

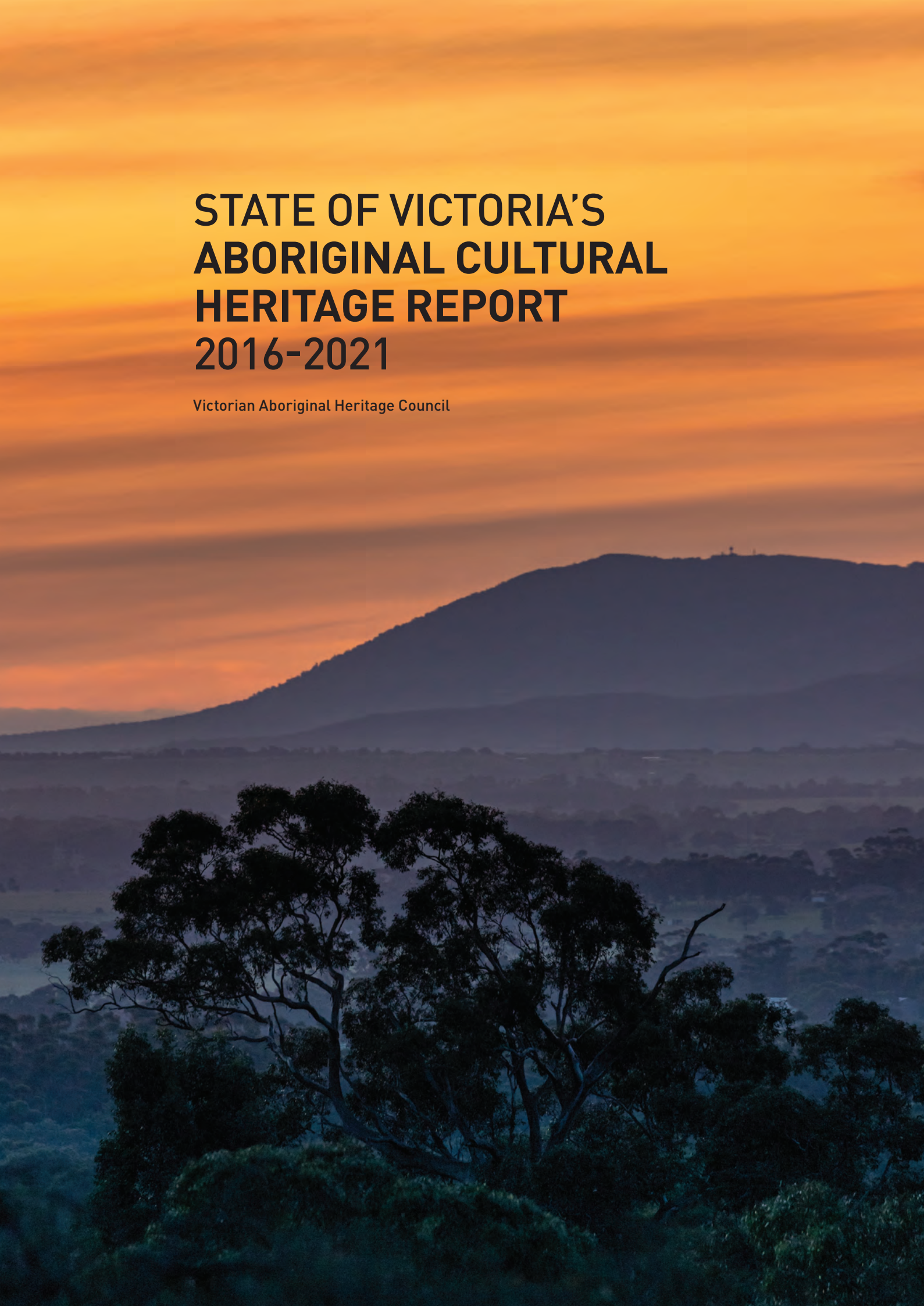
STATE OF VICTORIA'S ABORIGINAL CULTURAL HERITAGE REPORT 2016-2021



VICTORIAN ABORIGINAL
HERITAGE COUNCIL

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Victorian Aboriginal Heritage Council



ACKNOWLEDGMENTS

Acknowledgment of Country

Terri Janke and Company acknowledge the Aboriginal and Torres Strait Islander peoples of the lands on which we live and work, and all Aboriginal and Torres Strait Islander peoples in Australia. We extend our respect to Aboriginal and Torres Strait Islander Elders – past, present and emerging.

Written and researched by:

Anika Valenti, Dr Terri Janke, Laura Curtis, Samantha McNeil with assistance from Adam Broughton and Annabelle Burgess.



TERRI JANKE AND COMPANY
LAWYERS & CONSULTANTS

Terri Janke and Company Pty Ltd
Lawyers and Consultants
PO Box 780, Rosebery NSW 1445 Australia
Email: tjc@terrijanke.com.au
Website: www.terrijanke.com.au

Commissioned by the Victorian Aboriginal Heritage Council

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WARNING

Terri Janke and Company would like to advise readers that this report may contain images or names of people who have since passed away.

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The Victorian Aboriginal Heritage Council acknowledge the Traditional Owners of Country throughout Victoria and pays respect to them, their Culture and their Elders past, present and future.

VICTORIAN
ABORIGINAL
HERITAGE
COUNCIL



Level 3, 3 Treasury Place, East Melbourne, Victoria, 3002
www.aboriginalheritagecouncil.vic.gov.au

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The background of the page is a photograph of a sunset. The sun is a bright, glowing orb on the right side of the horizon, casting a warm, orange light across the sky. The sky is filled with soft, wispy clouds. In the foreground, there is a body of water that reflects the orange light of the sunset. Several dark, silhouetted trees are scattered along the horizon line. In the water, there are numerous dark, rounded shapes that appear to be rocks or logs. The overall color palette is dominated by warm oranges, yellows, and dark silhouettes.

Aboriginal Culture includes connections to land, waters, plants and animals, it also includes all the deep and layered knowledge that has been passed through generations for tens of thousands of years.







FOREWORD

VICTORIAN ABORIGINAL HERITAGE COUNCIL

Mick Harding
Chairperson

*“liwik nugal-nganjin marram-nganjin
dadbaji-k*

*dudandun nugal-nganjin marram-nganjin
dadbaji-k*

*biik nugal-nganjin marram-nganjin
dadbaji-k yumaa-djerri-ngat.”³*

From this place of respect, we have a responsibility to bring others in and to share our Culture, without relinquishing control and connection. We do this by talking about our responsibilities as Traditional Owners – to Country, Culture and Community. In listening to and respectfully supporting Traditional Owners, we can all benefit from the oldest living Cultures on earth.

This report establishes a benchmark for where we are now and where we want to be. It enables everyone to critically assess how they engage with Aboriginal Cultural Heritage in Victoria, how they can be better informed and how we can all better support Traditional Owners to control and manage their Cultural Heritage. We do this together,

*“ngalu bappak mana dardee loong wurk work
bramung-ma.”⁴*

The Victorian Aboriginal Heritage Council was created under the *Aboriginal Heritage Act 2006*, ensuring that Traditional Owners were responsible for key statutory functions relating to the preservation and protection of Victoria’s rich Aboriginal Cultural Heritage.

It is Victoria’s only independent statutory body comprised entirely of Victorian Traditional Owners. Subsequently, the critical decisions it makes regarding Aboriginal Cultural Heritage inherently embeds self-determination in its policy and practice. Importantly, Council has custodianship of all Aboriginal Ancestral Remains and Secret or Sacred Objects that are not in the care of their Traditional Owners and registered Aboriginal parties (RAPs) in Victoria.

It was important to Council that an independent assessment of the state of Aboriginal Cultural Heritage in Victoria was undertaken, ensuring transparency and best practice research, consultation and analysis. Dr Terri Janke is a Wuthathi/Meriam woman and an international authority on Indigenous Cultural and Intellectual Property (ICIP). It was essential that in undertaking this statutory function, Council decolonised the process, ensuring it was undertaken with an Aboriginal perspective and embedded with Aboriginal approaches and understandings.

As members of our communities, as descendants of our Ancestors and as members of a statutory authority, we felt a profound responsibility to speak frankly in this report.

We acknowledge that government is supporting Traditional Owners, the *Aboriginal Heritage Act 2006* is protecting Cultural Heritage, and that some non-Aboriginal People are willing to acknowledge Victoria's painful history.

But it's not enough.

We need to enshrine the government's commitment to self-determination in legislation; to embed it in the transfer of power for Aboriginal Culture, Heritage and wellbeing to Aboriginal People.

We need the casual and overt racism to stop.

We need the dismissal of Victoria's shameful history to stop and be willing to have uncomfortable conversations.

We need to end the theft of our cultural knowledge and creative expression.

We need to acknowledge the multiplicity of Aboriginal Cultures, rather than compressing them into one homogenous unit.

We need the Victorian community who live on our beautiful Country to respect Traditional Owners as the only authority on their Aboriginal Cultural Heritage.

As identified in this report, self-determination is an existing right. However, government should,

"use the legal and policy levers at their disposal to facilitate Aboriginal people in exercising these rights. In order for the Victorian government to play an effective supporting role, the heritage management process must be decolonised."

We embody the principle that we must ourselves determine our lives, our rights, our responsibilities, our Cultures and our futures. We have a collective responsibility and inherited right to our Cultures and Countries that's as unique as it is fundamental. We must be enabled to achieve self-determination through our embodiment of the oldest living Cultures on earth.

*"nindi dinatji nindi ngujarn nindi gundj
nindi djinan yerribi dununak yalagan dinatji
garek ngalak, njarala ngalak bala-bala nindi
goorabung."⁵*

In 2007, the United Nations General Assembly adopted the significant Declaration on the Rights of Indigenous Peoples. However, there is still much to be done in realising this commitment and Council calls for all Victorians to join us in affirming that:

"Indigenous Peoples are equal to all other peoples, while recognising the right of all peoples to be different, to consider themselves different, and to be respected as such."

Until the Declaration is recognised as the benchmark for all engagement with, legislation concerning and policy controlling Aboriginal Peoples; we're just dressing in new clothes the mission management of the past.

This report joins a suite of strategic documents that should govern all our engagement with Aboriginal Peoples. Some are old, like the Declaration, and some are new, like Council's own contribution.

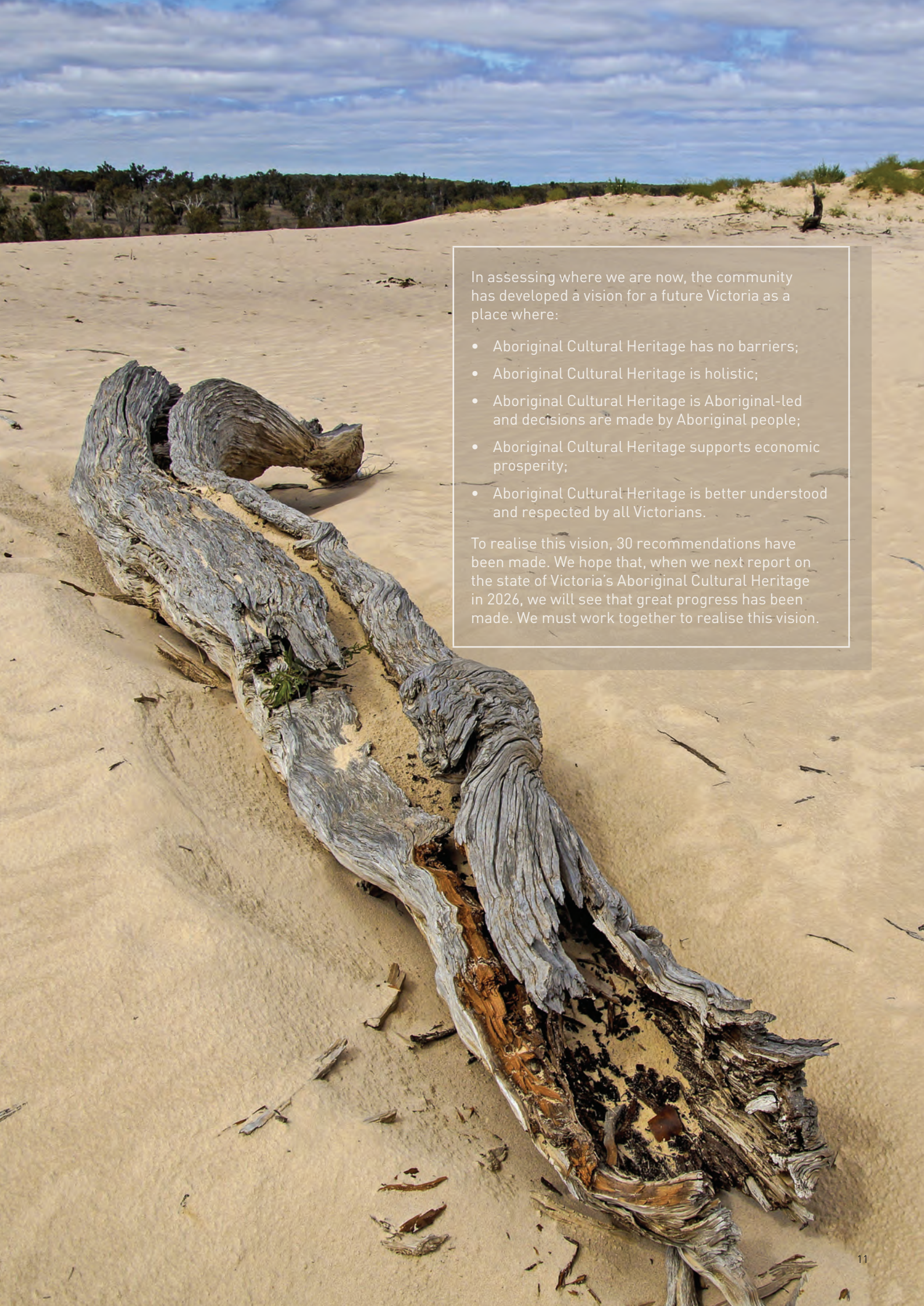
Council felt that what was missing from the national discussion about Cultural Heritage was a set of Best Practice Standards to guide the engagement of all Australians with Aboriginal People and their Cultural Heritage. The resulting Best Practice Standards in Indigenous Cultural Heritage management and legislation are included in Dhawura Ngilan - A vision for Aboriginal and Torres Strait Islander heritage in Australia.

