, the inspector may apply to a Justice for a warrant to search any place or premises in the company of a member of the police force and, where appropriate, take possession of the Property that is endangered.

In this sort of case a Justice would issue a warrant under the rules of the Magistrate's Courts Act but only after being satisfied by information submitted by the inspector under oath that there is reasonable ground to do so.

Honorary Wardens

These people would be appointed by the Minister on the recommendation of the Aboriginal Heritage Council.

The primary role of honorary wardens would be to record and maintain Aboriginal places and areas and other items of Aboriginal Cultural Property either generally or on a site-specific or object/collection-specific basis.

It is proposed that any Aboriginal people who are custodians of a site, place, area, or other Cultural Property that is of special significance to them, should be encouraged to take positions as wardens.

Where Aboriginal custodians do become wardens and consequently become responsible to the Registrar of the Aboriginal Heritage, it is proposed that this responsibility should not impinge upon the rights of these people to manage the Cultural Property concerned according to Aboriginal custom.

It is also proposed that similar administrative arrangements to those that now exist between the Victoria Archaeological Survey and the Land Management Officers of the Department of Conservation, Forests and Lands, as honorary wardens under the existing Relics Act, should be continued under the proposed Act and become the responsibility of the Aboriginal Heritage.

SECTION 12 : DECLARATIONS OF PROTECTION FOR ABORIGINAL PLACES, AREAS AND OTHER ABORIGINAL CULTURAL PROPERTY

Question 17. How many types of protective declaration will there be under the proposed Act?

It is recommended that three types are needed to protect Aboriginal Cultural Property in Victoria. These have been mentioned briefly before in the answer to Question 15 above. They are:

- (a) Declaration of Protection
- (b) Temporary Declaration of Protection
- (c) Emergency Declaration of Protection.

Question 20. What are the main differences between these forms of protective declaration and how will each one work?

Broadly, the main aspects and workings of each are these:

- (a) Declaration of Protection

This Declaration would be made by the Governor of Victoria on the recommendation of the Minister, following advice from the Aboriginal Heritage Council.

A Declaration could be used where permanent formal legal protection is thought to be necessary for a particular example of Aboriginal Cultural Property which is of special significance, be it a place, area, object or collection of objects, skeleton remains, or an example of Aboriginal Folklore.

Before making a recommendation to the Governor, the Minister would get an independent report on the need to make the Declaration. People likely to have an interest in the proposed Declaration would be notified that a Report was being prepared and would be able to make input into it.

The Report would cover the potential effects a Declaration would have on their interests and prosperity and would point out ways people could be compensated if they were to be disadvantaged.

These people would also be able to comment on the report itself before the Minister considered it, and they would have the right to appeal against a Declaration being made where they believe they had grounds to do so. (Please see answer to Question 25 concerning appeals).

In investigating the need for a Declaration, it will be crucial not to harm the goodwill which often can be found existing between Aborigines and farmers or other landholders having archaeological sites on their land, or between Aborigines and other people possessing private or scientific collections of Aboriginal artefacts.

It is also important to recognise that this goodwill could make a formal Declaration of Protection unnecessary. Instead, in many cases, it may be more sensible and acceptable to the people involved for an Aboriginal Heritage Agreement to be drawn up, or simply for long-standing arrangements for access, use and maintenance to be left as they are. (Aboriginal Heritage Agreements are explained in the answer to Question 19 below.)

(b) Temporary Declaration of Protection

It is proposed that the Minister, on the advice of the Council, could make a Temporary Declaration and could also alter or withdraw it on the advice of the Council or in his own right.

This type of Declaration could be made in cases where the Minister has been shown that a particular example of Aboriginal Cultural Property is threatened by actions that could injure or interfere with it.

The Minister could make this sort of Declaration last for up to 60 days. This should allow enough time to check the significance of Aboriginal Cultural Property concerned, the way it was being threatened, and what to do about it.

If more time were needed to make sure a reasonable solution was reached over what to do, including making a permanent Declaration of Protection if this were required, then it is proposed that the Minister, in consultation with the Council, could make the Temporary Declaration last longer.

Again, any of the people involved would have the right to appeal to against a Temporary Declaration being made or extended.

