Taking Control of Our Heritage

Recommendations for reform of the *Aboriginal Heritage Act 2006*

Realising self-determined ownership of our Culture, Heritage, History and Country

2021

Warning: Aboriginal and Torres Strait Islander readers should be aware that this document may contain images or names of People who have since passed away.

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We acknowledge the Traditional Aboriginal Owners of Country throughout Victoria and pay our respect to them, their Culture and their Elders past, present and future.

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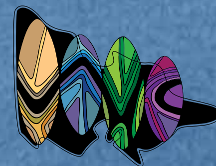

Council's logo of four shields is our commitment to supporting, respecting and celebrating our Country, Culture and Life.

The shields in Council's logo celebrate our Countries:

- gold for desert sands and dry country
- green for forests and grasslands
- blue for waters, rivers and lakes
- purple for the metropolitan regions as well as the basaltic and volcanic plains.

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Introduction

As the Victorian Aboriginal Heritage Council (**Council**) has progressed broad community consideration of the practical application of the *Aboriginal Heritage Act 2006* (the **Act**), its failures and successes, Council has been forced to reassess the commitment of both the community and the government to self-determination.

This program of rigorous consultation and review has been undertaken through two Papers developed by Council in 2020 and 2021:

- *Taking Control of Our Heritage - Discussion Paper on legislative reform of the Aboriginal Heritage Act 2006* (**Discussion Paper**) released in June 2020; and
- *Taking Control of Our Heritage - Aboriginal People caring for Aboriginal Heritage Recommendations for self-determined reform of the Aboriginal Heritage Act 2006* (**Proposals Paper**) released in April 2021.

Overall, the responses to both the Discussion Paper and Proposals Paper were considered and appropriate but, across some sectors, the overwhelming considerations were that Aboriginal Peoples cannot responsibly undertake the function of the Act. It is our ancestry, our genetic makeup, our connection to Culture that makes us resilient, informed and consultative Peoples. These are the same things that some consider render us unable to manage the functions of the Act that are often in the hands of bureaucrats, non-Traditional Owners and other entities whose Culture it isn't.

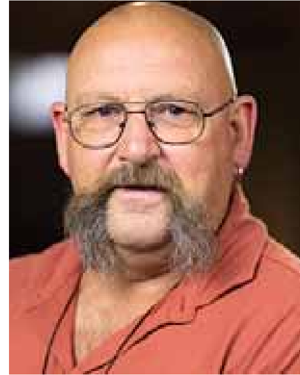
It is essential that, as a society, we truly understand that Traditional Owners are the only comprehensive knowledge holders of their Cultural Heritage. Once we understand that single, fundamental truth, then the recommendation for Traditional Owners to manage their own Cultural Heritage becomes clear and purposeful. Such understandings are in step with the international benchmark set by the *United Nations Declaration on the Rights of Indigenous Peoples* (the **Declaration**). Together with the Act, they provide some of the greatest protections for Traditional Owners in the country. However, there is still much to be done in realising a fundamentally self-determined and tangible ownership of our Culture, Heritage, History and Country.

Since the Act was assented to in 2006, a seismic change has happened in the way that Traditional Owners' rights, responsibilities, knowledge and voice is considered and appreciated in the broader community. Government's own policies of self-determination for Victorian Traditional Owners are reflective of this change but it is time that they are implemented in legislation as, whilst the Act is good, it can be better. The time has come for Traditional Owners to do more than play a part, they must realise their rights to control their Cultural Heritage through the law that governs the protection and management of that Cultural Heritage. It is essential that in recommending change, we also call for Aboriginal legislators to be included in drafting these changes.

Council's ambition is that these recommendations will be implemented and Victoria's Aboriginal Cultural Heritage legislation set a benchmark at both national and international levels. This can be achieved through incorporating a national set of best Practice Standards and fully realising the Declaration. With strong leadership and constructive conversations, we will help others better understand that the positive contributions we put forward are not only just, but are what is needed to ensure the uniqueness of Victoria's Aboriginal Cultural Heritage is not further eroded.

Our Cultural Heritage is best understood through demonstrating respect for Traditional Owners – our knowledge, our skills, our appreciation of our Heritage. The practicing of our Culture and Traditions makes us stronger and this strength offers us all an opportunity to value, understand and celebrate the unique Cultural Heritage we care for on behalf of all Victorians. We all have a part to play in ensuring our Peoples' rights to self-determination, our Culture and Country.

We invite you to walk beside us to ensure that the statutory protections our Peoples have for their Culture is commensurate to over 40,000 years of connection to Country.



Mick Harding

Chairperson
Victorian Aboriginal Heritage Council

Background

As Victorian Traditional Owners, custodians of the oldest living Culture on earth and an independent statutory authority, Council felt that it was time to for the Act to realise its intention. Whilst strong, the Act fails in key areas to enshrine self-determination adequately or respectfully in its prescription for the management and protection of Aboriginal Cultural Heritage on the lands now known as the state of Victoria.

May 2006

In a landmark piece of legislation, the Council was created through the *Aboriginal Heritage Act 2006,* as the only statutory authority composed entirely of Victorian Traditional Owners. Then, as now, the significance of Council's representation is a positive step towards empowerment. The Minister for Aboriginal Affairs in 2006, the Hon. Gavin Jennings, supported the policy shift towards self-determination in that "the Council will ensure Aboriginal people throughout Victoria play a central role in protecting and managing their heritage and that this role is widely acknowledged and respected in the broader community".

September 2007

The United Nations General Assembly (**Assembly**) adopted the significant Declaration on the Rights of Indigenous Peoples. Even then they recognised *"the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources."*

It is with great sadness that, as Traditional Owners, members of the broader Victorian community and as those with responsibilities for Victoria's Cultural Heritage legislation, we must acknowledge that the Assembly's call for action has fallen on deaf ears.

March 2016

The *Aboriginal Heritage Act 2006* is amended. Council has increased statutory responsibilities, including:

- overseeing Registered Aboriginal Parties' (RAP) operations
- overseeing and monitoring the system of reporting and returning Ancestral Remains and Secret or Sacred Objects (Sacred Objects) in Victoria
- managing the Victorian Aboriginal Cultural Heritage Fund
- producing a State of Victoria's Aboriginal Cultural Heritage report every five years.

January 2020

Council's Legislative Review and Regulatory Functions Committee (**LRRFC**) initiated a project to review the Act and develop any necessary proposals for legislative reform.

June 2020

Council published Taking Control of Our Heritage, a Discussion Paper on legislative reform of the *Aboriginal Heritage Act 2006*. The objective of the Discussion Paper was to have a genuine conversation with Traditional Owners, land managers, the broader community and the government on the operation of the Act.

September 2020

The Heritage Chairs of Australia and New Zealand welcomed and supported *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia* (Appendix IV). Council's contribution to the Vision, in the development of the *Best Practice Standards in Indigenous Cultural Heritage management and legislation* (Appendix IV), meant that Victorian Traditional Owner voices were heard on a national level.

November 2020

The June 2020 release of the Discussion Paper was followed by comprehensive community consultation and rigorous review of submissions received by late November 2020. The LRRFC considered the submissions and developed a revised proposal informed by policy and community perspectives.

April 2021

The revised suite of proposals were again taken to the community for public consultation. Once submissions closed, Council's LRRFC considered further submissions and developed the current recommendations made in this document.

October 2021

Council makes these formal recommendations for reform of the *Aboriginal Heritage Act 2006* to the Hon. Gabrielle Williams, Minister for Aboriginal Affairs.

Notes on the Recommendation Format

Each recommendation includes:

- a quote from Traditional Owners provided during the consultation process,
- the problem or issue that is being experienced,
- the proposal for legislative reform that would resolve this issue,
- considerations that should be given in thinking about the recommendation, and
- submissions received through the Discussion Paper process.

To show that each recommendation meets the ambitions set by the *United Nations Declaration on the Rights of Indigenous Peoples* and the *Best Practice Standards in Indigenous Cultural Heritage Management and Legislation*, details are tabled at the end of each recommendation.

Summary

I. Consultation

Council's legislative review is pursuant to its responsibilities under Sections 132(2)(cg) and 132(3) of the Act. It has undertaken this reform process to ensure that the voices of Traditional Owners are heard at all levels of government and that their responsibilities to their Cultural Heritage and Ancestors is not only lived, but supported in legislation.

Council sought feedback from key rightsholders, including RAPs, organisations representing Traditional Owners/Traditional Owner Corporations, and stakeholders in Victoria's development and land-use industry, heritage advisors, local government authorities (**LGAs**), and public land managers.

More than 22 submissions were received in response to the Discussion Paper and an additional 9 submissions were received to the Proposals Paper. Across both consultation processes, the submissions included positive, negative and mixed responses on individual themes and proposals. Overall, responses to the proposals were resoundingly positive.

II. Submissions to the Discussion Paper and Proposals Paper

Council is pleased at the breadth and depth of submissions it received to both the Discussion Paper and Proposals Paper. Above all else, the informed and impassioned responses showed that Aboriginal Culture, whether it be your cultural heritage or not, is slowly being appreciated for its value to all Victorians.

Significantly however, the responses also revealed the inherent racism that exists in some sectors and the fear of change associated with this. It is not a surprise that, as a society, we still have a long way to go to achieve reconciliation. But, what is surprising, is the perception within government and powerful industry bodies that Aboriginal People are unable to manage their own affairs and are unqualified to speak with authority on their own Cultural Heritage. Whilst Aboriginal People understand what loss of Country means, to many non-Aboriginal people, the threat of any interference with what could be considered as inappropriate management of Country is met with hostility and ever-present racial slurs.

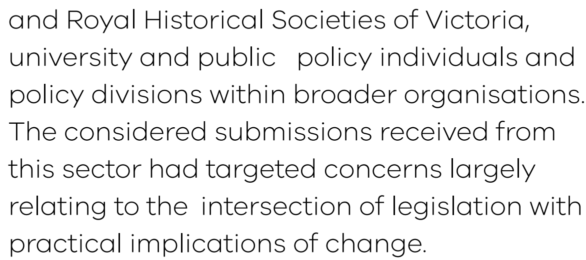
To better understand the perspectives and voices in this recommendations document, the submissions have been grouped into the following representative sectors.

Traditional Owner Organisations

The Traditional Owner Organisation sector is broad in Victoria, comprising a range of organisations including but not limited to Registered Aboriginal Parties, Aboriginal Controlled Heath Organisations, the First Peoples' Assembly of Victoria, Federation of Victorian Traditional Owner Organisations, Victorian Aboriginal Corporation for Languages, Victorian Aboriginal Education Association Inc. and independent wellbeing and cultural entities. Across these groups, the membership or primary users are Victorian Traditional Owners with connection to Culture, community and Country at the centre of service delivery. As they had been instrumental in working with Council's LRRFC on development of the proposals and Discussion Papers, this sector was largely supportive of the proposed reforms.

Heritage – Policy

The Heritage Policy sector encompasses a range of organisations that oversee the broader policy direction of Heritage in Victoria. This includes the Victorian Aboriginal Heritage Council and Heritage Council of Victoria, peak heritage organisations outside of statutory bodies, like the National Trust



and Royal Historical Societies of Victoria, university and public policy individuals and policy divisions within broader organisations. The considered submissions received from this sector had targeted concerns largely relating to the intersection of legislation with practical implications of change.

Heritage – Business

The Heritage Business sector is the 'on the ground' heritage industry of archaeologists, Heritage Advisors (**HAs**), researchers, and industry bodies such as the Australian Association of Consulting Archaeologists Inc. and Australian Archaeological Association Inc. The sector is supported by tertiary education departments and associated areas within government. As a sector, submissions largely took an 'if it isn't broken, it doesn't need fixing' approach. Such an approach fails to consider that Traditional Owners do feel that the system is broken. Hence, it fundamentally lacked constructive critical insight whilst conceptually supporting Traditional Owner responsibilities and rights. Largely, concerns raised were around the practical application of any proposed amendments and regulation of the broader Heritage Business industry.

Building and Development

The Building and Development sector is a significant contributor to the Victorian economy and employs almost 240,000 people. Given the sector's size and influence, it is important that these submissions be considered. However these submissions revealed the most significant lack of understanding of the principles of self-determination and overt racism of any sector. Whilst there was some consideration made of the need for Traditional Owners to retain a connection to Country, the submissions were clear that it should not come at any cost to the sector's requirements for access to Country and quick planning and building decision approvals.

Local Government Sector

The Local Government Sector includes Local Government Authorities LGAs and those community organisations that exist to support community within geographic specific and community-based areas. Whilst generally submissions from this sector supported the rights of Traditional Owners to participate in management of their Cultural Heritage on Country, there were also significant concerns raised for the practical implications of implementing changed consultation processes within the LGAs themselves. It is appropriate that submissions considered the practical implementation of the proposals but these should not impact on broader legislative considerations of Traditional Owner rights and responsibilities.

III. Considerations

Whilst the primary focus of the review was the Act, it has however brought to the fore issues around the Act's associated *Aboriginal Heritage Regulations 2018* (the **Regulations**) and the *Geographic Place Names Act 1998*.

The Act is currently failing to meet its objective that Aboriginal Cultural Heritage be managed by Traditional Owners; protected for their ongoing cultural connection and wellbeing, and enjoyed by all Victorians. The necessarily lengthy consideration involved in legislative reform will further allow an opportunity for the failings of the Act to be exploited. Full realisation of self-determination by Aboriginal Peoples must be made in the Act and this can only be done by adopting the recommendations made here and enshrining them in law. There are also minor regulatory changes that could affect significant change in protecting Aboriginal Cultural Heritage in Victoria. Recommendations on amendments to the Regulations will be made by Council later in 2021.

Theme One: Furthering Self-Determination for Registered Aboriginal Parties

Victoria's RAPs are a fundamental function of the effective management of the Act. They are a primary source of advice and knowledge of Aboriginal places, Cultural Heritage and Objects on Country. The strength of RAPs lies in their representative and inclusive structures for their Peoples, allowing discourse, engagement and intergenerational knowledge sharing within community. In Article 33, the *United Nations Declaration on the Rights of Indigenous Peoples* details how critical it is that *"Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures."*

Recommendation One:
Expansion of the Legislative Functions of a RAP

"This is about sovereignty. They're a local government Council and we're a Council of Traditional Owners. We acknowledge their responsibilities, but they don't acknowledge ours. And it's not just us, the RAP, they don't acknowledge Aboriginal People most of the time either."

ISSUE

People who are not representative of inclusive and representative Traditional Owner Aboriginal Corporations are speaking for Aboriginal Cultural Heritage.

BACKGROUND

The legislative functions of a RAP mainly relate to the technical aspects of managing Aboriginal Cultural Heritage, such as CHMPs, Cultural Heritage Permits (**CHP**) and Cultural Heritage Agreements. The only provisions which refer to a RAP's more general responsibilities are "to act as the primary source of advice and knowledge for the Minister, Secretary [of DPC] (**Secretary**) and (Victorian Aboriginal Heritage) Council on matters regarding Aboriginal Places and Objects relating to their registration area; and to provide general advice regarding Aboriginal Cultural Heritage relating to the area for which the party is registered."

RECOMMENDATION

That RAP's should be the primary source of advice to government on both tangible and intangible Aboriginal Cultural Heritage in their registration area.

The current legislative framework should be expanded to encourage increased government engagement and consultation with RAPs on Cultural Heritage matters, relating to both tangible and intangible Aboriginal Cultural Heritage. In particular, the relationship between RAPs and local governments would benefit from the prescription of the specific obligations that local governments have to their relevant RAP(s).

Further, the Act should reflect the growth of RAPs' responsibilities and expertise since the establishment of the first RAPs in 2007. They are now able to act as representatives of the Traditional Owners in their registered area in regard to a range of matters beyond the technicalities of Cultural Heritage. The Act should be amended to reflect this and also identify RAPs as the primary source of advice to government on other Aboriginal affairs in their registration area.

This recommendation seeks to reclaim the rights and responsibilities of governance of Aboriginal People and would frame RAPs as the peak advisors on Aboriginal Cultural Heritage and other issues regarding Aboriginal affairs in their registration area. Consideration should be made to:

- RAPs being the primary consultant on all matters relating to Aboriginal Cultural Heritage in the registration area to both the Minister and LGAs.
- Both State and local government being required to consult with RAPs on matters of intangible and tangible Aboriginal Cultural Heritage; and on matters relating to other Aboriginal affairs in their registration area beyond Aboriginal Cultural Heritage.

Aunty Dyan Stewart conducting a Smoking Ceremony.

"This will assist RAPs to establish commercial enterprises and related training and employment opportunities from a strength-based development approach rather than the current risk-based approach which is predicated on the management of tangible heritage."

Federation of Victorian Traditional Owner Corporations

The Federation is the Victorian state-wide body that convenes and advocates for the rights and interests of Traditional Owners while progressing wider social, economic, environmental and cultural objectives. We support the progress of agreement-making and participation in decision-making to enhance the authority of Traditional Owner Corporations on behalf of their communities.

CONSIDERATION

RAP expertise and ability

Key criteria for registration as a RAP include expertise in Cultural Heritage management and organisational sustainability. No RAP application is approved by Council without extensive scrutiny on these matters. Several groups criticised this recommendation on the basis that RAPs do not have the expertise or capability to carry out increased functions. Council believes that this opinion is formulated upon an incorrect understanding of the competency of existing RAPs.

For example, established RAPs employ an extensive staff that may include Heritage Unit Managers, Heritage Advisors, Heritage Bookings Officers, Elders, Cultural Heritage Officers, Compliance Officers, anthropologists, research assistants and other employees. Although not all RAPs commence operations with access to a large staff or considerable resources, Council has observed the strong ability of RAPs to grow their organisational capacity in line with industry demands. Council is confident that RAPs will be able to fulfil any new legislative functions that arise as a result of this recommendation..

Furthermore, if recommendation 3 (following) is passed, RAPs may not be obliged to perform every single legislative function from the time of their registration. This will enable RAPs to establish themselves in the industry before taking on certain responsibilities that they may not yet be able to complete.

Responsibilities outside Cultural Heritage

Since the establishment of the first RAPs in 2007, their responsibilities and expertise have grown to a point where many are able to act as representatives of the Traditional Owners in their registered area in regard to a range of matters beyond the technicalities of Cultural Heritage. The Act should be amended to reflect this, and to increase RAPs' voices as the primary source of advice to government on other Aboriginal affairs in their registration area.

However, Council recognises that legislating for RAPs to assume an advisory position on matters such as health, housing and social services may be outside the objectives of the Act.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

Council wishes to note the strong support that this recommendation received in relation to its proposals to legislate for stronger relationships between RAPs and local LGAs. Importantly, RAPs and LGAs made some of the more vocal submissions on this issue. A Traditional Owner organisation stated that it:

"supports the expansion of the legislative framework to encourage greater and more meaningful engagement to occur between RAPs and other stakeholders including but not limited to Local Government".

Whilst another said that it:

"strongly agrees that RAPs should have primacy regarding matters related to our Cultural Heritage within local government areas".

A submission from the LGA sector identified that:

"This would benefit local governments by providing specific obligations that local governments have to their relevant RAP(s)."

The above submissions demonstrate that both RAPs and LGAs (urban and rural) have a strong support for increased collaboration. They indicate that this recommendation could have highly desirable outcomes for the parties that it affects most. This type of support exemplifies that communities are welcoming of the stronger relationships that the suite of amendments could introduce.

Whilst most submissions supported this recommendation, some organisations believed that RAPs may not have sufficient capacity to carry out increased legislative functions. It is difficult to appreciate that currently the Act has capacity to support an approach that fundamentally questions the expertise of Traditional Owners in their own Cultural Heritage.

A notable submission from the Building and Development Sector stated that:

"It would be irresponsible and unprecedented to provide such legislative advocacy power to a group where such a group does not have the requisite skill, knowledge or expertise to provide opinions"

Furthermore, several submissions specifically raised concerns that RAPs may not have the expertise to consult on matters outside the ambit of Aboriginal Cultural Heritage and that to legislate on such an area may be outside the objectives of the Act.

UNDRIP

This issue should be considered in relation to Article 11:

"Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 4 – Definitions:

"Definitions should recognise that an essential role of ICH is to recognise and support the living connection between Indigenous Peoples today, our ancestors and our lands."

Recommendation Two:
Enabling Council to approve RAP applications with conditions

"It's difficult to suddenly having legal responsibilities under the Act. RAPs are small businesses and from the day of registration, you must have an office, staff, finance and HR capacity and corporate governance structures, just to be able to fulfil this requirement. When that day also marks the start of any financial support, there's hitting the ground the running and then there's not even being able to see the ground."

ISSUE

The legislated and operational responsibilities of a RAP start at the date of registration, not allowing for sufficient development or capacity building within the organisation.

BACKGROUND

Council has the power to impose conditions on the registration of any RAP. However, this provision is only in regard to existing RAPs. The current legislative framework does not allow newly appointed RAPs to have conditions set on their registration immediately upon appointment.

RECOMMENDATION

This recommendation is for an amendment to allow Council to approve RAP applications subject to conditions. This would allow groups that are potentially unable to carry out their functions as a RAP, at the time of application, to still have their registration as a RAP approved. Additionally, it would stagger the commencement dates of the new RAPs' obligations so that they would not immediately be flooded with all RAP responsibilities upon registration.

For example, if a RAP was appointed over a small area that had a disproportionately high number of activities requiring Cultural Heritage Management Plans (**CHMPs**), its appointment could be subject to the condition that for the first six months following the appointment, it does not have the power to approve CHMPs over a certain zone of its registration area. This would enable the RAP to spend that period establishing itself and obtaining the funding and resources to be able to properly approve CHMPs over the entirety of its registration area.

This amendment would provide great assistance to new RAPs in their early stages of development. It would also make it more efficient for Traditional Owner groups to apply for and obtain RAP status. In turn, this would encourage inclusivity of more groups and would increase the rate at which Victoria achieves full RAP coverage.

"First Nations has worked with Traditional Owner corporations in the early stages of their RAP appointment and has found that they struggle to fulfil their functions through lack of training, resources and support. RAPs are often faced with an influx of work when they are initially established but lack the funding, skills and resources to adequately perform their role."

First Nations Legal & Research Services

First Nations Legal & Research Services (**FNLRS**) facilitates sustainable native title and land justice outcomes. In the wake of the 2002 High Court decision in Yorta Yorta v Victoria there was a common view that native title as a doctrine would have little application in Southern Australia. Since its creation in 2003, FNLRS (previously Native Title Services Victoria) has proved this view wrong. Victoria now has four successful determinations of native title covering much of the crown land of the State and a settlement under the *Traditional Owner Settlement Act 2010* (Vic).

CONSIDERATION

Purpose and necessity

This recommendation is aimed at bringing flexibility to the RAP approval process, as many Traditional Owner groups lack the resources and organisational capacity that are necessary to achieve and sustain RAP status.

It also recognises that although some Traditional Owner groups may not be capable of performing all RAP functions at the time of application, they are often able to develop that complete capacity in the period following registration. Enabling Council to approve RAP applications subject to conditions would allow such groups to achieve RAP status. This would empower more groups to obtain RAP status and enable Victoria to achieve full RAP coverage.

Funding and resourcing

Council recognises that some RAPs may need increased funding and resourcing to carry out their legislative functions. This recommendation does not aim to take the place of other forms of RAP assistance. Rather, it should be viewed as an additional mechanism of support for new RAPs.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

This recommendation received wide support with most submissions acknowledging that the relevant amendments would provide much needed support for new RAPs. A Traditional Owner sector organisation stated that:

> *"RAPs need sufficient resources to run the additional activities and responsibilities. Financial and staffing resources are fundamental to the process."*

Notably, one Traditional Owner organisation submission identified that allowing Council to approve RAP applications subject to conditions is an ineffective way to assist RAPs who lack resources, highlighting the fundamental issue of financial support for RAPs.

> *"Imposing conditions on RAP approval does not address the underlying issue and is not supported…RAPs require greater base level funding to ensure that they can operate a basic office and employ sufficient staff to fulfill their legislative requirements."*

Building and Development sector organisations criticised the proposal on the grounds that its purpose lacks clarity and that the proposed changes are unnecessary.

UNDRIP

This issue should be considered in relation to Article 34:

"Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 7 – Resourcing, participation:

"There must be acceptance that the Indigenous representative organisation engaging with proponents and assessing their proposals are performing a statutory function under the relevant jurisdiction's project assessment and approval regime and must be adequately resourced to perform this function."

Recommendation Three:
Native title definitions and RAP applications

"Ours are collective rights, not individual ones. We must ensure that legislation is consistent and reflects our collective, representative and self-determined structures."

ISSUE

There is confusion in the Act around the use of terms relating to native title, allowing individuals to apply for registration as an Aboriginal party but only allowing prescribed body corporates (**PBC**) to be registered.

BACKGROUND

Currently, the Act defines "***native title party for an area***" as including a "***registered native title claimant***" and "***registered native title holder***". Whilst both these terms are utilised in the *Native Title Act 1993* (Cth.) (**NTA**), the definition does not refer to the NTA definitions which clarify the use of these terms.

Under the definitions in the NTA, a "*registered native title claimant*" can only be a natural person or a group of natural people. The definition of "*native title holder*" is either a PBC or the person or persons who hold the native title.

Also using these terms, subsection 151 of the Act requires Council to register a "*registered native title holder*" as a RAP and in deciding a RAP application to take into account whether the applicant is a "*native title party for the area to which an application relates*". However, the Act also defines that an applicant for RAP registration must be a body corporate.

RECOMMENDATION

That the section 151 of the Act be amended by:

- deleting the reference to "registered native title holder" in subsection (2) and replacing it with the phrase "prescribed body corporate under the *Native Title Act 1993* (Cth.)", and
- changing the reference to "native title party" in subsection (3) to include:

  "Section 151(3)(a).. Council must take the following into account –

  a) whether in ***Council's view*** the applicant is ***representative*** of a native title party for the area to which the application relates;

  c) whether in ***Council's view*** the applicant is a body representing the traditional owners of the area to which the application relates."

Both of these amendments give effect to the original intent of the legislation, but in a manner that is consistent with the fact that a RAP (or a RAP applicant) is required to be a body corporate.

UNDRIP

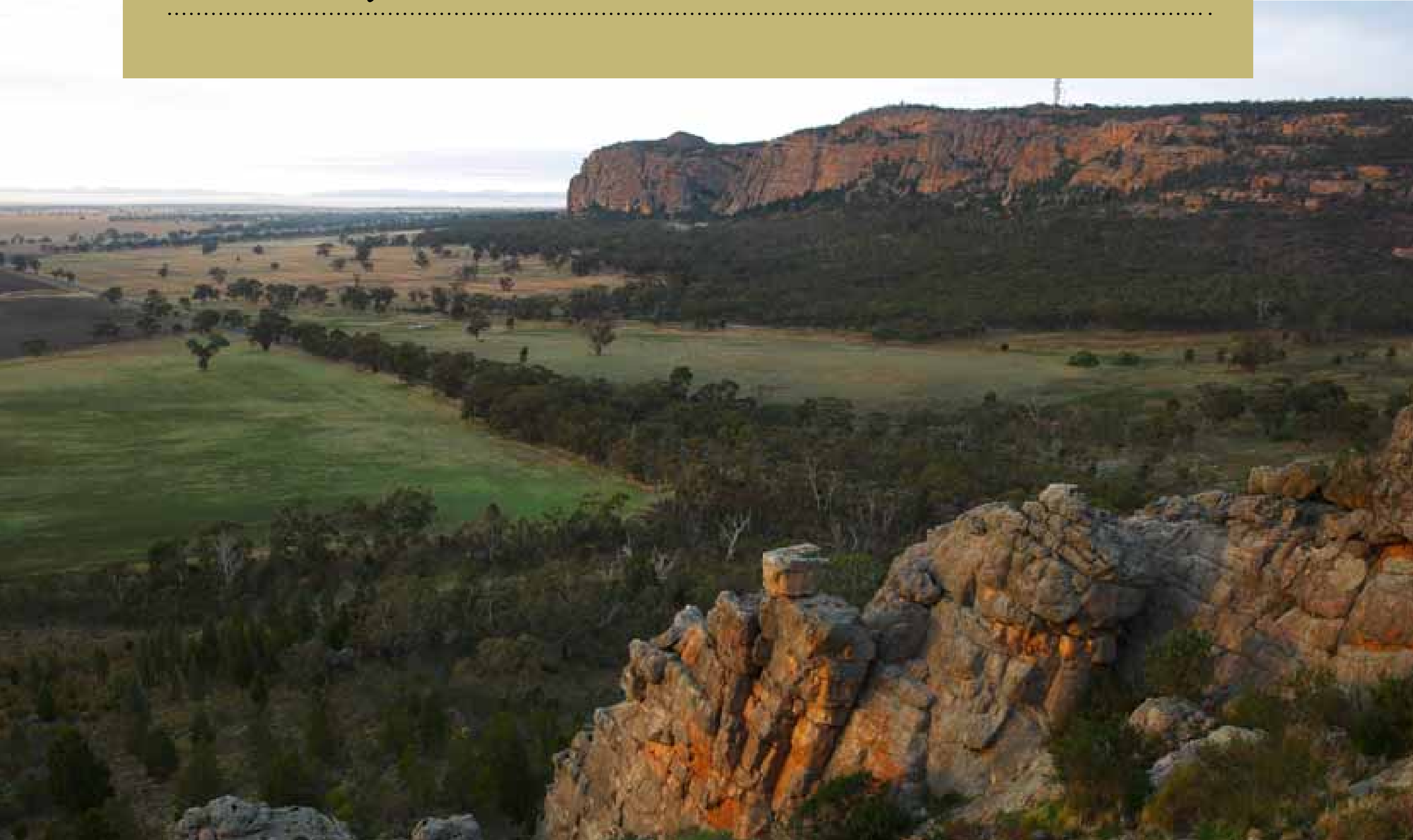
This recommendation should be considered in relation to Article 33:

"Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 5 – Incorporation of principles of self-determination:

"The affected Indigenous Community itself should be the ultimate arbiter of the management of the Indigenous Cultural Heritage (ICH) aspects any proposal that will affect that heritage."



