model for settling of native title. It is noteworthy that this model has emerged from a State where there is currently a very strong Indigenous heritage protection regime under the *(Cth) Aboriginal and Torres Strait Island Heritage Protection Act 1984,* and that perhaps dictates the approach taken.

For the native title holders themselves, the outcome is a compromise and one of the Senior Elders from among the native title holders has stated that "we have made a very big compromise to you Europeans within a system that is your own, not ours. In an imperfect system we are forced to trade off, agree over long disputed boundaries. We do this because we believe in a future for our children. Our past gives us this strength. We will never give up our identity, histories and cultures as long as one of us lives and breathes, however, there is a terrible trade off in terms of gaining realistic resource outcomes and cultural capacity for our endeavours."[4]

Certainly claimant groups in southern Australia continue to share the tenacity of their northern neighbours, a fierce determination to continue to look after country using a mixture of native title, indigenous heritage and environmental protection laws in order to do so.

ABORIGINAL CULTURAL HERITAGE BILL[*]

On 18 October 2005, the Victorian Government released an exposure draft of an Aboriginal Heritage Bill. The Government allowed 2 months for submissions on the draft and a number of submissions have now been made.

At present, Aboriginal Cultural Heritage in Victoria is regulated both by Victorian statute (the Archaeological and Aboriginal Relics Preservation Act 1972(the "Relics Act")) and Commonwealth legislation (the Aboriginal and Torres Strait Islander Heritage Protection Act 1984(the "HPA")). The HPA contains, most unusually for Commonwealth legislation, a Part applicable only in one State - Part IIA, which contains special provisions applying only in Victoria, under which (among other things) any one of about 35 licensed inspectors may issue emergency declarations of preservation (not revocable by the Minister) requiring the immediate shut down of any project in Victoria for a minimum period of 30 days.

The Commonwealth intends that Part IIA of the HPA will be repealed at the same time as the new Victorian Aboriginal Heritage Act becomes law.

From a mining and resources perspective, the principal features of the Bill (which will repeal the Relics Act, and contains no transitional provisions) are noted and discussed below.

It will be an offence "knowingly or recklessly" to do an act which harms *or is likely to harm* Aboriginal cultural heritage, unless the act is done –

> in accordance with a "cultural heritage permit" issued by the Secretary to the Department for Victorian Communities;
>
> in accordance with a "cultural heritage assessment" approved by the Secretary;

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4 O'Bryan, K "The Tide has Turned – the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Consent Determination", Native Title Newsletter, November/ December 2005, 3–4.

* Christopher Davie, Consultant, Clayton Utz

in accordance with the regulations (no draft regulations have yet been made available for comment);

in accordance with registered indigenous land use agreement under the *Native Title Act 1993* (Cth);

in accordance with Aboriginal tradition as it relates to the Aboriginal cultural heritage;

in the course of conducting a cultural heritage assessment; or

as a necessary act because of an emergency such as a bushfire or other natural disaster.

The Bill establishes a regime under which any registered native title holder or registered native title claimant over an area in Victoria, or any "body representing Aboriginal people asserting familial or traditional links" to the area, or "any other body representing Aboriginal people who have an interest in the Aboriginal cultural heritage of the area", may apply to the [to-be-established] Aboriginal Heritage Council for registration as a "registered Aboriginal party" in respect of that area. An applicant must be a body corporate. After considering whether the applicant's relationship to the area is "broadly recognised by the Aboriginal people of Victoria", the Council may grant or refuse the application for registration. The Bill permits multiple "registered Aboriginal parties" for the same area of land.

Any one or more of the registered Aboriginal parties for an area will be able to block the issue of a cultural heritage permit, or the approval of a cultural heritage assessment, in relation to the land; the Secretary will have no power to issue a cultural heritage permit if any relevant registered Aboriginal party objects to the issue of the permit, and will have no power to approve a cultural heritage assessment if any relevant registered Aboriginal party refuses to endorse his or her approval. It is not clear from the materials issued by Aboriginal Affairs Victoria whether this result is intended, but as the Bill is drawn, an appeal to the Victorian Civil and Administrative Tribunal against the Secretary's failure to issue a permit or approve an assessment will be doomed to failure where the Secretary is so prohibited from issuing the permit or approving the assessment.

