

**Further Submission to the Victorian Environmental Assessment Council  
from Arnold Bloch Leibler**

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## Executive Summary

Whilst supporting the overall intent of VEAC as appears in its important and timely paper, titled "*River Red Gum Forest legislation draft proposals paper for public comment July 2007*" ("**VEAC's proposals**"), Arnold Bloch Leibler makes the following comments on VEAC's proposals and recommends the following changes to them:

- The recommendations of VEAC for legislative reform should go beyond amendments to the *National Parks Act 1975* and other public land management legislation.
- Specific legislation is needed to facilitate shared management arrangements. Experience has shown that inserting Indigenous land rights into existing legislation is far from ideal.
- In its reasons for recommending co-management over Barmah National Park ("co-management has the potential to achieve the *most* desirable and effective conservation and cultural heritage outcomes, while ensuring access for visitors and providing a richer visitor experience"), as opposed to joint management, VEAC does not explain why joint management is not preferred over country that is already the subject of a co-management regime.
- VEAC is encouraged to apply its own general recommendation (R20) by specifically recommending that the national parks it proposes, including, but not limited to, Barmah National Park and Nyah-Vinifera National Park, and those areas into which national park status is to be extended, be subject to joint management regimes, involving hand back/lease back arrangements.
- Under national park joint management arrangements, tourism revenue will accrue, which in turn will supplement natural resource and land management. Hand back/leaseback arrangements would also generate the level of momentum needed to further develop Indigenous capacity.
- VEAC is silent on a shared management arrangement for the proposed Lower Goulburn River National Park. This region falls within the Designated Areas of the Yorta Yorta Cooperative Management Agreement. VEAC is encouraged to recommend joint management for this area.

## **Introduction**

- 1 This submission, prepared by the public interest law practice of Arnold Bloch Leibler, Lawyers and Advisers, is written in response to VEAC's proposals.
- 2 In this submission, amongst other things, Arnold Bloch Leibler comments on recommendations in VEAC's proposals relating to legislative reform (R20, 21 & 22) and to the designation of the Barmah National Park and Nyah-Vinifera National Park for co-management regimes (R24).
- 3 This submission complements Arnold Bloch Leibler's original submission in respect to VEAC's October 2006 discussion paper, which submission was provided to VEAC on 8 December 2006. The substance of that submission is referred to and repeated here, and the definitions used in that submission are used again here.

## **VEAC is to be commended**

- 4 Arnold Bloch Leibler commends VEAC for its principled environmental and cultural stand, manifested in the recommendations contained in VEAC's proposals, which we generally support.
- 5 Arnold Bloch Leibler welcomes VEAC's acknowledgment of the need for greater involvement by Indigenous peoples in public land and water management. We further commend VEAC for its recognition that the State of Victoria has lagged behind other States in the adoption and implementation of shared land management regimes "as a means of reconciling Indigenous claims to land" (page 15, VEAC's proposals).
- 6 Arnold Bloch Leibler fully supports VEAC's recommendations concerning environmental water (R10 to R17). We similarly fully support VEAC's recommendations for the establishment of four new national parks and the enlargement of three existing national parks.
- 7 We endorse VEAC's recognition that shared management over national park and other protected areas between traditional owners and government will give long overdue recognition to traditional owners and will serve to reaffirm connections to country.

### **Adoption of definitions from VEAC's proposal**

- 8 ABL also commends VEAC for its view that meaningful Indigenous involvement in public land management must be underpinned or initiated by specific legislation.
- 9 VEAC recommends, as necessary, the amendment of the *National Parks Act 1975* to provide for the increased involvement of traditional owners in the management of parks, and specifically for shared management arrangements, including joint management, co-management and other related arrangements.
- 10 For the purpose of clarity, we note the following definitions used in VEAC's proposals, and we adopt them in this further submission:
- (a) Joint management is the process/arrangement whereby scheduled areas are transferred to traditional owners as National Park Aboriginal land (inalienable freehold), subject to agreement to enter into a lease for use of the land as a national park. Under this process the board of management would have a majority of traditional owners (Recommendation 20).
  - (b) Co-management is the arrangement under which a national park or reserve is managed by a co-management board consisting of a majority of members of the traditional owner group or groups (Recommendation 21).
  - (c) 'Other' co-management arrangements are those that do not necessarily involve a board of management with majority traditional owners (Recommendation 22)
- 11 VEAC makes a number of recommendations designating specific areas for particular management regimes. Recommendation 24, for example, proposes that the Barmah National Park and Nyah-Vinifera National Park be managed by a co-management board consisting of government and a majority of the relevant traditional owner group representatives.
- 12 VEAC does not designate any specific area for the application of joint management. This is surprising and disappointing.
- 13 In addition, for reasons not explained by VEAC, no shared management regime has been designated for the Lower Goulburn River National Park.