Recommendation Four: RAP Cultural Heritage Consent in relation to CHMPs

"Don't kid yourself. We're managing destruction, not protecting Heritage, when we approve a CHMP. There has to be a way that we can say: 'No, this is too important a place to tens of thousands of generations of my Old People, you can't put a drain there'."

ISSUE

Traditional Owners must watch the destruction of Cultural Heritage because their capacity to stop harm is so limited.

BACKGROUND

A RAP may only refuse to approve a CHMP on substantive terms if it is not satisfied that the plan adequately addresses the matters set out in section 61 of the Act, including "whether the activity will be conducted in a way that avoids harm to Aboriginal Cultural Heritage; and if it does not appear to be possible to conduct the activity in a way that avoids harm to Aboriginal Cultural Heritage, whether the activity will be conducted in a way that minimises harm to Aboriginal Cultural Heritage."

This means that Sponsors have the power to argue that an activity must still go ahead despite the threat of harm to Aboriginal Cultural Heritage. This is because the activity is still arguably being conducted in a way that minimises that harm. Thus, the RAP's position in the approval process is less about protecting Aboriginal Cultural Heritage and becomes something in the way of managing damage to Cultural Heritage. RAPs are often placed in a difficult negotiating position, having to approve CHMPs that still cause harm to important Cultural Heritage.

Under these current provisions of the Act in Victoria, destruction like that of Juukan Gorge in Western Australia, would be permitted as minimisation of harm could be argued.

RECOMMENDATION

That the Act be amended to give RAPs the authority of Cultural Heritage Consent. This would provide a mechanism to both give and withhold consent for harm to Aboriginal Cultural Heritage proposed in CHMPs.

This would be in accordance with section 1(b) of the Act, which states that a purpose of the legislation is to empower Traditional Owners as protectors of their Cultural Heritage. It would also accord with Article 31 of the *United Nations Declaration on the Rights of*

Indigenous Peoples, which states that Indigenous peoples have the right to maintain, control, protect and develop their Cultural Heritage.

Victoria would not be the first jurisdiction in Australia to introduce a provision of this kind. Section 10(f) of NTASSA gives the AAPA the function to refuse to issue an Authority Certificate it believes that there is a threat of harm to sites of Cultural Heritage significance. Developers are then unable to carry out activities without this Authority Certificate. They are also unable to apply again for that same Authority Certificate, except with the permission in writing of the Minister. Allowing RAPs in Victoria this same authority would enable them more control over the management of their Cultural Heritage.

"We strongly support the consideration of veto powers in relation to CHMPs, recognising that the current threshold under Section 61 of the Act, which requires CHMPs to consider "whether the activity will be conducted in a way that minimises harm to Aboriginal Cultural Heritage", can facilitate approvals resulting in the destruction of cultural heritage, with Registered Aboriginal Parties powerless to prevent it. We note that providing veto powers would more closely align with the purpose of the Act to "empower Traditional Owners as protectors of their Cultural Heritage", as well as Article 31 of the Declaration."

National Trust of Australia (Victoria)

Since 1956 the National Trust of Australia (Victoria) has been actively conserving and protecting our heritage for future generations to enjoy. We are an independent non-profit charity organisation and the leading operator of house museums and heritage properties in the state.

As a community-based member organisation, we are not part of government and work with partners to deliver our mission to "inspire the community to appreciate, conserve and celebrate its diverse natural, cultural, social and Indigenous heritage."

CONSIDERATION

The authority of Cultural Heritage Consent provides greater protection from harm and greater alignment with the prescribed functions of a RAP.

Section 148 of the Act contemplates the functions of a RAP, including *"to act as a primary source of advice and knowledge for the Minister, Secretary and Council on matters relating to Aboriginal places located in or Aboriginal objects originating from the area for which the party is registered"*. It is therefore notable that RAPs across the State are reporting that, in the course of CHMP approval, the application of section 61(b) means that Sponsors have the power to argue that an activity must still go ahead despite the threat of harm to Aboriginal Cultural Heritage and despite the RAP's advice to protect and manage their Cultural Heritage differently.

RAPs are finding that the approval process, as it currently stands, is less focused on protecting Aboriginal Cultural Heritage. RAPs are often placed in a difficult position very much at odds with the purpose of the Act and stated function of RAPs, having to approve CHMPs that still cause harm to their Cultural Heritage in a manner that they do not find acceptable. The authority of Cultural Heritage Consent would allow RAPs to withhold consent to a CHMP, effectively providing a veto, where harm to Aboriginal Cultural Heritage is considered too great and in contradiction to the requirement to care for Country.

Furthermore, conferring such an authority is considered an appropriate reflection of the RAP's function as primary knowledge holder and custodians over the Country to which they are registered and again align the Act better with self-determination principles.

This issue of certainty

The Northern Territory's regime strikes the balance between providing protection and certainty. This is done by the AAPA offering certainty to developers by providing adequate information about places that do require protection.

Whilst a veto power in the form of an authority may introduce in level of initial uncertainty, it does not outweigh the longstanding benefits of certainty delivered that the project once approved will not cause harm to sites of significance and will not face longstanding challenges and subsequent longstanding uncertainty that the current system creates.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

The proposal was in majority supported by submissions from across the community.

A Traditional Owner organisation said that:

> *"For RAPs to have full functions under the Act they must have powers to veto in matters where highly significant Aboriginal Cultural Heritage is under threat of harm or possibly destroyed."*

Another identified that:

> *'Veto power would introduce a degree of certainty to the protection of the Aboriginal Cultural Heritage. The amendment would allow Traditional Owners to stop harm on Aboriginal Heritage as opposed to managing destruction after it has taken place.'*

Whilst a Local Government sector submission stated that:

"The Act should be amended to allow RAPs a veto power over CHMPs that threaten harm to Aboriginal Cultural Heritage. It would make sense to intervene/identify the potential for harm at the preliminary stages of a CHMP preparation process."

Some Building and Development sector submissions were concerned that an authority for Cultural Heritage Consent would introduce a degree of uncertainty in the assessment process required for investment in infrastructure. Whilst others, expressed the view that such a power of self-determined control over their own Cultural Heritage was inappropriate for RAPs to hold.

A notable submission from this sector articulates a common thread through the sector's submissions that Traditional Owners are not authorities of their Cultural Heritage and should not be entrusted with management processes and approvals.

'The function of a RAP…is to act as an advisory and evaluation mechanism. It is not appropriate to provide veto powers to such a body. These functions should remain to be determined by appropriately qualified Heritage Advisors.'

Whilst another from this sector explains that destruction of Aboriginal Cultural Heritage is just 'the cost of doing business'.

"The veto option as described in the Discussion Paper focuses upon current approval provisions and these could be amended to meet the requirements of both industry and Aboriginal Peoples. The ubiquitous nature of Heritage and the fact that all Heritage is significant means that it is not possible to undertake development in Australia without the risk of some impact on Cultural Heritage."

Support was also expressed by Traditional Owner organisations for the authority of Consent to apply in the preparatory stages of the CHMP process to better align the Act with the UNDRIP.

"… veto power should be extended and or included as part of CHMP preparation, so that no harm to Heritage is caused during the preparation of a CHMP."

UNDRIP

This issue should be considered in relation to Article 31:

"Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage"

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 5 - Incorporation of principles of self-determination:

"The affected Indigenous Community itself should be the ultimate arbiter of the management of the ICH aspects any proposal that will affect that heritage."

Theme Two:
Increasing the Autonomy of the Victorian Aboriginal Heritage Council

The Victorian Aboriginal Heritage Council is unique in Victoria as a statutory authority with membership of only Victorian Traditional Owners. Members have knowledge and experience of Aboriginal Cultural Heritage and strong governance experience and leadership at a state level. The establishment of Council enables self-determination in its registration of inclusive and representative Traditional Owner Aboriginal Corporations to speak for their Country and Culture on Country. The failure of the Council to realise true autonomy from government, since its creation in 2006, has been a great disappointment in realising the self-determination benchmark set by the Declaration.

Recommendation Five: Appointment of Members through existing representative Victorian Traditional Owner institutions

"Self-determination means Our People making decisions for our mob, our Culture and our Country. We can't do that if we have no say in who is making those decisions."

ISSUE

The Ministerial appointment of Council members does not actively support the principles of self-determination.

BACKGROUND

Council is composed of up to eleven Traditional Owners. Each Council member must be an Aboriginal person who is a Traditional Owner, a resident in Victoria, and has relevant experience or knowledge of Aboriginal Cultural Heritage in Victoria. Council members are appointed by the Minister for Aboriginal Affairs (**Minister**).

RECOMMENDATION

That section 133 of the Act be amended to allow nomination for appointment of Council Members from two existing representative Victorian Traditional Owner institutions - the First Peoples Assembly of Victoria (**FPAV**) and the RAPs.

The eleven members of Council should be appointed by the Minister from amongst Victorian Traditional Owners nominated by these two institutions. It is proposed that five members of Council be nominated by the FPAV and six nominated by meeting of authorised representatives of the RAPs (a "College" of RAP representatives).

Whilst the Minister would retain the ultimate power to decline an appointment at their discretion, they would be unable to appoint to Council members not nominated by the FPAV or the College of RAPs.

This would be in keeping with principles of self-determination and would enable Council to be representative of the RAP sector, which Council has the function of overseeing, as well as the broader Victorian Traditional Owner community, some of whom may not participate in the RAPs.

"RAPs' nomination of Council members will ensure self-determination and advocacy of cultural activities by the Traditional Owners through the Council."

Barengi Gadjin Land Council Aboriginal Corporation

The Barengi Gadjin Land Council Aboriginal Corporation represents Traditional Owners from the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples, who were recognised in a 2005 Native Title Consent Determination, the first in south-eastern Australia. It is a federally recognised authority to speak on behalf of the Wotjobaluk peoples, the Prescribed Body Corporate for the Wotjobaluk claim area, as outlined in the Native Title Act, and a Registered Aboriginal Party under the Act.

CONSIDERATION

Transparency Issues

Council understands concerns that this recommendation may result in less transparency within the RAP appointment process, as Council is the body that determines RAP applications under the Act. Furthermore, Council is also the body that manages, oversees and supervises the operations of RAPs.

However, the current proposal is not to guarantee an allocated number of membership positions on the Council to any particular RAP(s). The proposal aims instead to allow a group of RAP representatives to nominate Council and another group to nominate from a broader representation. It is erroneous to presume that a Council member who has been nominated by a group of RAP representatives, rather than the Minister, would be beholden to the interests of a singular RAP or several RAPs and may therefore make decisions in a way that threatens the transparency of the RAP appointment process.

The operation of pre-existing legislative and procedural protections further allays transparency concerns. A precondition for appointment to the Council is to be a Traditional Owner, resident in Victoria, who has extensive knowledge of Aboriginal Cultural Heritage. Naturally, this means that many current and former Council members have held associations with particular RAPs. There are safeguards in place for protecting decision-making processes from bias in these scenarios. For example, section 142 of the Act states that if a Council member has a pecuniary or personal interest in a particular decision, they must declare their interest and take no further part in the making of the decision. The Council's Procedures Manual further stipulates that upon receipt of a RAP application, the Office of the Council must contact each Council member to identify whether there is any potential bias in relation to the application and prevent such bias accordingly. These types of protections mitigate the need for any concern that members' decisions may lack transparency.

Individual RAP representation

Council acknowledges that several submissions to its Discussion Papers voiced a desire for each RAP to have a representative member sit on the Council. Council understands the motivation for having direct RAP representation on Council. However, such a form of representation is likely unworkable at present. There are currently eleven RAPs in Victoria and there is only a maximum of eleven available membership places on the Council at any given time. If each individual RAP was given representation, that would leave no positions for any other members, whether those members were to be nominated by the Minister or by the FPAV..

Furthermore, individual RAP representation on the Council would not be in keeping with the underlying spirit of the recommendation, which is aimed at increasing representation of the RAP sector generally. The use of a 'College of RAPs' or another similar electoral process would ensure that Council becomes an advocate for the entire RAP sector, rather than any specific RAP. Maintaining some positions that are outside of this process would ensure the capacity for inclusion of voices from regions without formal RAP recognition.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

Responses to a previous proposal, that was to allow Ministerial and College of RAP appointment of Council members, relate also to this amended recommendation. Largely, the balanced approach of some Council members elected by the College of RAPs, and others in a way that would allow positions for representation from areas without a RAP appointment, was largely supported by the Traditional Owner and Heritage sectors submissions received.

A Traditional Owner Organisation submission stated that it:

"supports the proposal to amend the Act to allow at least five of its eleven members to be appointed by the RAPs themselves."

Whilst a Heritage – Business sector submission identified that:

"Aboriginal People and (Traditional Owner) representative bodies, not currently recognised as a RAP or affiliated with a RAP, should continue to have access to representation on the Victorian Aboriginal Heritage Council (VAHC). This appears to be considered and possible with the proposed changes."

However, one submission from the Building and Development sector criticised the proposal on the grounds that it would not ensure sufficient transparency in the RAP appointment process. Furthermore, several parties criticised the proposed 'College of RAPs' electoral body and sought individual RAP representation.

UNDRIP

This recommendation should be considered in relation to Article 33:

"Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 5 - Incorporation of principles of self-determination:

"The affected Indigenous Community itself should be the ultimate arbiter of the management of the Indigenous Cultural Heritage (ICH) aspects of any proposal that will affect that heritage."

Recommendation Six: Victorian Aboriginal Heritage Council name change

"It's only because we're blackfellas that they don't call us an Authority. Scared we'll take the hills hoist out from under'em."

ISSUE

Council's identity as a Victorian statutory authority is compromised when neither 'Victorian' nor 'Authority' are in its name.

BACKGROUND

Council is established under the Act as a body corporate with a range of statutory functions. Whilst the membership and responsibilities of the Council are Victorian, the omission of 'Victorian' from Council's statutory name creates an issue of establishing identity.

RECOMMENDATION

That the Act be amended to redefine Council and the body corporate structure of Council as separate but related functions.

The body corporate should be changed from the 'Aboriginal Heritage Council' to the 'Victorian Aboriginal Heritage Authority'. The existing Council would be renamed as the 'Victorian Aboriginal Heritage Council' and become the Authority's governing body. This amendment better reflects the scope of operational, and not merely advisory, functions of Council and makes clear that not all these functions under the Act are to be undertaken by Council members personally.

CONSIDERATION

The insertion of "Victorian" in the title makes clear the Authority's scope of operations in an area jointly regulated by the Commonwealth and the State. Whilst the use of "Authority" identifies Council's statutory responsibilities and is consistent with other similar agencies such as the Environment Protection Authority and the Victorian WorkCover Authority.

UNDRIP

This recommendation should be considered in relation to Article 33:

"Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 5 - Incorporation of principles of self-determination:

"The affected Indigenous Community itself should be the ultimate arbiter of the management of the Indigenous Cultural Heritage (ICH) aspects of any proposal that will affect that heritage."

Recommendation Seven: Transferring responsibility of the Register from FPSR to Council

"It must be hard for other people to understand the impact of government controlling what we can and can't say is our own Culture. My mum's still with us and she grew up classified as 'not' an Australian by the government and they're still classifying us."

ISSUE

Significant registration delays have created obstacles for Traditional Owners trying to protect their Cultural Heritage.

BACKGROUND

One of the functions of the Secretary is to establish and maintain the Victorian Aboriginal Heritage Register (**Register**). This means that powers over the Registration of Aboriginal Heritage lie with public servants within First Peoples - State Relations (**FPSR**), and not with Traditional Owners. FPSR staff views on what is appropriate for registration can often conflict with those of both Traditional Owners and HAs, meaning that what appears on the Register is not always representative of the views of Traditional Owners.

RECOMMENDATION

That the Act should be amended to transfer responsibility of the Register (including Registration of both tangible and intangible Heritage) to Council.

Section 1(b) states that one of the Act's purposes is to empower Traditional Owners as protectors of their Cultural Heritage on behalf of Aboriginal People. Transferring the responsibility of maintaining the Register to Council would allow Traditional Owners to oversee the Registration of Aboriginal Cultural Heritage, empowering them with the management of their Heritage and therefore aligning with the purposes of the Act.

Section 144A(a) states that a main purpose of the Register is for Victorian Traditional Owners to store information about their Cultural Heritage. It follows on from this notion that Victorian Traditional Owners should be the group that actually stores the information on the Register. As Council is composed solely of Traditional Owners, they are the most suitable authority to oversee the storing of this information.

In practice, the transfer of responsibility of the Register would result in the current staff who monitor and maintain the Register having their operations transferred to the Office of the Victorian Aboriginal Heritage Council (**OVAHC**). There, they would report to and be overseen by Council to ensure that Traditional Owners had oversight over the Registration process and the ongoing maintenance of the Register.

"The Act should be amended to transfer responsibility for the Victorian Aboriginal Heritage Register to the Victorian Aboriginal Heritage Council as this would be an important and appropriate acknowledgement of the role of Traditional Owners as custodians of Aboriginal Cultural Heritage."

Dr Katie O'Bryan, Faculty of Law, Member, Castan Centre for Human Rights Law

The Castan Centre is a world-renowned academic centre using its human rights expertise to create a more just world where human rights are respected and protected, allowing people to pursue their lives in freedom and with dignity. The Centre's innovative approach to public engagement and passion for human rights are redefining how an academic institution can create important and lasting change. Dr O'Bryan is a lecturer in the Faculty of Law and former solicitor in native title, acting for native title claim groups in both Western Australia and Victoria.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

Most submissions supported transfer of responsibility. It was generally acknowledged that having control over the Register is perceived as fundamental to Aboriginal self-determination and subsequent participation of Traditional Owners in the registration, security and storage of their Cultural knowledge and places.

One Traditional Owner organisation stated that they:

"support the right of Traditional Owners to maintain, control, protect and develop their Aboriginal Cultural Heritage and agree that Traditional Owners should have greater oversight over the Registration process and the ongoing maintenance of the Register."

The only submission opposed to the proposal was raised by the Building and Development sector, who stated preference for responsibility for the Register to remain with FPSR. However, no explanation was proffered. Another from this sector was notably not in opposition of transfer of responsibility to Council but that they did not support *'any change to the Registry's main functions which is to act as a repository of information.'*

UNDRIP

This issue should be considered in relation to Article 11:

"Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 5 - Incorporation of principles of self-determination:

"The affected Indigenous Community itself should be the ultimate arbiter of the management of the ICH aspects any proposal that will affect that heritage."

Recommendation Eight: Transfer of various other Secretarial Functions to the Council

"To me, self-determination is our mob making decisions for ourselves. Some secretary of a department of whitefellas can't really understand."

ISSUE

Important Aboriginal Cultural Heritage statutory functions are not being undertaken by Traditional Owners.

BACKGROUND

Significant functions relating to the self-determination of protection and management of Aboriginal Cultural Heritage are undertaken by the Secretary. These functions include the following:

1) to take whatever measures are reasonably practicable for the protection of Aboriginal Cultural Heritage;
2) to establish and maintain the Victorian Aboriginal Heritage Register;
3) to grant Cultural Heritage permits;
4) to approve Cultural Heritage Management Plans in the circumstances set out in section 65;
5) to develop, revise and distribute guidelines, forms and other material relating to the protection of Aboriginal Cultural Heritage and the administration of this Act;
6) to publish, on advice from Council, appropriate standards and guidelines for the payment of fees to registered Aboriginal parties for doing anything referred to in section 60;
7) to publish standards for the investigation and documentation of Aboriginal Cultural Heritage in Victoria;
8) to manage the enforcement of this Act;
9) to collect and maintain records relating to the use by Authorised Officers (AOs) of their powers under this Act;

10) to facilitate research into the Aboriginal Cultural Heritage of Victoria;
11) to promote public awareness and understanding of Aboriginal Cultural Heritage in Victoria;
12) to maintain a map of Victoria which shows each area in respect of which an Aboriginal party is registered under Part 10, and to make the map freely available for inspection by the public;
13) to maintain a list of all Aboriginal parties registered under Part 10 that includes contact details for the parties, and to make the list freely available for inspection by the public;
14) to carry out any other function conferred on the Secretary by or under this Act;
15) to consider applications for the registration of Aboriginal intangible Heritage and make determinations regarding sensitive Aboriginal Heritage information.

These functions are all carried out by FPSR in the name of the Secretary.

RECOMMENDATION

That some of the above responsibilities, as well as others outlined in other parts of the Act, should be transferred from the Secretary to the Council. The transfer of some of these functions has already been considered in other recommendations in this paper.

For example, one of Council's statutory functions is "to manage, oversee and supervise the operations of registered Aboriginal Parties" set out in section 132(2)(ch) of the Act. However, the majority of RAP support functions currently sit with FPSR, rather than Council. If the Act was amended to encourage more RAP support functions to sit with Council, then the relationship between RAPs and Council would be strengthened. Furthermore, it would allow RAPs more direct support from Traditional Owners.

"As a Council of Traditional Owners, we feel it is our responsibility to ensure that our People manage our Cultural Heritage. Whether the responsibilities are held by RAPs or Council, it is essential that statutory responsibilities reflect the principles of self-determination, respecting and supporting Traditional Owner rights and responsibilities."

Victorian Aboriginal Heritage Council

The Council was created under the *Aboriginal Heritage Act 2006* to ensure the preservation and protection of Victoria's rich Aboriginal Cultural Heritage. With important decision making responsibilities and all eleven members Victorian Traditional Owners, the Council is the only statutory body of its kind in Victoria.

CONSIDERATION

While there was concern raised in relation to potential conflict of interest around this proposal and abuse of power, Council underscores that it is governed by strong principles of ensuring that there is no conflict of interest or abuse of power in any of its functions.

Pursuant to section 142 of the Act:

1) If a member of the Council has a pecuniary or personal interest in the subject-matter of a decision that is to be made by the Council, the member must—

   a) declare his or her interest (including the nature of the interest) to the Council; and

   b) take no further part in the making of the decision by the Council.

If a Council member has an interest (personal or pecuniary) in a matter or bias (whether actual or apprehended), they cannot take part in making a decision in relation to that matter. This is to safeguard the validity and legitimacy of Council decisions, ensuring that decisions are made by Council members who are independent from the subject matter of the decision.

The transfer of various other Secretarial functions to the Council aligns with the intended purpose of the Act and principles of self-determination

The various powers that would be transferred under this proposal are in line with the intended purpose of the Act and principles of self-determination. That is, the increase of powers would strengthen the autonomy of the Council to better align with RAPs and empower Traditional Owners to meet their social, cultural and economic needs and aspirations.

With one of Council's statutory functions being 'to manage, oversee and supervise the operations of RAPs, it is fitting that the support functions that underpin this be transferred to Council. This would strengthen the relationship between RAPs and Council and, equally, Traditional Owners.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

Most submissions supported this recommendation. One Traditional Owner organisation sector submission stated that it:

"supports the transfer of functions and say that they must include Registry, Enforcement and Compliance and Registration of Intangible Places."

Whilst another from this sector noted that they are supportive of only the following responsibilities being transferred to the Council. Those to:

1) "facilitate research into the Aboriginal Cultural Heritage of Victoria;

2) promote public awareness and understanding of Aboriginal Cultural Heritage in Victoria;

3) maintain a map of Victoria which shows each area in respect of which an Aboriginal party is registered under Part 10, and to make the map freely available for inspection by the public; and

4) maintain a list of all Aboriginal parties registered under Part 10 that includes contact details for the parties, and to make the list freely available for inspection by the public."

Significant concern was raised however by one submission from the Heritage – Business sector regarding:

"a conflict of interest and consequent potential for abuse of power and ensuring enforcement is independent."

UNDRIP

This issue should be considered in relation to Article 19:

"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 5 - Incorporation of principles of self-determination:

"The affected Indigenous Community itself should be the ultimate arbiter of the management of the ICH aspects any proposal that will affect that heritage."

Recommendation Nine: Amending the procedures for dispute resolution under the Act

"We're placed in a situation where we have to defend our inherited, spiritual understandings of the importance of Culture to mob and Country. We live in the real world and understand that but if we can't aff ord to go to VCAT, or find the processes disrespectful, we lose. We should be able to have our say on our Culture."

ISSUE

RAPs are unable to meet the significant costs of going to court when their considerations on Cultural Heritage are disputed.

BACKGROUND

Part 8 of the Act outlines the procedures to be followed when disputes arise regarding Aboriginal Cultural Heritage. These procedures mainly involve applying to the Victorian Civil and Administrative Tribunal (**VCAT**) for review of a decision made by a RAP, the Secretary, the Minister or another approval body. Division 1 deals with disputes regarding CHMPs, Division 2 deals with disputes regarding Cultural Heritage permits, and Division 3 deals with disputes regarding protection declaration decisions.

Division 1 is the only one of these three Divisions to provide procedures for alternative dispute resolution (**ADR**). Section 111 outlines exactly which disputes can be subject to ADR under Division 1:

"dispute means a dispute between 2 or more registered Aboriginal parties, or between the sponsor of a Cultural Heritage Management Plan and a registered Aboriginal party, arising in relation to the evaluation of a party for which approval is sought under section 62, but does not include a dispute arising in relation to the evaluation of a plan for which approval is sought under section 65 or 66."

The disputes described in section 111 are therefore the only type of disputes that are eligible for ADR. The specific process for ADR under Division 1 is outlined in section 113(2):

> *"The Chairperson may...arrange for the dispute to be the subject of mediation by a mediator; or another appropriate form of alternative dispute resolution by a suitably qualified person."*

Therefore, ADR under Division 1 can only be facilitated through mediation or another form of ADR by this external arrangement.

RECOMMENDATION

This would mean that parties have more options for dispute resolution before applying to VCAT or going to court, both of which can be costly, time-consuming and inefficient. It would also be in line with Council's newly introduced "Complaints Against RAPs" and "Imposition of Conditions" Policies.

These changes can be made in the following three ways:

1) The amendments should expand the types of disputes that are eligible for ADR under the Act beyond the one type that is outlined in section 111. For example, the meaning could be expanded to include disputes regarding Cultural Heritage permits and disputes regarding protection declaration decisions. Ideally, it would include all disputes that arise under the Act.

2) The amendments should expand the parties that are eligible for ADR under the Act beyond RAPs and Sponsors. For example, ADR could be arranged for disputes between RAPs and other non-RAP Traditional Owner groups.

3) The role of Council in the ADR process should be expanded beyond arranging the dispute to be the subject of external ADR. Council should be the initial body that facilitates disputes arising under the Act, as an alternative to external mediators. The facilitation would likely occur through the OVAHC. This proposal would be in line with Council's statutory function "to manage, oversee and supervise the operations of registered Aboriginal Parties" set out in section 132(2)(ch) of the Act. It would also be in line with the new "Complaints Against RAPs" and "Imposition of Conditions" Policies, which outline a more structured process for the way that Council deals with complaints and disputes relating to RAPs. If the parties did not wish for Council or the OVAHC to facilitate the mediation of their dispute, then they could elect for external mediators to facilitate it.

These amendments would ensure that there are more formal options and processes that are available to more parties in regard to disputes that arise under the Act. It would also give Council more authority in the dispute resolution process, therefore increasing their autonomy and status as the peak body representing Traditional Owners in Victoria.

NW to Mt Samaria State Park, Victoria by BazMius

"Alternative dispute resolution is a valuable tool in any statutory environment. From our experience, mediation and similar options work well when undertaken by parties independent of the process."

Strathbogie Shire Council

The Strathbogie Shire Council oversees a vibrant and progressive rural municipality located approximately two hours from the Melbourne CBD along the Hume Highway. We have diverse and picturesque communities served by townships such as Euroa, Nagambie, Violet Town, Avenel, Longwood, Ruffy and Strathbogie with a population of approximately 10,000.

CONSIDERATION

Parties have more options to resolve disputes, alleviating VCAT caseload

VCAT is Australia's largest and busiest tribunal. As the Act currently stands, it provides no other form of dispute mechanism than to go directly to VCAT which is both costly and time consuming for all involved. These amendments would ensure that there are more formal options and processes that are available to parties in regard to disputes that arise under the Act.

Furthermore, the proposal to expand the use of ADR as the primary mechanism for the resolution of any dispute arising under the Act, would reduce the caseload and be of benefit to parties by reducing costs and increasing efficiency of VCAT processes.

ADR increases engagement with the RAP

The concern that ADR processes would divert Sponsors away from the RAP is alleviated by the process of ADR itself, which relies on the parties coming together to reach an agreement. It would therefore encourage Sponsors to work closely with the RAP at first instance because, if an ADR process is employed, they will still be engaging with the RAP. Through the ADR process though, discussions will be mediated and/or facilitated with a third-party present and an externally imposed structure and timeframes. Although this may be more efficient than VCAT, it will still be less efficient than negotiating with the RAP directly. It is considered that this alone will provide a large enough disincentive for Sponsors to circumnavigate the RAP.