(c) Emergency Declaration

Where there is not enough time for the Minister to make a Temporary Declaration, it is proposed that an Emergency Declaration could be made by an inspector to protect a place, area or other Aboriginal Cultural Property that is known or suspected to be of special significance to Aborigines and that is threatened by some sort of injury or interference.

The Emergency Declaration could remain in force for upto 7 days and varied or revoked by the inspector, in consultation with the Registrar of the Aboriginal Heritage within this time. The Declaration would be in writing and would describe the Aboriginal Cultural Property involved. It would also contain the reasons and provisions for its protection.

After the inspector had made an Emergency Declaration he would tell the Minister and the Registrar the reasons for it and take reasonable steps to notify people likely to be affected by it.

It is proposed that an Emergency Declaration could also be revoked or varied by the Minister who, in consultation with the Council, or in his own right, could within 7 days of the Emergency Declaration, use the Temporary Declaration power to extend the protection for a further period of time.

SECTION 13 : PHYSICAL PROTECTION AND MAINTENANCE OF ABORIGINAL PLACES, AREAS, AND OTHER ABORIGINAL CULTURAL PROPERTY

Question 18. If the three types of Declaration just explained can give legal protection for some examples of Aboriginal Cultural Property how will the rest be physically protected and maintained?

The proposed Act will, in fact, provide a blanket form of legal protection for all known and as yet undiscovered examples of the Aboriginal Cultural Heritage in Victoria, not just those declared protected. This was explained in the answer to Question 4, which dealt with the principle of legal protection, and is discussed in detail in Section 3.1 of the main Paper.

Given this, it is proposed that the Aboriginal Heritage Council should be responsible for developing policies, standards and regulations that can be applied either broadly or, where necessary, in specific ways to the on-going physical protection and maintenance of Aboriginal Cultural Property.

These policies, standards, and regulations would cover:

- how to establish the special significance of particular examples of Aboriginal Cultural Property;
- how best to preserve and maintain these things in ways acceptable to Aborigines, as well as to landholders and other people or organisations possessing examples or collections;
- access for Aborigines and other people to Aboriginal Cultural Property that is covered by Declarations of Protection, Aboriginal Heritage Agreements, or informal arrangements;
- education and employment of Aborigines in the maintenance, interpretation and use of Aboriginal Cultural Property for public education purposes;
- archaeological investigations and associated scientific research;
- the general public's involvement in helping to protect and maintain the Aboriginal Cultural Heritage by encouraging Aborigines and other people and private organisations who know something about it to tell the Registrar of the Aboriginal Heritage;
- the Registrar being able to make enquiries of Aborigines and others who may have examples or collections worth recording and, where appropriate, to offer these people a legal guarantee to ensure their permanent possession of the item or collection as well as assistance in its continued protection and maintenance if necessary;

- not allowing anyone to damage or interfere with any material evidence of the Aboriginal Cultural Heritage in Victoria except where they have the consent in writing of the Minister on the recommendation of the Aboriginal Heritage Council;
- forbidding a person, including an Aborigine, to sell or allow out of Victoria for the purposes of sale anything which that person knows or suspects is an example of Aboriginal Cultural Property, no matter where it comes from in Australia, unless, on the advice of the Council, the Minister has given them permission in writing.

It is also proposed that the Council's policies, standards, and regulations covering these various things may be strengthened and supported in different ways depending on the circumstances.

For example, when a Declaration of Protection concerns an Aboriginal Place or Area on public land, the Government Departments that have responsibilities to protect that land e.g. by fencing and by controlling fire, soil erosion, vermin and weeds, should continue to do so while understanding and taking into account the reasons for the Declaration.

Similarly, where a Declaration of Protection or an Aboriginal Heritage Agreement concerns material evidence of the Aboriginal culture on private land, it is recommended that the Council should be able to make physical protection arrangements like those on public land.

To do this in both public and private cases will mean that the Aboriginal Heritage Council will have to be given enough money and other resources to make sure these tasks can be carried out in an on-going way, or be able to make use of other Departments' resources.

Also, in those private cases where people need help with the upkeep of Aboriginal Cultural Property in their possession, it is proposed that the Minister should be able to arrange to lower rates and taxes or provide other forms of compensation to assist these people. Aboriginal Heritage Agreements may involve these sorts of financial arrangements more often than Declarations of Protection.

Question 19. What is an Aboriginal Heritage Agreement and how will it be used?