Supported by the Chairs of Australia's national, state and territory Indigenous heritage bodies, these two documents provide a roadmap for improving approaches to Aboriginal and Torres Strait Islander heritage management in Australia.

This report gives a frank evaluation of where we are, acknowledges that we live in a society impacted by the past and charts a new course forward. Council's vision is of a place where language is spoken easily, Traditional Owners are respected, Countries are cared for appropriately and Cultures are proudly lived by all our Peoples.

*"barimbanganak barim gurkanganak
wukinangatjaniyn."⁶*

Council will continue to strive to reshape the landscape in which Aboriginal Cultural Heritage exists, is managed and is experienced by Traditional Owners and the wider Victorian community. It is essential to our wellbeing and our right as Aboriginal Peoples that we engage with Culture and Country in a meaningful and respectful way. From reading this report, we know that this is feasible. However, there are fundamental shifts that first need to happen in the legislative, policy and broader community.



In assessing where we are now, the community has developed a vision for a future Victoria as a place where:

- Aboriginal Cultural Heritage has no barriers;
- Aboriginal Cultural Heritage is holistic;
- Aboriginal Cultural Heritage is Aboriginal-led and decisions are made by Aboriginal people;
- Aboriginal Cultural Heritage supports economic prosperity;
- Aboriginal Cultural Heritage is better understood and respected by all Victorians.

To realise this vision, 30 recommendations have been made. We hope that, when we next report on the state of Victoria's Aboriginal Cultural Heritage in 2026, we will see that great progress has been made. We must work together to realise this vision.



EXECUTIVE SUMMARY

ABORIGINAL CULTURAL HERITAGE IN VICTORIA

Aboriginal peoples have lived in Victoria for tens of thousands of years, and despite colonisation and its ongoing threats, have remained resilient and continued to live and practice Culture.

When we use the term Culture, we refer to the living practices of Aboriginal peoples including all connections to family, Country, community. Country refers to the way in which Aboriginal peoples describe the lands, waterways and seas to which they are connected, encompassing complex ideas about law, place, custom, language, spiritual belief, cultural practice, material sustenance, family and identity.⁷

When we speak of Aboriginal Cultural Heritage, we refer to the dynamic tangible and intangible expressions of Culture that link generations of Aboriginal peoples. Aboriginal peoples express their Cultural Heritage through 'the person' and their relationships with Country, people, beliefs, knowledge, law, language, symbols, ways of living, sea, land and objects, all of which are interconnected and arise from Aboriginal spirituality.⁸

Aboriginal Cultural Heritage comprises everything that Aboriginal peoples need to express their identities as Aboriginal peoples. Aboriginal Cultural Heritage includes connections to land, waters, plants and animals. Aboriginal Cultural Heritage also includes all the deep and layered knowledge in relation to these aspects of Culture, comprised of knowledge that has been passed through generations for tens of thousands of years. Aboriginal Cultural Heritage is holistic and includes all aspects of doing, being and knowing, both tangible and intangible, that are intertwined. Aboriginal Cultural Heritage is a living cultural practice and is constantly evolving, being more than mere "stones and bones".

The practice of managing and caring for Culture is at the heart of Aboriginal Cultural Heritage. These cultural obligations are about continuing and strengthening Culture. This includes caring for Country, cultural fire management, protecting sacred sites, objects, and trees, and passing on knowledge to future generations.

Since colonisation, there has been and continues to be, an impact on Aboriginal peoples' ability to fulfil these cultural obligations. The Victorian heritage laws, like other Australian heritage laws, have tended to focus on consents for destruction of sites, rather than provide for a proactive process for managing cultural landscapes collaboratively, with Aboriginal peoples leading decision-making processes. Historical management practices have misunderstood Aboriginal Cultural Heritage. Culture and heritage places have been perceived as relics and stones. These fundamental misunderstandings of Aboriginal Cultural Heritage have left in place laws and policies that continue to impact Aboriginal Victorians.

There is evidence that this approach is changing. There are a growing number of Aboriginal organisations and networks for the practice of Culture including language, arts and heritage. Aboriginal peoples continue to practice their Culture as a living cultural practice, despite the devastation wrought by colonisation. There is a growing realisation by the wider Victorian community that where Aboriginal peoples are the leaders of cultural heritage practice, Aboriginal Cultural Heritage is vibrant and strong. Yet, there are many who are unaware of the importance of Aboriginal Cultural Heritage.

The *Aboriginal Heritage Act 2006* (Vic) (**AHA** or the **Act**) introduced measures designed to improve Aboriginal peoples' input into Cultural Heritage management. The objectives of the Act are to empower Traditional Owners as protectors of their Cultural Heritage on behalf of Aboriginal peoples, and all other peoples.⁹ The Act operates to establish Registered Aboriginal Parties (**RAPs**), who may approve or reject Cultural Heritage Management Plans (**CHMPs**) in relation to their Country. The Act also establishes the Office of the Victorian Aboriginal Heritage Council (**VAHC** or the **Council**), which has numerous functions essential to achieving the objectives of the Act. These include:

- to advise the Minister in relation to the protection of Aboriginal Cultural Heritage in Victoria,¹⁰
- to receive and determine applications for registration of Aboriginal parties,¹¹
- to promote public awareness and understanding of Cultural Heritage in Victoria, and
- to be the central coordinating body responsible for the overseeing, monitoring, managing, reporting and returning of Aboriginal Ancestral Remains and Secret and/or Sacred Objects in Victoria.¹²

The VAHC has also produced a number of key heritage documents which set standards for heritage management, including most recently, providing to the Minister for Aboriginal Affairs 24 recommendations

to enshrine self-determination and the *United Nations Declaration on the Rights of Indigenous Peoples*¹³ (**UNDRIP** or the **UN Declaration**) in Victorian Aboriginal Cultural Heritage legislation.¹⁴

The model established under the Act is one of the best in Australia. It prioritises Aboriginal-led decision making in recognition of Traditional Owner groups rights and responsibilities over Country and Cultural Heritage. The Act is also significant in that it links practice of Culture with Country – RAPs are given cultural management duties over their Country. The linking of Culture and Country is significant because it actually reflects the reality of how Aboriginal people practice Culture. A frequent failing of cultural heritage laws in other jurisdictions is that they dislocate Culture from Country and impose a western perspective that cultural objects and practice exist separately to Country.

Nevertheless, there remains some further challenges to be managed, including how the heritage laws in the AHA work with native title laws. The role of the Council and government in recognising RAPs and the significant rights and obligations passed to RAPs upon recognition, means that this model carries a lot of responsibility, especially on Country that has not been the subject of a native title determination, or where the government has not otherwise entered into an agreement under the *Traditional Owner Settlement Act 2010* (Vic). The Council bears significant responsibility to ensure the RAP consideration process is robust, and guards against all perceived, potential or actual conflicts of interest.

AREAS FOR IMPROVEMENT

Victorian Aboriginal peoples call for and assert their right to self-determination, including greater decision-making powers concerning their Cultural Heritage. Aboriginal peoples want the laws to adequately recognise their existing rights to express, revitalise, strengthen and manage their Cultural Heritage.

Aboriginal peoples also assert the right to enjoy the economic benefits that come from Aboriginal-led commercialisation of their Cultural Heritage, provided through access and benefit sharing and free, prior informed consent processes among other mechanisms. In this context, Aboriginal Cultural Heritage is also an enabler of economic, social and cultural prosperity.

Traditional Owners themselves identified a number of threats to Aboriginal Cultural Heritage in Victoria, including:

- heritage consent determination processes that limit the ability of RAPs to reject applications they consider would harm Aboriginal Cultural Heritage;
- lack of decision-making power, oversight and control;
- lack of appropriate resourcing;
- confusion over the interaction of heritage laws and native title laws;
- perceived, potential or actual conflicts of interest in decision making processes; and
- lack of public awareness.

To reduce these risks there needs to be legal and policy changes, greater support for the governance of Aboriginal organisations, and support for cultural practice succession. There is also a need to raise the general public's awareness and subsequent understanding of the value of Aboriginal Cultural Heritage. If all Victorians understand the importance of Cultural Heritage, Victoria's heritage will be stronger and safer. Most importantly, the Act requires further amendment to increase Aboriginal control of the heritage management process and to improve penalties for non-compliance.

The Victorian Government has committed to the Aboriginal self-determination. Aboriginal control of Aboriginal Cultural Heritage is progressing in Victoria. The Government has implemented the *Aboriginal Affairs Framework 2018-2023*, working to embed Aboriginal self-determination goals across the whole of government, embarked on a Treaty process with Victorian Aboriginal peoples and established the Yoorrook Justice Commission to undertake a truth telling inquiry. Reporting on Aboriginal self-determination and empowerment is required by all departments and agencies. These efforts must be ongoing and continually developed under the leadership of Aboriginal peoples.

Aboriginal peoples are empowered to care for Country. Where Aboriginal peoples are empowered to care for Country, positive outcomes are achieved. This is not only the case for the management of Aboriginal Cultural Heritage, but also extends to the health and wellbeing of Aboriginal peoples, social and cultural engagement, employment opportunities and a greater understanding of Country. A notable example is that of fire management practices, which have been utilised to assist natural resource management in Victoria. Given that it is so important that Aboriginal peoples are empowered to care for Country, there needs to be

greater clarity of the interaction of heritage laws and native title law, and there needs to be further work undertaken to ensure the AHA is implemented to maximise representation of Aboriginal Victorians. This also means that perceived, potential or actual conflicts of interest must be avoided in any decision-making process.

Aboriginal peoples are empowered to carry out their cultural responsibilities when it comes to caring for water and waterways. Processes for waterway naming are often overlooked. The Victorian Aboriginal Heritage Council's *Our Places Our Names – Waterways Naming Project* aims to enable RAPs to name unnamed waterways.¹⁵ There is also the *Yarra River Protection (Wilip-gin Birrarung murrnong) Act 2017* (Vic) which is the first legislation to legally identify a river as being a single living and natural entity, capable of protection. Victoria has also made significant strides in facilitating Aboriginal peoples caring for water and waterways through their recognition of cultural flows.

Plants and animals are looked after as Cultural Heritage. Plants and animals hold great cultural significance to Aboriginal peoples, including Bunjil the Eagle, and represent individual totems holding spiritual significance, defining Aboriginal peoples' connection to Country, each other and their Culture. The Victorian Traditional Owner Food and Botanicals Strategy is an initiative of the Victorian Government and the Federation of Victorian Traditional Owner Corporations, recently introduced to develop a strong, authentic, sustainable bushfood industry in Victoria and empower Aboriginal bushfoods businesses.

Aboriginal peoples control and manage cultural objects that are held in private, public and government institutions. Removal of objects from Country denies the ability for Aboriginal Cultural Heritage to be passed on and valued. Inventory making, repatriation of objects, and greater involvement of Aboriginal peoples in the Galleries, Libraries, Archives & Museums (GLAM) sector are key issues. Places like Bunjilaka Aboriginal Cultural Centre and Koori Heritage Trust provide a space for Aboriginal interpretation and understanding of Aboriginal cultural objects and heritage. There is a need to support local keeping places including in regional areas. The Indigenous Cultural and Intellectual Property (ICIP) rights of objects and cultural practices is important, and ICIP protocols should be observed.