Engaging skilled, trained independent mediators and facilitators through a Traditional Owner led and designed dispute resolution process

The facilitation involved in ADR methods, such as mediation, would likely occur through the OVAHC. They would either train staff as mediators or, alternatively, engage and manage independently facilitated mediation and discussions.

If the parties did not wish for Council or the OVAHC to facilitate the mediation of their dispute, then they could elect for external mediators to facilitate.

The Council as a Traditional Owner led statutory authority, independent of the process, is best placed to conduct and/or facilitate ADR between RAPs and other non-RAP Traditional Owner groups. This would mean dispute resolution processes are designed and managed by Traditional Owners for Traditional Owners and better align Cultural Values.

Increasing Council's status as the peak body representing Traditional Owners in Victoria

The proposal would provide Council more authority in the dispute resolution process, therefore increasing their autonomy and status as the peak body representing Traditional Owners in Victoria. Where a party is a RAP, the proposal would also be in line with Council's statutory function "to manage, oversee and supervise the operations of registered Aboriginal Parties" set out in section 132(2)(ch) of the Act.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

The proposal to introduce greater use of ADR was widely supported. One Traditional Organisation submission noted that:

> *"RAPs are unlikely to be as well-resourced as proponents to pursue matters through the Court and mechanisms should be enlivened that would mitigate the RAP's costs and see disputes mediated in a manner that accords more with, and is respectful of, Aboriginal law and custom as opposed to mediation through VCAT, where the RAP is already at a disadvantage due to VCAT's limited interaction with Cultural Heritage matters, and Traditional Owners more generally, and extensive experience in dealing with developers."*

Notably, one Traditional Owner organisation submission expressed desire for:

"further details around the capacity and expertise of the Council to undertake this role."

And another from this sector, whilst supportive, raised that:

"The main concern with this proposal is an increase in the reliance on external ADR rather than coming to the table directly with the RAP. If ADR is to be listed as the primary mechanism for dealing with disputes regarding CHMPs there needs to be an appropriate threshold for entry into the program."

A submission from the Heritage – Business sector identified that:

"Enabling the Council or its office to facilitate a dispute resolution option subject to the agreement of both parties appears reasonable and would not negate the options for external mediation or further legal action."

And another from this sector was the only opposing submission expressing the view that it:

"does not believe that Council members should have a role to play in mediating disputes... to ensure fairness for all parties and efficacy in the process, a mediator must be an independent party to the mediation and is engaged to assist the parties."

UNDRIP

This issue should be considered in relation to 18:

"Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 8 – Resourcing compliance and enforcement:

"Wherever possible, affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions."

Recommendation Ten: Amending the prosecution powers

"There's no punishment, no comeuppance for destroying our sacred places. So, if making money's your only interest, why would you bother to work with us?"

ISSUE

There is no prosecution and so no disincentive for the destruction of Aboriginal Cultural Heritage.

BACKGROUND

The Act states that "proceedings for an offence against this Act may only be taken by the Secretary or a police officer" and that "the Secretary may, in writing, delegate any of his or her powers, functions, or duties under this Act, other than this power of delegation, to a person employed in the Department [of Premier and Cabinet]."

Read together, these provisions mean that the power to prosecute a person for an offence against the Act may only be taken by an employee of DPC, as delegated to by the Secretary. As it stands, these rights and responsibilities of prosecution lie with FPSR.

RECOMMENDATION

That the rights and responsibilities of prosecution be moved from DPC (as delegated by the Secretary) to the Council so that it can prosecute as a statutory authority on its own behalf. Other statutory authorities, such as the Environment Protection Authority and the Royal Society for the Prevention of Cruelty to Animals, have prosecution powers. Offences against the Act result in harm to Aboriginal Cultural Heritage, which is harm against the interests of RAPs and Traditional Owners. To award increased powers to Traditional Owners in the oversight and management of prosecuting and actioning regulatory responses to offences, would be in keeping with principles of self-determination, and specifically with the Act's purpose of empowering Traditional Owners as protectors of their Cultural Heritage.

To this end, it is further proposed that Aboriginal Heritage Officers (**AHOs**) and Authorised Officers (**AOs**) should be empowered to issue infringement notices in relation to minor offences. Infringement notices enable offences to be handled without a court's intervention. Provision of powers to AHOs and AOs to issue such notices would relieve some of the workload from the state and transferring the powers to Council could also ensure that there is increased action taken against offences. FPSR has often taken a cautious approach to prosecution. RAPs often expend large amounts of time and resources on gathering evidence for potential offences yet are not closely involved in

FPSR's investigation process. However, if the powers were moved to Council and increased powers were provided to AOs and AHOs, breaches of the Act could be acted upon more often and more thoroughly. In turn, this would have a denunciating and deterrent effect to encourage increased compliance with the Act.

Empowering the Council to prosecute offences could also build stronger relationships between RAPs and Council. The prospect of Council's full engagement with RAPs throughout the investigation and prosecution procedures would provide for both increased transparency in the process and stronger links between the parties.

"Increasing powers to the Aboriginal Heritage Council by transferring some of the Secretary functions will increase and strengthen their autonomy to align with RAPs and Victorian Aboriginal community views and aspirations."

Gunaikurnai Land and Waters Aboriginal Corporation

Gunaikurnai Land and Waters Aboriginal Corporation represents Traditional Owners from the Brataualung, Brayakaulung, Brabralung, Krauatungalung and Tatungalung family clans, who were recognised in the Native Title Consent Determination, made under the new *Traditional Owner Settlement Act 2010*, the first such agreement under that Act. It is the Registered Aboriginal Party for the Gunaikurnai claim area under the *Aboriginal Heritage Act, 2006* and has a membership of more than 600 Traditional Owners.

CONSIDERATION

Shifting responsibility will lead to increased protection for Aboriginal Cultural Heritage

Legislation is only as effective as it is enforceable. Since the introduction of prosecutorial rights and responsibilities in 2016, there has been a negligible number of prosecutions.

As stated by a Traditional Owner organisation:

> *"Infringement notices should be issued when: Harm to Cultural Heritage has been caused outside what is permissible in an approved CHMP/CHP; the Sponsor has not adhered to a condition or contingency; and a CHMP/CHP has not been prepared when one is required."*

In turn, this would have a denunciating and deterrent effect to encourage increased compliance with the Act.

Shifting responsibility from the Secretary to the Council aligns with self-determination and the intended purpose of the Act

To award increased powers to Traditional Owners, in the oversight and management of prosecuting and actioning regulatory responses to offences, would be in keeping with principles of self-determination, and specifically with the Act's purpose of empowering Traditional Owners as protectors of their Cultural Heritage.

Notably, a Heritage – Policy submission also supported the proposal and proposed further transfer of powers to the Council stating:

> *"although not one of the proposals in the Discussion Paper, the Victorian Aboriginal Heritage Council should also be given the power to make protection declarations under Part 7 of the Act."*

Infringement notices provide sanction for harm to Cultural Heritage without burdening the courts

Offences against the Act result in harm to Aboriginal Cultural Heritage, which is harm against the interests of RAPs and Traditional Owners and the general public.

One Heritage – Business sector submission identified that:

> *"an infringement notice could be issued where there has been a contravention of the Act that requires a more formal sanction but where the matter may be resolved without legal proceedings."*

Notably, this would create required protections swiftly and expediate the level to which offences under the Act are taken seriously as well as alleviating the burden that the current system places on RAPs, the Director of Public Prosecutions (**DPP**) and the court system.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

Whilst one Building and Development sector submission called for more evidence that existing powers to prosecute were not being used appropriately, the recommendation was widely supported by submissions. Overwhelmingly, Traditional Owner organisations expressed views aligning with this one, that this recommendation:

'Allows the interests of the Traditional Owners to be held higher and specifically than those of potentially politicised industry. Traditional Owners can now enforce or prosecute actions and actively protect Heritage and customs as necessary.'

Industry bodies, local government authorities and Traditional Owner organisations supported the recommendation in principle though some submissions also expressed that adequate training and resourcing would be necessary. For example, one Traditional Owner organisation said:

"for this responsibility to be successful, it needs to be properly resourced";

and a LGA sector submission stated that:

"Changing the responsibility of prosecution should only be done with clear parameters and policies around how these powers will be enacted. Due consideration of what sort of enforcement will be undertaken should be made to ensure that the application of any prosecution powers is done in a balanced and consistent manner."

UNDRIP

This issue should be considered in relation to Article 32:

"Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 8 – Resourcing compliance and enforcement:

"Wherever possible, affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions."

Recommendation Eleven: Extension of Chairperson Terms

"When you're trying to develop relationships and really connect with people, to make a difference through education, it's almost impossible in under a year."

ISSUE

There are concerns about management of stakeholder relationships and the stability of Council due to the Council Chairperson and Deputy Chairperson one-year terms.

BACKGROUND

Under section 138 of the Act, the Council's Chairperson and Deputy Chairperson, "hold office for one year; and are each eligible for re-election for two further terms of one year."

RECOMMENDATION

That the Act be amended to extend election terms to two years. The current system of one-year leadership terms is unworkable. Longer terms will allow the Chairperson and Deputy Chairperson to provide stability of leadership, properly develop relationships, effectively represent the Traditional Owner sector, ensure that tacit knowledge is not lost and continue the momentum built over the last term.

Building on the above proposal, the Chairperson and Deputy Chairperson should only be eligible for one term of re-election. This would mean that the total amount of time that a Council member could hold either of these offices would be four years.

"AACAI supports the proposal to extend the term of the Chair and Deputy of the VAHC. No precise determination has been made on timing, however in principle it could align to the terms for 'local government', currently four years."

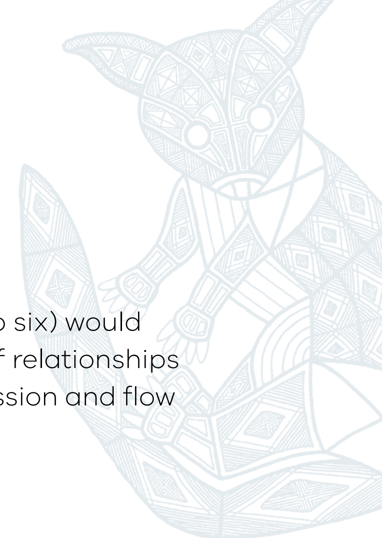
Australian Association of Consulting Archaeologists Inc. (AACAI)

The AACAI is an organisation for professionals working in all fields of contract and public archaeology. As the professional association for consulting archaeologists in Australia, it develops best practice in this field, promotes training and communication and provides support for its members. The Association liaises with Traditional Owner groups and other stakeholders and influences policy and decision makers to protect and manage cultural and historical heritage in this Country. It is affiliated with the Australian Archaeological Association Inc. and is a Foundation Member of the Council for the Humanities, Arts and Social Sciences.

CONSIDERATION

Four-year term most appropriate

Currently, both the Chairperson and the Deputy Chairperson are only eligible for terms of one year at a time. As outlined by this proposal, and supported by Traditional Owner organisation submissions, short leadership terms can be disruptive.



While longer terms can enhance confidence, four-year terms (as opposed to six) would enable a good balance between stability of leadership and strengthening of relationships with all of Council's stakeholders. It would also allow room for for the progression and flow of new ideas, fresh perspectives, diverse opinions and varied skill sets.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

Most submissions had no comment on this recommendation or supported it with no further or alternative suggestions. The general view was that the extension of the Chairperson's term is fitting, and that the overall term for a Chairperson and Deputy Chairperson being restricted to four years is appropriate.

However, the following notable suggestion was received from a Heritage – Policy sector submission:

"Terms of appointment should be extended to 3 years (not 2). This would be in line with the current 3-year term of appointment of Council members generally. Consequently, eligibility for re-election should be limited to once, i.e. the total amount of time a Council member could hold either of those offices would be six (6) years."

UNDRIP

This issue should be considered in relation to Article 23

"Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 6 – Process:

"The role of ICH in the process of consideration of development proposals in a jurisdiction is important. So, to is the process of consideration of the management of ICH in the context of a specific proposal."

Recommendation Twelve: Council's Financial Operation

"This isn't about Culture or Aboriginality, it's about effective corporate financial management."

ISSUE

Once Council achieves autonomy from government in management of its staff, structure and budget; the Act as it currently stands will not allow Council to manage those things whilst adhering to the principle of good financial management.

BACKGROUND

Currently, any money that Council receives must be paid into the Aboriginal Cultural Heritage Fund (the **Fund**). However, Council's operating budget is not allocated into the Fund, instead the Fund is used exclusively for the Secretary's provision of RAP funding and Council's own grant programs. It could be considered that, whilst finally enabling Council to be the independent authority the Act intended it to be, in not supporting it through allowing clear financial management structures, Council is being set up to fail.

RECOMMENDATION

That the Act be amended so that Council can, subject to the requirements of the *Financial Management Act*, establish other bank accounts for the purposes of its day-to-day operations.

Maintaining separate transactional accounts is standard at this level of organisation and ensures adherence to clear principles of financial management.

Whilst the current statutory definitions appear sufficiently broad to include monies received by Council for its operations through government appropriation, it does not provide clarity of detail. The existing arrangement would appear to require use of the Fund for purposes not originally envisaged and does not facilitate financial transparency in the operation of the Fund or Council's operational activities.

UNDRIP

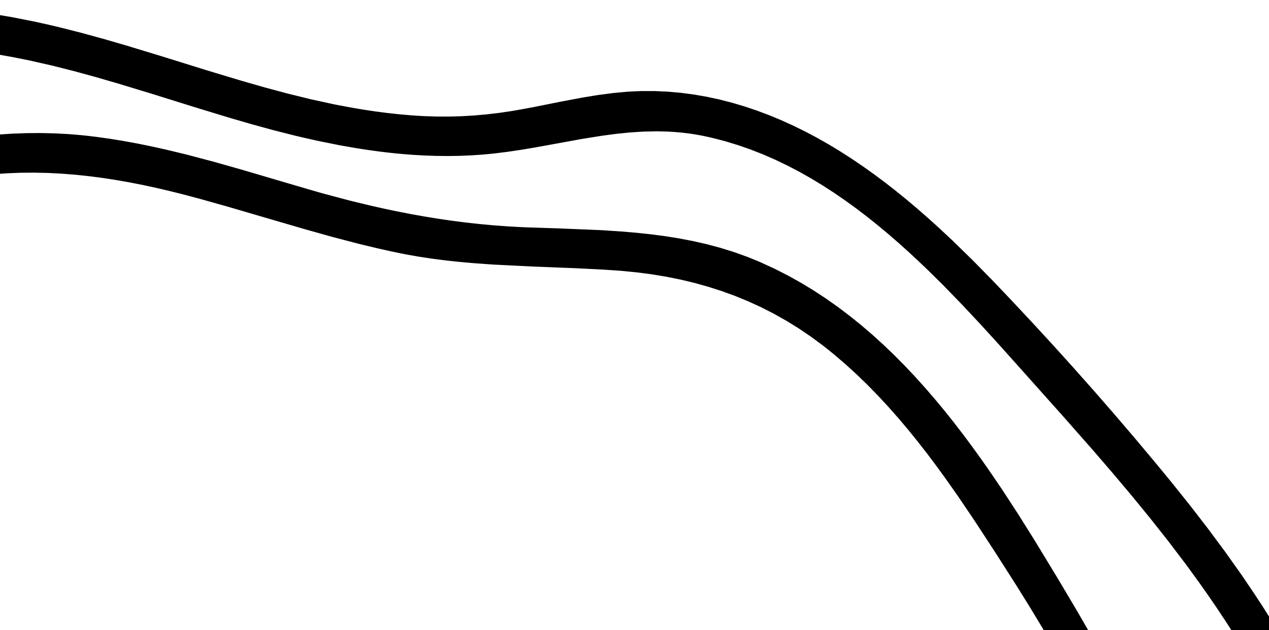
This issue should be considered in relation to Article 34:

"Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."

Best Practice Standards in Indigenous Cultural Heritage Management and Legislation

This recommendation should be considered in relation to Best Practice Standard 7 – Resourcing, participation:

"There must be acceptance that the Indigenous representative organisation engaging with proponents and assessing their proposals are performing a statutory function under the relevant jurisdiction's project assessment and approval regime and must be adequately resourced to perform this function."



Recommendation Thirteen: Empowering Council to employ its own Staff

"If they [Council] are appointed by the Minister and have government staff who are giving advice to them as well as to FPSR and the Minister; then they've all got to be singing from the same hymn sheet don't they? They're lapdogs aren't they?"

ISSUE

The self-determination and autonomy of Council is significantly compromised whilst it is unable to control its own staff and their work.

BACKGROUND

Currently, the OVAHC is a section of FPSR. Therefore, all its staff members are employed through DPC. It has been a long held perception in the community that Council is a government entity, as Council's budgeted work is approved by FPSR, it has no control over the Aboriginal Cultural Heritage Fund or the Register, and Council members are appointed by the Minister.

RECOMMENDATION

That the Act be amended to allow Council to employ its own staff. This would be in keeping with principles of self-determination and would provide greater autonomy to Council as an independent statutory authority.

Royal Botanic Gardens, Melbourne by njmelb

"The Act should be amended to allow Council to employ its own staff. This would be in keeping with principles of self-determination and would provide greater autonomy to Council as an independent statutory authority."

City of Melbourne

The City of Melbourne is the capital city of Victoria, and Australia's second-largest city. The municipality of Melbourne includes metropolitan Melbourne's innermost suburbs, including the central city. Our municipality is around 37 km^2 and shares its borders with seven other councils. The municipality of Melbourne is the gateway to Victoria, the seat of the Victorian Government and the headquarters of many local, national and international companies, peak bodies, and government and non-government agencies.

CONSIDERATION

Strategic justification or operational benefits for this proposal

With the primary purpose of this recommendation being to increase the autonomy of Council, enabling Council to employ its own staff would be an important part of allowing such autonomy. In order to maintain its ability to undertake its functions it is important that Council, as an independent statutory authority, is given powers that allow decisions that impact its operation to be made by it. The strategic justification and operational benefits of this extend to the ongoing process of enabling and furthering principles of self-determination – in line with the Victorian government's commitment, and the Act's purpose of empowering Traditional Owners to meet their social, cultural and economic needs.

Employment based on skill and expertise

Council, as an established statutory body responsible for managing and overseeing multiple functions, would have the ability to adopt a recruitment process that is fair and based on appropriate levels of skill and expertise.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

Most submissions were in support of empowering Council to employ its own staff – with the majority holding the view that this is in line with principles of self-determination.

Criticism of this recommendation mainly came from Building and Development, and Heritage – Business sectors. These submissions reinforced the sector's underlying reluctance to support the principle of self-determination and questioning of the capacity of Traditional Owners to manage their own Cultural Heritage.

"The current arrangements for employment through the Department of Premier and Cabinet are considered appropriate in the absence of any further strategic justification or operational benefits for this proposal."

"It is to be recalled the Council is a statutory body exercising statutory duties and responsibilities under the Act... It is an imperative decision-makers are employed based on the right skill set leading to robust and considered decision making."

UNDRIP

This issue should be considered in relation to Article 35:

"Indigenous peoples have the right to determine the responsibilities of individuals to their communities."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 7 – Resourcing; participation:

"There must be acceptance that the Indigenous representative organisation engaging with proponents and assessing their proposals are performing a statutory function under the relevant jurisdiction's project assessment and approval regime and must be adequately resourced to perform this function."

Theme Three: Recognising, Protecting and Conserving Aboriginal Cultural Heritage

The Act seeks to keep safe Aboriginal Cultural Heritage for Aboriginal Peoples and all Victorians. Whilst some consideration is made for this custodianship to be held by Traditional Owners, the Act can be strengthened to ensure that Aboriginal Peoples hold the statutory responsibilities to speak for all their Culture on Country. This should be done without the intercedence of non-Traditional Owners in the management of a cultural and spiritual legacy older than the state of Victoria by tens of thousands of years.

Recommendation Fourteen: Regulation of Heritage Advisors

"As a RAP, we want the behavioural problems of Heritage Advisors addressed. There are shonky people out there actively facilitating the destruction of Culture through bad business practice, ineptitude and general poor regulation."

ISSUE

HAs are actively participating in the destruction of Aboriginal Cultural Heritage through inadequate CHMPs and inappropriate work practices.

BACKGROUND

Section 58 of the Act gives specific responsibility over the preparation of a CHMP to HAs. During the preparation of a CHMP, they are expected to fulfil a range of obligations, including consulting with Traditional Owner Groups and RAPs, conducting Cultural Heritage assessment of an activity area in compliance with the Act, and preparing the final CHMP in accordance with the prescribed standards. HAs therefore have a key role in the protection and management of Aboriginal Cultural Heritage in Victoria.

Sponsors of development activities engage and pay HAs to prepare CHMPs. Whilst Sponsors can be held liable for causing unauthorised harm to Aboriginal Cultural Heritage under the Act, there are no consequences for misconduct on the part of the HA. This makes them unaccountable for failure to engage in proper consultation with Traditional Owners, or for drafting poor or incomplete CHMPs. Furthermore, their economic relationship with the Sponsor gives them more incentive to act in the Sponsor's interests, rather than the interests of Traditional Owners.

RECOMMENDATION

That the Act be amended to create a regulation system for HAs. Regulation would include a *formal registration system, a binding code of conduct, a formal complaints process and the enforcement of sanctions*. This would protect Traditional Owners and the public from poor practices. It would also benefit Sponsors and HAs as it would provide them with stronger relationships with Traditional Owners and better Heritage management outcomes.

Preceding the implementation of the relevant amendments to the Act have been the introduction of non-binding guidelines holding Heritage Advisors to a standard of conduct. These guidelines were produced by Council under their statutory function to

publish policy guidelines consistent with the functions of the Council as per section 132(2)(ck) of the Act and published in February 2021. It is hoped that these will assist in establishing a foundation for the introduction of the amendments in 2021.

The onus to produce satisfactory CHMPs that are the result of thorough Cultural Heritage assessments and proper engagement with Traditional Owners needs to be on HAs themselves. Implementing a system where HAs will be held accountable for their actions will help to create an industry standard that lifts quality of work and builds stronger relationships for all parties involved in the CHMP process.

"The current system would be strengthened by ensuring that the accreditation of Heritage Advisors and others that have a statutory role under the Act included formal training in the provisions of the Act, policies and guidelines, and the functions of their role."

APA Group

The APA Group is a leading Australian energy infrastructure business. We've been connecting Australian energy since 2000. From small beginnings we've become a top 50 ASX-listed company, employing around 1,900 people, and owning and operating the largest interconnected gas transmission network across Australia. We deliver smart, reliable and safe solutions through our deep industry knowledge and interconnected infrastructure.

CONSIDERATION

Financial cost

Naturally, the need to ensure better regulation and training of HAs will reflect a change in projected spending/expenditure. However, with the key aim of the Act (and this proposal) being to ensure respect for Traditional Owners and protection of Cultural Heritage, the benefits far outweigh the disadvantages. These advantages also extend to protecting the public from poor practices.

Current regulation by industry specific bodies is not adequate

While the suggestion that industry specific bodies should be able to undertake the regulation of HAs, there is a need for a better system (including ensuring proper consultation with Traditional Owners) where HAs can be held liable for causing unauthorised harm to Aboriginal Cultural Heritage under the Act. Doing this would help to create an industry standard that lifts quality of work and builds stronger relationships for all parties involved in the CHMP process.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

Most submissions support the recommendation, with the general position being to support the introduction of non-binding guidelines for the conduct of HAs engaged in the preparation of CHMPs. It was also widely encouraged that HAs should belong to at least one professional association relevant to their field of expertise and be bound by its standards and code of ethics.

However, some submissions expressed concern at an erroneous proposal that HAs, who had an appropriate standard of expertise, training and experience in working with Traditional Owners and Aboriginal Cultural Heritage in a sensitive and respectful way, would be disadvantaged.

UNDRIP

This issue should be considered in relation to Article 31:

"Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 5 – Incorporation of principles of self-determination:

"The affected Indigenous Community itself should be the ultimate arbiter of the management of the ICH aspects any proposal that will affect that heritage."

Recommendation Fifteen: Compulsory Consultation of RAPs During the CHMP Process

"Co-design is just a new way of saying working together. It's always been essential in all projects on Country. If we have input at the start, we can identify problems and make genuinely positive contributions to the project. I know the broader Melbourne based mobs have been involved in some great projects that worked for everyone. Saving Culture, saving time and saving money – for everyone."

ISSUE

Sponsors can start preparing a CHMP before a RAP has knowledge of the activity, excluding co-design of the project and putting at risk Aboriginal Cultural Heritage and Values.

BACKGROUND

Section 59 of the Act sets out the obligations between a Sponsor and a RAP during the CHMP process:

1) "This section applies if a registered Aboriginal party gives notice under section 55 of its intention to evaluate a CHMP.
2) The Sponsor must make reasonable efforts to consult with the registered Aboriginal party before beginning the assessment and during the preparation of the plan.
3) The registered Aboriginal party must use reasonable efforts to co-operate with the sponsor in the preparation of the plan."

Although Sponsors are obliged to 'make reasonable efforts to consult', there is no binding obligation to consult with a RAP during the process. This is problematic. For example, under the current regime, Sponsors often engage HAs and begin preliminary discussions regarding a CHMP before a RAP has even been provided with the Sponsor's Notice of Intention to prepare the CHMP. This means that preparation of a CHMP begins to occur before a RAP has knowledge of the activity. It encourages the development of a relationship between the Sponsors and HAs that omits the interests of Traditional Owners.

RECOMMENDATION

That the Act be amended to require Sponsors to consult with RAPs from the outset of the CHMP process. This will ensure that RAPs are informed and have a say in activities regarding the assessment of Aboriginal Cultural Heritage values. If it was stated in the Act that prospective Sponsors had to consult with Traditional Owners before engaging a HA, then both parties would be able to create a stronger relationship throughout the consultation process.

Creating a strategy for greater consultation between all parties would ensure enhanced accountability and better governance of Sponsors and HAs. Additionally, Sponsors who establish a relationship with the RAP of the area in which they wish to undertake an activity will be able to make an informed decision when engaging a HA.

"From our perspective, this proposal is an absolute priority inclusion in any reform package and this should be the main element/centrepiece of the Act for engagement with Sponsors."

Bunurong Land Council Aboriginal Corporation

The Bunurong Land Council Aboriginal Corporation represents Bunurong Peoples' rights and interests and manages the statutory responsibilities of the Corporation. The Corporations aims to preserve and protect the sacred lands and waterways of our Ancestors, their places, traditional cultural practices, and stories. Registered as a Registered Aboriginal Party under the *Aboriginal Heritage Act (2006)* in 2017, their recent experiences in undertaking that significant statutory responsibility for Country inform their support for this recommendation.

CONSIDERATION

Minimising harm to Aboriginal Cultural Heritage and ensuring accountability

The argument that this recommendation will increase complexity in the process has been raised. However, this recommendation aims to further minimise harm to Aboriginal Cultural Heritage and ensure accountability – which the current regime does not sufficiently provide for. It will also ensure that stronger relationships are formed between RAPs, HAs and Sponsors. As the aim of the Act is to ensure RAPs are continuously and adequately consulted with, this recommendation would manage enhanced accountability of Sponsors and HAs.

Section 59 of the Act is not sufficient

While section 59 of the Act sets out the obligations between a Sponsor and a RAP during the CHMP process, there is no binding obligation to consult with a RAP during this process. One notable Traditional Owner organisation submission identified that:

> *"there have been known cases of HAs conducting 'due diligence' without the RAP even knowing and, in such circumstances, this allows for HAs to have too much say on Country without the respectful consultation with Traditional Owners."*

COMMUNITY SUPPORT FOR THE RECOMMENDATION

Most submissions support this recommendation, citing the introduction of stronger relationships and interactions between HAs, RAPs, and Sponsors, as well as sufficient consultation and referral processes.

A Heritage – Business sector submission stated that:

> *"a compulsory RAP consultation or referral processes for voluntary PAHTs (Preliminary Aboriginal Heritage Test) is supported for works within areas of cultural heritage sensitivity, particularly if the PAHT process includes consultation options that are eff icient and eff ective for both RAPs and Sponsors."*

Some submissions expressed concerns about the potential delays and additional costs this proposal would incur. However, it is important to consider that much time would be saved if RAPs were involved from the outset, not to mention the greater community trust they would build by respectfully consulting with Traditional Owners.

UNDRIP

This issue should be considered in relation to Article 32:

"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 6 – Process:

"The role of ICH in the process of consideration of development proposals in a jurisdiction is important. So, to is the process of consideration of the management of ICH in the context of a specific proposal."

Recommendation Sixteen: Elective power for RAPs to engage as Heritage Advisors in the preparation of CHMPS

"This is our Country. Our mob speaks for our Country, that is our inherited responsibility as Traditional Owners. Our Ancestors did not draw a line between responsibilities for Lore and responsibilities for Culture and nor do we. Our Country, our Culture, our Responsibility."

ISSUE

The current ambiguity around the legislated capacity of RAPs to act as Heritage Advisors has created an environment in which the authority of Traditional Owners is being questioned.

BACKGROUND

In the preparation of a CHMP, the Sponsor is obligated under the Act to engage a Heritage Advisor to assist in the preparation of the plan. Additionally, the Sponsor must make reasonable efforts to consult with the RAP before beginning the assessment and during the preparation of the plan. This consultation is usually undertaken by the Heritage Advisor on behalf of the Sponsor.