## **Barmah National Park**

- 14 Whilst Arnold Bloch Leibler supports VEAC's draft recommendation for a 'new' kind of co-management regime in which traditional owners will hold a majority of the board, such a regime is, in fact, not so new. It already exists over certain areas within the VEAC study area, namely areas defined as the "Designated Areas" in the Yorta Yorta Cooperative Management Agreement ("**the YYCMA**"). More particularly, the areas of the proposed Barmah National Park and Lower Goulburn River National Park are included as Designated Areas under the YYCMA.
- 15 In these circumstances it is unclear to us how VEAC reached a recommendation that eschews joint management over the proposed Barmah National Park in favour of co-management. In the result, this particular management recommendation (as opposed to its tenure recommendation, of according the area national park status), regrettably, is in effect one of maintaining the management status quo, given the existence already of co-management in respect of this area under the YYCMA.
- 16 Perhaps the reason for this lies in the apparent misconception, which we adverted to in our original submission, that VEAC considers the Yorta Yorta peoples under the YYCMA "are restricted to an advisory capacity under the current provisions of the *National Parks Act 1975*." To repeat what we stated in our earlier submission, this is incorrect. The YYCMA is not directly related to the *National Parks Act 1975* and the Yorta Yorta peoples have a role under the YYCMA well beyond being mere advisors.

## **Yorta Yorta Cooperative Management Agreement**

- 17 To assist VEAC with an understanding of the YYCMA, particularly as VEAC under the terms of reference for the VEAC Riverine Red Gum Forest Investigation must take the YYCMA into consideration, the essential features of the YYCMA are described in the following paragraphs.
- 18 On 10 June 2004 the Yorta Yorta Nation Aboriginal Corporation ("**YYNAC**") and the State of Victoria entered into the YYCMA. To commemorate the YYCMA, a declaration was signed by YYNAC and the Victorian Attorney General, Rob Hulls, on the same day.

19 It reads, in part:

*“The State [of Victoria] recognises that the Yorta Yorta Peoples are the traditional owners of and have a unique inherent relationship with and responsibility to their country ... In accordance with this recognition, the State will ensure the ongoing important role of the Yorta Yorta Peoples in land and water management decision making relating to the protection, management and sustainability of their country, including cultural and environmental values.”*

20 The YYCMA establishes a sustainable partnership between the Yorta Yorta peoples and the State of Victoria.

21 Clause 13 of the YYCMA identifies its objects, which are to facilitate:

- The active and resourced involvement of the Yorta Yorta people in decisions about the management of the Designated Areas, including “the integration of Yorta Yorta knowledge, internal decision-making processes and perspectives into management planning and works programming”;
- “[T]he development of mutual recognition and trust between the Yorta Yorta people and the State”; and
- The identification and promotion of employment, training and economic development opportunities for the Yorta Yorta people.

22 The YYCMA’s “Designated Areas” comprise Victorian crown lands and waters in Yorta Yorta country, being a sub-set of traditional Yorta Yorta country in Victoria.

23 The Designated Areas include Kow Swamp, Barmah State Park, Barmah State Forest and other areas of public lands and waters located along the Murray and Goulburn Rivers in Victoria. The Preamble to the YYCMA records that “[t]he State of Victoria acknowledges the cultural connection of the Yorta Yorta People to the Designated Areas.” By the YYCMA, the value of the Yorta Yorta peoples’ involvement in planning and management decisions concerning the Designated Areas is recognised.

24 In practical terms, under the YYCMA an eight member committee is established, with Yorta Yorta comprising the majority of members of the committee. Known as the “Yorta Yorta Joint Body”, the committee is constituted by five members representing

the Yorta Yorta peoples (as nominated by YYNAC) and three members representing the State of Victoria (as nominated by the Secretary of the Department of Sustainability and Environment).

25 The Yorta Yorta Joint Body constitutes a committee within the meaning of section 12 of the *Conservation, Forests and Lands Act 1987* (Vic) ("**the CF and L Act**"). One of the legislative purposes of the *CF and L Act* is the establishment of a system of land management co-operative agreements.