Aboriginal knowledge is passed through storytelling and performance. Aboriginal communities' benefit from a vibrant and sustainable Arts and Performance sector as evidenced through thriving Aboriginal arts,

performance, dance, film and musical practice. Aboriginal writers and storytellers continue to tell the truth of Aboriginal existence and the ongoing impact of colonisation on Aboriginal peoples, as do exhibitions, performance and research presented from an Aboriginal perspective. Arts and performance practice also have positive outcomes on the health and wellbeing of Aboriginal peoples.

Aboriginal language is revitalised, maintained and taught. Victorian languages are being revitalised through the hard work of many Aboriginal groups, and the role of the Victorian Aboriginal Corporation of Languages. These language revitalisation programs strengthen Culture and encourage the passing on of knowledge. Aboriginal peoples seek to revitalise their languages, and there have been calls for revitalised languages to be taught in Victorian schools and added to the curriculum.

Aboriginal knowledge and of ways of knowing and being are often recorded, collected and reproduced without respect for cultural protocols. The 2016 amendments to the *Aboriginal Heritage Act 2006* (Vic) incorporate a process for Aboriginal parties to register their intangible Cultural Heritage to afford protection. However, this has had limited use. There are advantages and challenges with recording Aboriginal Cultural Heritage in a register, including consideration of knowledge being held by government bodies, and the bureaucracy involved in registration. However, it does provide a means for Aboriginal peoples to protect their cultural practice and their commercial interests to songs, stories, and knowledge that is not widely known. Best practice cultural protocols should be developed for all industries and upheld when recording, collecting and reproducing Aboriginal Cultural Heritage and Aboriginal knowledge.

Aboriginal peoples have self-determination over the use of their data. Cultural safety when sharing Aboriginal knowledge is of continuing concern, as is the consideration and understanding of Aboriginal data governance and sovereignty. Article 31 of the UNDRIP calls for the rights of Indigenous peoples to their Cultural Heritage, traditional knowledge and traditional cultural expression to be acknowledged and respected. These rights necessarily extend to the ability of Aboriginal peoples to control and safeguard data collected about them and their ICIP.

Aboriginal peoples express the importance of caring for Ancestral Remains. There are complex legacies that arise. Years of removal of Aboriginal Ancestral Remains from burial places as a colonising practice has caused great intergenerational harm which continues today. The AHA covers human remains, recognising that Aboriginal peoples have the right to the repatriation of Ancestral Remains pursuant to Article 12 of the UNDRIP. The creation of the statutory framework under the Act, and the VAHC's Aboriginal Remains Unit, which is Aboriginal-led and carries out the Act's repatriation functions, are positive steps in facilitating the repatriation of Ancestral Remains to their rightful homes. However, the Act does not incorporate Aboriginal customary law or understandings, instead operating on a Western understanding of governance. Further, the offences and penalties listed under the Act are subject to jurisdictional limitations, in that international institutions cannot be compelled to repatriate Ancestral Remains across jurisdictions. Repatriation under the Act can also be re-traumatising for Aboriginal individuals and communities, in the sense that dealing with Ancestral Remains that have historically been mistreated and removed raises emotional and distressing issues for those involved.

As identified in this report, Aboriginal peoples in Victoria are empowered to practice their Culture *in part*, but there is a much wider holistic approach that should be considered and is outlined in Part 3 of this report. Here, such a holistic and unified approach is necessary to ensure culturally safe and Aboriginal-led practice, understanding and protection of Aboriginal Cultural Heritage and self-determination in Victoria.

GOALS AND RECOMMENDATIONS

Aboriginal Victorians' vision for the care of Aboriginal Cultural Heritage covers seven key areas which were identified during consultations.

These are:

- Empowerment;
- Economic strength;
- Cultural practice;
- Education;
- Health and wellbeing;
- Succession; and
- Valuing Aboriginal Cultural Heritage.

There is support for the principles outlined in *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia* and the *Best Practice Standards in Indigenous cultural heritage management and legislation*. Aboriginal peoples are the custodians of their heritage, which must be protected, celebrated and valued. Aboriginal management of their heritage is necessary for the wellbeing of current and future generations of Australians.

Aboriginal Cultural Heritage management practices in Victoria must be proactive and Aboriginal-led rather than continuing to enable a reactive Western system made with limited recognition or comprehension of the Aboriginal issues and concerns that underlie decision-making. Aboriginal peoples must have genuine self-determination in making decisions affecting them and their Cultural Heritage.

The seven key areas provide the basis for the 30 recommendations identified on page 161 of this report. At the centre of these recommendations are the notions of self-determination and empowerment, and the facilitation of better education and understanding of Aboriginal Cultural Heritage.

These recommendations should be prioritised and implemented by the Victorian Government and its departments and agencies from now until the next review, as they provide a clear pathway towards achieving an improved state of Victorian Aboriginal Cultural Heritage emphasising empowerment and self-determination. It is recognised that some of these recommendations are already being addressed, and this work must continue in full collaboration with Victorian Aboriginal peoples.



THE RECOMMENDATIONS ESTABLISHED IN THIS REPORT CAN BE BROKEN DOWN INTO 5 KEY GOALS

GOAL 1

Aboriginal Cultural
Heritage has no barriers

- Government management practices, both internal and external, facilitate greater connection and practice of Aboriginal Cultural Heritage;
- Practice and engagement with Aboriginal Cultural Heritage is culturally safe and Aboriginal-led;
- Engagement with Aboriginal Victorians to strengthen Aboriginal Cultural Heritage registers and encourage practical application and enforcement, and to better reflect Aboriginal community requirements and obligations;
- AHA reflects empowerment and self-determination of Aboriginal peoples to their Cultural Heritage, with the *Taking Care of our Heritage* principles implemented;
- Operation of CHMP process reconsidered moving away from harm minimisation towards care model, including veto power for Traditional Owners;
- Aboriginal-designed best practice protocols for AHA-related projects and developments;
- Aboriginal-designed protocols, guidelines and frameworks in industries managing and utilising Aboriginal Cultural Heritage.

GOAL 2

Aboriginal Cultural
Heritage is holistic

- Aboriginal Cultural Heritage is defined and recognised through Aboriginal perspectives and ways of knowing;
- Definition of “Aboriginal cultural heritage” and “Aboriginal intangible heritage” under AHA are amended to better reflect the true nature of Aboriginal Cultural Heritage;
- Improved understanding of the connection between human rights and Aboriginal Cultural Heritage management;
- Recognition that Aboriginal knowledge is connected to all aspects of Aboriginal Cultural Heritage;
- Aboriginal health and wellbeing is directly connected to Aboriginal Cultural Heritage, and must be defined and applied through Aboriginal perspectives and understandings;
- Measures of Aboriginal wellbeing must be assessed through an Aboriginal definition of health and wellbeing;
- Aboriginal cultural practices, including arts, performance, language and ceremonies, are inherently linked to Aboriginal identity.

GOAL 3

Aboriginal Cultural Heritage is Aboriginal-led and decisions made by Aboriginal peoples

- Continued implementation of whole-of-government Aboriginal Affairs self-determination framework;
- Move to Aboriginal decision-making model for the future management of Aboriginal Cultural Heritage;
- Development of sui generis laws for protection of Indigenous Cultural and Intellectual Property (ICIP) enshrining the rights of the UNDRIP;
- Cultural auditing of government agencies managing Aboriginal Cultural Heritage;
- Cultural models integrated which enable revitalisation of practice, passing on of Culture;
- Consideration of effective representation of all Victorian Traditional Owner groups, including in handling of perceived, potential or actual conflicts of interest and in relation to the Treaty process;
- Encouragement and emphasis of Aboriginal law and custom within the framework of repatriating Aboriginal Ancestral Remains and cultural objects.

GOAL 4

Aboriginal Cultural Heritage supports economic prosperity

- Government funding and partnerships to provide appropriate financial support and capacity building for RAPs and Traditional Owner groups managing, protecting and engaging with Aboriginal Cultural Heritage;
- RAPs and Traditional Owner groups empowered to build infrastructure and resourcing for sustainable community growth and opportunity;
- Statutory functions undertaken by RAPs and Traditional Owner groups to be fully funded by Government;
- Right of Aboriginal peoples to commercialise Aboriginal Cultural Heritage through Access and Benefit Sharing and free, prior informed consent processes;
- Barriers to government funding are reduced, and funding is focused towards fostering long-term growth and economic independence of Aboriginal initiatives, entrepreneurs, organisations and partnerships.

GOAL 5

Aboriginal Cultural Heritage is better understood and respected by all Victorians

- Aboriginal Cultural Heritage and truth-telling incorporated into all Victorian schools and as part of curriculum;
- Wider education and awareness by all to ensure the better protection of Aboriginal Cultural Heritage;
- A good state of Victoria's Aboriginal Cultural Heritage is where Aboriginal Cultural Heritage is valued by all peoples - Aboriginal and non-Aboriginal;
- Aboriginal and non-Aboriginal peoples understand and respect Black Excellence.



INTRODUCTION

The Victorian Aboriginal Heritage Council engaged Terri Janke and Company to prepare this inaugural state of Victoria's Aboriginal Cultural Heritage report. This report was developed in fulfilment of the reporting mechanism introduced in 2016 to the *Aboriginal Heritage Act 2006* (Vic) (AHA or the Act). The Act requires that every five years, a report on the state of Victoria's Aboriginal Cultural Heritage be completed.

The aim of this report, as identified by the Victorian Aboriginal Heritage Council, is to provide a holistic snapshot of Aboriginal Cultural Heritage management in Victoria during the reporting period 2016 - 2021, and to identify a vision, based on an Aboriginal-led framework, encapsulating how Aboriginal peoples see their Cultural Heritage cared for into the future.

This report is the first such report and will reflect on the following questions:

- What is Aboriginal Cultural Heritage?
- How do Aboriginal peoples connect with and practice Culture?
- How are Aboriginal peoples currently asserting their rights to practice Culture?
- What stressors create challenges for Aboriginal peoples when practising Culture?
- How well does the wider Victorian community understand Aboriginal Cultural Heritage?
- What is the vision for the future management of Aboriginal Cultural Heritage?

These assessment questions were matched with benchmark criteria, also discussed during our consultations and outlined in the *Taking Care of Culture* Discussion Paper issued for public comment in January 2021. These benchmark criteria form the basis for our understanding of how Aboriginal peoples connect with and practice Culture.

When we initially began this process, we had anticipated using the key assessment criteria and benchmark criteria as the basic framework of this report. However, as we conducted consultations and our understanding of the current state of Aboriginal Cultural Heritage in Victoria developed, we learned the story of Black Excellence and we realised that a truly forward-thinking report required us to respond to this improved understanding.

As a result, the structure of this report developed. The key assessment criteria and benchmark criteria became pathways into the information, and we developed a more streamlined framework to the report that would more effectively tell the story of Black Excellence and an Aboriginal-led model for the future. This revised structure is represented in Figure 1.

However, the Council and many of our respondents, reminded us not to lose sight of the big picture.

The big picture is that of Black Excellence. Over the 200+ years since colonisation, Black Excellence has seen Aboriginal peoples assert their rights as custodians of the world's oldest continuous Culture. Aboriginal peoples have not merely conserved Culture; Aboriginal Cultural Heritage is a living practice that has grown and flourished because of Black Excellence. The model for the future reflects a vision in which law and policy works in service of Black Excellence. By this, we mean that the vision for the future is one in which Aboriginal peoples continue to assert their rights, as they have always done, and law and policy is tailored to facilitate Aboriginal-control and practice of Culture, ultimately achieving the outcomes outlined in each Section in Part 3.

The Conclusion to this report outlines our recommendations for improvement to the state of Victoria's Aboriginal Cultural Heritage.



FIGURE 1: Structure of this report

	THE REPORT	KEY ASSESSMENT QUESTIONS	BENCHMARK CRITERIA
PART 1	What is Aboriginal Cultural Heritage?	What is Aboriginal Cultural Heritage? How do Aboriginal peoples connect with and practice culture?	Aboriginal Cultural Heritage is understood as a living cultural practice
PART 2	How are Aboriginal peoples currently asserting their rights, and how effective are Victoria's policies and management actions?	How are Aboriginal peoples currently asserting their rights to practice culture? What stressors create challenges for Aboriginal people when practising Culture? How well does the wider community understand Aboriginal Cultural Heritage?	<ul style="list-style-type: none"> • Self-determination and Aboriginal control of Aboriginal Cultural Heritage is promoted in Victoria • Aboriginal peoples in Victoria empowered to practice their culture • All Victorians understand the importance of Aboriginal Cultural Heritage • Country is cared for and managed by Aboriginal peoples • Aboriginal peoples empowered to carry out their cultural responsibilities when it comes to caring for water and waterways • Plants and animals are looked after as Aboriginal Cultural Heritage • Aboriginal peoples control the management/care of cultural objects • Communities benefit from a vibrant and sustainable Arts and Performance sector • Language revitalisation programs strengthen culture • Traditional Knowledge is cared for and shared in culturally safe ways • Aboriginal peoples further empowered to manage care of Ancestral Remains • Effective management of advantages/challenges of recording Aboriginal Cultural Heritage in a register • Reduce and prevent threats to Aboriginal Cultural Heritage in Victoria
PART 3	What is the model for the future?	What is the vision for the Future management of Aboriginal Cultural Heritage?	Aboriginal Victorian's vision for care of Aboriginal Cultural Heritage in Victoria fully realised



THIS REPORT IS SEPARATED INTO THREE PARTS

PART 1 of this report looks at the ways Aboriginal peoples connect with, and practice, Culture. Aboriginal Cultural Heritage is a living practice, and all expressions of Culture are interconnected.