The current legislative framework does not specify whether RAPs can or cannot operate as Heritage Advisors in the preparation of a CHMP undertaken within their RAP area. Nor does it provide appropriate recognition of RAP expertise and skill within the field. However it should acknowledge such expertise. The ambiguity provided by the current Act creates an environment in which Traditional Owners and their self-determined representative entities (in this case, RAPs), are able to be circumvented and their authority on Cultural Heritage questioned.

RECOMMENDATION

That the Act specify that RAPs can operate as Heritage Advisors in the preparation of a CHMP, and to define the obligations of a Sponsor to provide the RAP with the first opportunity to provide Heritage Advisor services.

The proposal works to effectively support principles outlined in the Victorian Social Procurement Framework by ensuring a public entity Sponsor use their buying power to generate social value through Victorian Aboriginal businesses. It recognises the skill and expertise of Traditional Owners to control and manage their own Cultural Heritage on Country and thereby better aligns the Act with its objectives and principles of self-determination.

This recommendation affords a systemic change to facilitate Traditional Owner led Cultural Heritage management, ensuring self-determination is affected and creates a more efficient process for Sponsors.

CONSIDERATION

Does this raise an issue of conflict of interest?

It does not. As it stands, RAPs are already able to provide services as Heritage Advisors. This can be undertaken either directly or via subsidiary arrangements and, as such, the proposal to give first elective rights to RAPs provides clarity of this option. Significantly, this proposal also affords appropriate respect for Traditional Ownership and Traditional Owners' responsibility for their Cultural Heritage.

Furthermore, currently a Heritage Advisor engaged and paid by a Sponsor to prepare an approved CHMP can reasonably be seen as acting in the Sponsor's interests via an economic incentive. The Heritage Advisor has neither an economic nor a legal obligation to act in the interests of Traditional Owners.

There is strong argument that the Traditional Owners, whose Heritage is being assessed by the Heritage Advisor, also hold a legitimate interest that is unprotected by the current professional service arrangement between Sponsors and Heritage Advisors. If amended, Sponsors would engage directly with the RAPs, and from the outset would have a clear understanding of the RAP's expectations for any given assessment. Within the current system, Sponsors request quotes from Heritage Advisors, and subsequently award a contract, to prepare a CHMP without ANY prior consultation with the RAP.

If a RAP was to perform the function of the Heritage Advisor, but due to staffing or time constraints could not effectively undertake the work, a RAP could engage the services of a sub-contractor to supervise and conduct the fieldwork and write the CHMP. This practice is not uncommon with many archaeological consultancies.

Under the current provisions, the Sponsor often has little to no oversight of the work undertaken and a limited understanding of the experience of the field staff or knowledge of the Cultural Heritage found. If the RAP was to fulfil the role of the Heritage Advisor, this arrangement could promote a more collaborative approach to managing Cultural Heritage values and facilitate an increased appreciation and respect for these values. The reporting requirements and archaeological standards that the RAP's Heritage Advisor would have to meet (i.e. photography, data collection and reporting) would be more than adequate to ensure all work is undertaken to the prescribed standards and legislative requirements and should assuage any concern a Sponsor may have over the legitimacy of the work undertaken.

The argument against this recommendation on the grounds of a perceived or actual conflict of interest has little to no application when considering this option for projects undertaken by public land managers. Public land managers have a responsibility above and beyond that of private entities to uphold, advocate for and facilitate opportunities to exercise the principles of self-determination for Traditional Owners. It would be difficult to justify an argument that denies the fact that Traditional Owners themselves are the people/organisations best placed to design appropriate assessment methodologies, to undertake the assessment itself and to report on the Aboriginal Cultural Heritage values present within a public land tenure.

Does ambiguity undermine respect for Traditional Owners?

The current legislative framework does not specify that RAPs can or cannot operate as Heritage Advisors in the preparation of a CHMP undertaken within their RAP area, nor is it prohibited within administrative or consumer law. If a RAP was seeking to perform such a function, independent legal advice provided to some RAPs has been that they establish a separate unit and undertake this role as an independently governed body, separate from the primary RAP structure. This, although not technically a requirement within law, would serve to establish a separate accountable entity for the prospective Sponsor to engage/liaise with. There are RAPs who have already established such a structure to carry out this work.

The ambiguity of the Act provides an environment in which Traditional Owners and their self-determined representative entities (in this case, RAPs), are able to be circumvented and authority questioned. The provision of legal advice to develop corporate structures to provide assurance that conflicts of interest do not exist contributes to this environment. Conflicts of interest do not exist, and the Act should be amended to clearly articulate this, thereby also remedying the distrust of the Traditional Owners as Heritage Advisors prevalent in the current operating environment.

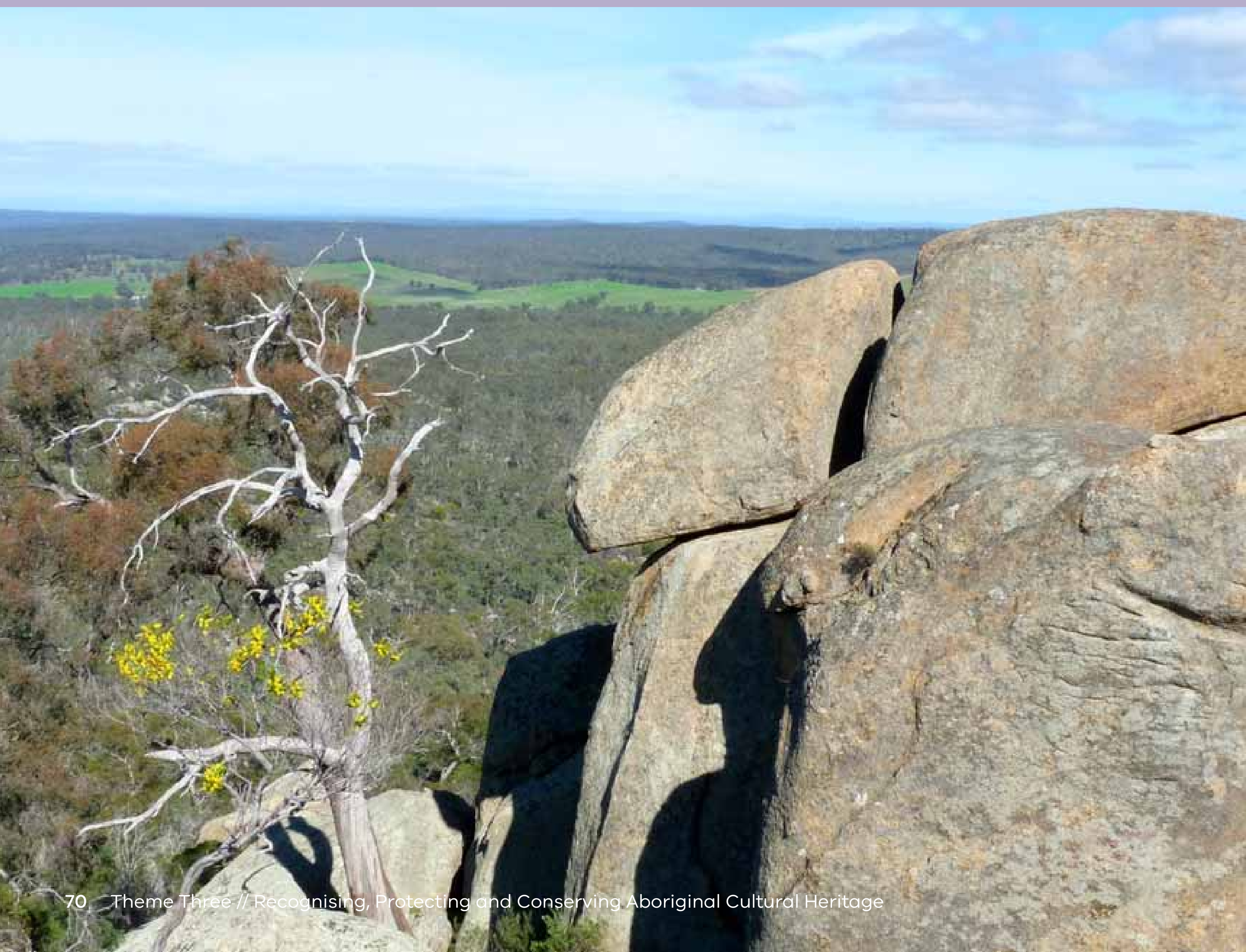
Comparison Legislation

By comparison, in the Northern Territory the consultation and approval of the CHMP equivalent is done within the one government agency. The Aboriginal Areas Protection Authority (**AAPA**) is a statutory body mainly composed of Aboriginal custodians of sacred sites that is commissioned by the *Northern Territory Aboriginal Sacred Sites Act 1984* (NTASSA). If a person proposes to use or carry out work on land in the vicinity of sacred sites, they are obliged to apply to the AAPA for an "Authority Certificate" under section 19B of NTASSA. The AAPA then must consider a range of relevant issues and must decide whether to issue an Authority Certificate under section 22. Therefore, Traditional Owners are positioned as both the primary consultants and preparers of the Authority Certifi cate application, and the primary approval body. This is a viable model that could be followed in Victoria.

“RHSV support provision in the Act for an increased involvement of RAPs in preparation of CHMPs in relation to activities within their registration areas, with provision for both independent tribunals and alternative dispute resolution procedures in cases of conflict of interest and interpretation of heritage.”

Royal Historical Society of Victoria

Formed in 1909, the Royal Historical Society of Victoria is the centre of Victoria’s non-Aboriginal history movement, with nearly 1,000 individuals and 350 local historical societies as members. We are the peak body for those local historical societies and heritage groups.



COMMUNITY SUPPORT FOR THE RECOMMENDATION

Most submissions supported this recommendation and acknowledged its value in furthering self-determination.

A Traditional Owner organisation details that:

"The heritage advisor industry received a combined $42.71 million from CHMP preparation fees in 2010 -2011. Prior to the introduction of the AHA 60 cultural heritage advisors operated in Victoria; as at October 2022, there are over 300 cultural heritage advisors registered with Aboriginal Victoria. Traditional Owners are largely excluded from the economic benefits that this industry stimulates."

"We support the empowerment and recognition of Traditional Owners as the keepers and knowledge holders of Aboriginal Cultural Heritage and agree that the AHA be amended to allow for Sponsors to engage RAPs to assist in the preparation of CHMPs that are in relation to activities within their registration areas, as an alternative to Heritage Advisors."

However, some industry groups advocated for maintaining the status quo, expressing concern regarding potential conflict of interests and credibility of the Cultural Heritage assessment industry.

A Building and Development Sector organisation noted that:

"there should be a separation between the functions of preparing a CHMP and the statutory evaluation of a CHMP. Having one agency to do both potentially exposes the process to risk and potential conflict of interest particularly for the RAP."

UNDRIP

This issue should be considered in relation to Article 31:

"Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 5 – Incorporation of principles of self-determination:

"The affected Indigenous Community itself should be the ultimate arbiter of the management of the ICH aspects any proposal that will affect that heritage."

Recommendation Seventeen: Amending the Power of Entry for Authorised Officers and Aboriginal Heritage Officers

"If someone has our Old People in the shed and they know they're not supposed to, of course they're not going to let one of our mob in to check the shed. The thing that keeps me awake at night is the vision that they can just say 'no, you can't come in here' and our Old People can just stay there, on a concrete shed floor under a blanket forever. And there's nothing we can do about it."

ISSUE

AOs and AHOs are inhibited from carrying out their functions, to protect Aboriginal Cultural Heritage, as they are unable to enter land or premises without the consent of the occupier.

BACKGROUND

Under the Act, AOs and AHOs are appointed by the Minister to carry out the Act's enforcement functions. Those functions include monitoring compliance with the Act, investigating suspected offences against the Act, and issuing and delivering stop orders under Part 6 of the Act. Under section 166 of the Act, both AOs and AHOs have a general power to enter land or premises to carry out these functions.

Section 166(2) stipulates that *"an authorised officer or Aboriginal heritage officer must not enter any land or premises under this section without the consent of the occupier of the land or premises; and unless the occupier is present; or has consented in writing to the authorised officer or Aboriginal Heritage officer entering the land or premises without the occupier being present."*

RECOMMENDATION

That the Act be amended to allow AOs and AHOs to enter land or premises without the consent of the occupier.

The current legislation restricts AOs' and AHOs' powers to the point where they are prevented from carrying out their functions. In the likely event that an individual who is suspected of an offence against the Act does not give an Officer consent to enter their premises, the Officer is blocked from carrying out their duty to protect Aboriginal Cultural Heritage.

Although this amendment may seem like a curtailment of the occupier's rights, it is necessary for striking a delicate balance between those rights and the rights of Traditional Owners under the Act. Namely, the rights to the protection and management of their own Cultural Heritage.

"The Board believes that changes proposed are an important step in meeting the purposes stated in Section 1 of the Act, and by promoting these changes into law they will strengthen the protection of Aboriginal Cultural Heritage and further empower traditional owners in supporting their Culture."

Dja Dja Wurrung Clans Aboriginal Corporation

The Dja Dja Wurrung Clans Aboriginal Corporation represents the Dja Dja Wurrung Peoples of central Victoria. As our Country's first people, Dja Dja Wurrung have an established place in society and are empowered to manage our own affairs. Our Recognition and Settlement Agreement (Native Title) is an important milestone for Dja Dja Wurrung people and the Victorian Government now recognises us as the Traditional Owners of this Country and acknowledges the history of dispersement and dispossession that has affected our people. Our Agreement allows for continued recognition, through protocols and acknowledgements and Welcomes to Country, and signage on Dja Dja Wurrung Country.

CONSIDERATION

Currently, AOs and AHOs have powers limited to monitoring compliance with the Act, investigating suspected offences against the Act, and issuing and delivering stop orders - under Part 6 of the Act. These functions cannot be effectively undertaken if the suspected wrongdoer is allowed time to consent and provide access to various places. As such, there are instances that warrant entry to land or premises without the consent of the occupier.

With the primary aim of this recommendation being to ensure the recognition, protection and conservation of Aboriginal Cultural Heritage – amending the power of entry for AOs and AHOs would lead to better compliance with archaeological investigations, subsequent management plans, and many other functions.

Submissions from the Building and Development sector erroneously noted there are limited laws that support entry without authority. However, making these amendments would be in accordance with similar provisions for Authorised Officers under 55 of the *Victorian Environment Protection Act (1970)* and part 7.4 of the *NSW Protection of the Environment Operations Act (1997).*

The submissions from this sector also considered that there are current laws that support the use of a warrant to access various places, thus invalidating the need to have the authority to enter places without consent. While this argument has merit – giving AOs and AHOs this power would enable them to adequately and efficiently carry out their functions. Council underscores that Traditional Owners have a general tenant to uphold the legislation, not try and overextend their rights.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

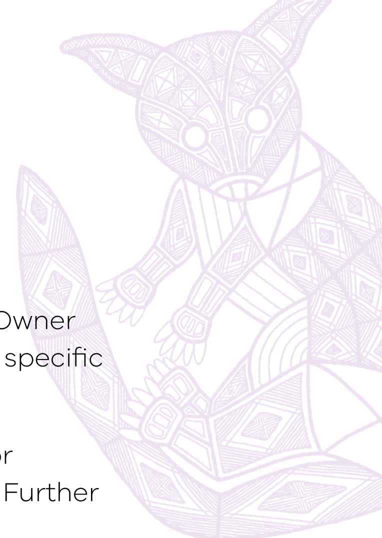
This recommendation received some support, with many holding the view that it would bring a necessary balance between occupier's rights and the rights of Traditional Owners. However, the general view was that powers of entry should be measured, and that consideration could be made to allow for written notice (or reasonable attempt to contact the owners) to be provided prior to entry – which would maintain the occupier's rights, while still allowing AOs to attend site.

An LGA sector submission noted that:

"the standard of proof in this instance should be beyond reasonable doubt."

They further noted that:

"...it is far preferable that the Power of Entry be used with occupiers present and with their consent. [We] would therefore support wording that balanced that preference with the need to provide AOs with the practical ability to monitor and enforce compliance with the Act."



There were a number of negative submissions received around Traditional Owner capacity to undertake this responsibility and appropriate entry to sites with specific OH&S requirements.

There was very strong opposition from one Building and Development sector submission, that noted that they 'vigorously oppose this legislative change.' Further (incorrectly) adding:

"There are very few acts or legal instruments allowing Authorised Officers to enter land without consent… it would be a disproportionate abuse of power to almost all conceivable breaches of the Act to allow an AO or AHO to enter land without consent. It would also be a breach of the right to privacy under the Charter."

UNDRIP

This issue should be considered in relation to Article 8:

"Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 8 – Resourcing compliance and enforcement:

"Wherever possible, affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions."

Recommendation Eighteen: Amending evidentiary provisions regarding Aboriginal Objects

"The Museums still have our Old People and won't return them. How can they be trusted to know what is Sacred to us? We're still little typed numbers on a dusty box to them."

ISSUE

Council is required to make decisions about the Sacred status of an Aboriginal Object but is unable to certify Objects as such.

BACKGROUND

Section 187 of the Act sets out evidentiary rules which apply for proceedings for offences under the Act. Specifically, that certificates signed by certain parties can act as evidence for the facts stated in that certificate. For example, section 187(2)(e) states the following:

"a) a certificate signed by the Minister to the effect that a person named in the certificate is an authorised officer is evidence of that fact;

b) a certificate signed by the Minister administering the *Conservation, Forests and Lands Act 1987* to the effect that land identified in the certificate is Crown land is evidence of that fact;

c) a certificate signed by the Secretary to the effect that a Cultural Heritage permit has not been issued in respect of particular Aboriginal Cultural Heritage is evidence of that fact;

d) a certificate signed by the Secretary to the effect that an entry in respect of particular Aboriginal Cultural Heritage has been made in the Register is evidence of that fact;

e) a certificate signed by the Chief Executive Officer of the Museums Board to the effect that an object referred to in the certificate is an Aboriginal object is evidence of that fact."

It is also noted that there is currently no mechanism under the Act to determine whether an Aboriginal Object is Sacred.

RECOMMENDATION

That section 187(2) of the Act be amended to include an additional provision similar to section 187(2)(e). This would enable certificates signed by Council, to the effect that an Object referred to in the certificate is an Aboriginal Object or Secret or Sacred Object, to be evidence of that fact.

This would mean that when Secret or Sacred Objects, or Aboriginal Objects in general, are necessary as evidence in proceedings for offences against the Act, Council would have the authority to deem the Objects as such.

"We support the recommendation to amend section 187 (2) to include an additional provision similar to section 178(2)(e) that enables certificates signed by the VAHC to the effect that an object referred in the certificate is an Aboriginal or Secret or Sacred Object to be evidence of that fact."

Federation of Victorian Traditional Owner Corporations

The Federation is the Victorian state-wide body that convenes and advocates for the rights and interests of Traditional Owners while progressing wider social, economic, environmental and cultural objectives. We support the progress of agreement-making and participation in decision-making to enhance the authority of Traditional Owner Corporations on behalf of their communities.

CONSIDERATION

Provision of certainty regarding Aboriginal Objects and Secret or Sacred Objects

There is currently no mechanism under the Act to determine whether an Aboriginal Object is Secret or Sacred. The proposed amendment allows Council to certify whether an Object is Secret or Sacred and provides greater certainty (for the general public, collectors, museums and Traditional Owners). Such certainty is warranted given the offences outlined in section 33 of the Act.

Drawing on Traditional Owner's expertise to protect Cultural Heritage and provide certainty

The proposal to allow the Council (an expert and Traditional Owner led statutory authority) to certify Aboriginal Objects as such, appropriately recognises that ownership of Aboriginal Cultural Heritage rests with Traditional Owners. It also appropriately utilises the knowledge and expertise of the Council to better achieve the purpose of the Act, as outlined in section 1(b): *" to empower Traditional Owners as protectors of their Cultural Heritage on behalf of Aboriginal People and all other peoples".*

Subcommittee operations ensure transparency and efficiency

The Council, like many bodies, operates expertly and efficiently by use of sub-committees. In this case, the subcommittee tasked with certification of Aboriginal Objects and Sacred or Secret Objects may make recommendations to the Council for decision or would be delegated aspects of Council's decision making. Furthermore, any decisions made by subcommittees are Council's responsibility. Council's subcommittees operate with transparency as documented by clear terms of reference, circulated meeting minutes and with accountability through their reporting procedures to Council.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

This recommendation was widely supported across all sector submissions.

One LGA sector submission stated that it:

> *"considers the Traditional Owners/Custodians of the lands in which certain Objects originate, to be in the best position to verify whether items are Aboriginal Objects and whether they are Secret or Sacred. (We) support an amendment that enables certificates to be signed by the Victorian Aboriginal Heritage Council to that effect, where that approval process involves relevant Traditional Owners/Custodians. Where there are multiple interests in non-RAP areas (or contested areas), a Sub-Committee should be created that would act as a mechanism to determine specific matters in relation to Secret or Sacred Objects."*

Some concern was raised about how any sub-committee would operate, transparency of decision making and accountability. Additional concerns relating to the need for such certificates at all was raised as there is the existing provision for the Museums Board to do so under the Act.

Given the nature of these responses, there is an underlying community concern at the implementation of self-determination in legislation. This is a clear example of underlying racism, when people are concerned about Aboriginal People making these decisions instead of institutions like Museums.

UNDRIP

This issue should be considered in relation to Article 12:

"States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 9 - Secret and Sacred Objects:

"ICH legislative regimes must acknowledge that property in secret and sacred objects can only legitimately vest in the community of origin of the object and deploy mechanisms to achieve the repatriation of these objects."

Recommendation Nineteen: Clarifying ownership with regards to Secret and Sacred Objects

"It's pretty clear to us, as Aboriginal People, who the owners are. It should also be pretty clear in the law."

ISSUE

Traditional Owners are being denied access to their Cultural Objects and Practices because the Act is convoluted in its identification of ownership of Objects.

BACKGROUND

Sections 21 and 21A of the Act, detail a convoluted recognition of ownership of Secret or Sacred Objects before and after commencement of the Act. Given the significant cultural distress experienced by Traditional Owners when these Objects are not in their care, and the financial disincentive of loss of ownership for some private collectors of Aboriginal artefacts, it is essential that there is absolute clarity of ownership in the Act.

RECOMMENDATION

That the Act is clear that the rightful owner of a Secret or Sacred Object is a Traditional Owner from where the Object is reasonably believed to have originated (also identified as an Aboriginal Person who is the rightful owner of the Object).

For clarity, it should state that no Secret or Sacred Object is able to be owned by anyone other than the Traditional Owners from where the Object is reasonably believed to have originated.

UNDRIP

This recommendation should be considered in relation to Article 12:

"States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 9 - Secret and Sacred Objects:

"ICH legislative regimes must acknowledge that property in secret and sacred objects can only legitimately vest in the community of origin of the object and deploy mechanisms to achieve the repatriation of these objects."

Recommendation Twenty: Secret and Sacred Objects – Search and Seizure Powers

"If a TO knows that the Object is Sacred, and is an AHO, they should be able to take it on the spot. Not for one moment longer should it be away from the TO's care and not for one moment at all, should their knowledge about its status be able to be interrogated."

ISSUE

The limitation of search and seizure powers of Authorised Officers and Aboriginal Heritage Officers is actively enabling the commission, repetition, and continuation of offences regarding Secret or Sacred Objects and Aboriginal Ancestral Remains.

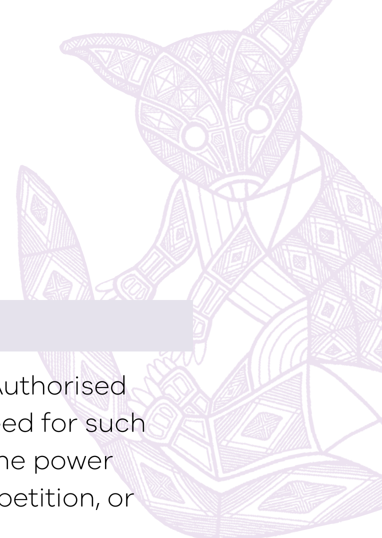
BACKGROUND

Currently, the Act provides very limited powers in relation to the ability of Authorised Officers or Aboriginal Heritage Officers to:

- to enter and search land or premises, and
- seize Secret or Sacred Objects or Aboriginal Ancestral Remains.

Whilst officers are provided a right of entry onto premises open to the public or with the consent of the owner/occupier, it is unlikely that someone in contravention of the Act will consent to the entry of Authorised Officers or Aboriginal Heritage Officers.

Having gained entry, the seizure of Secret or Sacred Objects or Aboriginal Ancestral Remains is only lawful if there is a subsequent positive determination as to the Secret or Sacred status of the Objects or identity of the Aboriginal Ancestral Remains. As the determination can currently only be made by a Court, this places an extraordinary interpretive burden on Authorised Officers or Aboriginal Heritage Officers in undertaking duties in the field. It also increases the likelihood of subsequent litigation to determine the legitimacy of their actions.



RECOMMENDATION

The Act should be amended to introduce search and seizure powers when Authorised Officers or Aboriginal Heritage Officers *reasonably believe* that there is a need for such an action around Secret or Sacred Objects Aboriginal Ancestral Remains. The power would be limited to being for the purposes of preventing the commission, repetition, or continuation of an offence against the Act.

The powers of Authorised Officers under the *Fisheries Act 1995* (Vic) provide an example:

> "Search, inspect, measure, test, photograph or film any part of the place and seize anything that is being used by, or that is in the possession of, a party who has just committed or is reasonably suspected of having committed, or is committing or otherwise appears to be just about to commit, an offence against the Act – pertaining to Secret and Sacred Objects.
>
> This should extend to any case where a person is found behaving or acting in such a manner or under such circumstances that Council believes on reasonable grounds, without having observed the commission of an offence against the Act, that the person found has committed such an offence."

The above is in line with powers available under the Aboriginal Heritage Acts of other jurisdictions i.e., *Aboriginal Cultural Heritage Act 2003* (QLD).

UNDRIP

This issue should be considered in relation to Article 8:

"Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 8 – Resourcing compliance and enforcement:

"Wherever possible, affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions."

Recommendation Twenty-One: Granting of permits pertaining to the management of Ancestral Remains

"Again, this is a white bloke making a call on what happens to our Old People. Ring, ring, it's 1860 calling, they want their power back."

ISSUE

The Act undermines the principles of self-determination to provide Traditional Owners with the responsibility to make decisions about their Ancestors.

BACKGROUND

Cultural Heritage Permits are required to;

- disturb or excavate land for the purpose of uncovering or discovering Aboriginal Cultural Heritage, or
- carry out research on an Aboriginal place or Aboriginal Object, including the removal of an Aboriginal Object from Victoria for the purposes of that research,
- carry out an activity that will, or is likely to, harm Aboriginal Cultural Heritage
- sell an Aboriginal Object,
- remove an Aboriginal Object from Victoria
- rehabilitate land at an Aboriginal place, including land containing burial grounds for Aboriginal Ancestral Remains, or
- inter Aboriginal Ancestral Remains at an Aboriginal place.

The approval body for Cultural Heritage Permits is the RAP or, in areas where there is no RAP, the Secretary. If the applicant is either of these parties, then the approval body is Council. Whilst the Secretary must consult with Council when granting Cultural Heritage Permits that impact Ancestral Remains, the control still lies in the hands of government and not Traditional Owners.

RECOMMENDATION

That in areas where there is no RAP, Council is the approval body for Cultural Heritage Permits impacting Aboriginal Ancestral Remains.

The Secretary being the approval body for applications for permits to do any activity that relates to the management of Ancestral Remains raises several issues. Firstly, and most most concerning, is that even though the management of the physical Ancestral Remains was transferred to Council in the 2016 amendments to the Act, the granting of permissions, decisions around processes, risk management and outcomes for any such activity is not in the hands of Council and by extension, Traditional Owners themselves. Within the current framework, it is very difficult for Traditional Owners to realise and exercise their rights to self-determination.

The assessment of permit applications and the drafting of permit conditions relating to applications for activities in non-RAP areas, is often undertaken by FPSR regional offices. These offices often have large workloads, particularly as they are also the approval body for CHMPs undertaken in non-RAP areas within their jurisdiction. Due to this, the timeframes around the granting of permits is often in conflict with the urgent needs of stakeholders and of Council's Ancestral Remains Unit (**ARU**) when managing Ancestral Remains, particularly when found on private land.

If Council was to be the approval body for all permits relating to the management of Ancestral Remains, this would not only give Traditional Owners control of their Ancestors but would also ensure all aspects of work associated with the management of Ancestral Remains is undertaken by one centralised entity. This arrangement would make the most of the stakeholder engagement already established by the ARU. The new streamlined system would also facilitate quicker response times in actioning Traditional Owner decisions and the needs and interests of external stakeholders.

UNDRIP

This issue should be considered in relation to Article 8:

"Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 8 – Resourcing compliance and enforcement:

"Wherever possible, affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions."

Recommendation Twenty-Two: Introducing civil damages provisions

"Juukan Gorge is one awful, soul destroying example of destruction. Here, in Victoria, ask any RAP and they'll give you others that were destroyed on their Country and in the last few years. Something has to change because this system is well and truly broken."

ISSUE

The destruction of Aboriginal Cultural Heritage is considered an acceptable risk as there are very few prosecutions.

