

Registrations of Multiple RAPs for a Single Area

1. Background

Under Aboriginal Tradition there were people responsible for looking after every piece of the land which today is called Victoria. At times particular pieces of country could be shared between more than one Traditional owner group. Also, at times while one mob might be the main Traditional Owners group for an area another group might have had traditional rights to go on to country and use it. (In some native title determinations this has been referred to as “primary” and “secondary” rights holders). Today there may be some uncertainty as to the exact definition of boundaries that existed before dispossession.

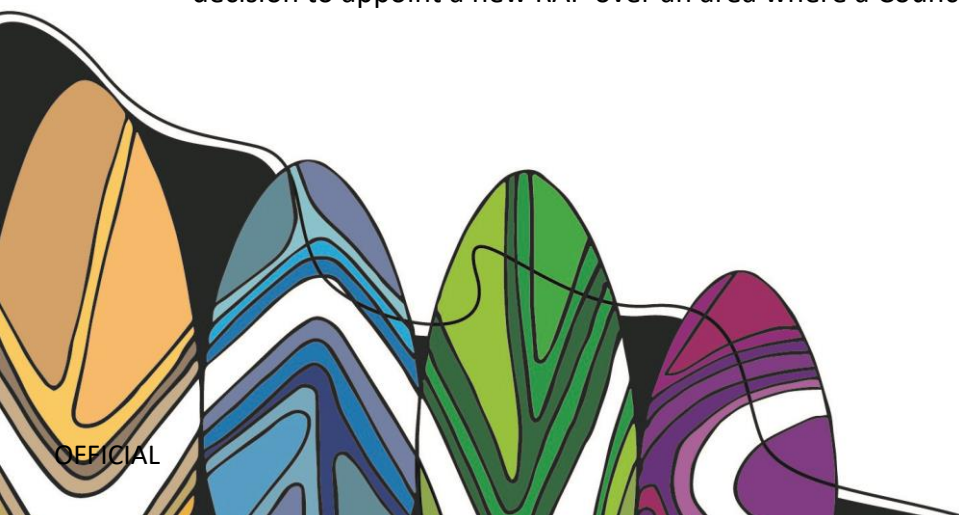
2. The Act

The scheme and purpose of the *Aboriginal Heritage Act* (the Act) depends upon the appointment of Registered Aboriginal Parties (RAPs). The Act in sections 153, 154A and 155 recognises that more than one Traditional Owner Group may have responsibility for particular areas of country. Section 153 allows for the appointment of more than one RAP for an area. If more than one RAP is appointed for an area under section 153 all those RAPs will have equal rights under the Act with respect to that area. This may occur pursuant to an application under section 150 or the variation of a registration area under section 155. Section 154A allows a RAP to be appointed “subject to conditions” (e.g. “in assessing a CHMP the RAP will consult with the adjacent RAP/TO Group”). This provision accommodates the idea of “primary” and “secondary” rights holders and also facilitates agreements between Traditional Owner groups where there may be uncertainty about exact boundaries. Section 155 also allows the boundaries of a RAP to be adjusted but for this adjustment to be subject to conditions in a similar fashion to section 154A.

3. Utilisation of the Provisions

a. Arising from a section 150 Application

Utilisation of section 153 can arise when Council is exercising the power to appoint a new RAP under section 150. A number of factors would impact upon Council’s consideration of a decision to appoint a new RAP over an area where a Council has already appointed a RAP.





Basic Principles

In the initial appointment of a RAP for an area, Council is forming a view that the RAP is representative of the Traditional Owners for that area. Therefore, if Council were to consider appointing a *new* RAP over the area of an existing RAP pursuant to a section 150 application it would, in essence, be forming a view that the existing RAP were for some reason no longer representative of all of the Traditional Owners for that area. An applicant under section 150 in these circumstances would have to present compelling evidence to Council in support of such an application.