26 The function of the Joint Body is to provide advice and make recommendations to the Minister for Environment or the Secretary concerning the management of the Designated Areas, including advice on:

- the development and review of strategic and site specific management plans;
- the development of work programs and land, waters and resources protection and management plans;
- certain major developments concerning land, water and resource uses; and
- the management of grazing in Barmah.

27 The YYCMA's Terms of Reference state that the five Yorta Yorta representatives on the Yorta Yorta Joint Body have the right to refer any matter before the Joint Body to YYNAC for advice or consideration prior to any Yorta Yorta Joint Body decision being made.

28 The Minister or Secretary (as applicable) is required, when making a decision regarding the management of the Designated Areas, to take into account advice and recommendations received from both the Yorta Yorta Joint Body and other organisations responsible for managing and providing advice in relation to the Designated Areas (Clause 16). If the Minister or Secretary receives conflicting advice, then he or she is obliged to seek the advice of the Yorta Yorta Joint Body in relation to the conflicting advice before making a decision (Clause 17). If the Minister or Secretary ultimately decides to act otherwise than in accordance with advice or recommendations given by the Joint Body, he or she may provide to the Yorta Yorta Joint Body written reasons for that decision (Clause 18). Co-management clauses 16-18 are the key empowering clauses of the YYCMA.

- 29 By these clauses, the Yorta Yorta peoples are truly involved with the State of Victoria in cooperatively managing the Designated Areas, without of course fettering ultimate Ministerial discretion. In other words, the Yorta Yorta peoples have an important role well beyond simply advising Government as mere stakeholders.
- 30 Schedule 5, Part A of the YYCMA characterises certain developments within the Designated Areas as “high impact land, water and resource management activities”. They include mining, the construction of pipelines, electricity transmission lines and telecommunications infrastructure, logging and other high impact forestry activities and the sale of land or changes to the status of land. If the State is considering approving any such activities, it must first provide to the Yorta Yorta Joint Body all relevant information regarding the project and require the Joint Body to seek advice from the Yorta Yorta peoples about what actions might be taken to minimise the impact of the proposed project, from a “caring for country” perspective, which accommodates both cultural heritage and environmental concerns. The Joint Body is then required to refer that advice back to the State and the State is obliged to consider that advice when deciding whether to approve the project.
- 31 The Yorta Yorta peoples, together with a confederacy of their supporters, including this firm of lawyers and advisers, have on many occasions, over many years now respectfully presented to the Government the ways and means of moving beyond cooperative management and into the realm of joint management, built on the foundation of a hand back/lease arrangement over country that becomes national park.
- 32 On page 17 of VEAC’s proposals, VEAC comments on the distinction between co-management and joint management, and stresses that according to its own definition of co-management, “these management board provisions are essentially the same whether the parks remain in public ownership or transferred to Aboriginal Traditional Owners.”
- 33 It is unclear to us how VEAC arrived at the conclusion that a co-management partnership for the proposed Barmah National Park “has the potential to achieve the *most* desirable and effective conservation and cultural heritage outcomes, while ensuring access for visitors and providing a richer visitor experience” (p.19 of VEAC’s proposal, emphasis added). There is a logical inconsistency in this conclusion because it effectively represents that co-management is as desirable for the Yorta

Yorta peoples and as effective as joint management, despite VEAC for good reason making a distinction between the two and recognising that joint management is a more empowering structure, and despite the fact that the Designated Areas of the YYCMA are already under a co-management regime.

### **Joint Management for all new and extended national parks**

- 34 We urge VEAC to take this unique opportunity to recommend joint management structures for the areas of country that were nominated in VEAC's proposals as deserved of national park status (whether by creation or enlargement of national parks), housed in purpose built legislation, which legislation could also accommodate processes to arrive at other shared management structures in the future for the remainder of the public lands in the VEAC study area.
- 35 In ABL's respectful view, for those areas recommended in VEAC's proposals as deserving of national park status (and certainly, at an absolute minimum, in the case of the proposed Barmah National Park), effective and sustainable conservation can be best achieved through properly resourced joint management of national parks under which the traditional owner groups are fully empowered to protect their inherent rights to care for country. This degree of control would secure a future cultural and environmental economy, whilst also benefiting water quality, biodiversity, and threatened species.
- 36 Another of VEAC's stated reasons for recommending co-management in the areas it specified is that it will ensure "access for visitors" and provide "a richer visitor experience" (VEAC's Proposals, page 19). Of VEAC's apparent concern relating to access for visitors under a joint management scenario, again there seems to be an inconsistency in VEAC's position, bearing in mind VEAC's own acknowledgement (at page 303 of its Discussion Paper of October 2006) that in most joint management examples that currently exist over national parks across Australia, the "land use is closely prescribed". VEAC also acknowledges that often the lease agreements will "guarantee the continuation of existing rights and interests, including those of the State's for decision making authority" (VEAC Discussion Paper at page 97).
- 37 In the examples of joint management agreements referred to by VEAC in its October 2006 discussion paper (pages 96-97), the degree of public access is provided for as part of the lease agreement and the management plans. Indeed, visitor access is often a requirement of joint management arrangements over national parks. For

