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**Submission to the
Victorian Environmental Assessment Council
River Red Gum Forests Investigation 2007
Draft Proposals Paper**

This submission is provided by the Human Rights Law Resource Centre (**HRLRC**) to the Victorian Environmental Assessment Council (**VEAC**) in relation to its River Red Gum Forests Investigation Draft Proposals Paper dated 19 July 2007 (***Draft Proposals Paper***).

About the HRLRC

The Human Rights Law Resource Centre is Australia's premier human rights legal service. It aims to promote and protect human rights through casework, strategic litigation, advocacy, legal education and human rights capacity building.

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Scope of submission

This submission is intended to address the Draft Proposals Paper only so far as it relates to Indigenous land management and cultural practices. It considers the application of the rights and obligations contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (***Victorian Charter***) to those specific recommendations made in the Draft Proposals Paper.

The Victorian Charter

The Victorian Charter enshrines a body of civil and political rights derived from the *International Covenant on Civil and Political Rights (ICCPR)*. The Victorian Charter establishes a 'dialogue model' of human rights protections which seeks to ensure that human rights are taken into account when developing, interpreting and applying Victorian law and policy.

This 'dialogue' is facilitated through a number of mechanisms, including in particular:

- (a) the scrutiny of any new legislation or regulations for the purpose of consistency with the human rights contained in the Victorian Charter;
- (b) an obligation on 'public authorities'¹ to act compatibly with human rights and to give proper consideration to human rights in any decision-making process; and
- (c) so far as possible, courts and tribunals must interpret and apply legislation consistently with human rights and should consider relevant international, regional and comparative domestic jurisprudence in so doing.

As stated in the Preamble, one of the founding principles of the Victorian Charter is that human rights have a special importance for the Aboriginal people of Victoria with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

Relevant human rights contained in the Victorian Charter

Of particular relevance to the recommendations contained in the Draft Proposals Paper relating to Indigenous land management and cultural practices are:

- (a) the protection of cultural rights (section 19); and
- (b) the right to take part in public life (section 18).

Section 19 of the Victorian Charter provides as follows:

19. Cultural rights

- (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practice his or her religion and to use his or her language.
- (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community -
 - (a) to enjoy their identity and culture; and
 - (b) to maintain and use their language; and
 - (c) to maintain their kinship ties; and

¹ A 'public authority' is defined in section 4 of the Victorian Charter and includes 'an entity established by a statutory provision that has functions of a public nature': see section 4(b).

- (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

Section 19 of the Victorian Charter is modelled on article 27 of the ICCPR. The content of the right is broad and includes the maintenance of traditional beliefs and practices and a particular way of life associated with land resources. In some circumstances it may also include those social and economic activities that are part of a group's tradition, such as fishing and hunting, and may even extend to protect traditional cultures that have adapted 'to the modern way of life', such as by undertaking commercial fishing in addition to traditional fishing.²

The HRLRC notes that the UN Human Rights Committee has stated that 'a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation'.³ The UN Committee on the Elimination of Racial Discrimination has also called upon States parties to 'recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands'.⁴

Indeed, the enjoyment of cultural rights is often closely connected with the right of minority groups to participate in decision-making processes which affect them. The UN Human Rights Committee has also observed that:

The enjoyment of [cultural] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.⁵

To this end, section 18(1) of the Victorian Charter provides as follows:

18. Taking part in public life

- (1) Every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.

The informed and active participation of people who are marginalised or disadvantaged in the development and implementation of laws, policies and practices that affect them is crucial in both an instrumental and developmental sense. In an instrumental sense, the participation of stakeholders is more likely to result in the development and implementation of laws and policies that are targeted, efficient, effective and meet people's needs. In a developmental sense, the participation of stakeholders can contribute to individual and community empowerment.⁶

For strategies to be effective, Aboriginal communities must be empowered, have ownership of the programs and be provided with sufficient support to enable them to run effectively.

² *Mahuika v New Zealand*, UN Doc CCPR/C/52/D/511/1992.

³ UN Human Rights Committee, *General Comment No. 23: The rights of minorities* (8 April 1994), at [6.1].

⁴ UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples* (18 August 1997), at [5].

⁵ UN Human Rights Committee, *General Comment No. 23: The rights of minorities* (8 April 1994), at [7].

⁶ See generally, Mark Considine, *Making Public Policy: Institutions, Actors, Strategies* (2005) 186–206.

Response to Draft Proposals Paper

The HRLRC commends the steps that VEAC has taken to consult with Indigenous communities in the development of the Draft Proposals Paper. The approach taken by VEAC is consistent with the fundamental right of Indigenous peoples to self determination and to participate meaningfully in decisions which affect them.

The HRLRC is generally supportive of Recommendations 20, 21 and 22 contained in the Draft Proposals Paper relating to the implementation of joint management schemes for national parks and co-management arrangements for certain parks and reserves. Many Australian jurisdictions are increasingly adopting joint management arrangements with Indigenous Australians as a means of reconciling Indigenous claims to land. However, even though many Aboriginal communities in Victoria have expressed the desire to participate in public land management, they have been constrained in various ways and hence been prevented from direct participation in land management. This is extremely disappointing and unfortunate given the extensive knowledge many traditional land owners have with the land and their skills and expertise in maintaining and improving it. Accordingly, the HRLRC endorses the implementation of Recommendations 20, 21 and 22 in their consistency with sections 18 and 19 of the Victorian Charter.

The HRLRC supports Recommendations 18 and 19 of the Draft Proposals Paper relating to enhancing the capacity of the Indigenous community to be involved in decision-making regarding public land management. Such measures are consistent with sections 18 and 19 of the Victorian Charter and will contribute to empowering the Indigenous community to become involved in decision-making process. This will assist in the maintenance and protection of traditional Indigenous beliefs and practices and the realisation of the cultural rights of Aboriginal communities.

However, the HRLRC considers that Recommendation 27 raises concerns in relation to sections 18 and 19 of the Victorian Charter. Recommendation 27 provides that:

traditional cultural practice be governed by a permit regime and protocols established by the land manager in partnership with the identified Aboriginal Traditional Owners for the specific area(s).

In addition to raising concerns in relation to the Victorian Charter, Recommendation 27 is in clear breach of section 211(2) of the *Native Title Act 1993* (Cth), which states that:

211. Preservation of certain native title rights and interests

...

- (2) the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:
 - (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
 - (b) in exercise or enjoyment of their native title rights and interests.

As such, the HRLRC submits that VEAC reconsider this recommendation in light of the rights and obligations contained in sections 18 and 19 of the Victorian Charter.

Conclusion

It is imperative that Recommendations 18 to 22 contained in the Draft Proposals Paper are implemented and acted upon by the Victorian Government to ensure a human rights consistent approach to the development of laws and policies with respect to Indigenous land management and cultural practices.

Those areas where VEAC recommended increased Indigenous involvement in management are those that VEAC recognised as having 'a high level of Indigenous cultural heritage' and where Indigenous groups have 'an enthusiasm and willingness to engage in management issues'.⁷ In such situations, the HRLRC urges the implementation of measures to facilitate the involvement of Indigenous people in decision-making about issues relating to their identity and culture and their connection with traditional lands in accordance with the human rights contained in the Victorian Charter.

8 October 2007

⁷ Draft Proposals Paper, p 19.