A cultural heritage assessment will be required wherever an Environment Effects Statement is required under the *Environment Effects Act* 1978, and wherever the regulations so prescribe or the Minister so directs. Where a cultural heritage assessment is required, a cultural heritage permit cannot be issued, and Clause 42 of the Bill prohibits a "decision maker under another Act" from granting an authorisation for any project development (e.g., a planning permit) unless the cultural heritage assessment is approved by the Secretary. As any registered Aboriginal party for the area concerned can block the approval by the Secretary, this has the potential to impose significant impediments to the development of mining and resources (and indeed all other) projects in Victoria.

The Bill perpetuates certain key features of Part IIA of the HPA, in that the Minister may make an *interim* "protection declaration" (expiring 3 months after it is made, or at the end of such other period as is specified in the declaration) in relation to an Aboriginal place or object where he or she is satisfied that the place or object *is likely to be* of exceptional cultural heritage significance to Aboriginal people, and may make an *ongoing* "protection declaration" where he or she is satisfied that the place or object *is* of exceptional cultural heritage significance to Aboriginal people. Further, the Minister or any appointed "inspector" will be able to issue a "stop order" freezing a project for up to 30 days.

The powers of the Minister to issue protection declarations and stop orders, and the powers of inspectors to issue stop orders, apply whether or not the activities concerned are being done in conformity with a cultural heritage permit, an approved cultural heritage assessment, or a registered ILUA. Hence, obtaining an approved cultural heritage assessment or a cultural heritage permit, while it may give protection from criminal liability for harming Aboriginal cultural heritage, gives a mining or infrastructure company no guarantee of being able to carry out its project activities without disruption.

The establishment of a Victorian Aboriginal Heritage Register, recording all known "Aboriginal places" in Victoria, all known private collections of Aboriginal objects in Victoria, all approved cultural heritage assessments, cultural heritage permits, and "cultural heritage agreements". However, this register will be open for inspection only by limited classes of persons such as registered Aboriginal parties, public servants administering the Act, cultural heritage advisers for cultural heritage assessments, land owners (it is unclear whether this will include Crown lessees or holders of mining or exploration tenements), or "persons with appropriate heritage qualifications" appointed by a proposed developer. Moreover, those who search the register and find nothing there are not necessarily protected from prosecution under section 23 if they proceed and ultimately harm Aboriginal cultural heritage, although in appropriate circumstances having done so may afford a defence to a charge of having "knowingly or recklessly" harmed Aboriginal cultural heritage.

The Bill contains no "cultural heritage duty of care" provisions mirroring those in the *Aboriginal Cultural Heritage Act* 2003 (Qld), requiring developers to take all reasonable and practical measures to ensure that their activities do not harm Aboriginal cultural heritage. Under the Queensland Act, discharge of that duty affords a 'catch-all defence', but a breach of that duty is itself an offence. Suggestions to Aboriginal Affairs Victoria to include such provisions have not been adopted.

EQUITY AND ASSIGNMENT OF INTERESTS IN CONTRAVENTION OF PRE-EMPTIVE RIGHTS[*]

Rathner v Lindholm & Ors [2005] VSC 399 (Whelan J)

Pre-emptive rights – purported assignment of shares in breach of pre-emptive rights provisions – rights of the assignee of such shares.

Background

The case concerned a purported transfer of shares in breach of pre-emptive rights provisions of a company's constitution. The background to the case is complex and the questions considered by the court form part of a "labyrinth of claims and interests" relating to the arrangements between the various companies concerned. Only those facts which are essential to understand the context of the decision as it relates to the issue of effectiveness of a purported transfer in contravention of pre-emptive rights are summarised below.

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[*] Andrea Blake, Senior Associate and Bronwyn Thomas, Articled Clerk, Blake Dawson Waldron, Melbourne.