BACKGROUND

Currently, all offences capable of being committed under the Act are criminal offences.

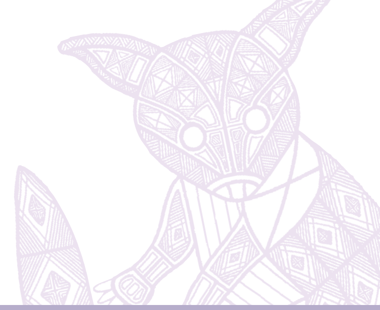
RECOMMENDATION

That civil damages be introduced for offences against the Act. Introducing civil damages provisions will result in greater compliance for the following key reasons:

1) Introducing civil damages will urge higher rates of compliance amongst corporations, for whom the possibility of criminal prosecution may be less of a threat than that of civil liability and the ensuing damages.

2) The DPP has the ultimate discretion to prosecute criminal offences under the Act. The DPP has strict evidentiary requirements for pursuing legal action, meaning that many suspected offences are not prosecuted. In comparison, the decision to prosecute civil offences would not lie with the DPP. This would potentially result in more offenders being held liable.

3) For civil offences, the relevant threshold for establishing liability is if a party is found to have committed an offence on the 'balance of probabilities.' This is lower than the threshold for criminal offences, which dictates that it must be 'beyond reasonable doubt' that a party offended. Introducing civil damages provisions would therefore result in a lower standard of proof for parties being held liable for offences against the Act.



"I fully support the proposal to introduce liability for civil damages. I believe we are losing so much significant Cultural Heritage due to the punishment being worth the risk or cheaper/easier than doing the right thing."

Helen Kalajdzic, Secretary of the Stanley Park Committee of Management

Helen Kalajdzic is Secretary of the Stanley Park Committee of Management. The land that became Stanley Park was purchased by the community in 1919 and now belongs to the Macedon Ranges Shire Council. The 1983 Ash Wednesday bush fires caused significant damage, leading to massive regrowth of blackberry and broom. Our volunteers meet eight times a year for on-ground works with mainly weed control and revegetation. Additionally, we have a number of partnerships that attend at other times of the year to work on projects. The restoration works have brought back indigenous grasses, shrubs, wildflowers and maidenhair fern. The park forms a wildlife corridor close to the Macedon Regional Park.

CONSIDERATION

Key proposal for ensuring compliance

The criticism that civil damages will not encourage higher rates of compliance is made on an erroneous basis. Currently, very few compliance breaches are prosecuted as the threshold 'beyond reasonable doubt' is considered too challenging to prove in relation to many offences that harm Cultural Heritage. The implementation of this recommendation and the subsequent use of the 'balance of probabilities' liability threshold would result in increased liability for breaches of the Act. In turn, this would encourage greater compliance amongst all parties.

Council acknowledges that businesses are deterred by both criminal prosecution and civil liability. For the purposes of this recommendation, it is not important to conclude definitively whether criminal or civil liability is a stronger deterrent for corporations who may be liable for harming Cultural Heritage. This recommendation is simply aimed at maximising compliance with the Act by ensuring that there are multiple layers of legal responsibility for certain offences. It does this by ensuring that parties will be held liable for civil damages and may also attract the threat of criminal prosecution for certain breaches of the Act.

Nuanced implementation

Council affirms that it will introduce any civil damages provisions with nuance, taking into account the severity and harm of each offence. Although the introduction of civil damages for every offence in the Act would ensure the highest rates of compliance, such a blanket approach will not necessarily be adopted. Council will consider each individual offence on a case-by-case basis and decide whether civil liability is applicable to that offence.

No change to pre-existing criminal provisions or related procedures

Council confirms that civil damages would co-exist with potential criminal responsibility for certain offences. Council also confirms that the introduction of civil liability for offences against the Act will not preclude the DPP's discretion to prosecute potential incidences of criminal liability. The decision whether or not to pursue legal action will still ultimately lie with the DPP.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

This recommendation received widespread support, with several parties noting the importance of ensuring high levels of compliance with the Act. The Traditional Owner organisations sector particularly welcomed the introduction of civil damages provisions as a key priority for reform.

However, one submission from the Traditional Owner organisation sector was critical of the idea that civil damages should be introduced at all whilst some minor concerns relating to the procedural implementation of the amendments were also raised:

> *"In developing this proposal, it would need to be clarified whether civil damages would co-exist in the system with potential criminal charges (with the option of criminal prosecution in particular instances) or whether it would be a change entirely to civil damages with this the only option."*

UNDRIP

This issue should be considered in relation to Article 11:

"States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 8 – Resourcing compliance and enforcement:

"Wherever possible, affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions."

Recommendation Twenty-Three: RAP consultation in the due diligence assessment/PAHT process

"People are using due diligence to make sure that the Traditional Owners aren't asked whether that particular part of Country is important. It just sounds dodgy doesn't it? Why not even ask?"

ISSUE

As a result of advice given from a due diligence assessment, Aboriginal Cultural Heritage is being harmed through activities undertaken without a CHMP first being conducted.

BACKGROUND

Due diligence assessments are advisory assessments undertaken by HAs. These assessments quantify the risk about a defined situation or recognisable hazard in relation to Cultural Heritage and are not regulated under the Act. Due diligence assessments are intended to establish a Sponsor's legislative requirements for a proposed activity, such as whether a CHMP is required for that activity. However, they are usually made without consulting the relevant RAP. This means that RAPs can often be completely unaware that an assessment has been undertaken for a proposed activity.

Additionally, HAs are not required to consult with RAPs in the preparation of a PAHT, which is another formalised mechanism for determining whether a proposed activity requires the preparation of a CHMP.

RECOMMENDATION

That the Act be amended to require that a PAHT be undertaken for ***all*** building and construction related planning applications that do not trigger a CHMP. Additionally, the HA would be required to seek participation and input from RAPs in the preparation of a PAHT, as with a CHMP.

This would not only offer RAPs an opportunity to provide input and guidance as to the whether an activity requires a CHMP but would also offer an opportunity for RAPs to draft conditions for inclusion within the PAHT. These conditions could include provisions for RAPs to undertake compliance inspections they may deem necessary during the proposed activity.

If a ***mandatory*** CHMP is required and a Sponsor is seeking to undertake a due diligence assessment, provisions within the Act should be amended to ensure this due diligence assessment can only be undertaken as a PAHT, and includes RAP/Traditional Owner consultation and/or participation.

"Evidence has shown that the current practice of relying on due diligence reports is undermining efforts to protect Aboriginal Cultural Heritage throughout the state. The reliance of Local Government Authorities (LGAs) on the expert testimony of Heritage Advisors, without any evaluation, has resulted in a corrupt system, where some practitioners are supplying due diligence reports that do not correlate with legislative requirements."

Wadawurrung Traditional Owners Aboriginal Corporation

The Wadawurrung Traditional Owners Aboriginal Corporation is the Registered Aboriginal Party for Wadawurrung Country. With the statutory authority for the management of Aboriginal Heritage values and Culture, under the *Victorian Aboriginal Heritage Act, 2006*. Wadawurrung People are determined to see their unique Cultural Heritage protected and respected. Wadawurrung aims to restore Traditional knowledge and authority over the management of Wadawurrung Country for the betterment of those living on, prospering from and/or simply enjoying its land, waterways and coastal areas.

CONSIDERATION

The current due diligence mechanism accepted by approving bodies disempowers RAPs and Traditional Owners and is insufficient in adequately assessing the potential impact of a proposed activity on Cultural Heritage.

Section 49B of the Act also provides for PAHTs, which are a formalised mechanism for determining whether a proposed activity requires the preparation of a CHMP. Currently, Heritage Advisors are not required to consult with RAPs in the preparation of a PAHT.

The definition of Significant Ground Disturbance (**SGD**) in the Regulations to the Act also impacts on this recommendation. Some Sponsors have abused the provisions within the Regulations that state an area that has been subject to SGD is not an area of Cultural Heritage sensitivity and therefore not subject to a mandatory CHMP. This has been done through their employment of an HA to undertake a due diligence assessment to define this disturbance, which needs only to demonstrate disturbance to 'the topsoil or surface rock layer of the ground' in order to avoid undertaking a mandatory CHMP.

Additionally, these amendments would be extremely effective in mitigating the risk posed by construction activities to highly sensitive Cultural Heritage such as Ancestral Remains and intact Traditional burials. If a proponent was required to undertake a PAHT before a planning permit is granted, measures could be put in place to mitigate this risk to Cultural Heritage.

These amendments would ensure that the Act provides a comprehensive system of Cultural Heritage protection throughout all the stages of any proposed activity.

COMMUNITY SUPPORT FOR THE RECOMMENDATION

This recommendation received mostly supported or were not concerned with the proposal. However, one submission from the Heritage – Business sector explicitly did not support this amendment:

> ***'A due diligence tool remains an acceptable management tool for LGAs to make decisions on matters of Cultural Heritage.'***

UNDRIP

This issue should be considered in relation to Article 32:

"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 6 – Process:

"The role of ICH in the process of consideration of development proposals in a jurisdiction is important. So, to is the process of consideration of the management of ICH in the context of a specific proposal."

Recommendation Twenty-Four: Prohibition on use of land of up to 10 years

"Whatever disincentives we currently have to stop destruction of our heritage, they're not working. If new ones can protect white heritage, they can protect blak heritage too."

ISSUE

Stronger disincentives need to be introduced to stop the destruction of Aboriginal Cultural Heritage.

BACKGROUND

Currently the Act imposes only a monetary penalty on a person who intentionally harms Aboriginal Cultural Heritage. Although a Court can order a perpetrator to pay an amount to repair or restore damage; often damage to Aboriginal Cultural Heritage is simply irreparable and its cost priceless. As experience in non-Aboriginal heritage has shown, monetary penalties and restoration orders often do not provide the necessary financial disincentive to undertake deliberate harm to Cultural Heritage.

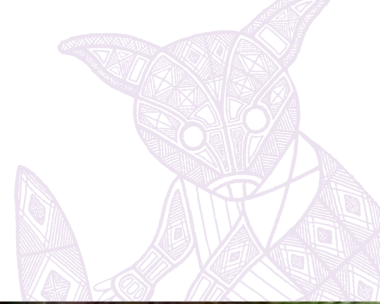
RECOMMENDATION

That a Court be able to order the prohibition of use or development of land for a period of up to 10 years on a culturally significant site where there has been deliberate or wilfully negligent unlawful destruction – whether in full or in part. This will ensure that the Act continues to:

> Protect the Aboriginal Cultural Heritage from harm, or the risk of harm, including prohibiting the carrying out of a specified activity in a specified way (i) immediately and (ii) for a specified period of time.

This would align the Act with the provisions introduced to the *Planning and Environment Act 1987* (Vic) (the **PE Act**) in 2021, that give similar protections for heritage buildings/ non-Aboriginal Heritage. The new PE Act provisions prohibit property development where owners/offenders have been charged with unlawful demolition of a heritage building (whether in part or in full).

This change would significantly strengthen the current enforcement regime and allow for the protection of Aboriginal Cultural Heritage in Victoria through deterrence of deliberate unlawful destruction.



UNDRIP

This issue should be considered in relation to Article 31:

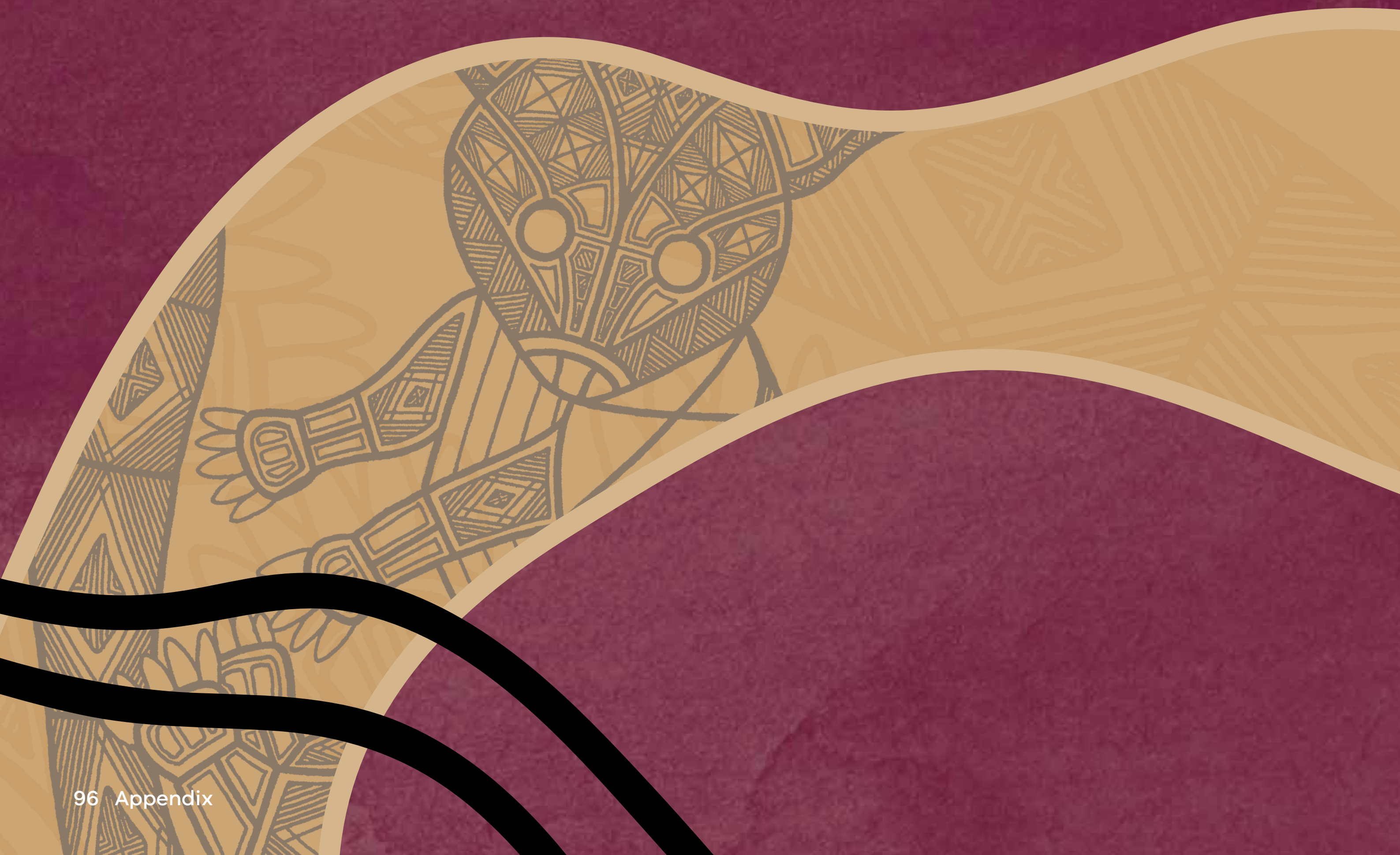
"Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage."

BEST PRACTICE STANDARDS IN INDIGENOUS CULTURAL HERITAGE MANAGEMENT AND LEGISLATION

This recommendation should be considered in relation to Best Practice Standard 5 – Incorporation of principles of self-determination:

"The affected Indigenous Community itself should be the ultimate arbiter of the management of the ICH aspects any proposal that will affect that heritage."

Appendices



Appendix I: Glossary

SHORTENED FORM	IN FULL
AAPA	Aboriginal Areas Protection Authority
Act	*Aboriginal Heritage Act 2006*
ADR	Alternative Dispute Resolution
AHO	Aboriginal Heritage Officer
AO	Authorised Officer
ARU	Ancestral Remains Unit
Assembly	United Nations General Assembly
AV	Aboriginal Victoria
CHMP	Cultural Heritage management plan
CHP	Cultural Heritage permit
Council	Victorian Aboriginal Heritage Council
Declaration	United Nations Declaration on the Rights of Indigenous Peoples
DELWP	Department of Environment, Land, Water and Planning
Discussion Paper	Taking Control of Our Heritage: Discussion Paper on Legislative Reform of the *Aboriginal Heritage Act 2006*
DPC	Department of Premier and Cabinet
DPP	Director of Public Prosecutions
FNLRS	First Nations Legal and Research Services
FPSR	First Peoples - State Relations
HA	Heritage Advisor
ICH	Indigenous Cultural Heritage
LGA	Local Government Authority
LRRFC	Victorian Aboriginal Heritage Council Legislative Review and Regulatory Functions Committee
Minister	Minister for Aboriginal Affairs (Victoria)
NTASSA	*Northern Territory Aboriginal Sacred Sites Act 1984*
NTAV	National Trust of Australia (Victoria)
GNV	Geographic Names Victoria
OVAHC	Office of the Victorian Aboriginal Heritage Council
PAHT	Preliminary Aboriginal heritage test
RAP	Registered Aboriginal Party
Register	Victorian Aboriginal Heritage Register
Regulations	Aboriginal Heritage Regulations 2007
Secretary	The Secretary to the Department of Premier and Cabinet
Sponsor	Sponsor of a CHMP
Submissions	Submissions to the Taking Control of Our Heritage: Discussion Paper on Legislative Reform of the *Aboriginal Heritage Act 2006*
VCAT	Victorian Civil and Administrative Tribunal
VICNAMES	VICNAMES Register of Geographic Names Victoria

Appendix II: Proposed Suite of Reforms

RECOMMENDATION ONE

Expansion of the Legislative Functions of a RAP

Registered Aboriginal parties (**RAPs**) should be the primary source of advice to government on both tangible and intangible Aboriginal Cultural Heritage in their registration area. The current legislative framework should be expanded to encourage increased government engagement and consultation with RAPs on Cultural Heritage matters, relating to both tangible and intangible Aboriginal Cultural Heritage.

RECOMMENDATION TWO

Enabling Council to approve RAP applications with conditions

To support Traditional Owner organisations that are not yet registered as RAPs, and thus unable to carry out their functions, the recommendation is for Council to approve RAP applications with conditions. This allows for staggered commencement dates for RAP obligations, to ensure that RAPs are not flooded with responsibilities upon registration.

RECOMMENDATION THREE

Native title definitions and RAP applications

This recommendation removes confusion in the *Aboriginal Heritage Act 2006* (the **Act**) around the use of these terms, giving effect to the original intent of the legislation, but in a manner that is consistent with the fact that a RAP (or a RAP applicant) is required to be a body corporate.

RECOMMENDATION FOUR

RAP Cultural Heritage Consent in relation to CHMPs

To eradicate instances of harm of Aboriginal Cultural Heritage, this recommendation gives RAPs the authority of Cultural Heritage Consent. This would provide a mechanism to both give and withhold consent for harm to Aboriginal Cultural Heritage proposed in CHPMs.

RECOMMENDATION FIVE

Appointment of Members through existing representative Victorian Traditional Owner institutions

The eleven members of Council should be appointed by the Minister for Aboriginal Affairs from amongst Victorian Traditional Owners nominated by two existing representative Victorian Traditional Owner institutions – the First Peoples Assembly of Victoria and the RAPs (through meeting of authorised representatives of the RAPs, or "College" of RAP representatives).

RECOMMENDATION SIX

Victorian Aboriginal Heritage Council name change

This proposal seeks to redefine Council and the body corporate structure of Council as separate but related functions. The body corporate should be changed from the 'Aboriginal Heritage Council' to the 'Victorian Aboriginal Heritage Authority'. The existing Council would be renamed as the 'Victorian Aboriginal Heritage Council' and become the Authority's governing body.

RECOMMENDATION SEVEN

Transferring responsibility of the Register from Aboriginal Victoria to Council

In order to increase Traditional Owners' control of their Cultural Heritage, the transfer of the responsibility of the Victorian Aboriginal Heritage Register (**Register**) from First Peoples – State Relations (**FPSR**) to Council is proposed. This would allow Traditional Owners to be the custodians of all information on their Cultural Heritage.

RECOMMENDATION EIGHT

Transfer of various other Secretarial Functions to the Council

To instil the principles of self-determination, this recommendation proposes to transfer a range of functions and responsibilities from the Secretary (**Secretary**) of the Department of Premier and Cabinet (**DPC**) to Council. These functions include a majority of the RAP support functions that are currently undertaken by FPSR.

RECOMMENDATION NINE

Amending the procedures for dispute resolution under the Act

In support of better methods of conflict resolution, this recommendation expands the use of Alternative Dispute Resolution as the primary mechanism for any issue under the Act.

RECOMMENDATION TEN

Amending the prosecution powers

This recommendation is to transfer rights and responsibilities from the Department of Premier and Cabinet (**DPC**) (as delegated by the Secretary of DPC) to Council. A further proposal is for Aboriginal Heritage Officers (**AHOs**) and Authorised Officers (**AOs**) to be empowered to issue infringement notices in relation to minor offences.

RECOMMENDATION ELEVEN

Extension of Chairperson Terms

This proposal seeks to extend the terms of the Chairperson of Council to two years. Further, the Chairperson and Deputy Chairperson would only be eligible for one further term of re-election. This will provide Council with stability of leadership, development of relationships, effective representation of the Traditional Owner sector, maintenance of tacit knowledge and continuation of momentum built over the last term.

RECOMMENDATION TWELVE

Council's Financial Operation

Subject to the requirements of the Financial Management Act, this recommendation seeks for Council to be able to establish other bank accounts for the purposes of its day-to-day operations.

RECOMMENDATION THIRTEEN

Empowering Council to employ its own Staff

To maintain and support the principles of self-determination and autonomy, the reform proposes amendments to the Act to allow Council to employ its own staff.

RECOMMENDATION FOURTEEN

Regulation of Heritage Advisors

This recommendation seeks to create a regulation system for Heritage Advisors (**HAs**) including a formal registration system, a binding code of conduct, a formal complaints process and the enforcement of sanctions. This is aimed at protecting Traditional Owners and the public from poor practices.

RECOMMENDATION FIFTEEN

Compulsory Consultation of RAPs during the CHMP Process

To ensure that RAPs are informed and have a say in activities regarding the assessment of Aboriginal Cultural Heritage value – a requirement for Sponsors to consult with RAPs at the outset of the CHMP process is proposed.

RECOMMENDATION SIXTEEN

Elective power for RAPs to engage as HAs in the preparation of CHMPS

This recommendation seeks for the Act to specify that RAP's can operate as HA's in the preparation of a CHMP, and to define the obligations of a Sponsor to provide the RAP with a first option to provide HA services.

RECOMMENDATION SEVENTEEN

Amending the Power of Entry for AOs and AHOs

Currently, Officers have limitations that prevent them from sufficiently undertaking their responsibilities. This recommendation seeks to amend the Power of Entry for Officers, to allow them to enter land/premises without the consent of the occupier.

RECOMMENDATION EIGHTEEN

Amending evidentiary provisions regarding Aboriginal Objects

Evidentiary provisions regarding Aboriginal Objects would be amended to enable certificates signed by Council, to the effect that an object referred to in the certificate is an Aboriginal Object or Secret or Sacred Object, to be evidence of that fact.

RECOMMENDATION NINETEEN

Clarifying ownership with regards to Secret and Sacred Objects

It must be clear that the rightful owner of a Secret or Sacred Object is a Traditional Owner from where the object is reasonably believed to have originated (also identified as an Aboriginal Person who is the rightful owner of the object).

RECOMMENDATION TWENTY

Secret and Sacred Objects – Search and Seizure Powers

This proposal seeks to introduce search and seizure powers when AOs and AHOs reasonably believe that there is a need for such an action around Secret or Sacred Objects or Aboriginal Ancestral Remains.

RECOMMENDATION TWENTY-ONE

Granting of permits pertaining to the management of Ancestral Remains

If Council was to be the approval body for all permits relating to the management of Ancestral Remains, this would not only give Traditional Owners control of their Ancestors but would also ensure all aspects of work associated with the management of Ancestral Remains is undertaken by one centralised entity.

RECOMMENDATION TWENTY-TWO

Introducing civil damages provisions

To urge increased rates of compliance, this recommendation would introduce a provision that would deem some offenses as civil damages.

RECOMMENDATION TWENTY-THREE

RAP consultation in the due diligence assessment/PAHT process

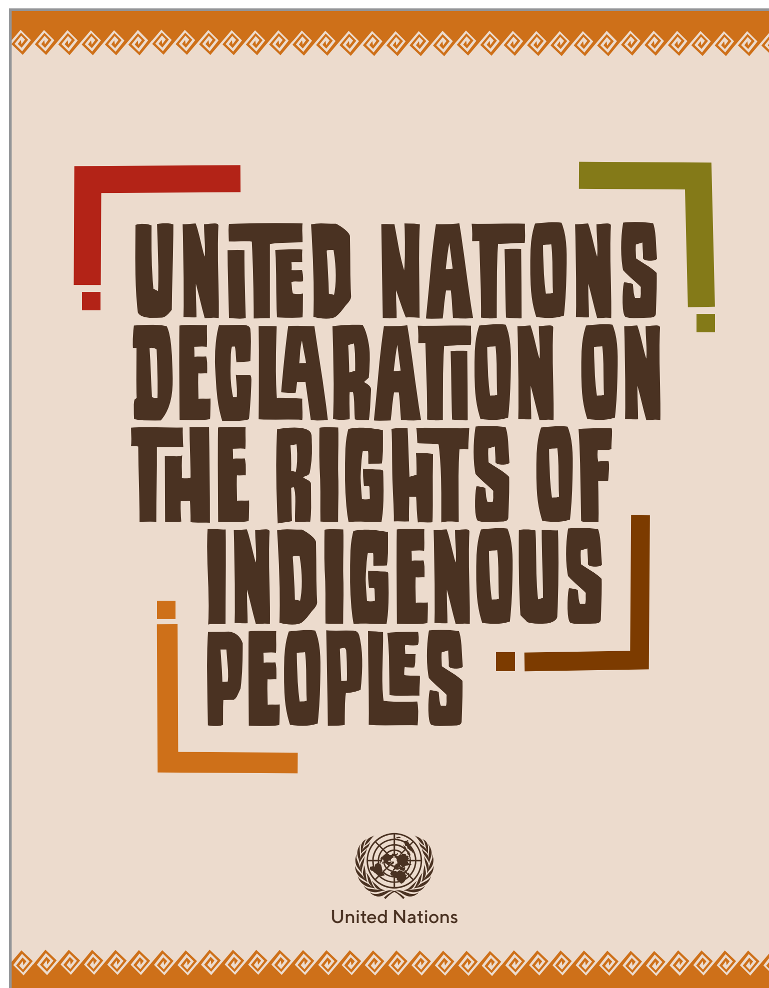
This recommendation is that a Preliminary Aboriginal Heritage Test (**PAHT**) be required to be undertaken for all building and construction related planning applications that do not trigger a CHMP. Additionally, the HA would be required to seek participation and input from RAPs in the preparation of a PAHT, as with a CHMP.

RECOMMENDATION TWENTY-FOUR

Prohibition on use of land of up to 10 years

This recommendation is that the Court has the capacity to order the prohibition of use or development of land for a period of up to 10 years on a culturally significant site where there has been deliberate or wilfully negligent unlawful destruction of Cultural Heritage– whether in full or in part.

Appendix III: United Declaration on the Rights of Indigenous Peoples



Resolution adopted by the General Assembly on 13 September 2007

[without reference to a Main Committee (A/61/L.67 and Add.1)]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006[1], by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

1 See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sect. A.

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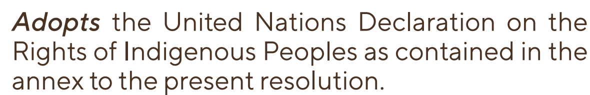

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

2

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples

3

affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

4

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights[2] and the International Covenant on Civil and Political Rights,[2] as well as the Vienna Declaration and Programme of Action,[3] affirm the fundamental importance of the right to self-determination of all peoples, by

2 See resolution 2200 A (XXI), annex.

3 A/CONF.157/24 (Part I), chap. III.

virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all

7

human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights[4] and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

4 Resolution 217 A (III).

8

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

9

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

   (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

   (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

   (d) Any form of forced assimilation or integration;

   (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

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Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

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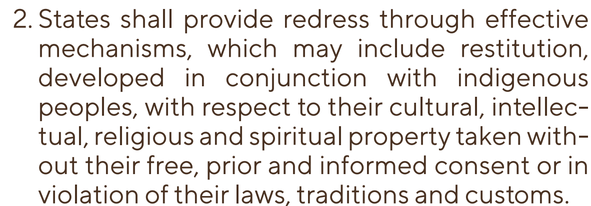

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future genera-

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tions their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including

those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous

cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect

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their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

16

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

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Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

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Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

19

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take

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the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the

right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and

23

appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

24

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and re-

spect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective

remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

27

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismem-

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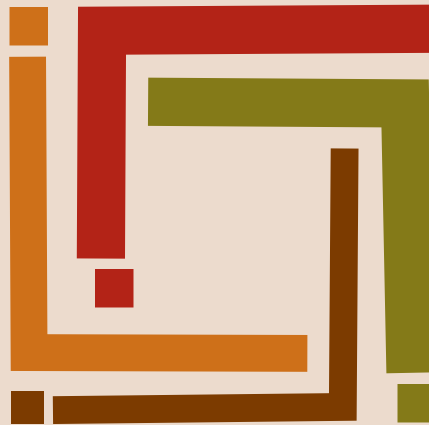
ber or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

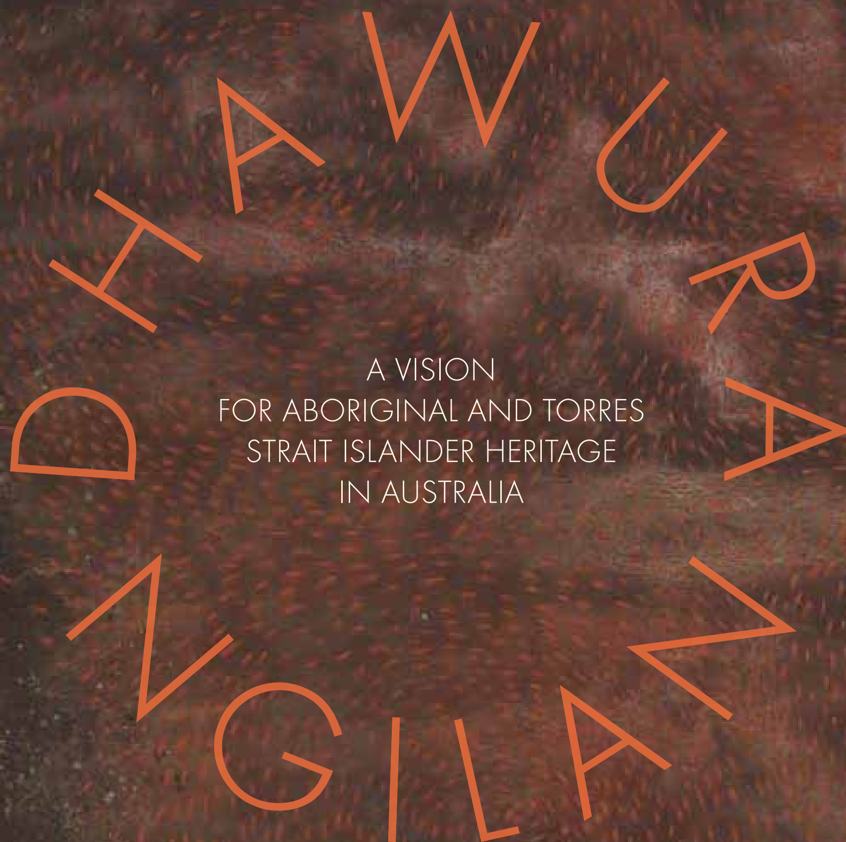
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.