An Aboriginal Heritage Agreement is proposed to be basically a legal Agreement that could be made between the Minister and anyone possessing Aboriginal Cultural Property that is known to be specially significant to the Aboriginal Heritage in Victoria.

Mostly these Agreements can be expected to be made with people and organisations in the private sector. They would obviously be based on a consensus of views reached between those signing the Agreement about their rights, needs and wishes relating to the Aboriginal Cultural Property concerned.

This form of Agreement has the potential of becoming an extremely important way of ensuring the continuing protection and maintenance of Aboriginal places, areas and other cultural properties in private hands or on private land in Victoria.

Where an Aboriginal Heritage Agreement concerns a place or area, it is proposed to register the Agreement on the Title of the land concerned in a similar manner to the ways covenants are registered on land titles.

Question 20. In a worst case situation, what happens when a particularly good example of Aboriginal Cultural Property, that is known or thought to be extremely important to the Aboriginal Cultural Heritage of Victoria, cannot be physically protected by any of the ways discussed before?

To cover circumstances where the Council believes no other alternative exists, it is proposed that it could recommend to the Minister the compulsory acquisition of Aboriginal Cultural Property so as to make sure its protection can be guaranteed.

But the Council could only make this sort of recommendation if both of the following points were established first:

- (a) the Council had reasonable grounds for considering the Aboriginal Cultural Property concerned was of such special significance to the Aboriginal Cultural Heritage in Victoria that it believed it to be irreplaceable in that context; and also,
- (b) it had reasonable evidence that the subject Property was either under threat of interference or destruction or that its continuing protection and maintenance could not be guaranteed;

Question 21. What rights of appeal will people have against these sorts of action?

The common law right of any person to seek a staying order or an injunction against compulsory acquisition taking place will not be jeopardised by the proposed Act. Any matters of issue are proposed to be settled through the conciliation of disputes and appeals process outlined in the answer to Question 25.

SECTION 14 : DISCOVERY AND DISPOSAL OF ABORIGINAL REMAINS.

Question 22. What happens when someone accidentally discovers what they think might be the bones of an Aborigine?

Usually when any human remains are found unexpectedly, say in the course of building a road or in a natural wash away in the banks of a river, the person making the find will report it to the police.

This will not be changed by the proposed Act. At present the police tell the Victoria Archaeological Survey about the find if they think it is the skeleton of an Aborigine. Under the new Act they will tell the Registrar of the Aboriginal Heritage who will have the find checked and, if it is the remains of an Aboriginal person, he will tell the Minister, the Council and the Police.

The Registrar would then take on responsibility for having the remains recorded and for making sure that they were handled with proper care and respect until arrangements could be made for their reburial, or their protection if they were found to be extremely old, or had other special qualities that made it important to safeguard them for scientific research and public education purposes.

In the process of deciding what to do with the remains, the Council would require the Registrar to consult with local Aboriginal groups. In doing this the Registrar would use the inspector and wardens associated with the area where the remains were found.

If necessary, the inspector could make an Emergency Declaration to make sure the burial site and remains were protected from any immediate threat of being damaged. Afterwards the Minister could extend the protection by making a Temporary Declaration to make sure there was enough time to deal with the remains in a careful and respectful manner.

Question 23. What guarantee is there that Aboriginal remains will be dealt with in a careful and respectful manner?

It is proposed that the Act will require the Aboriginal Heritage Council to take one of two possible courses of action:

1. The Council would have the discovery carefully recorded and then return the remains to the local Aboriginal people who may be descendants of the dead person for them to deal with according to their own spiritual beliefs. These local people could also ask the Council to deal with the remains on their behalf if they wished.

2. Where the remains are, for example, extremely old and there are no local Aboriginal descendents, the Council would be required to make sure:

- (a) the site of the discovery was properly recorded; and
- (b) the remains were carefully transferred to the Museum of Victoria or another suitable place where they could be examined and recorded, and either preserved or reburied, preferably within the locality in which they were found with the area of the reburial being permanently safeguarded by a Declaration of Protection.

Question 24. How will the display and use of Aboriginal remains be controlled under the proposed Act?

It is recommended that no person should be allowed to possess, use, or display any Aboriginal remains unless the Minister has given his consent in writing on the advice of the Council. If someone did do any of these things without permission then they would be committing an offence under the Act and would have to face the consequences in Court.