PART 2 of this report looks at how Aboriginal peoples are currently asserting their rights to practice Culture. We will also consider how effective Victoria's policies and management actions are in enabling Aboriginal Cultural connections and practice.

This assessment will provide a snapshot of the current state of Victoria's Aboriginal Cultural Heritage. Each Section within Part 2 engages with an overarching theme that emerged during our consultations. Case studies provide actual examples of enablers and stressors to Aboriginal-control and practice of Culture.

PART 3 of this report sets out a model for the future. Our instructions for this report from the Victorian Aboriginal Heritage Council's State of Victoria's Aboriginal Cultural Heritage Subcommittee were to engage in blue sky thinking.

The report necessarily engages in detailed analysis of the responses provided, as well as the legal and policy architecture that represents the Victorian government's current approach to Aboriginal Cultural Heritage management.

THE METHODOLOGY

The process of preparing this report was initiated with a Discussion Paper, *Taking Care of Culture*, also prepared by Terri Janke and Company (the Discussion Paper).¹⁶ The purpose of the Discussion Paper was to initiate discussion from as many participants as possible including Aboriginal peoples currently living in Victoria, Aboriginal businesses and organisations, Traditional Owners groups and Registered Aboriginal Parties (RAPs), and people working in Cultural Heritage management.

The Discussion Paper was complemented by a series of surveys and group and individual consultation sessions.

THE SURVEY

Our survey was distributed widely amongst the Victorian community, to Registered Aboriginal Parties (RAPs), Traditional Owners, the First Peoples Assembly of Victoria, local and state government, agencies, universities, private institutions and individuals.

The survey sought to capture as many perspectives as possible when asking about the state of Victoria's Aboriginal Cultural Heritage. The survey asked questions, including but not limited to:

- What would you describe as Aboriginal Cultural Heritage?
- How should the state of Victoria's Aboriginal Cultural Heritage be addressed?
- What restricts Traditional Owners in Victoria from practicing their Culture?
- What does Country mean to you?
- How can Traditional Owners be empowered to care for water and waterways?
- How should intangible heritage be protected?
- What can be done to strengthen the Aboriginal Arts and Performance sector?
- What empowers intergenerational sharing of language?

The survey was broken up into seven overarching topics:

- Self-determination;
- Protecting our Cultural Heritage;
- Embedding Cultural Responsibilities into the Landscape;
- Care for Ancestors and Management of Culture;
- Arts, Performance and Languages;
- Sharing and Safeguarding Aboriginal knowledge; and
- Supporting our Responsibilities.

We received 31 survey responses, 5 of whom identified as Aboriginal, although some of the respondents chose to remain anonymous or did not specify.

THE CONSULTATIONS

Extensive consultations were also conducted between February and September 2021. We conducted 11 group workshops, hearing from approximately 74 people, of whom 33 identified as Aboriginal (44%). We also engaged with people individually, conducting 30 individual consultations, 28 of whom were Aboriginal. We connected with our individual consultants through phone calls and Zoom meetings. We also had 6 email responses and 2 responses over social media. These consultations were with:

- RAPs;
- Traditional Owner corporations and representative groups;
- Aboriginal organisations involved in service delivery to Victoria's Aboriginal peoples in a variety of industries, including health and the arts;
- Aboriginal organisations with representation and advocacy functions;
- Aboriginal peoples working in collecting and cultural institutions;
- Government organisations and statutory bodies connected to Cultural Heritage management;
- Non-government organisations involved in heritage management;
- Aboriginal artists and entrepreneurs;
- Commercial organisations involved in land and resource management in Victoria;
- Local councils; and
- Higher education institutions.

We also collected qualitative data from the Victorian Department of Jobs, Precincts and Regions (DJPR), Department of Environment, Land, Water and Planning (DELWP), Department of Education and Training (DET), and Department of Premier and Cabinet (DPC).

These Departments have provisions for programs and/or statutory responsibilities related to Aboriginal Cultural Heritage. Each Department answered 32 general organisational questions that included questions about their Aboriginal Cultural Heritage strategies, funding data and employment data. Departments were also asked targeted questions, specific to their departments.

We have deidentified all responses. This has ensured that people felt comfortable sharing their experiences. Case studies reproduced in this report are with the consent of the source knowledge holder or organisation, where possible.

In addition to the surveys, consultations and data responses we conducted a literature survey of the key academic commentary.

DRAWING CONNECTIONS FOR CULTURAL PRACTICE

In coming to understand the current state of Victoria's Aboriginal Cultural Heritage, we connected to many voices. We consulted directly with Victorian Aboriginal peoples through several channels including through group and individual consultations, written feedback through survey responses and engagement with the Victorian Aboriginal Heritage Council. We connected with several quarters of the Victorian government, particularly through the data responses, and we connected through literature reviews of the key academic analyses.

Through listening to these perspectives, we developed the assessment criteria by which to assess the current state of Victorian Aboriginal Cultural Heritage. This process naturally involved us also developing a vision for the future which led to the development of the benchmark criteria.

Through this process of understanding and development, a clear message emerged. This message allowed us to simultaneously understand the current state of Victorian Aboriginal Cultural Heritage *and* the vision for the future. This message was the importance of acknowledging, respecting and practising the connective relationships inherent in cultural practice.

In our consultations with our Aboriginal respondents, we came to understand that all aspects of knowing, being and doing involve looking after and growing these relationships of connection. All aspects of Culture are connected – language, Country, stories, art, land and

waterways, management and ecological knowledge. We see that people are connected to Country and family. We see that history, present and future are indivisible. We also see a need for connecting the wider Victorian community to its Aboriginal history, to Aboriginal peoples today, and to a future in which Aboriginal peoples lead management of Aboriginal Cultural Heritage and help build Victoria's future.

Victoria's Aboriginal peoples have always understood these connections and have always asserted their rights to these connections. The role of the Victorian government heritage management framework is to acknowledge the importance of these connections and play a supporting role in Black Excellence.

BLACK EXCELLENCE

Black Excellence is a preferred term raised by respondents, which describes the collective survival, strength and resilience of Aboriginal peoples. As one respondent stated 'Black Excellence is a collective voice, spirit, knowledge and wisdom. The state of being'.¹⁷

Black Excellence describes the advocacy and continuation of Aboriginal Cultural Heritage against systemic oppression, and also describes a quiet knowing and strength that exists for Aboriginal peoples when they are able to sit and listen to their spirit, when they are connected to Country and their cultural practice.¹⁸

Black Excellence encompasses stories of survival and activism. One respondent stated that passion and dissent are also Black Excellence, with this passion often mistaken for anger. Instead, this respondent suggested that passion and disagreement are Black Excellence, as they are speaking from the truth and speaking from the heart.¹⁹

Black Excellence is referred to in this report as it frames Aboriginal peoples and Aboriginal Cultural Heritage in a way that uplifts and adequately describes the persistent advocacy and strength of Aboriginal peoples. As one respondent said, 'young people are so used to being spoken down to, rather than spoken with. Nobody speaks to young people on an individual level, always on a systemic level'.²⁰

Black Excellence is used throughout this report to describe advocacy and Aboriginal-led programs and the ripple effect that these programs have within the community. Black Excellence is seen in the arts,

education, language, politics, science and Cultural Heritage sectors. Black Excellence also encompasses the international human rights principles outlined in the *United Nations Declaration on the Rights of Indigenous Peoples*,²¹ namely, that Aboriginal peoples are the experts of their own culture, and that Aboriginal peoples should be empowered to manage, control and care for Aboriginal Cultural Heritage. Black Excellence is demonstrated when looking at initiatives that arise when these rights are not restricted, but also when these rights are interfered with. Black Excellence is also demonstrated in adversity and oppression.

Black Excellence challenges the language of oppression that is historically associated with Aboriginal peoples, and instead encourages a strength-based approach to considering Aboriginal culture and peoples. The authors have chosen to carry this strength-based approach throughout this report, as Black Excellence demonstrates how Aboriginal Cultural Heritage has survived and thrived against colonial impact.

A large, white, stylized quotation mark icon consisting of two curved lines meeting at a point, positioned at the top center of the page.

Aboriginal Victoria
is a diverse population of many
different cultures, languages,
Traditional Owner groups,
and Aboriginal peoples.

A large, white, stylized quotation mark icon consisting of two curved lines meeting at a point, positioned at the bottom center of the page.

The background of the image is a photograph of a sunset or sunrise. The sky is a gradient of orange and yellow, with some clouds visible. The horizon line is dark, and the foreground is a dark, silhouetted landscape with a body of water at the bottom.

PART 1

CULTURAL HERITAGE



PART 1

WHAT IS ABORIGINAL CULTURAL HERITAGE?

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WHAT IS ABORIGINAL CULTURAL HERITAGE?

Aboriginal peoples are best placed to define their Culture.

The first part of this report looks at how Aboriginal peoples define their Cultural Heritage, and how they connect with, and practice Culture on a daily basis. Responses to the *Taking Care of Culture* Discussion Paper, surveys and consultations informed this part of the report, as well as data collected from government agencies, and literature published by leading Aboriginal academics.

HOW DO ABORIGINAL PEOPLES DEFINE THEIR ABORIGINAL CULTURAL HERITAGE?

Cultural Heritage is our lifeblood. As Traditional Owners, our Heritage is our relationship to Country – land and waters, the rocks, soil plants, animals and all things on it. Our Heritage connects us with each other. We look after Country, and it looks after us – body, heart and spirit. We want to make sure that the Culture is living, vital and continuing for many generations to come. We have that responsibility. It is our inherited and fundamental right, as custodians of the oldest living Culture on earth, to practice Culture and to set a vision for a strong future for our Cultural Heritage.

Legislative Review and Regulatory Functions
Committee, Victorian Aboriginal Heritage Council

It is important that we are able to empower people in communities to let them talk about their experience and let them articulate what Cultural Heritage is to them.

Mick Harding, Chairperson 2021,
Victorian Aboriginal Heritage Council

Aboriginal Victoria is a diverse population of many different cultures, languages, Traditional Owner groups, and Aboriginal peoples. There are at least 48,000 Aboriginal people in Victoria,²² with approximately 54 percent of Aboriginal Victorians living in regional and remote areas, and 46 percent of Aboriginal Victorians living in metropolitan areas. Although not all Aboriginal peoples currently living in Victoria will be Traditional Owners of Victoria. Similarly, Victorian Traditional Owners could be living all around Australia and the world.

Given this incredible diversity, definitions of Aboriginal Cultural Heritage by Aboriginal people can vary, individuals will naturally have different opinions on how they connect with Culture.

Nevertheless, there are key aspects of the definition that emerged from our consultations:

- Aboriginal peoples in Victoria have a continuing connection to their heritage, the lands and waters, and all things on it.
- Aboriginal Cultural Heritage is holistic and interconnected, meaning all aspects of being and knowing including knowledge, practices, community, objects and places, are intertwined.
- Aboriginal Cultural Heritage is far more than “stones and bones”.²³

Throughout all our consultations, Aboriginal peoples reiterated this repeatedly:

We all exist within a culture. Often when we talk about culture, we refer it to a specific pre-colonial Aboriginal culture prior to invasion. But to me cultural heritage is not that. It is multilayered throughout history. We have Cultural Heritage prior to colonisation and 180 years of living under colonial oppression. There is historical culture that was practiced and alive that has been genocided. For me, one aspect of that is the reclamation of that ancestral culture through reclamation of language and dance. But there is also another important element, the 180 years that has lapsed since the invasion. Stories of resistance. Stories from my nan about her father and their life and their move to Fitzroy. Everything that has happened in Aboriginal Victoria for the past 180 years. For me that is more of a living cultural heritage. It is strongly retained. You cannot get these stories from a book, those are stories I have to get from my nan. There are other stories that speak to a more traditional Cultural Heritage that is a reclamation of the historical documents and the archives.

Some of the Cultural Heritage is being recorded in the archives, but there is a new kind that wasn't recorded. That's another cultural heritage.

