

2 September 2019

Our ref: VEB:PKR:20119

Your ref:

John Stevens
Manager Legal Services
Parks Victoria
10/535 Bourke Street
MELBOURNE VIC 3000

*By email only: info@parks.vic.gov.au
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Dear Mr Stevens

Grampians National Park set-aside determination

I write on behalf of the Australian Climbing Association (Victoria) Inc and its members (**ACAV**). ACAV is the pre-eminent representative body for climbing access in Victoria and it exists for objects to ensure that regulation and policy that affects climbing is lawful and appropriate, and to ensure that public land is managed to ensure its full recreational value.

We refer to your letter of 25 July 2019 and enclosed 4 February 2019 determination made by Simon Talbot as a delegate of Parks Victoria to set aside areas in the Grampians National Park (the **set-aside determination**) pursuant to the *National Parks Regulations 2013* (the **Regulations**), and the briefing paper recommending the making of the determination countersigned by Mr Talbot.

The set-aside determination states that the areas indicated in an appended table are set aside for the activities specified or for the prohibition or restriction of access, at the times or periods, and in accordance with the conditions as indicated. We assume it amends and replaces an earlier determination and would be grateful if that could be provided together with the relevant instrument of delegation.

The table includes an entry referring to reg 65 of the Regulations and stating that rock climbing is not permitted in the areas marked as "Special Protection Areas" in Figure 2 of the Grampians National Park Management Plan (attachment 1 to the set-aside determination) and as listed in Appendix 1 (attachment 6), and the "buffer zones" around Aboriginal Cultural Heritage Sites as indicated in Map 1 (attachment 7). The "conditions" state that "Both free and aided climbing and bouldering, whether up, down or across natural rock formations is prohibited".

The set-aside determination is invalid

ACAV has sought the advice of counsel and, without disclosing the substance of or waiving privilege in that advice, counsel are of the opinion that the prohibition of rock climbing in the set-aside determination is invalid.

First, the prohibition is not supported by reg 65 pursuant to which Parks Victoria by determination may set aside an area of a park in which “sport or similar recreational activities are prohibited”. Regulation 65, by reference to “sport” and the use of the words of limitation “or similar”, is confined to prohibiting activities of a competitive nature, conducted under rules, in contrast to the (lesser) power of restriction in reg 66 which extends to “sport or other recreational activities”. The set-aside determination purports to prohibit “rock climbing” per se and with purported “conditions” stating that “both free and aided climbing and bouldering ... is prohibited”, being recreational activities that may be restricted (reg 66), but not recreational activities similar to sport that may be prohibited (reg 65).

Second, if, contrary to the first point the prohibition is within the text of reg 65, the set-aside determination is legally unreasonable. Noting that the accompanying briefing paper to the delegate, Simon Talbot, evidences the reasons for the making of the determination and the supposed mischief sought to be addressed:

- (1) In making the determination there has been a failure to have regard to relevant considerations required, on a proper construction of the Regulations to be taken into account, being the objectives of the Regulations and the *National Parks Act 1975* as to the encouragement and use of national parks for the public purposes of enjoyment, recreation and education, and alternative measures to address the supposed mischief available in regulations 20, 48, 53–55 and 66 of the Regulations.
- (2) Alternatively, in view of the objectives of the Act and Regulations, the availability of those alternative and less burdensome measures, the supposed mischief referred to in the briefing paper, and:
 - (a) the extent of the measure by prohibiting all and any form of rock climbing and singling out that activity and no other recreational activity when other activities might also give rise the supposed mischief being addressed;
 - (b) the indefinite duration of the measure (not limited to 12 months as stated in the briefing paper);
 - (c) the width of the largely undefined and uncertain areas subject to the set-aside determination (incapable of meeting the requirement in reg 10 that Parks Victoria must erect or display signs at or near the entrance to each of those areas),

the set-aside determination is legally unreasonable in being disproportionate to the supposed mischief to be addressed, noting that the determination is in the nature of by-law sourced from the power on s 38(2)(ca) of the Act, and the making of the determination is legally unreasonable in lacking an evident and intelligible justification.

We have provided this information consistently with the obligations parties have to endeavour to resolve disputes by agreement, which we refer to below.

Further engagement with Parks Victoria

As a result of the matters set out above, we request your confirmation that Parks Victoria will revoke that part of the set-aside determination prohibiting rock climbing in the Grampians National Park.

Our client wishes to engage with Parks Victoria and stake holders, especially the traditional owners of the Park, in an endeavour to ensure that any risks to the environmental and cultural values of the Park posed by rock climbing are appropriately managed through the park management plan and a cultural heritage plan. ACAV and its members have expertise that will assist in formulating long term solutions.

However, in view of the severity of the current measure taken, and done without consultation or adequate consultation, our client cannot let the matter drift, noting also that there are time limitations on commencing proceedings to have the set-aside determination quashed.

Therefore, to be clear, if Parks Victoria is not prepared to revoke the set-aside determination, we are instructed to commence proceedings for judicial review of the decision without further notice, and this letter may be produced to the Court on the question of costs.

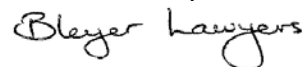
We draw your attention to the obligations in section 22 of the *Civil Procedure Act 2010*, and Parks Victoria's overlapping obligation in the Model Litigant Guidelines, to use reasonable endeavours to resolve a dispute by agreement including, if appropriate, by alternative dispute resolution.

If Parks Victoria does not revoke the determination, we invite it to participate in a meeting with ACAV regarding the set-aside determination and the future planning and management of the Grampians National Park. Being conscious of time constraints within which proceedings may be commenced, we emphasise that such a meeting should be done promptly.

We therefore seek your substantive response to the matters set out in this letter within 7 days.

You should give this letter your urgent attention, and we assume that you will also bring this letter to the attention of Mr Talbot as the relevant decision maker who made the determination under delegation.

Yours faithfully

A handwritten signature in cursive script that reads "Bleyer Lawyers".

Bleyer Lawyers Pty Ltd