example, Kakadu National Park is managed via a joint management arrangement under which title to Aboriginal land in the park is held by Aboriginal land trust, with a lease of land back to the Director of National Parks for the purposes of a national park “for the enjoyment and benefit of all Australians” (*Kakadu National Park Plan of Management [1999-2004]*, at page 5). *The Environmental Reform (Consequential Provisions) Act 1999* deemed Kakadu National Park to have been declared for the purpose of “the encouragement and regulation of the appropriate use, appreciation and enjoyment of the area by the public.” In Kakadu and Uluru Kata-Tjuta Parks visitor numbers are in the order of 200,000 and 300,000 per year respectively.

- 38 One of the concerns that also seems to lie behind VEAC’s specific recommendations of co-management instead of joint management, is what seems to be a perception of present governance incapacity. In its Discussion Paper, VEAC stated that “greater Indigenous community involvement in public land and natural resource management assumes Indigenous communities having the capacity to set agendas for, participate in, and implement management activities and make decisions” (VEAC Discussion Paper at page 304). In the specific context of the YYCMA, VEAC further surmised that the initial progress of the YYCMA was limited by “the absence of previous capacity and/or working relationships, specifically those designed for land management decision-making” (VEAC discussion paper at page 304). If this remains VEAC’s concern, it is an unjustifiable and unfair one. To the extent there has existed any governance incapacity with YYNAC, it has almost invariably been a product of serious under resourcing. In any event, Yorta Yorta nation (and the other nation groups within the area of VEAC’s terms of reference) have proven time and again their governance expertise, despite parlous resources provided to them to carry out their land and water management responsibilities.
- 39 The type of circular reasoning that the level of empowerment and autonomy granted to traditional owners should mirror their current capacity ought not be countenanced by VEAC. The Kakadu experience of joint management is yet another example of the fact that the level of empowerment and autonomy given to an Indigenous community will, over time, mirror that community’s capacity: when the one is increased, so too is the other. The same applies here. In our respectful view, YYNAC and the other nation groups are ready, willing and able to take the next step of governance into joint management of country, so long as they receive long term, sustainable resources.

- 40 The symbolic import of joint management over the proposed new and extended national parks in the VEAC study area would also reach far beyond practical management issues and structures. It would demonstrate a long overdue recognition of the veracity of the oral histories of the traditional owners of country in the area of VEAC's investigation, connecting them to country. This is particularly so of the Yorta Yorta nation of peoples, whose long and brave battle (a battle incidentally they never wanted, preferring common ground mediated outcomes over litigation) in the courts, for recognition of what they rightfully know is theirs, paved the way for a large increase in recent years in consent determinations of native title and Indigenous Land Use Agreements.
- 41 This recognition would attract national and international attention, which would in turn enhance the tourism prospects for the region.

### **Purpose built legislation is needed**

- 42 Notwithstanding Arnold Bloch Leibler's endorsement of the general thrust of VEAC's recommendations for legislative reform, amendment to the *National Parks Act 1975* is likely to prove in time a relatively inefficient way of effecting Indigenous/Government shared management arrangements. To reiterate what we stated in our original submission, tinkering with 30 year old legislation is far from the ideal solution.
- 43 As we also recommended in our initial submission, there is a compelling need for the introduction of specific, purpose built "ground up" legislation that is designed around Indigenous interests, and shared management frameworks, rather than treating Indigenous peoples as mere stakeholders and inserting mechanisms into legislation that is not purpose built for such frameworks. The essence of traditional owner interests - the ability to continue to enjoy and protect the natural and cultural resources of their country - needs to be secured in specific legislation.
- 44 Public land is currently managed under a number of different statutes in Victoria, including, but by no means limited to, the *Land Act*, the *Crown Land (Reserves) Act*, the *CF and L Act*, the *Forests Act* and the *Wildlife Act*. There is little coherence and consistency in the scope allowed under these statutes for traditional owner involvement in public land and water management. Attempting to provide for Indigenous participation in public land management by amending each of these Acts would create a mélange of regulations instead of a consistent, efficient and streamlined legislative framework.