Corey Theatre, Gunditjmara musician and language revivalist

Respondents did not separate aspects of Aboriginal Cultural Heritage into tangible or intangible. Instead, Aboriginal Cultural Heritage was described as connection to country,²⁴ traditional laws,²⁵ customs,²⁶ family,²⁷ ancestors,²⁸ knowledge of history and language. One respondent explained culture as “having your connection to country, being around your family and knowing the history”.²⁹ Aboriginal Cultural Heritage is also relational, to Country, to the world, to each other and to place.³⁰ This relationship also indicates who has authority to speak and who doesn't.³¹

When respondents were asked the question ‘*how important is a connection to Aboriginal Cultural Heritage in your life?*’, the overwhelming majority of responses were either “it's everything to me”³² or “a lot”.³³ None of the responses suggested that culture played only a partial role in a respondents' life.

Aboriginal Cultural Heritage is important. It is physical, oral, intangible and tangible. It is our intellectual property.

Monica Morgan, CEO Yorta Yorta Nation Aboriginal Corporation

Victoria's Aboriginal peoples are diverse, and peoples' perspectives naturally vary. As a result, some additional points were made in the Discussion Paper, survey and consultation responses relating to the definition of “Country” and “tradition”. These are outlined on following page.

WHAT DOES “COUNTRY” MEAN?

Country is really important. It is our relationship to the world around us. It is our relationship to each other. It is our relationship to place. And these are very fundamental things to Indigenous culture, but also to Indigenous [art] practice.

Professor Brian Martin, Associate Dean Indigenous, Monash Art Design and Architecture

Country is central to spiritual identity, and Aboriginal peoples have maintained their relationship with Country throughout the devastating impacts of colonisation and forced removal. Unlike non-Aboriginal perceptions, land is not a commodity to be owned and used, but rather a place of belonging as well as a way of connecting to one's culture, spirit, people and identity. When asked 'what does Country mean to you?' one respondent stated 'home, ownership, sacred, tribal connection, with laws and customs attached'.³⁴

When this report refers to Country, plants, knowledge and Culture belonging to Aboriginal peoples, the word “belong” is used to refer to the mutual relationship between people and Country, as belonging to each other.

Cultural Heritage is the legacy we inherited from our Ancestors. And it includes responsibilities to protect both the physical aspects – land, water, flora, fauna and today, archaeology; and the intangible aspects – our story, language, mythology and lore. Our Ancestors understood that caring for Country allowed Country to care for them.

Dan Turnbull, Member, Victorian Aboriginal Heritage Council

WHAT DOES “TRADITIONAL” MEAN?

One of the respondents picked up on problems associated with the word “traditional”.³⁵ From the respondent's perspective the word “tradition” fails to reflect the impacts of colonisation. Colonisation has resulted in significant damage and loss to Aboriginal Cultural Heritage. It has also meant that Aboriginal Cultural Heritage has picked up on cultural influences from the wider community,³⁶ meaning that Aboriginal Cultural Heritage is living not static, it responds to its surrounding influences and grows and changes with the generations.

“Tradition” does not mean fixed in time or history. Aboriginal Cultural Heritage has a long and deep history, but it is also a constantly lived practice that grows and changes over time.

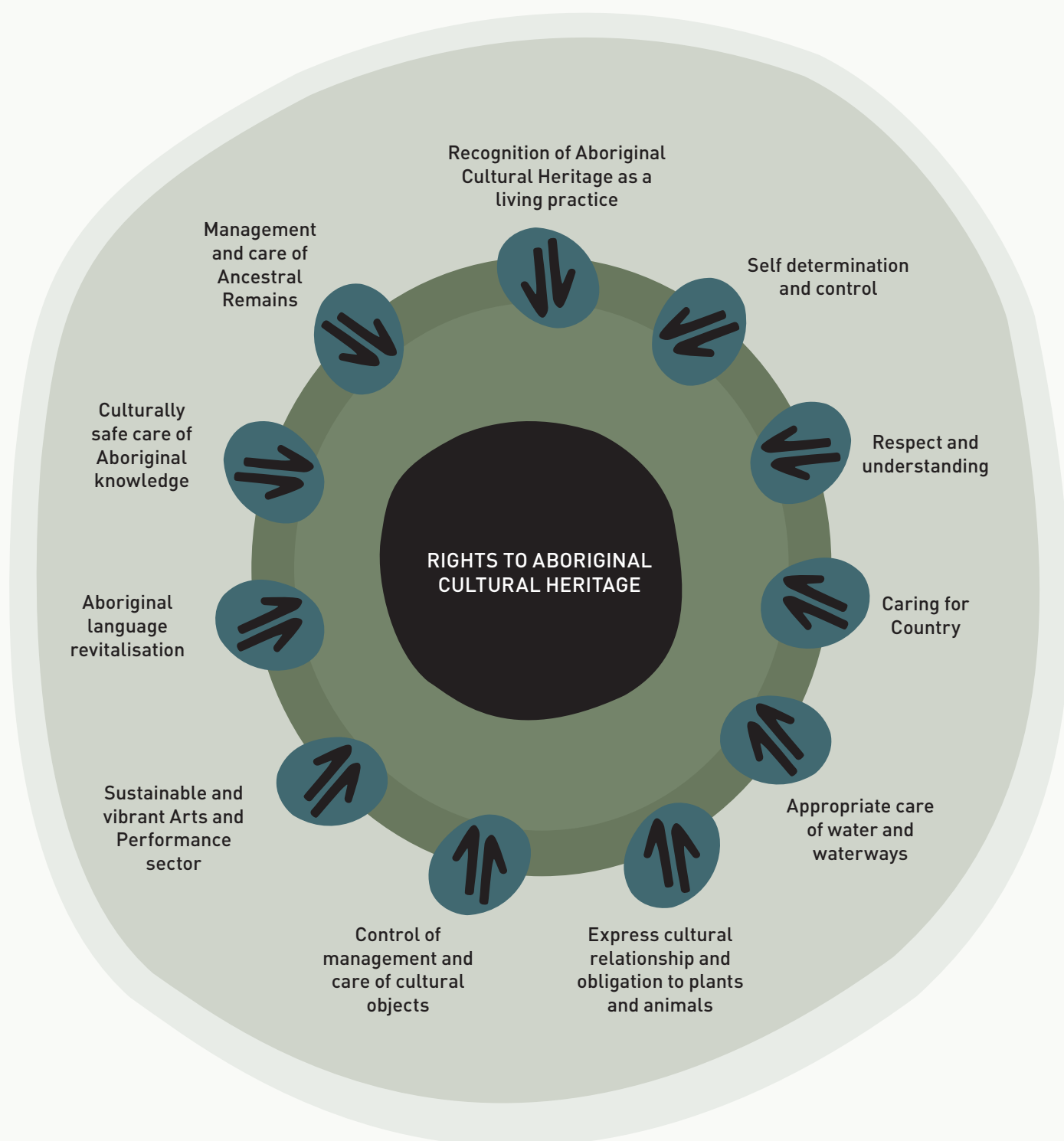
HOW DO VICTORIAN ABORIGINAL PEOPLES PRACTICE THEIR CONNECTIONS TO CULTURE?

It was clear from all the responses and academic literature, that Aboriginal Cultural Heritage extends beyond sites, objects and artefacts, and defies categorisation as tangible and intangible. Aboriginal Cultural Heritage transcends time and is grounded in Country. Aboriginal Cultural Heritage extends to Aboriginal peoples' sense of self, family, kinship and belonging.

Eleven key themes emerged from our consultations with Aboriginal Victorians, representing the predominant ways Aboriginal peoples connect with and practice culture. As a result, they are also the key rights that Aboriginal peoples want and need to be able to fully practice culture. Aboriginal peoples practice these rights to keep Culture strong, as illustrated in Figure 2.

The rest of this Part 1 is dedicated to a more detailed exploration of the rights of Aboriginal peoples to connect to their Culture.

FIGURE 2: Connections to Culture: rights to practice Aboriginal Cultural Heritage



1.1 ABORIGINAL PEOPLES HAVE THE RIGHT TO CONNECT WITH ABORIGINAL CULTURAL HERITAGE AS A DAILY PRACTICE

The health and wellbeing of our communities is underpinned by strong culture and a strong sense of connection with it.

Rodney Carter, Chairperson 2018-2021,
Victorian Aboriginal Heritage Council,
Annual Report 2018/2019

As a living cultural practice, the right to connect with Cultural Heritage requires that Aboriginal peoples are able to live and practice Culture daily. Daily practice establishes a mutual relationship between people and culture: as people contribute to their Culture, Culture grows in strength, and returns its strength back to people.

This section examines this relationship of mutual obligation and strength. We look first at the process of knowing and the way Aboriginal peoples actively participate in knowledge custodianship. We then look at the ways interpersonal relationships are a significant source of cultural strength. Connecting to future family is also an important cultural practice, as is relationships to Country because Country is a living entity.

The maintenance of these connections through cultural practice is a source of strength for people and communities.

THE PROCESS OF KNOWING

For Aboriginal people, the term *knowledge* is a living tradition. Within Western thinking, *knowledge* seems to relate to fixed and static facts. However, within Aboriginal Culture, *knowledge* is part of active and ongoing practice.³⁷ Knowledge is maintained, renewed, revised and developed through the practice of Culture. Moreover, knowledge is renewed and practiced in situ; drawing the link between knowledge and Country.³⁸

This view of Culture and knowledge as a vibrant ongoing practice was referred to repeatedly throughout the consultations and comments of respondents – in particular through the responses to questions about how Culture is learned. For example, one respondent,

when asked how they learnt about Culture referred to “connection to the tribal area, tribal family groups, language, DNA and history”.³⁹ Practice of Culture is a continuing process, and is interconnected to every way of being, including language, family, history and relationships. One of the respondent Registered Aboriginal Parties (RAPs) said it well stating, “Cultural Heritage has a direct and unbreakable connection with a living Culture”.⁴⁰

RELATIONSHIPS & CULTURAL STRENGTH

Relationships with family, Elders and people are an important way that Culture is expressed, and practices are passed down and strengthened. Several respondents drew links between living cultural practice, relationships to family and Elders, and relationships with Country. Practicing these relationships keeps Culture strong. One of the respondents commented that cultural resilience is built on connecting with Country and sharing Culture from Elders to younger generations.⁴¹ Another respondent reflected that connection to Culture is through family.⁴²

Intergenerational sharing is an essential element to Culture. Respondents were asked what could be done to facilitate intergenerational sharing of cultural practices. Responses focused on maintenance of relationships between Aboriginal peoples and Culture. More support is required for Traditional Owners and Elders to empower them to practice this intergenerational transfer,⁴³ as well as improved understanding of the importance of intergenerational transfer by the wider Victorian community.

STRENGTH IN CULTURE PROMOTES WELLBEING

Respondents identified that keeping Culture strong involves keeping relationships strong: relationships with ancestors, with Country and with family (including future family). Keeping Culture and relationships strong promotes physical and emotional wellbeing. This is illustrated in the following case study.



CULTURAL PRACTICE IS CONNECTED TO HEALTH AND WELLBEING

Dr Doris Paton is a proud Gunai and Monaro Ngarigo woman, and is a teacher, academic and language educator who grew up speaking Monaro Ngarigo. Doris' mother grew up speaking Monaro Ngarigo, with English as her second language, and is still teaching her children and grandchildren language at 85 years of age. Doris has spoken Monaro Ngarigo her whole life, using it to speak about everyday things in the family home. For Doris, it has just been a part of family life.

Doris describes her experience as quite unusual, as her family has maintained the generational sharing of language without having to reclaim and revive their language through research and archival resources. Doris says:

'Speaking language has been an important part of my mother's life and my grandmother's life, in that they were able to keep their cultural practices, their cultural knowledge, and their use of language within the family, and within their everyday lives'.⁴⁴

Doris believes that language is central to cultural revival, reclamation of knowledge, and to contribute to cultural practices of the different groups within the Victorian Aboriginal community. She says:

'It is really important to the wellbeing of Aboriginal people in Victoria to have their language and to have access to language, and to enable language to be taught in their families and in their communities'.⁴⁵

1.2 ABORIGINAL PEOPLES CONTROL AND MANAGE THEIR ABORIGINAL CULTURAL HERITAGE

Back in the day we were struggling to get Traditional Owners at the table to manage Cultural Heritage, but we campaigned and were successful in getting the Aboriginal Heritage Act up which gave Traditional Owners primacy in managing their own culture. We cannot be left out of the conversation about caring for our Country and managing our culture. Traditional Owners have managed to successfully sign settlement agreements with Government, and this has influenced Cultural Heritage policy reform. Traditional Owners have to be front and centre – we must benefit culturally, economically and spiritually.

Graham Atkinson, Dja Dja Wurrung Traditional Owner and Yorta Yorta man

This section looks more closely at how Aboriginal peoples see their right to self-determination.