SECTION 15 : CONCILIATION OF DISPUTES AND APPEALS

Question 25. How will disputes or issues related to actions taken under the new Act be dealt with and settled?

Where differences or issues arise as result of actions or decisions that are intended to be taken or that have been taken under the proposed Act, it is recommended that these be settled by the people in dispute over the issues being obliged to go through a legal process of conciliation and appeals.

The process that is proposed is that already established under the Planning Appeals Board Act. This would remove the cost of setting up and running a separate tribunal and support organisation as the Board has an efficient infrastructure that could readily cope with a new jurisdiction.

Also there are many provisions of the Planning Appeals Board Act which would be suitable for settling the sorts of issues that may arise under the proposed Act. These provisions are flexible, they can reduce legal formalities and could be applied to Aboriginal Cultural Heritage matters without the need for a whole new set of rules.

If this proposal is accepted, it is considered essential that three suitably experienced people, including a lawyer as Chairman, should be appointed to sit on all issues that may arise under the new Act.

So as to ensure that the Board has the necessary expertise ready to handle Aboriginal Cultural Heritage matters when the new Act is passed, it is recommended that at least two Aborigines and an anthropologist and archaeologist be appointed as part-time Board members as soon as possible.

This would enable these people to gain experience in most of the Board's appeals areas which, in turn, would help them in taking a broad view when they come to deal with cases in their own specialised area. They could also continue to sit on cases not related to Aboriginal Cultural Heritage after the proposed Act is in place.

The details of the Appeals Tribunal procedure will be set out in the Regulations of the proposed Act.

SECTION 16 : OFFENCES AND PENALTIES

Question 26. What will be considered an offence under the proposed Act and how will the offender be dealt with?

In a number of the areas already covered, offences have been mentioned. For example, it would be an offence for anyone, without the Minister's written permission, to knowingly damage an example of Aboriginal Cultural Property, or place Aboriginal remains on public display.

How offenders in these sorts of cases would be dealt with has yet to be decided, but a number of Acts now in force around Australia, covering both Aboriginal and European cultural heritage matters, will be used as guides. These include:

- Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984;
- Historic Shipwrecks Act 1981 (Victoria);
- Historic Buildings Preservation Act 1981 (Victoria);
- Western Australia Aboriginal Heritage Act 1972-1980;
- National Parks and Wildlife Act 1974 (NSW);
- Northern Territory Aboriginal Sacred Sites Act 1980;
- Archaeological and Aboriginal Relics Preservation Act 1972 (Victoria).

The relevant Sections of these Acts are included in Appendix 8 of the main Discussion Paper.

SECTION 17 : PERMITS AND CERTIFICATES

Question 27. Who will be responsible for issuing permits and certificates under the new Act and what sort of things would they be needed for?

It is proposed that the Minister either directly, or through the Aboriginal Heritage Council, would be responsible for issuing all permits and certificates connected with administering the Act.

Permits and certificates could be issued for:

- (a) excavation of Aboriginal places and areas;
- (b) collection, including the removal of Aboriginal Cultural Properties and remains and their subsequent scientific examination from such places and areas;
- (c) salvage and/or destruction and/or interference of Aboriginal places and areas and other examples or items of Aboriginal Cultural Property;
- (d) certificates of evidence and of prosecution;
- (e) the display and holding of collections of Aboriginal Cultural Property;
- (f) research into Aboriginal places and areas, or other examples or items of Aboriginal Cultural Property.

As with the present Relics Act, a person wanting to do an archaeological site survey would not require a permit, but they would be required to let the Registrar of Aboriginal Heritage know about their intended survey and the results of it afterwards. They would also need to consult the local Aboriginal community wherever one exists in the area in which they intend to work.

SECTION 18 : REGULATIONS UNDER THE PROPOSED ACT

Question 28. Regulation have been referred to before, what are they?

The so-called Regulations of an Act basically spell out the ways that each Part of the Act, and sometimes each Clause of it, should be managed by the responsible Ministry or Department.

Regulations are usually drafted into an Act when it is being drawn up as a Bill by the Parliamentary Counsel or Lawyer ready for introduction to the Parliament. This is why the Regulations for the proposed Act are not set out in detail in the main Discussion Paper.