- 45 The 1996 amendments to the *Parks and Wildlife Act 1978 (NSW)* is an example of a relatively cumbersome means of inserting an Indigenous land rights regime into an already existing Act. By the 1996 amendments, provision was made for national parks to come under joint-management arrangements.
- 46 The current level of protection afforded to Indigenous cultural heritage interests in NSW under that regime remains inadequate.
- 47 Closer to home, Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* is another example. In 1987 the Commonwealth inserted into this Commonwealth legislation Part IIA, which applies only to Victoria. The purpose then was to bring seminal cultural heritage legislation into Victoria through the back door. 20 years on, and the regime is in the process of being dismantled. In 2006, the Victorian government introduced the *Aboriginal Heritage Act* to replace Part IIA.
- 48 As VEAC is aware, the Victorian government itself justified dismantling Part IIA regime and replacing it with the *Aboriginal Heritage Act* for a similar reason we draw VEAC's attention to here: it is not ideal to tinker with 30 year old legislation to belatedly accommodate into an existing regime an Indigenous/Government shared management regime of seminal importance. It could cause confusion and lead to inconsistency of application of the existing provisions in the context of the new provisions, and vice versa. Purpose built legislation is the only way forward, to achieve certainty and efficiency for all.
- 49 Specific legislation, complemented by serious long term resourcing at a policy level of government, would provide the ideal means for securing the spectrum of rights and interests created by the shared management arrangements
- 50 Specific legislation could and should also integrate and, if necessary, streamline processes under the *Native Title Act 1993 (Cth)* future acts regime, *Environment Effect Act 1978* (and guidelines), the *Aboriginal Heritage Act 2006*, the *Planning and Environment Act 1987* and other natural resource legislation.

## To recap

- 51 To recap, in our respectful view, the most effective and efficient regime here is to enshrine the mechanisms for co-management, joint management and other shared management structures and processes in a readily identifiable legislative system. Purpose built legislation would, ideally, include provisions that promote flexibility and creativity in land and water management outcomes. New legislation may also include the processes for identifying the relevant group of traditional owners, but only if such processes are based on and respect the principle of Indigenous informed consent.
- 52 Of the Yorta Yorta peoples and their country, the legislative and policy regime ought to extend current arrangements by building upon the principles of the YYCMA, which were identified earlier in this further submission, and by a government commitment to long term funding of the new arrangements. We encourage VEAC, for example, to make final recommendations that are consistent with and acknowledge the fact that the Yorta Yorta nation of peoples, through YYNAC, is a self determining autonomous governing body of peoples, making decisions based on traditional affiliations to family groups, united through language and kinship ties and governed by distinct laws and customs.
- 53 The granting of joint management over Barmah National Park, for example, would be a long overdue recognition of the Yorta Yorta peoples' long, strong and principled struggle for land justice. It would build upon the principles of the YYCMA and the State's acknowledgment of the right of the Yorta Yorta peoples to retain their identity and intellectual property.
- 54 For many years now, Arnold Bloch Leibler has had the privilege of witnessing first hand (as legal support crew to the Yorta Yorta peoples and other traditional owners) the unwavering efforts of Victorian traditional owners to secure title to their country. At the very least, Arnold Bloch Leibler urges VEAC to take the step that VEAC itself recognises is needed, and recommend joint management structures over those areas flagged by VEAC as recommended new or extended national parks. Arnold Bloch Leibler wholeheartedly supports the efforts by Victorian traditional owners within the VEAC study areas as they seek to establish specifically designed and legislatively enshrined land and water joint management partnerships with the Victorian Government, complemented by long term funding arrangements.

## **Where to from here**

- 55 VEAC is uniquely poised to make a longstanding important contribution towards substantive reconciliation with Victorian traditional owners and the achievement of a measure of land justice in Victoria, through its recommended shared management arrangements, particularly joint management.
- 56 Not only would this further enhance the prestige and standing of Victoria nationally and internationally, and serve to promote the cause of reconciliation in this country, it is in our respectful view a social and moral justice imperative.

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