Self-determination and control are key to how Aboriginal peoples practice their connection to Culture. This is an existing right, that has always been practised by Aboriginal peoples. The nature of cultural relationships and connections necessitates that cultural management is by Aboriginal peoples. Interruption of this reciprocal relationship between Aboriginal peoples and their Culture is an intervention in that relationship. Management interventions by non-Aboriginal peoples are the source of the disconnections and pressures on cultural practice. Genuine co-management of lands and cultural sites by Aboriginal peoples is depicted as a step towards Cultural Heritage autonomy for Aboriginal communities.⁴⁶

Self-determination was a constant theme in the responses to the Discussion Paper – both Aboriginal and non-Indigenous. It came through in numerous ways. This is best illustrated by the direct response to the questions “How should the state of Victoria’s Aboriginal Cultural heritage be assessed?”: “By Aboriginal people”.⁴⁷ The Aboriginal respondents asserted their right to self-determination, their right to practice Culture and the right to pass their Culture onto future generations. In turn, many of the non-Indigenous responses deferred to Victorian Traditional Owners as the appropriate people to determine the criteria for assessment.

Inherent to self-determination is the right of Aboriginal Victorians to define for themselves what self-determination means.⁴⁸ Aboriginal peoples assert self-determination when connecting with Culture. For example, one Aboriginal respondent replied that they wanted the right to negotiate to protect, manage, and be awarded compensation for damage. The same respondent said that they wanted “future generations of our people to learn to manage, protect and assess its [Aboriginal Cultural Heritage] management”.⁴⁹

Self-determination requires that Aboriginal peoples are the key decision-makers for their Culture. In recognition of this fact, the wider community has a shared social responsibility to play an active supporting role. For this reason, partnerships between Aboriginal peoples and governments, and other stakeholders are necessary. Partnerships alone do not constitute self-determination but are an important step in the strengthening of relationships between government and Aboriginal communities in the shift toward community-led decision-making and resourcing.⁵⁰ On this topic, one of the respondents commented that they wanted to see strong partnerships between Traditional Owners and non-Indigenous peoples, but with leadership from the Traditional Owners and respect for cultural practices upheld.⁵¹

The Victorian Aboriginal Affairs Framework 2018-2023⁵² is the whole-of-government framework for working with Aboriginal Victorians and embedding self-determination enablers and principles, committing the Victorian Government to structural and systematic transformation.⁵³ The Framework recognises that ‘to achieve positive outcomes, we must fundamentally change the way governments work with Aboriginal people’.⁵⁴

The Victorian Government must recognise that the implementation of the Framework could result in processes, policies and structures that are foundationally built upon Western systems of management, and understandable through a Western lens. If this happens, the Framework will have failed. The empowerment and self-determination of Aboriginal Victorians must therefore be a process of decolonisation of those processes, policies and structures if true equity is to be achieved. Whilst the Framework recognises that Aboriginal self-determination involves more than just consulting and partnering with Aboriginal Victorians on policies and programs that affect their lives,⁵⁵ the Government has to back this up with real action.

The four self-determination enablers identified by the community for the Government to commit to and act upon to implement the Framework are:

1. Prioritise Culture
2. Address trauma and support healing
3. Address racism and promote cultural safety
4. Transfer power and resources to communities.⁵⁶

A key consideration for the Framework in achieving these self-determination enablers is the sufficiency of resources and economic sustainability of the Aboriginal custodians.⁵⁷ The approach to managing Cultural Heritage must not be a struggle for control over territory,⁵⁸ but instead must reflect a concerted effort towards ensuring the effective and genuine management of Cultural Heritage. To effectively facilitate self-determination, Aboriginal communities or custodians must be able to function and act with economic independence, wherein they can utilise funds as they deem appropriate for the management of their Culture.

Ultimately, the right of self-determination is an existing right, and one that Aboriginal peoples have always asserted. It is not a right granted by Australian or state governments. It is therefore the role of the Victorian government to use the legal and policy levers at their disposal to facilitate Aboriginal peoples in exercising these rights. In order for the Victorian government to play an effective supporting role, the heritage management process must be decolonised. Frameworks for assessing the scope and existence of Aboriginal Cultural Heritage must be through an Aboriginal and not a Western lens. Management of that Heritage must then be passed to Aboriginal peoples.

1.3 THE WIDER VICTORIAN COMMUNITY MUST RESPECT AND UNDERSTAND ABORIGINAL CULTURAL HERITAGE

Language [should be] taught in school for all children. Our history taught in school for all kids not just white Australian history. And not a small project but actually implement[ed] in our [education] system.

Discussion Paper written response,
24 February 2021

Our past influences the present, to go forward we need to understand the past and the journey that involves getting over the baggage that was thrust upon us. The hidden history needs to be brought out in the open and understood. This is where Cultural Heritage, native title and land justice will really benefit.

Taking Care of Culture Discussion Paper written response, 15 May 2021

An essential element to continued practice of connection is that Aboriginal Cultural Heritage is respected and better understood by the wider community. Responses to the Discussion Paper and consultations highlighted the importance of respect and understanding of Aboriginal Cultural Heritage by the wider Victorian community.

WHY IS UNDERSTANDING IMPORTANT?

Understanding by the wider community is important for several reasons. Firstly, collaboration, consultation and free, prior informed consent are necessary to ensure best practice and compliance with the United Nations Declaration on the Rights of Indigenous Peoples. This means that all non-Indigenous people working with Aboriginal peoples and communities must have a strong understanding of the importance of Aboriginal Cultural Heritage.⁵⁹

One consultation respondent noted that cultural resilience is built on trust and support,⁶⁰ which are themselves built on understanding and respect.

Another respondent drew the link between understanding and improvements in environmental management and personal health,⁶¹ identifying that environmental management is essential to human survival. To respect and empower Aboriginal peoples to care for Country is relevant for the whole Victorian community.

Where Aboriginal stakeholders were asked how they could be empowered to care for Culture, Country and waterways, a common response was the need for appropriate resourcing so this essential work can be undertaken.⁶² It is important for Victorians and government funding bodies to recognise that maintenance and management of Aboriginal Cultural Heritage is a shared social responsibility.

Victorian Aboriginal peoples are the custodians of their Culture, however, their rights to ongoing practice include a right to respect and understanding from the wider community. The continuing knowledge gap by the wider Victorian community is discussed further in section 2.1.

1.4 CARING FOR COUNTRY

Ensuring that the [understanding] is there around kinship – We have kinship as People but can't have it without Country – it is connected to the Country.

Liz Allen, Member, Victorian Aboriginal Heritage Council

Caring for Country relates to the activities undertaken that go towards maintaining the beneficial relationship between Aboriginal peoples and their Country.⁶³ These activities generally relate to land and water management.⁶⁴ Country refers to the lands to which Aboriginal peoples have a traditional attachment or relationship, and care means the laws, customs and way of life that Aboriginal peoples have inherited from their ancestors.⁶⁵

The phrase “Caring for Country” has been used since the 1970s and 1980s and makes the connection between Aboriginal peoples and their land.⁶⁶ Caring for Country encompasses land management practices including fire management, care of waterways and care of plants and animals. Aboriginal peoples have cultural obligations to look after their Country – to

look after it according to the practices passed to them by their ancestors, and to pass Country and those custodian roles onto future generations.

However, Caring for Country means more than just land management practices. Positive outcomes include not just improved land practices but also social, cultural, economic, physical and emotional practices.⁶⁷ In 2021, the NAIDOC week theme was *Heal Country*. As the NAIDOC committee explained:

“Healing Country means embracing First Nation’s cultural knowledge and understanding of Country as part of Australia’s national heritage. That the culture and values of Aboriginal and Torres Strait Islanders peoples are respected equally to the culture and values of all Australians.”⁶⁸

Many of the responses to the Discussion Paper, surveys and consultations considered Country and Aboriginal Cultural Heritage to be synonymous.⁶⁹ Culture is Country and Country is Culture. One of the respondents commented that there needs to be a broader understanding of what Aboriginal Cultural Heritage comprises, considering that a more expansive definition of Aboriginal Cultural Heritage in the *Aboriginal Heritage Act 2006* (Vic) (AHA or The Act) would help share knowledge about Country and sites to future generations.⁷⁰ In fact, disconnection from Country, through forced removal and intergenerational trauma, was cited as a key restriction in the practice of Culture.⁷¹ It should also be noted that various aspects of Country have differing levels of importance to men and women.⁷²

Another respondent stated that place names provide a good example of the significance of place, relationships and obligations and how those attributes are ignored in pursuit of Euro-Australian monetary based values. The respondent explained that Pura Pura is a word meaning kangaroo. Said twice informs you that there should be many kangaroos. Essentially kangaroo Country. Next to Pura Pura is Nerrin Nerrin. Nerrin means she-oak. Again, said twice informs you that there are many she-oak.⁷³

The respondent emphasised that place names are informative of the management plans implemented in a bio-cultural landscape that identified the optimum potential for any keystone cultural species that any given area was managed for. Place names are more than just words to be translated. They inform people of what was, and what should be, on Country and how then to interact with it and what obligations Aboriginal peoples owe to that Country: “That is the greatest example of an obtuse arrogance Europeans have brought here and the impacts of that are rapidly destroying our Country on a daily basis.”⁷⁴

ABORIGINAL PEOPLES MUST CONTROL AND MANAGE COUNTRY

Aboriginal peoples assert the right to control and manage Country in order to practice culture and as a fundamental right to their Cultural Heritage. Although heritage management processes have historically evolved to increase the participation of Traditional Owners and communities in the management of Country, and to incorporate their perspectives concerning Country,⁷⁵ these rights are not yet recognised as intrinsic.

One of the responses indicated that control over culture required control over Country, envisaging that Country be looked after by Aboriginal peoples, who are connected to their predecessors, and who own land and waters, rather than corporate bodies.⁷⁶

This reflects the movement towards instilling Aboriginal values in significance assessments required of places uncovered during commercial archaeological work in Victoria. Tutchener et al argue that these assessments are inconsistent and ineffective in incorporating Aboriginal values, introducing the approach to assessing Cultural Heritage significance developed by the Bunurong Land Council Aboriginal Corporation.⁷⁷ The Corporation's approach propounds that the values recorded during significance assessment activities must be interpreted through the lens of understanding Country itself, as well as its significance and relationships with its custodians.⁷⁸

This approach aims to ensure the protection and maintenance of Cultural Heritage sites uncovered by archaeological work in Victoria, promoting a more rigorous, collaborative, consistent and culturally respectful use of common assessment criteria.⁷⁹ Ultimately, the Traditional Owners of the Cultural Heritage must have the paramount voice in assessing and safeguarding the cultural significance of, and their relationship to, Country.

CONNECTING TO COUNTRY AND TRANSFERRING OF KNOWLEDGE

The Discussion Paper asked how Aboriginal peoples want to engage with Country. Many of the responses referred to ongoing connection and control of Country and intergenerational transfer of knowledge. One of the Aboriginal organisations that responded said that they wanted Aboriginal peoples to have the right to manage, negotiate and protect Country, and be provided with resources to share understanding about Aboriginal Cultural Heritage. They also wanted to be able to

share with future generations knowledge about their responsibility to cultural management.⁸⁰

Technology can assist Aboriginal peoples to connect Country, kin and culture. It also aids the transfer of Aboriginal knowledge to younger generations, particularly through online resources and apps.⁸¹ N'arweet Dr Carolyn Briggs AM, Ingrid Burfurd, Matt Duckham, Olivia Guntarik, Di Kerr, Mark McMillan, and Daisy San Martin Saldias⁸² write about geospatial technologies and how their use potentially disrupts Aboriginal connection to place, starting by drawing the distinction between place and space. While space connotes measurable facts about a location, place is more holistic.⁸³ A sense of place refers to the meaning imbued in places, and how places in turn inform peoples' world view. For Aboriginal peoples, Indigenous Knowledge and place are inextricably linked.⁸⁴

Geospatial technologies tend to manage facts and data through a Western lens and fail to represent Indigenous Knowledge of place. This is probably an inherent risk of geospatial technology given that it is a Western framework of data analysis.⁸⁵ There are doubtless many programs for geospatial mapping that have genuine intentions of promoting and preserving Aboriginal knowledge of place. However, if these programs fail to address the challenges of *place* and *space*, Indigenous Knowledge may fall through the geospatial gaps.

If geospatial mapping projects are used as a way of recording Aboriginal knowledge about place, a lot of Aboriginal data will be collected. Issues of data sovereignty and governance are discussed in Section 2.3 of the report in relation to current management approaches to Aboriginal Cultural Heritage. The relevance here is to highlight caring for Country as a complex process that involves engagement with knowledge, as much as it does a physical place. When we say that Aboriginal peoples have a right to care for Country, we refer to this complex and layered process, that includes both physical care through land management and cultural practices and care of knowledge. The following case study illustrates that the right to care for Country includes the right to the health and well-being outcomes of that holistic process.