Designed by the Graphic Design Unit, Department of Public Information, United Nations

Appendix IV:
Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia



REMEMBERING COUNTRY

Heritage Chairs of Australia and
New Zealand with the endorsement of the National Native Title Council
and the First Nations Heritage Protection Alliance

MARCH
2021

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Front cover design
Relative Creative

The Heritage Chairs of Australia and New Zealand acknowledge and give thanks to Judy Watson for her permission to use her artwork.

Judy Watson
Waanyi People Australia b.1959
sacred ground beating heart 1989

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Pronunciation of Dhawura Ngilan

At the suggestion of the Winanggaay Ngunnawal Language Group, the name Dhawura Ngilan (Remembering Country) was given to this vision. It reflects the deeply emotional and spiritual connection to environment. It includes all aspects of life including our relationships to all within. All living beings and objects share the spirit of our ancestors and have kinship with us. A deeply emotional and spiritual connection which is the heart of country that ensured continual systems that were sustainable.

Emphasis, or stress, is placed on the first syllable of each word: **DHA**wura **NG**Ilan.

Dha-wu-ra

dh sounds like an English 'd', but is made with the tongue touching the top front teeth

a is the same as 'ar' in English 'far'

w is the same as in English 'worry'

u in this word sounds like the 'u' in English 'supply'

r is like a Scottish rolled 'r'

a is again the same as 'ar' in English 'far'

Ng-ilan

ng is the same as 'ng' in English 'sing'

i is the same as 'i' in English 'igloo'

l is the same as 'l' in English 'belong'

a is the same as 'ar' in English 'far'

n is the same as 'n' in English 'button'

Acknowledgement and thanks to Caroline Hughes, Ngunnawal Elder and member of the Australian Capital Territory's Aboriginal and Torres Strait Islander Elected Body, for providing this information.

Dhawura Ngilan embodies the long-held aspirations of Aboriginal and Torres Strait Islander people for their heritage (see Appendix A and Appendix B). It has been developed by the Aboriginal and Torres Strait Islander Chairs as members of the Heritage Chairs of Australia and New Zealand. It is offered to inform policy, underpin legislative change and inspire action.

We acknowledge the diversity and complexity of First Nations across Australia. Examples of cultural concepts highlighted throughout the document do not represent all First Nations communities but are intended to help the reader better understand overarching cultural concepts under which the examples are given.

We acknowledge the National Native Title Council and the First Nations Heritage Protection Alliance representing every major Native Title Body and Land Council in Australia, who have given their input and support to this vision.

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Part 1 : Our Vision

Vision Statement

Each ring symbolises one aspect of our vision. Inspired by Judy Watson's artwork and symbolised by rhythmic circular repetition. With all circles together, they holistically create a united vision.

1

Aboriginal and Torres Strait Islander people are the Custodians of their heritage. It is protected and celebrated for its intrinsic worth, cultural benefits and the wellbeing of current and future generations of Australians.

2

Aboriginal and Torres Strait Islander heritage is acknowledged and valued as central to Australia's national heritage.

3

Aboriginal and Torres Strait Islander heritage is managed consistently across jurisdictions according to community ownership in a way that unites, connects and aligns practice.

4

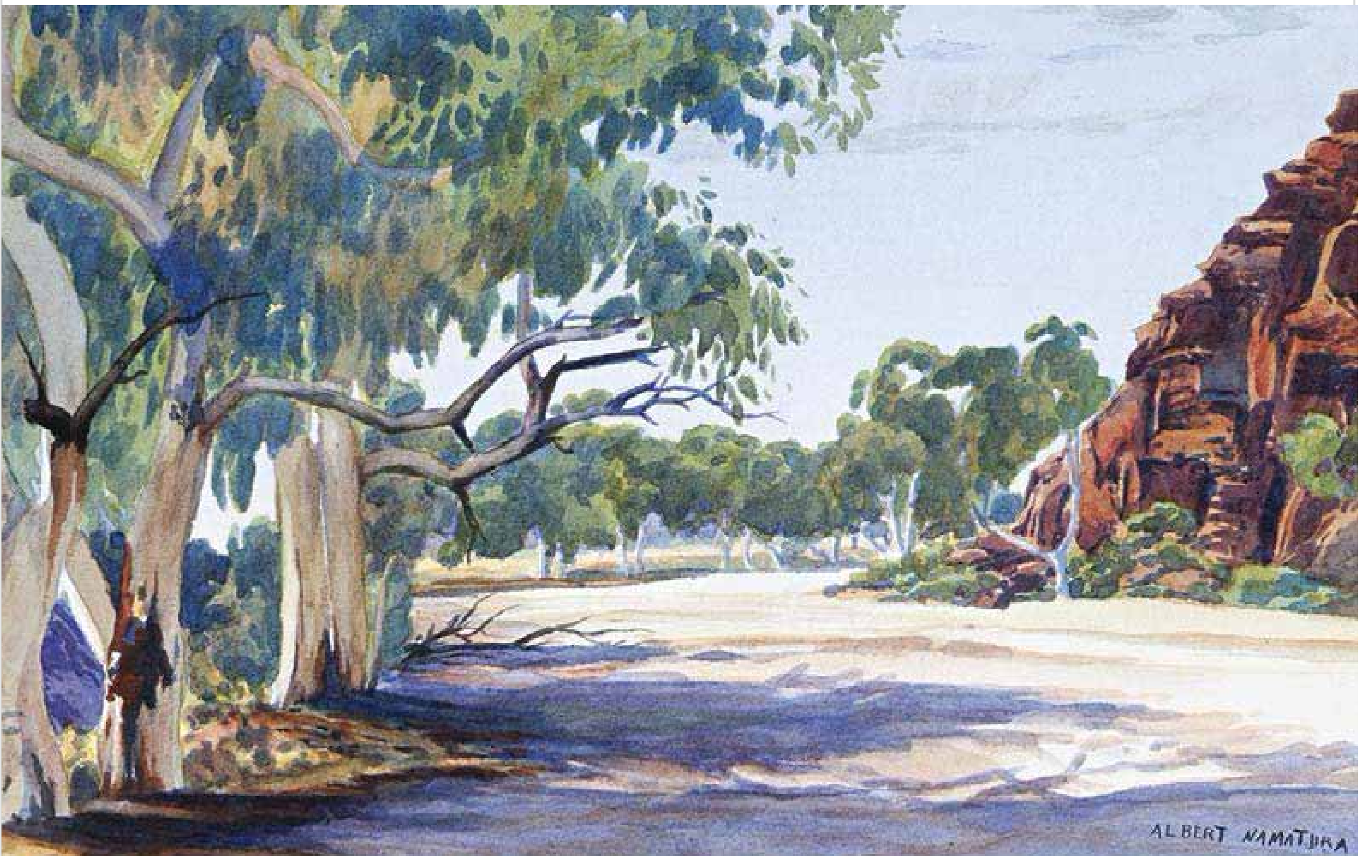
Aboriginal and Torres Strait Islander heritage is recognised for its global significance.

Connection to Country

Australia is home to the oldest continuous culture on earth. Sixty-five thousand years of uninterrupted heritage, demonstrated by archaeological evidence, makes our continent unique in the world. However, Aboriginal and Torres Strait Islander peoples' view of heritage transcends time into what is widely described as the Dreaming, but better expressed in our many Australian languages through concepts such as Tjukurrpa, a word used by the Anangu People. As Wenten Rubuntja[1], co-artist of the Barunga Statement and a Board Member of the Aboriginal Sacred Areas Protection Authority[2] described:

> *"The country has got sacred sites, that stone, that mountain has got Dreaming and himself is sacred country. Not just free mountain. We sing that one – we got that song. Well, the song is the history of the country. […] Albert Namatjira used whitefella's side of the story – he painted landscape. He painted the Tywerrenge (Dreaming) side there as well. Namatjira used two laws (Rubuntja 1990, p. 159)."*

The Bend of the Todd, Heavitree Gap, by Albert Namatjira, 1958



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1. Wenten Rubuntja AM (1923-2005) was an Arrernte law man, artist, historian, Aboriginal statesman and Chairman of the Central Land Council. In 1988, Mr Rubuntja and Dr Galarrwuy Yunupingu presented the Barunga Statement to the then Australian Prime Minister Bob Hawke.
2. The Aboriginal Sacred Areas Protection Authority is an independent statutory authority established under the *Northern Territory Aboriginal Sacred Sites Act 1989*. It is responsible for overseeing the protection of Aboriginal sacred sites on land and sea across the whole of Australia's Northern Territory. Viewed July 2020, <https://www.aapant.org.au/>.

This sacred essence of places Mr Rubunjta describes is also present in sacred objects. In the Arrernte language Mr Rubuntja uses, they are given the same name, indicating their sacred nature and connection to place.

In the historic Mabo Case, evidence was given that related how the Meriam people of the Torres Strait understand their connection to Country, land and waters, both in spiritual and practical terms. Henry Kabere testified that:

> *"The Malo story is part of our traditional law. This is the same law as that written in the court book. Malo law applies to the land, to land owners, to caretakers, to gardens, to fish traps, to inheritance of land and to boundaries (Keon-Cohen 2011, p. 371)."*

This has been described as a 'person-land-ancestral inter-relationship' (Rumsey 2001). It is a living connection between Aboriginal and Torres Strait Islander people today. Australia's landscape, waters, and seas, collectively referred to as 'country', are alive with a profusion of heritage places. Imbued with the essence of ancestral beings that created them, it is through these places that family descent and kinship connections flow. It is this connection that gives owners' rights, responsibilities and duties to country. This is often described as being a Traditional Owner or Native Title Holder. In this document we use the term Custodians. Often it is the senior Custodians who have the authority to speak for country in their role as repositories of knowledge about places.

Heritage is important to Aboriginal and Torres Strait Islander people, who have lived through colonisation over generations and continue to affirm their identity in the 21st century. Places of heritage significance can be found in urban areas, and built and contemporary features such as missions, protest routes and monuments. Aboriginal and Torres Strait Islander people may not have an ancestral connection to these places but their connection through lived experience is significant.

Dr Matilda House, a Ngambri Elder of the Canberra region, describes the role that Aboriginal people have in keeping culture alive:

> *"Passing on knowledge is something that Aboriginal people have been doing for thousands of years and that's what I'm doing here today. Passing on knowledge (San Miguel & House 2019)."*

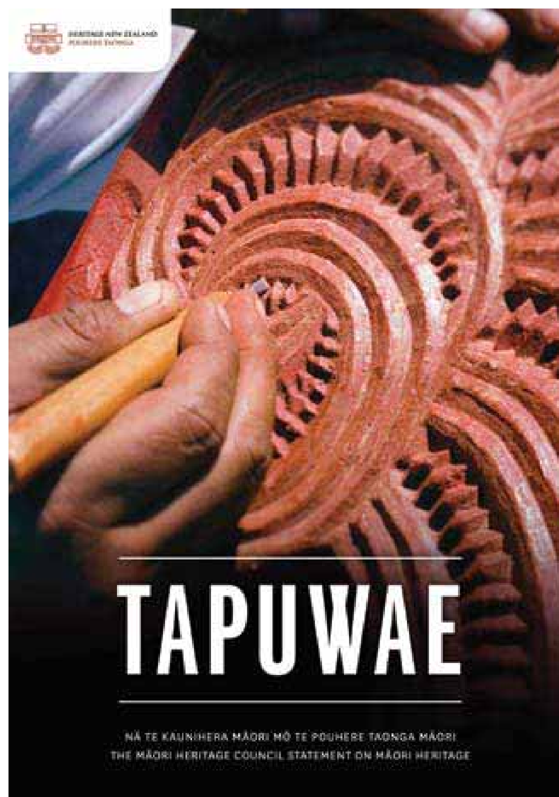
There has never been a better time to share this heritage with the Australian people. Dhawura Ngilan defines this vision and provides key areas of focus to collectively achieve it.

Background

In May 2018, membership of the Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) was expanded to include Aboriginal and Torres Strait Islander Heritage Chairs.[3] At their combined meeting in Darwin the expanded HCOANZ group issued the 'Darwin Statement' (see Appendix B), which captured their intention to work together in advancing a shared approach to Australia's cultural heritage. In October 2019, Aboriginal and Torres Strait Islander Heritage Chairs, board members and officials met in Canberra to discuss Indigenous heritage. A commitment was made to create a vision that would present a united voice for Indigenous Australians' heritage aspirations for the next decade. This vision aims to prioritise Aboriginal and Torres Strait Islander cultures as our shared Australian history and heritage, which has the power to shape and guide our nations and people.

The Australian Heritage Council hosted the meeting. Under its founding legislation, *Australian Heritage Council Act 2003* (Cth), the Australian Heritage Council brings together Aboriginal and Torres Strait Islander heritage with all other Australian heritage as a central element of Australia's nationally significant heritage.

Dhawura Ngilan was directly inspired by Māori achievements and their vision document, Tapuwae, meaning 'sacred footprint':



> *"The Māori Heritage Council uses this term to symbolise the Māori heritage 'footprints' in the landscape. It is also used to communicate the idea that we can look back to where we have been as we move forward, taking more steps (Māori Heritage Council 2017)."*

Aboriginal and Torres Strait Islander Australians' footsteps share a common path with the Māori people, who have thought deeply about their heritage. With their permission we have, on occasion, made their words our own. We pay respect to their leadership and the mana that resides in them.

3. Under Australia's federal system of government, local councils manage locally significant heritage, State and Territory governments manage State and Territory significant heritage and the Commonwealth Government manages national, Commonwealth and World heritage places. The Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) is a group of representatives from each of the State, Territory, Commonwealth and New Zealand governments, made up of the chairs of each jurisdiction's heritage council and the government officials who support those councils. The Aboriginal and Torres Strait Islander Chairs are the Indigenous representatives from each government's council.

Coorong and Murray Mouth
Ngarrindjeri Country
Noradoa

Part 2: Key Areas of Focus

Working Together

Dhawura Ngilan provides an opportunity for jurisdictions to collectively work with Aboriginal and Torres Strait Islander people to identify, protect, conserve, present and transmit for future generations the unique heritage of Australia. This vision identifies key areas of focus, which take the form of recommendations, to guide the actions of all Australian governments for the next decade.

It is expected that jurisdictions will develop implementation plans and associated targets to address the key areas of focus, and will report on progress. It is hoped that this work will also inform the State of the Environment Report 2021[4]. Ultimately our intention is that Dhawura Ngilan sits alongside the Australian Heritage Strategy and will be reviewed by Heritage Chairs in 2025 to assess progress.

Dhawura Ngilan is launched in the challenging and changing policy and legislative environment of 2020. The ten-year statutory review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) is underway and the Australian Heritage Strategy, the Commonwealth's key heritage policy document, is under review after five years of operation. Both reviews present future opportunities for better outcomes.

Aboriginal and Torres Strait Islander Heritage is currently inadequately served by multiple pieces of national legislation including the EPBC Act (Samuel 2020), the *Protection of Movable Cultural Heritage Act 1986* (Cth), *the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), and the *Underwater Cultural Heritage Act 2018* (Cth). The heritage legislation of the States and Territories is also at various stages of adequacy and review. Despite this uncertainty, HCOANZ will be working collectively and through partnerships to deliver better outcomes for Aboriginal and Torres Strait Islander heritage.

Whilst Dhawura Ngilan refers to some aspects of moveable cultural heritage, we recognise that the Australian Museums and Galleries Association (AMaGA) has established a ten-year Roadmap for Enhancing Indigenous Engagement in Museums and Galleries. This roadmap outlines AMaGA's commitment to 'Increasing Indigenous Opportunity' and 'Two Way Caretaking of Cultural Material' (Janke 2018, pp. 24–32) and is the key guidance document here.

Throughout the development of this vision it has been apparent there is immense goodwill and a genuine desire that it succeed. If the recommendations of *Dhawura Ngilan* are implemented, they will deliver significant and positive change for Australia's heritage.

4. The *State of the Environment Report* is a five-yearly statutory reporting requirement under the EPBC Act. It is prepared by independent experts using the best available information to support assessments of environmental condition, pressures, management effectiveness, resilience, risks and outlook. This includes reporting and assessment on the state of Australia's heritage.

KEY FOCUS AREA

vision 1

Aboriginal and Torres Strait Islander people are the Custodians of their heritage.

It is protected and celebrated for its intrinsic worth, cultural benefits and the wellbeing of current and future generations of Australians.

In Australia the protection of Aboriginal and Torres Strait Islander heritage has been maintained over thousands of years by Aboriginal and Torres Strait Islander people. More recently, this protection has been augmented by legislation, policy, professional codes of conduct and Australian community appreciation and regard for our heritage places. Across Australia, legislative responsibility for its protection is divided along jurisdictional lines. This legislation is inconsistent and, in some instances, outdated and inadequate. Heritage lists and registers under this legislative framework, in some jurisdictions, are inequitable and are incomplete with places recognised for their Aboriginal and Torres Strait Islander value being underrepresented or highly selective, focussing on archaeological or historic sites. Furthermore, the resources and data available to monitor and report on the condition of Aboriginal and Torres Strait Islander heritage are inadequate. Further, Victoria is the only Australian jurisdiction to have legislation that specifically protects the intangible elements of Aboriginal and Torres Strait Islander heritage. Aboriginal and Torres Strait Islander communities must be at the centre of a refreshed framework of protection.

We propose that the following should be key areas of focus to achieve this vision.

Dhawura Ngilan
Remembering Country

1.1 All jurisdictions adopt and work towards achieving the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation to ensure protection and management is consistently of the highest standard across jurisdictions

Aboriginal and Torres Strait Islander communities seek greater safeguards for their heritage through legislative reform. The Aboriginal and Torres Strait Islander Chairs developed the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation (the Standards, available in Part 3) for guidance. The objective of the Standards is to facilitate Aboriginal and Torres Strait Islander cultural heritage legislation and policy across the country that is consistently of the highest standard. Central to achieving this objective is the obligation to ensure the Free, Prior and Informed Consent (FPIC)[5] of Aboriginal and Torres Strait Islander people with an interest in the heritage being protected, be it land or sea or intangible heritage, before the approval of any project that affects their Country and their cultural heritage. Consideration must also be given to legislation that relates to definitions of Aboriginal and Torres Strait Islanders peoples' heritage, self-determination, process, ancestral remains, secret and sacred heritage, and intangible heritage.

The protection of intangible cultural heritage warrants particular focus. In Australia many of the issues were explored in the 1993 Federal Court case, and subsequent decision, which has come to be known as the Carpets Case (*M* & Others v. Indofurn Pty Ltd* (1995) 30 IPR 209). A decision by Australia to ratify the UNESCO Convention for the Safeguarding the Intangible Cultural Heritage 2003 would give significant momentum to addressing the ongoing issues in this space. If ratified, all relevant legislation would need to be aligned with the Convention.

5. FPIC is a central component of the *United Nations Declaration on the Rights of Indigenous Peoples*, adopted on 13 September 2007. Viewed July 2020, <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>.

Leeawuleena (Cradle Mountain and Lake St Clair) Larmairremener Country,
Ryan Hoi

1.2 Heritage Councils work with Aboriginal and Torres Strait Islander people to identify and protect heritage places and achieve better equity on statutory lists

Across Australia, heritage lists do not tell a comprehensive story of Australia's past. There is a need to bring balance to these lists by including more Aboriginal and Torres Strait Islander heritage. Not only will this contribute to protection and enhance opportunities for celebration, it will also enable a mature engagement with our shared heritage. Aboriginal and Torres Strait Islander people must be at the centre of this process and Free, Prior and Informed Consent must be obtained from all relevant Custodians at the earliest stages of the process.

Heritage places are sources of Australian cultural identity and history; the tangible and intangible elements of these places and objects are inseparable. The identification, protection, celebration, preservation and conservation of Aboriginal and Torres Strait Islander heritage has the potential to enrich the broader community socially, culturally, spiritually and economically.

1.3 Prioritise the recording and digitisation of place-based traditional knowledge, including Songlines and place names, which underpins Aboriginal and Torres Strait Islander heritage

The *State of the Environment Report 2016* identified Aboriginal and Torres Strait Islander heritage as being '...at risk from loss of knowledge and tradition' (Mackay 2016, p. vi). This threat is real. Aboriginal and Torres Strait Islander heritage has been impacted by colonisation and its intangible knowledge systems, which are held in songlines and language, are endangered.[6] This knowledge is held by Elders and the community, and by recordings held by both Custodians and research and collecting institutions. It is connected to heritage places and gives them meaning. The stories of the ancestors told through song, dance, lore and art are at the heart of Aboriginal and Torres Strait Islander heritage. Jurisdictions must work together, and with, Aboriginal and Torres Strait Islander people, and Heritage Councils, to find solutions to this immediate issue. Unless this knowledge is recorded and digitised soon, it will be lost forever.

Kunama Namadgi (Kosciuszco)
Ngarigo Nation,
Jakub

6. The preservation and maintenance of Aboriginal and Torres Strait Islander languages is funded through the Indigenous Languages and Arts program and supported through community language centres. For more information see: https://www.arts.gov.au/funding-and-support/indigenous-languages-and-arts-program

KEY FOCUS AREA

vision 2

Aboriginal and Torres Strait Islander heritage is acknowledged and valued as central to Australia's national heritage.

Aboriginal and Torres Strait Islander people are the Custodians of the oldest continuous culture on earth. The significance of this heritage transcends Australia's national boundaries and tells a story which is relevant to all of humanity.

Aboriginal and Torres Strait Islander heritage tells a story of a deeply spiritual people connected through their culture to their environment. The age and resilience of Aboriginal and Torres Strait Islander culture alone demonstrates that all people everywhere can benefit from an understanding of their culture. Aboriginal and Torres Strait Islander heritage shows the story of human ingenuity and a deep and spiritual relationship with nature, a relationship that through the manipulation of ecological processes has led to the Australia we know today. Our World Heritage places listed for Aboriginal and Torres Strait Islander cultural values include Budj Bim Cultural Landscape, Kakadu, Uluru-Kata Tjuta and the Tasmanian Wilderness. An essential part of this vision is ensuring that a global audience hears and appreciates these stories.

We propose that the following should be key areas of focus to achieve this vision.

Dhawura Ngilan
Remembering Country

2.1 Dual or sole naming of Aboriginal and Torres Strait Islander places is adopted across Australia

Place names carry cultural significance for Aboriginal and Torres Strait Islander people. By adopting dual naming or sole naming of places, Australians are provided with knowledge of their continent's deep heritage. It also brings the richness of Aboriginal and Torres Strait Islander languages into everyday use. There is also a need for greater understanding of the origin and meaning of Aboriginal and Torres Strait Islander place names that are currently in common usage.

The national policy Principles for the Use of Aboriginal and Torres Strait Islander Place Names (PCPN 2016, pp. 13–18) provides clear guidance on how Aboriginal and Torres Strait Islander names be embraced and the approach for implementing dual or sole naming. Heritage Councils can play an active role in promoting these Principles. Heritage Councils will form relationships with nomenclature authorities in their jurisdictions to implement this policy. Heritage Councils will also consider conducting inventories of Aboriginal and Torres Strait Islander names in their regions and adopting a policy of dual or sole naming for existing places on heritage lists.

2.2 Australia embraces truth telling about our heritage and our heritage lists reflect this truth

Australia's heritage narrative is one of survival and cultural achievement across thousands of years in a sometimes harsh and changing environment. It is also one of dispossession, aggression, violence and cultural assault. More recently Australia's narrative has been one of humanitarian but paternalistic policies giving way to heroic politics and national awakening as descendants of the nation's first peoples have used Australia's democratic institutions to claim recognition and rights. It is now time for Australia to adopt a process of Truth Telling (see Appendix C) and ensure the truth is told about this past.

Particular attention should be paid to the appropriate preservation, protection and memorialisation of colonial and post-colonial frontier conflict and massacre sites, as we as a nation reconcile with our past. This is shared heritage. This must be reflected on our heritage lists. So too must the stories of political resistance and cultural resilience.

The Wave Hill Walk-Off Route is already included on the National Heritage List and tells the story of the Gurindji people's demands for equal wages and their rights to their traditional lands. There are many more stories like this across Australia, stories of resistance, resilience and contribution. There is an opportunity for Australian governments to seek out and support the telling of these stories.

2.3 Jurisdictions engage with opportunities in the Australian Curriculum to promote Aboriginal and Torres Strait Islander heritage in their region

Aboriginal and Torres Strait Islander histories and cultures are one of the three cross-curriculum priorities in the Australian Curriculum. The Australian Curriculum specifically aims to address the following need:

... that the Aboriginal and Torres Strait Islander Histories and Cultures cross-curriculum priority is designed for all students to engage in reconciliation, respect and recognition of the world's oldest continuous living cultures (ACARA 2018).

There is an opportunity for Heritage Councils to assist in the development of resources which enable the delivery of this priority in relation to Aboriginal and Torres Strait Islander heritage and truth telling.[7]

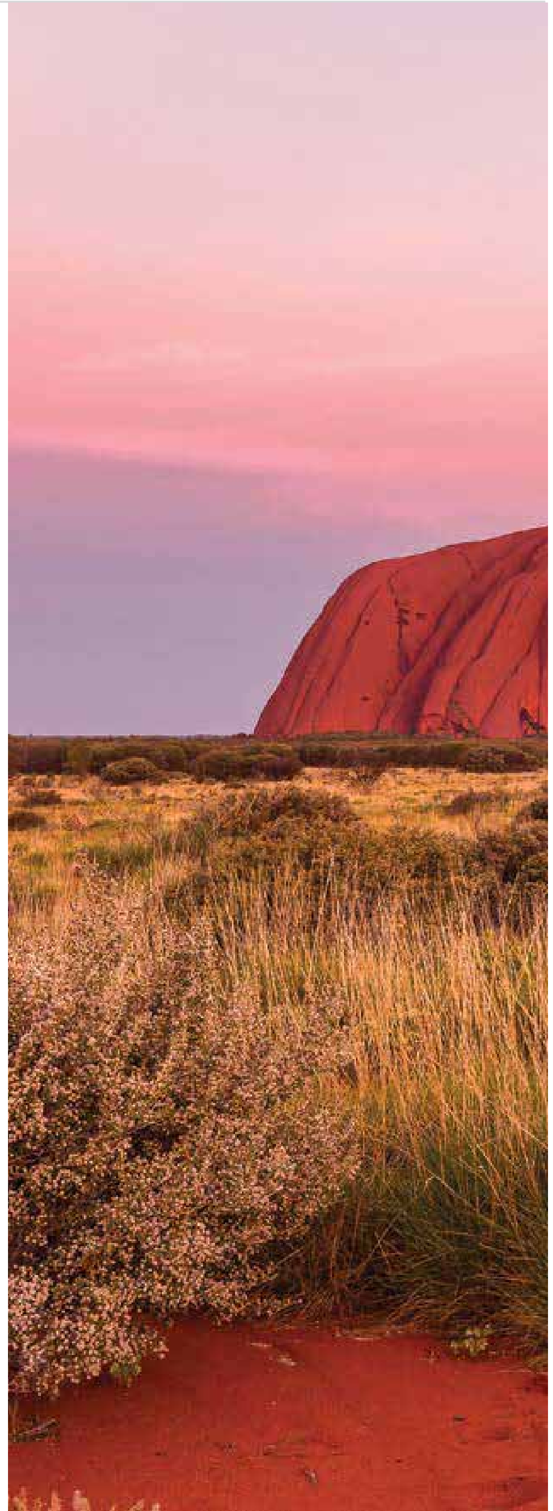
7. For an example of content, see *Indigenous Knowledge Resources for Australian School Curricula Project.* Available at: https://indigenousknowledge.unimelb.edu.au/curriculum

2.4 Jurisdictions consider how to recognise and protect Culturally Significant Species

Australia has been a party to the United Nations Convention on Biological Diversity (CBD) since 1993 and recognises the role of Aboriginal and Torres Strait Islander people in the protection of biological diversity. *Australia's Strategy for Nature 2019-2030* has shared goals and objectives for Australian biodiversity (Commonwealth of Australia 2019). It also makes specific reference to the importance of Aboriginal and Torres Strait Islander traditional ecological knowledge and stewardship of nature.