Relevant Factors

There are several factors that would be relevant to Council's consideration of such an application:

- Those factors contained in section 150;
- In particular, evidence regarding Traditional Ownership of the area in question;
- Any agreement between the parties (i.e. the section 150 applicant and any existing RAP – the content of such an agreement is discussed below);
- The technical requirements of section 153 (see further below);
- Procedural fairness for any party who may object to the possible determination; and,
- The Charter of Human Rights.

Requirements of section 153

Section 153 requires Council to consider whether the multiple registration of RAPs would:

- unduly hinder the ability of any one of the RAPs to exercise their powers and carry out their functions; and
- otherwise hinder the effective operation of the Act.

Accordingly, an applicant under section 150 seeking registration under section 153 in relation to an area where a RAP is already appointed would need to provide evidence to Council of the satisfaction of the requirements of section 153. Council will also seek the views of the existing RAP in respect of these matters.

Content of Agreements

In light of these factors, agreements between parties in relation the appointment of multiple RAPs for an area of the appointment of a RAP subject to conditions that it consult with another RAP/TO Group in the discharge of its functions in relation to any part of the RAPs appointed are should address the following issues:

- The ability of the parties to work together including any existing arrangements, agreements or protocols;
- The extent to which the parties or either of them have demonstrated good faith in the (attempts to) negotiate an agreement;
- Any history of cooperation between the parties;
- The joint or separate processes the parties will use to make decisions under the Act in relation to the overlap area; and,
- The practical arrangements for resolving disagreements between the two parties.

b. Pursuant to s 155

Multiple RAPS in relation to an area can also be appointed subsequent to the adjustment of existing boundaries (“variation of registration”) under section 155. Section 155 requires the consent of the existing RAP to an alteration of the boundary of another RAP to include an area within the registration area of the original RAP.

Parties should note though that even in such a case Council needs to be satisfied that the requirements under section 153 (discussed above) are satisfied.

In other circumstances, pursuant to section 155, Council can alter the boundaries of existing RAPs to include an area that was not originally within the registration area of either RAP (“close a gap”). In this case section 155 requires that each RAP consent to the variation of its own boundary but not that it agree to the variation of the other RAPs boundary.

Relevant Considerations

This matter aside, in considering the possible alteration of the boundaries of existing RAPs to include an area that was not originally within the registration area of either RAP, Council will is obliged to have regard to a number of factors as discussed below. In many respects these are similar (but not identical) to the factors relevant to section 150 as discussed above.





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The relevant factors are:

- The evidence regarding Traditional Ownership of the area in question;
- Any agreement between the parties (the description of the content of such an agreement in this context is the same as discussed above);
- The technical requirements of s 153 (as set out above);
- Procedural fairness for any party who may object to the possible determination;
and,
- The Charter of Human Rights.

c. Imposition of a Condition under section 154A

Under section 154A and in accordance with Council Policy on the imposition of conditions upon registration of a RAP Council can also impose a condition on the registration of a RAP that it must consult with another Traditional Owner group in the discharge of any of the RAPs statutory functions. As discussed above this course may be appropriate if the Traditional Ownership structure involves “primary” and “secondary” rights holders or pursuant to an agreement between a RAP and another RAP or a Traditional Owner Group (that does not have RAP status).

Relevant Considerations

In these circumstances Council is not strictly invoking a section 153 as there is still only one RAP in relation to the area. However, the factors contained in section 153 (the ability to exercise statutory powers and the effective operation of the Act) are still relevant. The other relevant factors are similar to those set out above in relation to section 155. In the context of the imposition of a condition under section 154A the other factors relevant to Council’s considerations are:

- Satisfaction of the procedural requirements contained in section 154A and Council’s policy with respect to the exercise of power under section 154A;
- The evidence regarding Traditional Ownership of the area in question;
- Any agreement between the parties (the description of the content of such an agreement in this context is the same as discussed above);
- The technical requirements of section 153 (as set out above);
- Procedural fairness for any party who may object to the possible determination;
and,
- The Charter of Human Rights.

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