BENEFIT OF BEING ON COUNTRY

The Lowitja Institute is Australia's national institute for Aboriginal and Torres Strait Islander health research, based in Melbourne. In 2018, Gwendolyn David, Robbie Wilson, Jennifer Yantarrnga, William von Hippel, Cindy Shannon and Jon Willis co-authored *Health Benefits of Going On-Country*.⁸⁶ Their research findings highlighted that while there were barriers to going On-Country, the potential benefits included 'a healthier diet, more frequent exercise, greater transmission of culture, increased family-time and enhanced spiritual connectedness'.⁸⁷

These benefits were due to the increased walking conducted by Aboriginal people when On-Country, increased beach activity associated with fishing On-Country, and collecting foods in a culturally inclusive way that encouraged self-determination.⁸⁸

1.5 THE RIGHT TO CARE FOR WATER AND WATERWAYS

Water affects the dreaming places; environmental flooding impacts Aboriginal Cultural Heritage.

Sissy Pettit, Deputy Chairperson 2018-2021,
Victorian Aboriginal Heritage Council

Aboriginal peoples have rights and obligations to water under Aboriginal law and custom. Aboriginal peoples have inherent rights to waterways, and rights over water and cultural flows. Aboriginal Cultural Heritage is not separate from connection to Country, and many Aboriginal communities in Victoria obtain their cultural and spiritual identity and livelihood from the waters and the land.⁸⁹ The care of water is an important part of Aboriginal Cultural Heritage.

Water sustains life. Water is also an aspect of Country. For many Victorian Aboriginal communities, their relationship to waterways is not separate from their relationship to Ancestors, Country, and identity. In this Report we discuss water separately from Country, only because it gives us an opportunity to discuss specific issues associated with water including the allocation of water rights, and the concept of cultural flows. Just like with Country, Aboriginal peoples must have control and management of their waterways in order to practice Aboriginal Cultural Heritage.

One of the survey respondents pointed out that the impact of colonisation in Victoria has disrupted the care for waterways and, as a result, they have been modified significantly.⁹⁰ In addition, the impact of colonisation has governed the allocation of water management and control, in many cases forcibly dislocating Aboriginal peoples from engaging in aquaculture practice and environmental engineering that had existed for thousands of years.

As is demonstrated with the aquaculture practice at Budj Bim, cultural relationships with water are evolving, incorporating new information and technology. Aboriginal peoples contribute to their Cultural Heritage with each new generation. New information about environmental engineering will inevitably form part of the Aboriginal Cultural Heritage passed to the next generation. Aboriginal peoples want to ensure water is cared for appropriately. This is not only for the benefit of Aboriginal peoples, but the wider Victorian community. Water health directly contributes to community health. Aboriginal control and management of water requires that they also have access to the latest technologies and research.

AQUACULTURE ENGINEERING SYSTEMS

The world heritage listed Budj Bim Cultural Landscape is a site of extensive human modification of the environment through Aboriginal aquaculture systems, including extensive hydrological engineering systems that have been dated back to 6600 years ago.⁹¹ The aquaculture practices of the Gunditjmara people at Budj Bim included modification of ponds to maximise conditions for fish production through habitat expansion, the manipulation of wetlands through a network of channels, and the modification of water flow to trap, store and harvest kooyang.⁹²

Today, Gunditjmara people are involved in the operation, control and management of the Budj Bim Cultural Landscape and continue to practice aquaculture with portable nets and traps, reflecting the living and adaptable nature of their Cultural Heritage.⁹³

Empowering Aboriginal peoples to care for water and waterways requires that Aboriginal peoples be provided with meaningful rights over cultural relationships with waterways, and opportunities for collaborative engagement. In addition, Aboriginal peoples should be empowered with opportunities to develop additional expertise in environmental engineering and riparian ecosystems.⁹⁴

WATER RIGHTS

As is outlined above, waterways are an important part of Aboriginal Cultural Heritage. When considering the allocation of water rights, it is important to consider the extent of meaningful collaboration with Aboriginal peoples, as well as the ability for Aboriginal peoples to make management decisions about waterways. Victoria is leading the way in this respect through the introduction of the *Yarra River Protection (Wilip-Gin Birrarung Murrumbidgee) Act 2017* (Vic), yet there are still areas for improvement. Aboriginal relationships to water prioritise the health and unity of the river, and as a result it is in the interest of the wider Victorian community to enable Aboriginal control and management of waterways. As the global environmental crisis worsens, Aboriginal peoples want and need to be a part of the solution.⁹⁵

CULTURAL FLOWS

Cultural flows use Aboriginal knowledge to determine the flow of waterways, including when and where water should be allocated. Cultural flows reflect the dynamic ways that water sustains diverse beliefs, values, and ways of life, as well as the ways in which groups value, care for, and sustain the health of aquatic systems.⁹⁶ Cultural flows must not only be considered as ancient methods of connecting to waterways, without contemporary application.⁹⁷

NAMING OF WATERWAYS

At the time of this report, there are many Victorian waterways that are named after European settlers who enacted atrocities against Traditional Owners.¹⁰² The English names for waterways were imposed on the landscape, contributing to the false impression that the waterways were otherwise unnamed and unowned. This is the *terra nullius* lie. As water and its sources are sacred and vital to Aboriginal Cultural Heritage, the process of re-naming waterways is an important process toward repairing the impact of colonisation. Waterway naming is a truth telling exercise.

MURRAY LOWER DARLING RIVERS INDIGENOUS NATIONS (MLDRIN)

The Murray Lower Darling Rivers Indigenous Nations (MLDRIN) is a confederation of twenty-four independent, sovereign First Nations in the southern Murray-Darling Basin. Established in 1998, MLDRIN advocates for the inherent rights of First Nations to own and manage water resources and water-dependent landscapes (Country) for cultural, spiritual, social, environmental and economic purposes. In May 2010, MLDRIN and the Northern Basin Aboriginal Nations (NBAN) jointly endorsed the Echuca Declaration, which defines cultural flows as:

*Water entitlements that are legally and beneficially owned by the Indigenous Nations of a sufficient and adequate quantity and quality to improve the spiritual, cultural, environmental, social and economic conditions of those Indigenous Nations. This is an inherent right.*⁹⁸

The joint endorsement of the Echuca Declaration followed the National Water Initiative (2004), which set the framework and conditions for the establishment of a water market and commodification of water, and the separation or ‘unbundling’ of land and water under the law, which has been referred to as a ‘double dispossession’ of First Nations’ water rights.⁹⁹ In 2007, amendments to the Victorian Water Act 1989 reflected this artificial separation of lands from waters. Similarly, the *Aboriginal Heritage Act 2006* (Vic) currently does not give rights to water, waterways or water-based places; the legislation only recognises land immediately adjacent to waterways. The separation of lands from waters under settler state law undermines and significantly impacts the inherent and unceded rights of First Nations across Australia.

In 2018, findings from the First Nations-led National Cultural Flows Research Project expanded on the Echuca Declaration and outlined the conditions necessary for cultural flows for First Nations in Australia.¹⁰⁰ These include three levels of First Nations involvement and influence in water law, planning and management frameworks:

- I. First Nations’ rights to water of sufficient quality, volume and flow frequency to achieve and sustain cultural, spiritual, social, environmental and economic outcomes;
- II. Influence over water landscapes through management and decision-making authority; and
- III. Foundational and transformative reform of settler state law and frameworks to build a more just, fair, inclusive and pluralist basis for managing water and water landscapes.¹⁰¹

The National Cultural Flows Research Project sets a new national standard for First Nations’ water justice in Australia, with lessons for the future reform of other settler state law and colonial frameworks, including cultural heritage legislation, that have historically excluded First Nations people, the inherent and unceded rights and obligations that First Nations have to Country, and the significance of water to First Nations people.

Dual naming is a way of decolonising the landscape because it ensures that the language of place remains connected to place. Connecting language and Country revitalises both. In addition, dual naming is a way of demonstrating improved understanding by the wider Victorian community of Aboriginal Cultural Heritage.¹⁰³

Victoria is making positive strides in the naming of waterways, through the *Our Places Our Names - Waterways Naming Project*, and the ability to name currently unnamed waterways under the *Aboriginal Heritage Act 2006* (Vic), discussed further at section 2.5.

1.6 ABORIGINAL PEOPLES MUST BE ABLE TO EXPRESS THEIR CULTURAL RELATIONSHIP AND OBLIGATIONS TO PLANTS AND ANIMALS

The impact of the loss of our totem animals is enormous. When our totem dies, our connection with the spirit is compromised. The spirit and totem are as one and once our totem dies, a bit of our spirit dies as well. We feel the whole of Country in ourselves and its loss is felt in our whole spirit, not just the body that carries the spirit.

Sissy Pettit, Deputy Chairperson 2018-2021, Victorian Aboriginal Heritage Council

Traditional Owners must be put in the key roles that allow them to control and manage the use of plants and animals.¹⁰⁴ This extends to controlling and managing the access and use of cultural knowledge associated with and connected to particular plants and animals.

Respondents agreed that if non-Indigenous businesses work with plants and animals (and associated knowledge) they must consult with Aboriginal peoples and gain their permission for use.¹⁰⁵ Additionally, Aboriginal peoples should share in the benefits that flow from the use of their knowledge and resources.¹⁰⁶

One of the Aboriginal organisations who responded to the Discussion Paper also made the link between Aboriginal peoples' control and management of plants and animals, and control and management of their intellectual property rights in relation to the same.

The issue of intellectual property rights, and gaps in the law, was raised in the responses to the Discussion Paper. Intellectual property laws frequently either do not recognise Aboriginal Culture as subject matter for intellectual property rights protection or assigns rights to individuals without cultural authority. This is discussed further in Part 2.

1.7 ABORIGINAL PEOPLES CONTROL THE MANAGEMENT AND CARE OF CULTURAL OBJECTS

When approaching institutions, you get met with gatekeepers, you have to prove connection. If you don't know the person you have to prove your legitimacy to get access to the information they stole 200 years ago. Institutions with materials, knowledge, stories, information – all of this [material] is a responsibility for institutions to relocate back to the community.

Aboriginal respondent¹⁰⁷

Aboriginal peoples must be able to control the management and care of cultural objects. This means facilitating access to collections within the Galleries, Libraries, Archives and Museums (GLAM) sector. It also means repatriation of cultural objects. The success of current laws and policies in facilitating this access and repatriation is discussed further in section 2.6. The purpose of the present discussion is to emphasise *why* this an essential right to the practice of Culture. In other words, this section emphasises that a key way that Aboriginal peoples connect to their Cultural Heritage is through continuing relationships with their cultural objects.

There are a vast amount of cultural objects in private, public and governmental institutions, such as Melbourne Museum, the University of Melbourne and Monash University, and the State Library of Victoria. Access to this material by the wider Aboriginal community can be problematic.

Aboriginal heritage professionals consulted for this Report stated that Aboriginal peoples have the right to say what their Culture is, and to maintain their culture.

Removal of objects from community denies the ability for Aboriginal Cultural Heritage to be passed on and valued. As noted in consultation feedback, Cultural Heritage requires maintenance, reconstruction and the ability to change.¹⁰⁸ One respondent consulted, stated that they want nothing less than full control of Aboriginal Cultural Heritage. Another stated that Aboriginal Cultural Heritage is 'everything'.¹⁰⁹ The theme of control of the management and care of Aboriginal Cultural Heritage should not be understated.

There are several barriers that respondents identified as pressures in the Aboriginal management and control of cultural objects in Victoria. This includes:

- Many GLAMs still hold cultural objects without the knowledge of Aboriginal peoples. This provides a barrier to Aboriginal self-determination.¹¹⁰
- Several Aboriginal respondents working in this space were surprised by the quantity of objects being held. They raised that it is a problem if Aboriginal peoples do not know their cultural objects exist without obtaining qualifications and employment in cultural heritage management.¹¹¹
- There is a need for increased governance by Aboriginal peoples in institutionalised decision-making relating to Aboriginal cultural objects.¹¹²
- There is a need for two-way learning between Aboriginal peoples and Cultural Heritage staff.¹¹³
- Aboriginal peoples want more say in the control, management and care of Aboriginal cultural objects.
- Aboriginal peoples want to be able to determine what, and how, Aboriginal cultural objects are held by GLAMs.¹¹⁴
- Aboriginal peoples want better relationships with people involved in collection and conservation practices, allowing for the development of protocols to be used concerning how GLAMs store, manage and control Aboriginal cultural objects in their collections.¹¹⁵
- Aboriginal peoples raised that they must endure a problematic process to identify and access Aboriginal Cultural Heritage held in institutions, requiring proof of a 'legitimate connection' to the information if they cannot prove a personal connection.

In addition to the pressures, there are several positive steps currently underway in Victoria, especially with the recognition of the importance of intangible Cultural Heritage as inseparable from tangible Cultural Heritage.