Aboriginal and Torres Strait Islander people attribute tremendous spiritual, cultural or symbolic value to many animals, plants and ecological communities, a value that is critical in their identity, and relationship with and adaptation to Country (IRG of the TSR 2020). In Victoria this includes Bunjil, the wedge-tailed eagle, and in the Northern Territory this includes Baru, the saltwater crocodile.

The protection of these cultural and spiritual assets is fundamentally important to maintaining Aboriginal and Torres Strait Islander culture and language. Recognition of Culturally Significant Species[8] will contribute to the development of a more holistic perspective on biodiversity and ecosystems in Australia and provides all sectors of society with another avenue through which to emphasise the importance of species and communities to the state of the Australian environment (IRG of the TSR 2020). Any potential listing or protection regimes should not impinge on any cultural practice of that species, including traditional take, sustainable use and other customary activities (IAC 2020).



8. 'There is no international unified definition for CSS, although it is synonymous with the concept of Culturally Defined Keystone Species (CKS) (Cristancho and Vining, 2004) or Cultural Keystone Species (Garibaldi and Turner, 2004; Nuñez, and Simberloff, 2005), CSS can be described as species of exceptional significance to a culture or a people, and can be identified by their prevalence in language, cultural practices (e.g. ceremonies), traditions, diet, medicines, material items, and histories of a community' (IRG of the TSR 2020).

Uluru,
Yankunytjatjara and Pitjantjatjara People
Serge

KEY FOCUS AREA

vision 3

Aboriginal and Torres Strait Islander heritage is managed consistently across jurisdictions according to community ownership.

It unites, connects and aligns practice.

The Heritage Chairs and Officials of Australia and New Zealand is a valuable mechanism to provide national coordination, particularly for Aboriginal and Torres Strait Islander land and sea country that traverses multiple State and Territory borders. Aboriginal and Torres Strait Islander people have culturally significant sites and cultural materials across various jurisdictions and must negotiate multiple legislative frameworks.
There is an opportunity for jurisdictions to improve processes and align practices to ensure Aboriginal and Torres Strait Islander heritage is protected, and that Aboriginal and Torres Strait Islander people have access to and control over their heritage.

We propose that the following should be key areas of focus to achieve this vision.

Dhawura Ngilan
Remembering Country

3.1. Jurisdictions work towards standardising heritage registers to support community access and scope the development of a national portal

At present South Australia, Queensland and Victoria separately use the same registry system to manage Aboriginal and Torres Strait Islander heritage called the Aboriginal Cultural Heritage Register and Information System, or ACHRIS, and share developments and improvements. There is an opportunity for other jurisdictions to adopt this system. This approach would enable Aboriginal and Torres Strait Islander people to search across jurisdictions and standardise data collection. It would also, in the longer term, facilitate a national portal, which would be extremely useful to Aboriginal and Torres Strait Islander communities.[9]

3.2. Jurisdictions work together to recognise, protect and celebrate the significance of sites and stories that cross borders

Landscapes, sea country, intangible heritage and culturally significant species traverse State or Territory borders and are subject to different legislative frameworks and administrative requirements. Heritage Councils should work collaboratively to progress a priority nomination list to provide recognition and protection to these places.

3.3. Heritage Councils support the establishment of a National Resting Place for unprovenanced Remains of Ancestors

Aboriginal and Torres Strait Islander people seek to secure the return of ancestors held overseas. For those ancestors returned from overseas who have no identified country (unprovenanced), the development of a National Resting Place is essential to safely house these ancestors until they can be repatriated to their communities.[10]

A business case for the establishment of a National Resting Place has been developed and is being considered by the Australian Government. Efforts should be made to support this proposal.

3.4. The Australian Government should amend its policy on Indigenous Repatriation of cultural materials to align with current activity

The Australian Government currently funds the international repatriation of cultural materials through the *Return of Cultural Heritage* program run by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS 2018).[11] This program fills a significant gap. The Australian Government policy on repatriation now needs to be updated to reflect their support for this new program (Department of Communications and the Arts 2011). Jurisdictions should work with AIATSIS and communities to support a coordinated approach to repatriation of culture heritage.

3.5. Jurisdictions work with Australian collecting institutions to return ancestors to Aboriginal and Torres Strait Islander communities in a coordinated way

Aboriginal and Torres Strait Islander people expect ancestors to be returned to their rightful place on Country. To achieve this, heritage agencies must work collaboratively to scope a plan to return ancestors held in Australian collections according to clan language or community groups in a staged process. Where communities wish to care for ancestors on Country, they must be empowered and resourced to do so. Research into collections which include ancestors is a first stage of the scoping process.

In the longer term, adoption of the Standards will also drive change in the repatriation of ancestors. An example of best practice in the management of ancestors can be seen in the *Victorian Aboriginal Heritage Act 2006* (see Part 3 for the Standards).

9. As discussed by Whitlam Institute Research Fellow Professor Hilary du Cros in her research, which calls for a national database of Indigenous cultural heritage sites in Australia (Western Sydney University 2019).

10. In November 2018, the Joint Select Committee on Constitutional Recognition Final Report recommended the Australian Government consider the establishment, in Canberra, of a National Resting Place for the remains of Aboriginal and Torres Strait ancestors which could be a place of commemoration, healing and reflection.

11. More information can be found at AIATSIS <https://aiatsis.gov.au/about/what-we-do/return-cultural-heritage>.

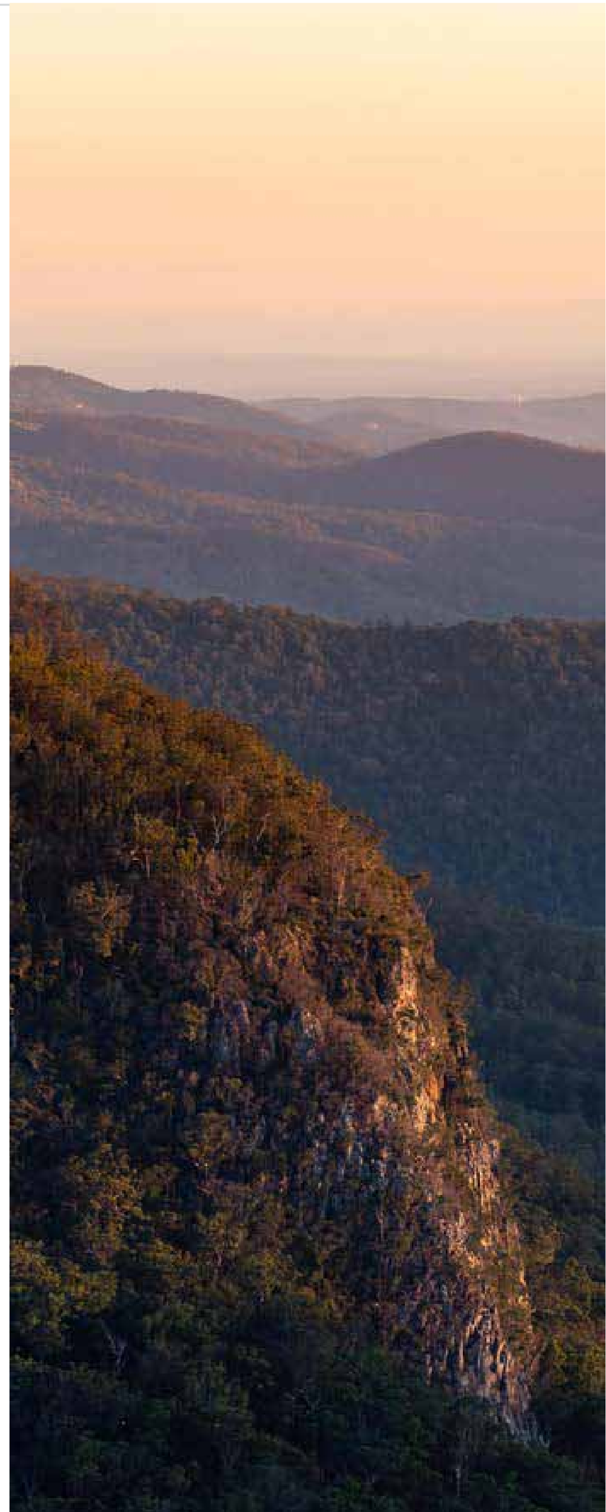
3.6. The rights of Aboriginal and Torres Strait Islander people to access and repatriate secret sacred materials held in Australia, both by institutions and private collectors, must be recognised and prioritised

Heritage agencies must work collaboratively to scope a plan to return secret sacred materials held in Australian collections according to clan, language, or community groups in a staged process. Where communities wish to care for materials on Country, they must be empowered and resourced to do so. Research into institutional collections would be a first stage.

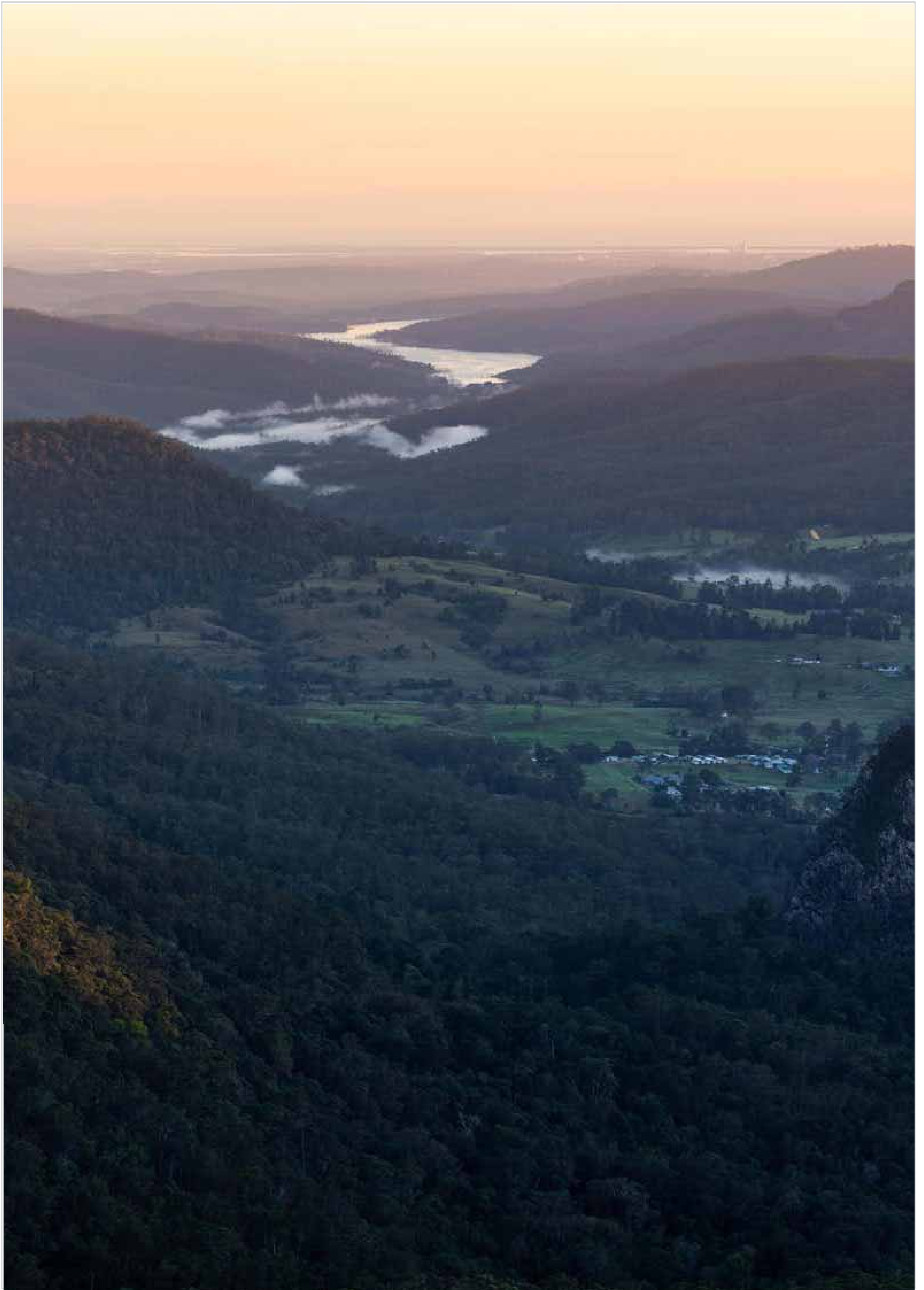
Jurisdictions must work together to ban the sale and export of secret sacred material across all jurisdictions and ensure the repatriation to communities of origin.

3.7. Jurisdictions review the National Heritage Protocol Statement of Roles and Responsibilities to ensure it is fit for purpose

The Protocol is a key heritage governance document. It should be reviewed and updated to ensure our working arrangements are optimised.



Woonoongoora (Lamington National Park and surrounds from Binna Burra) Bundjalung Nation
Marc Llewelyn



KEY FOCUS AREA

vision 4

Aboriginal and Torres Strait Islander heritage is recognised for its global significance.

Aboriginal and Torres Strait Islander people are the Custodians of the oldest continuous culture on earth. The significance of this heritage transcends Australia's national boundaries and tells a story which is relevant to all of humanity.

Aboriginal and Torres Strait Islander heritage tells a story of a deeply spiritual people connected through their culture to their environment. The age and resilience of Aboriginal and Torres Strait Islander culture alone demonstrates that all people everywhere can benefit from an understanding of their culture. Aboriginal and Torres Strait Islander heritage shows the story of human ingenuity and a deep and spiritual relationship with nature, a relationship that through the manipulation of ecological processes has led to the Australia we know today. Our World Heritage places listed for Aboriginal and Torres Strait Islander cultural values include Budj Bim Cultural Landscape, Kakadu, Uluru-Kata Tjuta and the Tasmanian Wilderness. An essential part of this vision is ensuring that a global audience hears and appreciates these stories.

We propose that the following should be key areas of focus to achieve this vision.

Dhawura Ngilan
Remembering Country

4.1 Heritage Chairs support increased focus on identifying and taking forward Aboriginal and Torres Strait Islander heritage places for inscription on the World Heritage List

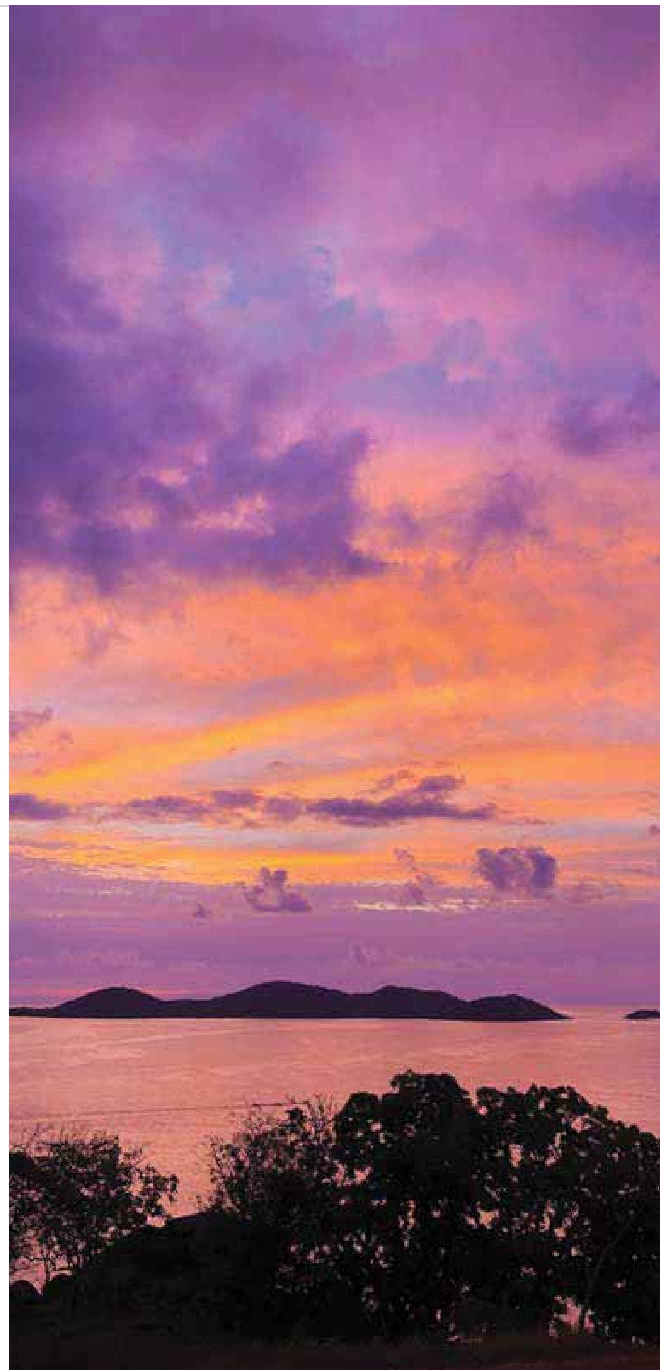
Support for World Heritage listing is one way that Heritage Chairs can assist in achieving this vision. The path to World Heritage listing is long and complex. To achieve the goal requires the support of both State and Territory heritage authorities as well as Commonwealth support. The Heritage Chairs commit to providing this support wherever possible and appropriate.

4.2 Heritage Councils support a significant Aboriginal and Torres Strait Islander engagement in the International Heritage space

There are also other international fora that provide opportunities to achieve this vision. These include the General Assembly of the International Council on Monuments and Sites, the International Union for the Conservation of Nature, and the International Indigenous Peoples' Forum on World Heritage. The Heritage Chairs also commit to support Aboriginal and Torres Strait Islander peoples' voices being heard in these fora.

4.3 Australian heritage should be a global leader in the preservation, protection, celebration and promotion of Aboriginal and Torres Strait Islander heritage and the development of international partnerships to tell the rich global heritage narrative

Aboriginal and Torres Strait Islander peoples' experience of colonisation is part of a global story of expansion, invasion and ongoing impacts on Indigenous peoples and cultures. This is a shared story with shared experiences, cutting across generations and international borders. Heritage Councils have an opportunity to work with Aboriginal and Torres Strait Islander people to identify the threads of this global story and determine an appropriate way to tell it.



Gealug and Muralag (Friday Island and Prince of Wales Island) from Waibene (Thursday Island),

Tish King, proud Masigalgal of Kulkalgal Nation, Community Organiser at Seed Mob and Our Islands Our Home

Statutory Framework

Under current arrangements state and territory governments have the primary responsibility for the protection of Aboriginal and Torres Strait Islander heritage. This legislation provides protection for types of heritage whether it has been formally identified or not. Generally, the legislation will prohibit any interference with Aboriginal and Torres Strait Islander heritage that satisfies the statutory definition unless there is a statutory authorisation in place. Individual places may also be listed, for example in those cases where a place may be affected by development.

The Commonwealth is responsible for protecting Aboriginal and Torres Strait Islander heritage that is a component of a listed value of a World Heritage property or National Heritage List place or that is situated on land and sea that is owned or managed by the Commonwealth. The Commonwealth shares responsibility with the States and Territories for ensuring the protection of Aboriginal and Torres Strait Islander heritage regardless of its location.

In some jurisdictions Aboriginal and Torres Strait Islander heritage is dealt with by more than one piece of legislation. At the Commonwealth level Aboriginal and Torres Strait Islander heritage is dealt with or has potential for protection in several pieces of legislation. This includes the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the *Protection of Movable Cultural Heritage Act 1986* (Cth), the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the *Native Title Act 1993* (Cth), and the *Underwater Cultural Heritage Act 2018* (Cth).

It should be noted that whilst Dhawura Ngilan references legislation which is currently in force for the management of Aboriginal and Torres Strait Islander cultural heritage across jurisdictions, it is imperative that all legislation drafted into the future that may have impact on or is related to Aboriginal and Torres Strait Islander cultural heritage should follow a collaborative process with the Chairs. Furthermore, where possible, amendments to existing legislation that does not include references to Aboriginal and Torres Strait Islander heritage should be assessed. For example, while the *Underwater Cultural Heritage Act 2018* (Cth) could, via Ministerial declaration, protect Aboriginal and Torres Strait Islander heritage that is in Commonwealth waters, there is no specific reference made to Aboriginal and Torres Strait Islander heritage. The Best Practice Standards in Indigenous Cultural Heritage Management and Legislation (Part 3) provide clear guidance on how these outcomes can be achieved.[12]

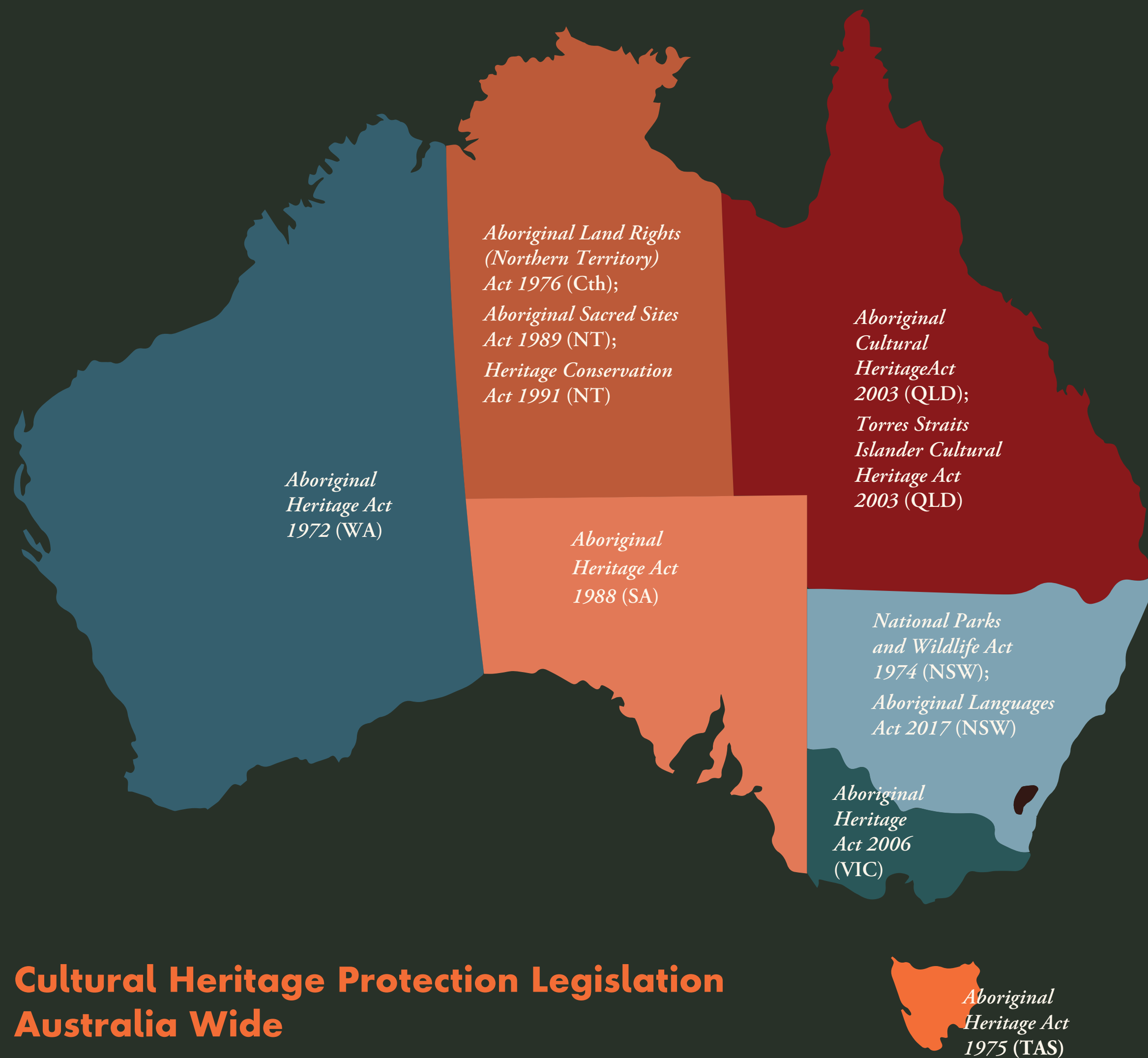
There are also statutory councils and authorities in each state and territory and at the Commonwealth level which provide advice to governments on Aboriginal and Torres Strait Islander heritage-related matters.

Heritage Chairs and Officials of Australia and New Zealand

The Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) is a bi-annual meeting of the Chair and Officials of statutory and administrative agencies responsible for heritage. It is comprised of the Chair of the Australian Heritage Council, Chairs of State and Territory Heritage Councils, the Chairs from each Indigenous Heritage Council from every State and Territory, and the manager or director of each associated government heritage agency. It includes similar representatives from Aotearoa New Zealand.

12. See the *Underwater Cultural Heritage Act 2018* (Cth) ss 17(5)

Legislation relating to Aboriginal and Torres Strait Islander heritage in Australia



Cultural Heritage Protection Legislation Australia Wide

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Protection of Movable Cultural Heritage Act 1986 (Cth)

Underwater Cultural Heritage Act 2018 (Cth)

Native Title Act 1993 (Cth)

Part 3:

Best Practice Standards in Indigenous Cultural Heritage Management and Legislation

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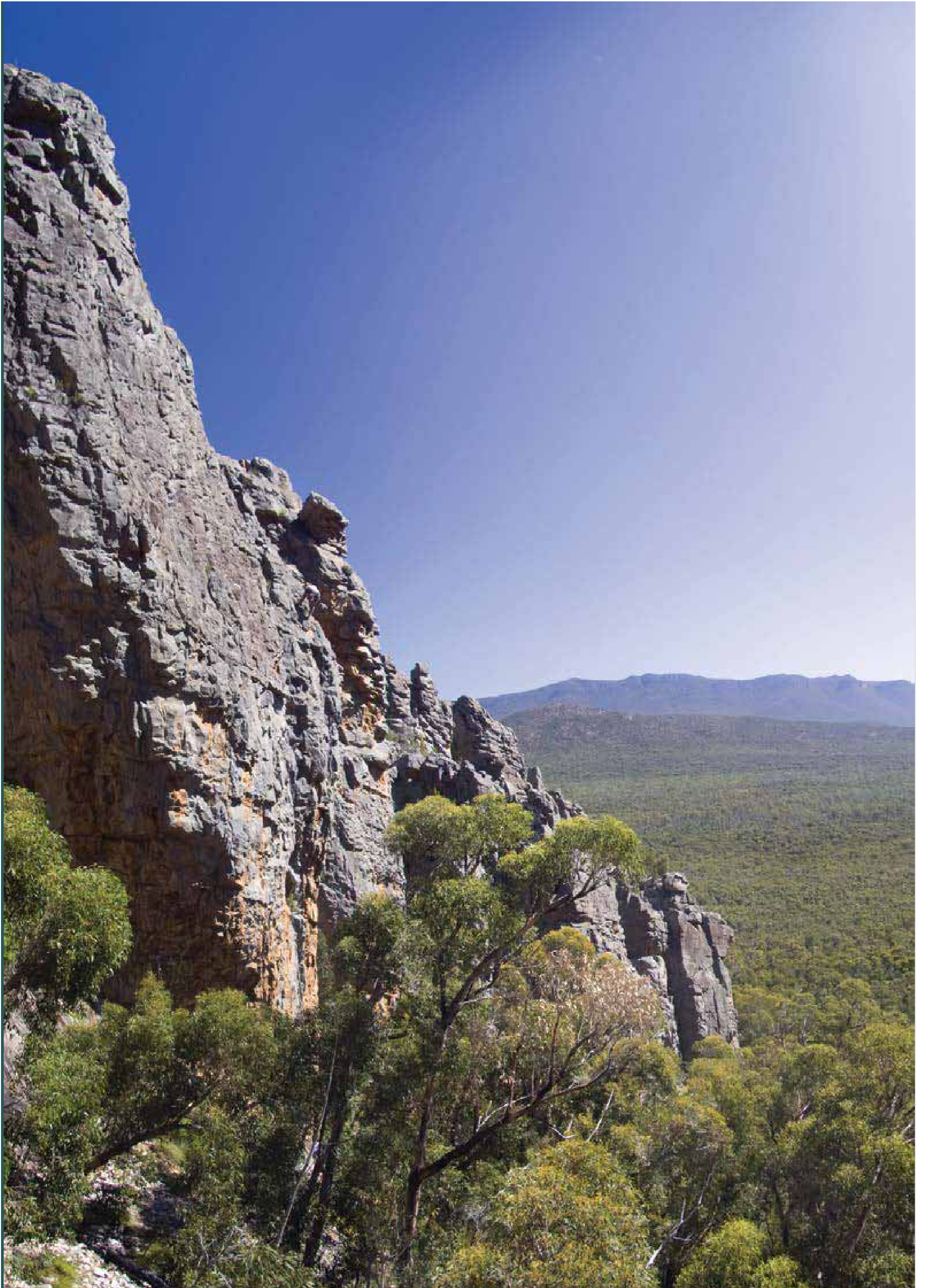
In Australia legislative responsibility for the protection, promotion and management of Indigenous Cultural Heritage is divided between the states and territories and the Commonwealth. This division has long been the foundation of aspirations to ensure consistency across jurisdictions while also ensuring that the level of protection of Indigenous Cultural Heritage (ICH) and the level of control over our cultural heritage enjoyed by Australia's First Peoples, is of the highest standard.

Gariwerd (Grampians National Park)
Djab Wurrung and Jardwardjali Nation
Josef



1. Background

In May 2018 the Heritage Chairs and Officials of Australia and New Zealand adopted the 'Darwin Statement'. Under the Darwin Statement the members of the HCOANZ agreed to implement best practice cultural heritage principles including the inclusion and engagement of Aboriginal and Torres Strait Islander Peoples. As part of the HCOANZ commitment to implementing the principles of the Darwin Statement, over 2019 and 2020 both in Australia and Aotearoa/New Zealand, HCOANZ engaged particularly with Indigenous Heritage Chairs and Officials and with many Indigenous organisations and leaders.

As a result of this engagement, the HCOANZ Indigenous Chairs group developed these Best Practice Standards for Indigenous Cultural Heritage Legislation (Standards). These Standards have been drafted by the Indigenous Chairs and officials who form part of the broader HCOANZ and brought forward by the Indigenous Chairs to HCOANZ. The objective of the Standards is to achieve the aspirations identified above; that is to facilitate ICH Legislation and policy across the country that is consistently of the highest standards.

2. Basic principles

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly on 13 September 2007. The Commonwealth Government announced its support for the declaration in 2009. The UNDRIP does not impose new international legal obligations on states. Rather, it restates existing international legal obligations but framed in the specific context of Indigenous Peoples. The UNDRIP is widely understood by the world's Indigenous Peoples as articulating the minimum standards for the survival, dignity, security and well-being of Indigenous Peoples worldwide. Acceptance of the UNDRIP obligations is increasingly a requirement of the processes of many multi-national agencies and organisations. The International Finance Corporation, the Equator Principles, the International Council of Mines and Metals and the UN Guiding Principles on Business and Human Rights are merely some examples of this general acceptance.

A number of the provisions of UNDRIP directly address issues associated with the enjoyment, management and protection of ICH. Articles 11, 12, 13, 18, 19 and 31 are examples of this. A number of other provisions of UNDRIP indirectly impact upon ICH. Provisions of UNDRIP that recognise the obligation to ensure the Free, Prior and Informed Consent of affected Indigenous Peoples before the approval of any project that affects Indigenous Peoples' lands or the resources therein (particularly Article 32) are an example of this as is Article 40 dealing with dispute resolution. The relevant provisions of UNDRIP are attached as an annexure to this statement.

As a foundational principle, Australia's Indigenous Peoples are entitled to expect that Indigenous Cultural Heritage legislation will uphold the international legal norms contained in the UNDRIP.

The rights set out in UNDRIP are also recognised in a range of domestic legislation such as the *Human Rights Act 2019* (Qld) and the Charter of Human Rights and Responsibilities 2006 (Vic). This principle is already applied in practice in a number of jurisdictions in Australia such as NT and VIC, where administrative, regulatory and decision-making structures related to Aboriginal heritage are under the practical control of Aboriginal people.

While the UNDRIP provides the foundational principles that all ICH legislation should uphold, the Declaration is not a comprehensive code or model legislation that addresses all matters that need to be included in ICH legislation. Therefore, the following Standards have been developed by the HCOANZ to identify some of these additional matters under the following headings: Definitions; Basic Structures; Indigenous Self-Determination; Process; Resourcing; Indigenous Ancestral Remains; Secret and Sacred ICH; Frontier Conflict Sites; and, National Intangible ICH Legislation.

3. Best Practice Standard: Basic structures

There are two basic models utilised in ICH legislation. The first prohibits harm to ICH only when there is a particular declaration in force in the place where the ICH is located. The second prohibits any interference to ICH that satisfies the statutory definition unless there is a statutory authorisation in place. The second model is by far the most effective and most ICH legislation operates on this basis, but this is not universally the case. There are examples, at both a state and Commonwealth level, of legislation that operates on the basis that ICH is only protected subsequent to some form of Ministerial declaration. ICH legislation structured only in this fashion cannot be seen as adequate. However, for the 'prohibition of harm unless authorised' model to be effective there must be a comprehensive definition of ICH. This matter is considered in the following section of these Standards. Many of the following sections consider the appropriate structures and processes around the authorisation to interfere with ICH so defined.

4. Best Practice Standard: Definitions

ICH is at the heart of all Australian Heritage and should be celebrated by all Australians as the foundation of Australia's unique cultural heritage. However more than anything else ICH is the living phenomenon connecting Traditional Owners' culture today with the lives of our ancestors. In legislation, this connection is described in the definitions of key terms such as 'Aboriginal or Torres Strait Islander cultural heritage' or 'Aboriginal and Torres Strait Islander place'. These definitions should recognise that an essential role of ICH is to recognise and support the living connection between Indigenous Peoples today, our ancestors and our lands. It is crucial that definitions of ICH within legislation should recognise the role of 'tradition' as it is understood today in the definition of what is ICH.

In similar fashion, ICH legislation must comprehend that, while physical artefacts provide an important ongoing physical representation of Indigenous Peoples' connection to their country over time, definitions of the manifestations of ICH must also comprehend the importance of the intangible aspects of physical places. It is in this way that a physical landscape can be properly understood as a living place inhabited by our ancestors and creators. Likewise, intangible ICH not necessarily immediately connected to physical places must also be recognised in legislation.

There are several examples in statutory definitions that are a useful illustration of these concepts. For example, the NSW draft Aboriginal Cultural Heritage Bill 2018 has the following definition:

*Section 4(1)...**Aboriginal cultural heritage** is the living, traditional and historical practices, representations, expressions, beliefs, knowledge and skills (together with the associated environment, landscapes, places, objects, ancestral remains and materials) that Aboriginal people recognise as part of their cultural heritage and identity.*

The Aboriginal Heritage Act 2006 (Vic) (AHA) has the following definitions:

***(AHA s 4) Aboriginal cultural heritage** means Aboriginal places, Aboriginal objects and Aboriginal ancestral remains*

(AHA s 5) What is an Aboriginal place?

(1) For the purposes of this Act, an Aboriginal place is an area in Victoria or the coastal waters of Victoria that is of cultural heritage significance to Aboriginal people generally or of a particular community or group of Aboriginal people in Victoria.

(2) For the purposes of subsection (1), area includes any one or more of the following—

a. an area of land;

b. an expanse of water;

c. a natural feature, formation or landscape;

d. an archaeological site, feature or deposit;

e. the area immediately surrounding anything referred to in paragraphs (c) and (d), to the extent that it cannot be separated from the thing without diminishing or destroying the cultural heritage significance attached to the thing by Aboriginal people;

f. land set aside for the purpose of enabling Aboriginal ancestral remains to be re interred or otherwise deposited on a permanent basis;

g. a building or structure.

Aboriginal tradition means—

a. the body of traditions, knowledge, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people; and

b. any such traditions, knowledge, observances, customs or beliefs relating to particular persons, areas, objects or relationships

The Northern Territory Aboriginal Sacred Sites Act 1989 utilises the following definitions of 'Aboriginal tradition' and 'sacred site':

Aboriginal tradition means *the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.*

sacred site *means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.*

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSHIPA) adopts a similar definition of 'Aboriginal tradition':

...the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

The term 'area' is defined to include a 'site' and a 'significant Aboriginal area' is relevantly defined to mean 'an area of particular significance to Aboriginals in accordance with Aboriginal tradition'. The term 'significant Aboriginal object' is defined in similar terms.

ATSHIPA subsections 3(2) and 3(3) provide the definitions of 'injury' or 'desecration' which also acknowledge that these acts should be determined by how Aboriginal or Torres Strait Islander people today perceive them. They are in the following terms:

(2) For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:

a. in the case of an area:

i. it is used or treated in a manner inconsistent with Aboriginal tradition;

ii. by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or

iii. passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or

b. in the case of an object—it is used or treated in a manner inconsistent with Aboriginal tradition;

and references in this Act to injury or desecration shall be construed accordingly.

At times case law may have given an over emphasis to the historical components of tradition. However, the essential aspect of the definitions provided, all of which were developed in consultation with Traditional Owners, is that the central lynchpin is how Traditional Owners today perceive their cultural heritage which is the crucial issue.

A similar issue arises in the context of intangible ICH. The only example of a legislative definition of

intangible ICH in Australia is in Part 5A of the Victorian AHA which (relevantly) provides:

*(1) ... **Aboriginal intangible heritage** means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.*

(2) Aboriginal intangible heritage also includes any intellectual creation or innovation based on or derived from anything referred to in subsection (1).

This definition then also adopts the key definition of 'tradition' with its reliance on a contemporary Traditional Owner understanding of its content.

3. Best Practice Standard: Incorporation of principles of self-determination

The key to UNDRIP is the principle of self-determination. In the context of ICH, this principle requires that the affected Indigenous Community itself should be the ultimate arbiter of the management of the ICH aspects any proposal that will affect that heritage.

Application of the UNDRIP is, in a practical sense, dependent upon the ability of the affected Indigenous Peoples to act collectively and independently. Thus, in the crucial UNDRIP Article 32, reference is made to Indigenous Peoples acting through 'their own representative organisations'. The identification of a legitimate 'representative organisation' capable of exercising an Indigenous community's rights and responsibilities with respect to their ICH is a fundamental component in any comprehensive ICH legislation. It is for the Indigenous community to decide who represents them, consistent with FPIC.

In the context of ICH in Australia, the rigorous processes associated with the appointment of Prescribed Bodies Corporate (PBCs) under the *Native Title Act 1993* (Cth) can ensure that such organisations, where they exist, satisfy the definition of 'representative organisations' under UNDRIP. In Victoria, the *Aboriginal Heritage Act 2006* provides for the legal recognition of Traditional Owner corporations with responsibilities for managing and protecting the cultural heritage of the Traditional Owners they represent. Further, in the Northern Territory, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) provides the Land Councils a statutory function to assist Traditional Owners to protect their sacred sites, both on and off Aboriginal land. In *New South Wales the Aboriginal Land Rights Act 1983* provides Aboriginal owners with direct membership of Aboriginal Land Councils and provides those Councils with the function to protect Aboriginal cultural heritage. This Act is currently being reformed to enhance its operation particularly in relation to the management of Aboriginal cultural heritage.

Thus, where a PBC, Aboriginal Land Council or an organisation that is representative of Traditional Owners exists, Indigenous cultural heritage legislation should vest in that organisation control of the management of the Indigenous cultural heritage aspects of any proposal that will impact upon the Indigenous cultural heritage of those Traditional Owners.

Where such an organisation does not yet exist, it may be that there are Traditional Owner organisations that can be legitimately characterised as 'representative organisations'. The Commonwealth Indigenous cultural heritage legislative regime should consider including mechanisms for the identification and appointment of such organisations to undertake this role. In areas where no PBC, Aboriginal Land Council or other organisation representative of Traditional Owners has been established, a Native Title Representative Body may have authority to perform this role or, alternatively, to serve as the accountable Indigenous structure as discussed below.

Greater difficulty arises where a 'representative organisation' does not yet exist. ICH legislation should include mechanisms for the identification and

appointment of an organisation that can genuinely be accepted as the 'representative organisation' of the affected Indigenous community to undertake this role.

4. Best Practice Standard: Process

The role of ICH in the process of consideration of development proposals in a jurisdiction is important. So, to is the process of consideration of the management of ICH in the context of a specific proposal. A central component of the principle of Free, Prior and Informed Consent under UNDRIP is that the affected Indigenous community has adequate information and adequate time to consider that information in making any decision that may affect their ICH. This fact impacts upon two aspects of a jurisdiction's development proposal consideration process. First, decisions regarding ICH management cannot be left to be the last consecutive approval required in the assessment of a development proposal. Rather, ICH consideration must be integrated as early as possible into development proposal assessment time frames. This ensures both adequate time to consider a proposal and that ICH considerations are not perceived as the 'last impediment' to development proposal approval. This principle is already incorporated into many existing government policies. The Commonwealth Government's Engage Early - Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and *Biodiversity Conservation Act 1999* (Cth) and Ask First – A guide to respecting Indigenous heritage places and values are examples of such policies.

This temporal integration of process should also strive to ensure that consideration of ICH is included as a first component in other development proposal approval regimes such as town planning, environmental assessment and National Heritage considerations. An example is section 52 of Victoria's *Aboriginal Heritage Act 2006*, which states:

The decision maker must not grant a statutory authorisation for the activity unless a cultural heritage management plan is approved under this Part in respect of the activity.

This structural barrier ensures that land development activity must address Aboriginal cultural heritage impacts before development can begin. It is critical that Aboriginal cultural heritage assessment occurs early, and that all the relevant information about the heritage to be impacted is known, to facilitate prior and informed consent.

The second component is that, consistent with the principles of UNDRIP, the ultimate decision regarding whether interference with ICH is acceptable or not, must rest with the affected Indigenous community. However, a jurisdiction's ICH regime can maximise the likelihood of consent to a development proposal being granted if the management regime within ICH legislation identifies interference with ICH as the last resort in regime that requires identification, recognition, conservation and protection as preferable approaches to the management of ICH.

A third component of the process around an effective ICH regime is of such importance as to warrant separate attention. This is the matter of resourcing. There are two aspects of this component: participation and enforcement.

5. Best Practice Standard: Resourcing; participation

First, there must be acceptance that the Indigenous representative organisation engaging with proponents and assessing their proposals are performing a statutory function under the relevant jurisdiction's project assessment and approval regime and must be adequately resourced to perform this function. An Indigenous representative organisation undertaking these functions should not be forced to subsidise these statutory obligations from their own resources. The resources provided should extend to undertaking identification, protection, promotion,

maintenance and intergenerational transmission and similar functions. Desirably the undertaking of these statutory obligations should facilitate opportunities for the Indigenous representative organisation involved to develop its independent economic activities.

6. Best Practice Standard: Resourcing compliance and enforcement

The second but existential aspect of the processes attached to ICH legislation is the regime around compliance and enforcement. In turn there are three issues in relation to this aspect. First, wherever possible, affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions. Second though, is the realisation that the structure of ICH legislation is dependent upon proponents understanding that interference with ICH without an authorisation or a failure to comply with the terms of the authorisation will result in a significant sanction. This is true whatever organisation or agency is undertaking compliance and enforcement functions. This understanding by proponents will only occur if there are sufficient resources allocated to enforcement regimes for these to constitute a real deterrent to non-compliance. Third, there is a need to ensure there is national consistency in both the structure and penalty regime of ICH offence provisions. The severity of penalties needs to ensure the effective operation of the legislative regime.

7. Best Practice Standard: Indigenous Ancestral Remains

The presence of Indigenous Ancestral Remains (IAR) in country is the clearest and most poignant illustration of an Indigenous People's ongoing association with their traditional lands. As such IAR are an aspect of ICH of such importance as to warrant particular attention in these best practice standards. The issue of IAR are specifically addressed in UNDRIP Article 12.

The fundamental principle applicable to this area is that, wherever possible, IAR identified in country should be left in country and these resting places protected as 'Aboriginal or Torres Strait Islander places' (howsoever described) in the legislation. Processes and protocols with agencies involved with the management of IAR must be built around this principle and adequate resources must be allocated to accommodate the effective implementation of these processes and protocols. Implementation of these measures may require review and amendment of other legislation (for example coronial) and processes.

The second fundamental principle in regard to IAR is that their management is the right and duty of the Indigenous community of origin of the ancestor in question. Again, processes, protocols and resources must be incorporated within an IAR regime to accommodate this principle. So too must the principle of self-determination; such that where there is no possible alternative to the relocation of IAR, this relocation takes places in accordance with the wishes of the affected community. Attention also needs to be paid to the care of IAR where no Indigenous community of origin can be immediately identified.

A further issue that arises with regard to IAR is the definitional one. Existing legislation in various jurisdictions provides various examples of definitions of IAR. The Victorian AHA provides one of the most comprehensive and yet workable definition. The relevant provision (in s 4) is as follows:

Aboriginal ancestral remains means the whole or part of the bodily remains of an Aboriginal person but does not include—

(a) a body, or the remains of a body, buried in a public cemetery that is still used for the interment of human remains; or

(b) an object made from human hair or from any other bodily material that is not readily

recognisable as being bodily material; or

(c) any human tissue—

i. dealt with or to be dealt with in accordance with the Human Tissue Act 1982 or any other law of a State, a Territory or the Commonwealth relating to medical treatment or the use of human tissue; or

ii. otherwise lawfully removed from an Aboriginal person

The Victorian definition was adapted from the very similar definition in ATSHIPA. (Although note in ATSHIPA Aboriginal ancestral remains are managed within the regime applicable to Aboriginal objects). The Victorian definition provides an important precedent in the development of appropriate definitions. However, in each jurisdiction consultation with Traditional Owners must always take place to ensure that local views around matters such as appropriate care of material containing human hair and other human components are incorporated.

Finally, the IAR regime included within ICH legislation must provide an effective regime for the expeditious return to the affected communities of IAR held in institutional and other 'collections'. Wherever possible such provisions should have extra-jurisdictional application.

8. Best Practice Standard: Secret and sacred objects

Some movable ICH (objects) will be considered secret or sacred by the Indigenous community of origin. It is inconceivable that ICH that is secret or sacred could ever have legitimately entered the realm of commercial transactions. It is for this reason that in addition to the relevant provisions of UNDRIP a body of internal law has developed around this topic. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property as too is the 1995 UNIDROIT Convention on the Return of Stolen or Illegally Exported Cultural Objects.

As such, ICH legislative regimes must acknowledge that property in secret and sacred objects can only legitimately vest in the community of origin of the object and deploy mechanisms to achieve the repatriation of these objects. This vesting must occur irrespective of the identity of the organisation or individual currently in possession of these objects. In addition, resources to facilitate the repatriation of objects must be provided to support the operation of these provisions. The ICH regime must acknowledge the role of Indigenous tradition as understood today in the definition of secret or sacred for these purposes. The Victorian AHA (s 4) provides a further example that incorporates the earlier definition of Aboriginal tradition:

sacred means sacred according to Aboriginal tradition;

secret means secret according to Aboriginal tradition

The (practically) similar definition of significant Aboriginal object in ATSHIPA has been noted above.

Further, ICH legislative regimes regarding regulation of the trade in movable ICH must incorporate mechanisms to prohibit trade in secret or sacred objects and to allow a potentially affected community to determine the status of an object proposed to be traded. To be effective these mechanisms must be nationally uniform or supported by Commonwealth legislation or both.

9. National legislation and Intangible Indigenous Cultural Heritage

Intangible ICH can exist independently of the association of this ICH with particular lands. The management, protection and promotion of this form of cultural heritage can provide particular challenges in a legislative context. This noted, the importance of this manifestation of ICH is indicated by the number of international instruments, in addition to

UNDRIP, that address this topic. The 2003 UNESCO Convention for the Safeguarding of the Intangible Heritage, the Convention of Biological Diversity, and (to some extent) the 1996 WIPO Performances and Phonograms Treaty are examples of this international attention. Regrettably Australia is not yet a party to the first of these instruments. Becoming so would demonstrate a concrete commitment to the protection and preservation of intangible heritage, Indigenous and non-Indigenous.

The Indigenous Chairs recommend that HCOANZ state its belief that it is desirable that this form of ICH be recognised and protected by Indigenous communities for their benefit and that of the broader community, and that HCOANZ congratulate those jurisdictions that have established regimes for the recognition and protection of intangible ICH. However, the Indigenous Chairs also acknowledge that, given the constitutional arrangements in Australia, it is desirable that measures in this respect are supported by Commonwealth legislation, and recommend that the HCOANZ states its support for the development of national legislation in regard to the recognition and protection of intangible ICH.

Annexure: Extracted articles from the UN Declaration on the Rights of Indigenous Peoples

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs (emphasis added).

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the

State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including 14 those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect 16 their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (emphasis added).
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Judy Watson
Waanyi People, Australia b.1959
sacred ground beating heart 1989

"Through paint and pigment, Judy Watson offers evidence of intimate encounters with the heat, air, moisture and pulse of the earth – the geographical emblems of her heartland. These emblems are linked with Australian Aboriginal totemic beings or culture heroes, who metamorphosed into landscape features, such as hills and rocks, and who continue to manifest their presence in meteorological or astral phenomena.

The unstretched canvas has been stained by layers of wet and dry pigment, creating a velvety, sensuous surface, which is then marked by distinct touches of colour. The imagery suggests an aerial perspective of parched land, a depiction of distant homelands or a material translation of an emotional state" (QAGOMA 2019).

Appendix A: The Barunga Statement

The Barunga Statement provides a framework for considering this vision in its assertion of rights:

- to the protection of and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art
- to the return of the remains of our ancestors for burial in accordance with our traditions
- to respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects.

Appendix B: The Darwin Statement

The Heritage Chairs and Officials of Australia and New Zealand came together for an historic meeting of cultural heritage leaders in Darwin on 22 May 2018.

The Heritage Chairs were joined by representatives of Aboriginal and Torres Strait Islander heritage from the Commonwealth, states and territories and have taken the opportunity to work together in advancing a shared approach to Australia's cultural heritage.

This was welcomed by Heritage New Zealand Pouhere Taonga.

The group agreed to implement best practice cultural heritage principles including:

- sharing the comprehensive Australian heritage story
- inclusion and engagement with Aboriginal and Torres Strait Islander people
- co-operation and collaboration.

The Chairs acknowledged the critical importance of recording and sharing the stories of Aboriginal and Torres Strait Islander cultural heritage.

Ngurrungurrudjba (Yellow Water)
Larrakia Nation
Relative Creative

Appendix C: Truth Telling

Australia and New Zealand's contact history, like that of many colonial countries, is one of intense conflict, displacement and trauma for Indigenous Peoples. Truth telling about the history of colonisation and its impacts today should be shared as part of the comprehensive Australian and New Zealand heritage story. Aboriginal, Torres Strait Islander and Māori Peoples have oral histories, songs, art and dance that depict often untold and unrecognised perspectives of colonial history. In line with the principles of United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), we support Indigenous peoples to share the stories they want to tell, in the ways they want to tell them.

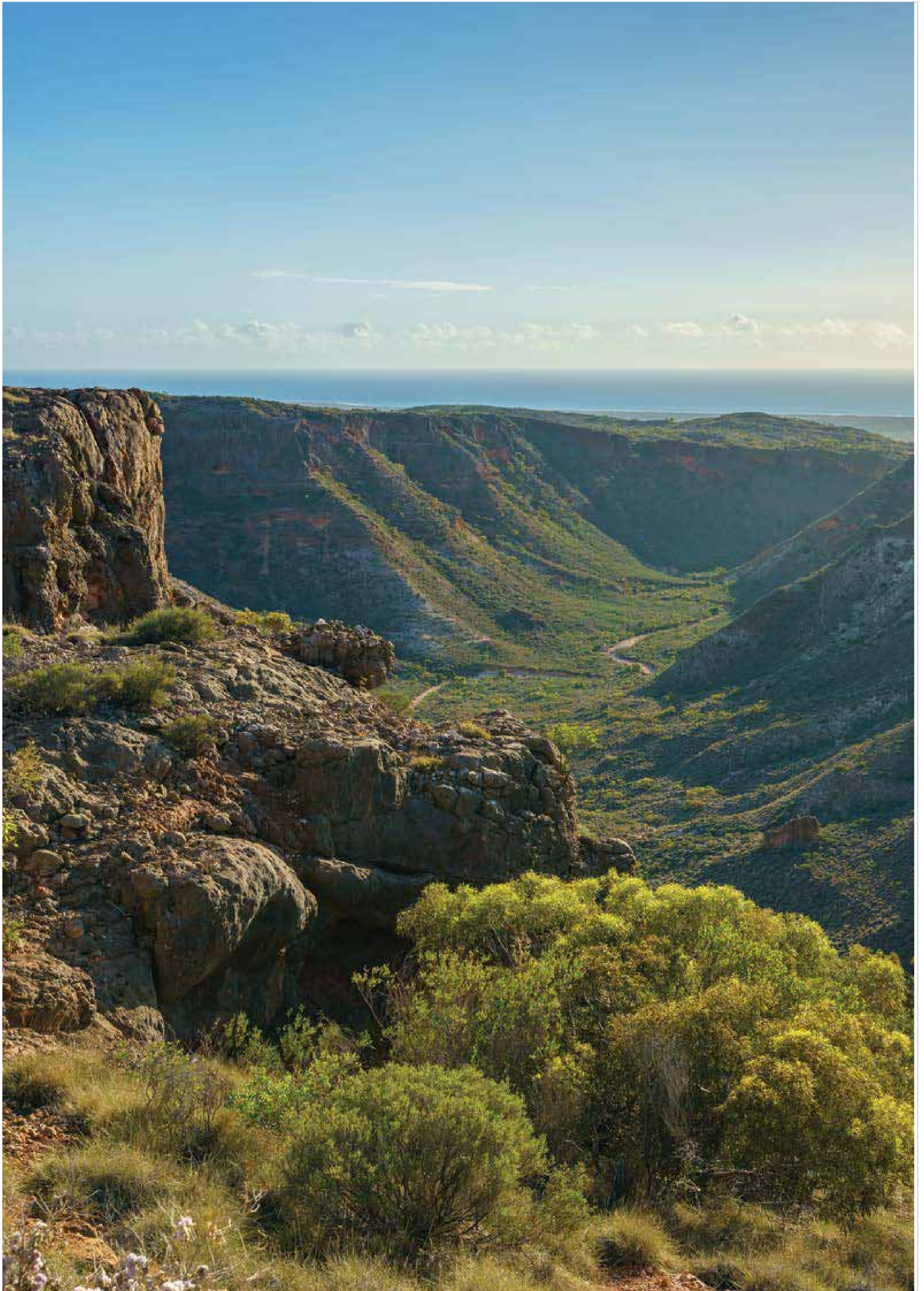
Australian and New Zealand governments are moving to prioritise recognition of the trauma and discrimination faced by Indigenous Peoples today and in the past. There is still much to learn, however, about culturally sensitive recognition and acceptance of the stories of First Peoples. In addition, jurisdictions differ in their approaches to recognition, protection and interpretation of contact history. Through truth telling, we hope to ensure Australians can be proud of their Indigenous heritage and see it as part of Australian culture. It is not about dwelling on the past, but about reflecting and moving forward into a more positive future.

Telling the truth means recognising the loss of life and land that has affected all of Australia's Indigenous Peoples. Recent mapping of massacre sites, for example, does not tell the whole story of this loss. The maps only mark places where six or more people were killed, when in fact there were countless other aspects of displacement, loss, active resistance and death outside of massacres that were equally destructive.

Telling the truth means framing these histories in ways that recognise Indigenous perspectives. Indigenous Peoples remain traumatised by the difficulty of finding evidence for historically documented massacres and other destructive acts. There are many more events, however, that exist in the memories of Indigenous Peoples that are today without documentation. It is important to consider Indigenous ways to memorialise all the truths of Australia's past through culturally sensitive approaches and creative interpretation. Memorialisation itself should be considered sensitively. There is great diversity amongst Aboriginal and Torres Strait Islander people, as demonstrated by the more than 250 different language groups spread across Australia. Each group's experience of colonial contact is different, and each group discusses and represents it in variety of ways.

Telling the truth about Indigenous history is the foundation for a full understanding on the basis of which all Australians can come together in acknowledgement of a shared past and a shared future.

(Charles Knife Canyon)
Thalanyji Nation
Christian B



Appendix D: Endorsements & Consultation by Organisation

Endorsed by:

- National Native Title Council and First Nations Heritage Protection Alliance, which combined represent every major Aboriginal Land Council and Native Title body in Australia
- Indigenous Advisory Committee through the EPBC Act
- Threatened Species Scientific Committee through the EPBC Act.

Consulted with:

- Kimberley Aboriginal Law and Culture Centre
- Parks Australia
- Great Barrier Reef Marine Park Authority
- Department of Infrastructure, Transport, Regional Development and Communications; Office for the Arts.

Welcomed and supported by:

- Australian Heritage Council
- Heritage Council of NSW
- Aboriginal Cultural Heritage Advisory Committee (NSW)
- ACT Heritage Council
- Victorian Heritage Council
- Victorian Aboriginal Heritage Council
- Queensland Heritage Council
- Department of Aboriginal and Torres Strait Islander Partnerships (Queensland) (responsible for administering Indigenous cultural heritage Acts)
- Tasmanian Heritage Council
- Aboriginal Heritage Council (Tasmania)
- SA Heritage Council
- State Aboriginal Heritage Committee (SA)
- National Museum of Australia.

Mowunjum dancers from Mowunjum community near Derby, WA at Barunga Festival 2019, Jawoyn Land
Relative Creative

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