INTANGIBLE CULTURAL HERITAGE

Intangible Cultural Heritage relates to:

'the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognise as part of their Cultural Heritage. This intangible Cultural Heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity'.¹¹⁶

Intangible Cultural Heritage is manifested through:

- (a) Oral traditions and expressions, including language as a vehicle of the intangible Cultural Heritage;
- (b) Performing arts;
- (c) Social practices, rituals and festive events;
- (d) Knowledge and practices concerning nature and the universe;
- (e) Traditional craftsmanship.¹¹⁷

Intangible can be manifested through cultural objects. While a Western view of a cultural object may raise questions of shape, form, marking and meaning, many Aboriginal ways of knowing do not separate the object from the story and knowledge (the intangible) that is transmitted through that cultural object. Separating the object from its community has the effect of dislocating the object from culture, dispossessing it, and preventing Aboriginal peoples from accessing their cultures.

Relationships concerning cultural objects clash when Aboriginal objects are kept in non-Aboriginal institutions, without the control, management and care of Aboriginal peoples. This is due to several factors:

- Many objects were stolen or acquired under unconscionable circumstances for 'research' purposes. In many ways, having exhibitions of these objects without Aboriginal collaboration is an exhibition of cultural theft;
- Many Aboriginal cultural objects lose power where they are removed from the intangible connection to Country and connection to kin;
- Aboriginal peoples have a different relationship to cultural objects, which may also have utility and functional uses;
- While Aboriginal cultural objects are being kept in collections and displayed behind glass, it is locking Aboriginal peoples away from their Cultural Heritage; and

- Aboriginal relationships to time differ to Western understanding. Western museums aim to preserve Aboriginal Cultural Heritage through a time-capsule approach. This may not be appropriate management for all Aboriginal cultural objects.

Key initiatives are being undertaken, largely driven through the employment of Aboriginal staff in GLAMs. The case study below illustrates the process of incorporating intangible heritage in relation to the tangible possum skin cloaks, removing the cultural object from the Western time-capsule approach, and working with Aboriginal communities to re-invigorate an important cultural practice.

GUNDITJMARA POSSUM SKIN CLOAK REVITALISATION

Museums Victoria holds two historic Aboriginal possum skin cloaks in its collection, a Yorta Yorta cloak from 1853 and a Gunditjmara cloak from Lake Condah from 1872.¹¹⁸ These two cloaks are the only two known surviving cloaks in the world from their time.¹¹⁹

After a smoking ceremony on the last day of May 2019, the Gunditjmara cloak was brought out of storage into public view alongside two recently commissioned cloaks, celebrating cultural practice as not just historical but continuing. This cloak has since been deinstalled from Museum Victoria and is being prepared to be brought to the Gunditj Mirring Traditional Owners Aboriginal Corporation's Keeping Place.

Today, the practice of making possum skin cloaks is flourishing with First Nations peoples from south-eastern Australia preserving, embedding, and revitalising their knowledge and culture through the contemporary practice.¹²⁰

This project was led by Southeastern Australia Aboriginal Collections senior curator Kimberley Moulton, who built upon Museum Victoria's work of community access and smoking ceremonies which has been a part of Museum Victoria's practice for well over a decade. Kimberley is a Yorta Yorta woman who uses anti-colonial curatorial methodology, building community access to cultural objects held in the museum, and building collections and collaborative relationships with Aboriginal artists and makers across disciplines.

An example of her ongoing critical research in Aboriginal curatorial methodology Kimberley created the MOVING OBJECTS project. In May 2021, Kimberley curated and developed the project, which was a partnership between Museums Victoria and RISING Festival. MOVING OBJECTS developed a framework for engagement between Museums Victoria's collections and Aboriginal community members.

MOVING OBJECTS is a project that supports the transformative potential of First Peoples artists and community engaging with historical collections and making new work in response to this. Kimberley developed a framework that looked at themes of Regeneration, Disruption and Renewal where artists had sustained access to collections of interest and worked to create a response with the thematic. The Project was presented as a projection, installation and performance across the city, creating a connection between collection material and creative practice and will be an ongoing and iterative project which she will work on both at Melbourne Museum and RISING and is a model that could potentially work in other museums and collecting institutions.

ABORIGINAL MANAGEMENT AND CONTROL OF CULTURAL OBJECTS IN CULTURAL CENTRES

Respondents raised concerns about Aboriginal Cultural Centres that are not Aboriginal-owned or run. Cultural Centres have an important role in educating the public about the inherent value of Aboriginal peoples and Aboriginal Cultural Heritage, through truth-telling and facilitating discussions between Aboriginal and non-Indigenous people about Aboriginal science, culture, arts and knowledge.¹²¹ It was raised that the wider public believes that Aboriginal Cultural Heritage is limited to objects alone rather than recognising and understanding Culture as a way of life.¹²²

Respondents reported that at each level of a Cultural Centre, Aboriginal management and control is required, as well as protecting funding to ensure the continued professional opportunities and teaching of cultural awareness to the wider public. It was raised that there are very few Aboriginal-run museums and archives, and for the ones that exist, funding is drying up. This is also relevant for Aboriginal language centres (see section 2.3). In addition, it was suggested that funding is generally focused on supporting Cultural Centres based in the Melbourne CBD, rather than regional Victoria.¹²³

It was raised by respondents that insufficient funding leads to reactive work, high demand, and staff being constantly over worked.¹²⁴ For example, data provided by First Peoples-State Relations (formerly Aboriginal Victoria) provided an example of large collections of cultural objects being returned to an Aboriginal language group in Victoria, that due to their lack of resources and resultant inability to care for the repatriated cultural objects, had to arrange for external storage and maintenance with a regional heritage body.¹²⁵

From an Aboriginal perspective, cultural objects are not mere artefacts of Aboriginal Cultural Heritage. GLAMs are not neutral spaces. Museum theory was developed from Western perspectives. For Aboriginal peoples, their objects are part of the lived cultural practice, and indivisibly connected with people and Country. Therefore, a right to the practice of Cultural Heritage means a right to interact with cultural objects in context, on terms determined by Aboriginal peoples. The latest developments in the GLAM sector, towards increased Aboriginal representation, interpretation and decision-making, as well as repatriation, is discussed further in section 2.6.

1.8 ABORIGINAL PEOPLES HAVE A RIGHT TO BENEFIT FROM A SUSTAINABLE AND VIBRANT ARTS AND PERFORMANCE SECTOR

Engagement with the arts can have powerful impacts on health, wellbeing and the strengthening of communities... The role of the arts in exploring and communicating social concerns, giving voice to hidden issues and allowing self-expression is also a major contributor to health.

VicHealth, Promoting Aboriginal Health through arts: Overview of supported projects.¹²⁶

Aboriginal arts and performance, whether based on stories, knowledge, connection to Country or spiritual connection, are all expressions of cultural practice and constitute Aboriginal Cultural Heritage. Victoria

has a vibrant Aboriginal Arts and Performance sector, providing social, economic, physical and cultural benefits, and positive wellbeing outcomes for the wider community.

There is a demonstrable link between connection to arts and performance, social relationships and mental and emotional wellbeing. The World Health Organisation (WHO) has reported evidence that arts-based activity can contribute to strengthened social relationships, increasing the likelihood of good mental health and wellbeing.¹²⁷ Additionally, Deakin University reported the important role that arts programs play in the maintenance and transmission of Aboriginal Cultural Heritage, while maintaining connection to Country.¹²⁸ Research findings identified that arts programs can increase health benefits, providing a powerful vehicle for community education around public health, improving mental health and wellbeing, and reducing harmful behaviours through the outward expression of emotional healing and negative life experiences.¹²⁹

One program that highlights the wellbeing benefits of the Aboriginal Arts and Performance sector is the Torch Project. This Project began in 2011 as an 18-month pilot program to address the over-representation of Aboriginal peoples in the Victorian prison system.¹³⁰ Today, the program has demonstrated the powerful benefits of cultural connection and social wellbeing, boasting a 50% reduction in recidivism rates.¹³¹ The Torch Project provides inmates access to cultural and artistic knowledge and tools to build an arts practice upon their release.¹³² The project connects them to community arts programs and the professional arts industry. The annual "Confined" exhibition has become a highlight in the Victorian arts calendar, exhibiting Aboriginal artists at various stages of their artistic careers.

Arts and performance programs allow for an increased sense of self through community connection, a place of belonging, emotional exploration and expression. They provide opportunities for exploration of political beliefs and values, and for Aboriginal peoples to experience cultural validation through telling cultural stories and transmitting cultural knowledge.¹³³

The ILBIJERRI Theatre company is an example of an Aboriginal-run theatre initiative which connects people to Culture with positive social and community outcomes.

VicHealth findings state that arts and performance activities can improve mental and physical health through increasing peoples:



ILBIJERRI THEATRE COMPANY

ILBIJERRI is a professional theatre company for Aboriginal and Torres Strait Islander peoples of Victoria, which was formed in 1990 by Melbourne-based First Nations artists and community members. Today ILBIJERRI is one of Australia's leading theatre companies.¹³⁴

ILBIJERRI's works features a uniquely Aboriginal and Torres Strait Islander perspective and gives a voice to First Nations artists and cultures. As well as creating innovative theatre, ILBIJERRI collaborates extensively on community health-message works; conducts artistic development including the ILBIJERRI Ensemble and BlackWrights programs for emerging First Nations theatre practitioners and playwrights of all ages; and holds a leadership position in the Australian performing arts sector marketplace.

ILBIJERRI actively engages First Nations peoples and protocols in the development, production and delivery of all artistic works, and uses its nation-wide platform to advocate through theatre including 2019 production *Conversations with the Dead*, 2019 production *Viral*, and internationally renowned production, *Jack Charles v the Crown*.¹³⁵

- self-esteem, pride and cultural identity;
- sense of self-determination, control and belonging; and
- academic outcomes, skill development and employment pathways.¹³⁶

Social cohesion and community cohesion are facilitated in arts and performance programs, which increases positive cultural identity, a sense of resilience, and positive impacts on educational and employment outcomes.¹³⁷ Like the ILBIJERRI Theatre Company, the Short Black Opera Company promotes self-determination, cultural identity, and skills development.

The wider Victorian community also benefits from the interaction with Aboriginal knowledge in the arts that is created and interpreted by Aboriginal peoples.

Consultants for this report explained that telling Aboriginal stories through creative practice is one method of protecting stories.¹³⁸ It was raised repeatedly that creative practice provides a method of passing on Aboriginal Cultural Heritage to future generations. Artists consulted discussed the process of their artistic practice as a way of teaching the next generation to engage in Aboriginal Cultural Heritage, allowing for the continuation of knowledge for generations to come.

SHORT BLACK OPERA COMPANY

Established in 2009 by Professor Deborah Cheetham AO, Short Black Opera is a national not-for-profit opera company specialising in the training and development of Aboriginal and Torres Strait Islander musicians. The recipient of numerous awards, Professor Cheetham has been a pioneer in Australian arts for over 30 years. She describes herself as a 21st century urban woman, Yorta Yorta by birth, stolen generation by government policy, soprano by diligence, composer by necessity and a proud member of the LGBTIQI community.

Short Black Opera began with the vision of increasing Indigenous representation in the world of classical music and has achieved international acclaim through projects such as *Pecan Summer*, Australia's First Indigenous Opera written and composed by Prof Cheetham, Dhungala Children's Choir and *Woven Song*, a celebration of ancient culture in the form of tapestry. Short Black Opera has recently embarked on another project, *Ensemble Dutala*, Australia's first Aboriginal and Torres Strait Islander chamber ensemble, led by Noongar conductor and violist Aaron Wyatt.

When asked how the Arts and Performance sector can be improved, respondents stated that negotiations between Aboriginal and non-Aboriginal arts and performance groups should be strengthened if non-Aboriginal performers are using any Aboriginal cultural material.¹³⁹ It was suggested that the Arts and Performance sector can be strengthened through increased use of intellectual property laws, such as copyright and performers rights.¹⁴⁰

Another respondent suggested the Arts and Performance sector can be improved through educational measures to ensure greater respect within the broader community for Aboriginal peoples' responsibilities concerning storytelling, knowledge and cultural practice.¹⁴¹

TREELINES ART INSTALLATION

TreeLines is an upcoming art installation, incorporating Aboriginal community consultation and respect for Country as key features of the artistic and design process. Funded by Creative Victoria, Australia Council for the Arts, and Monash Art Design & Architecture, TreeLines is a solar-powered, Aboriginal community-owned public artwork. TreeLines will use modular glass covered boxes, inserted into the ground in a non-disruptive, impermanent manner to light up trees on Country. This project is being led by Artists Professor Brian Martin and Daniel von Sturmer.

Community consultation is a key feature and strength of the work. Brian says, 'the most important part of this project is the process'.¹⁴² TreeLines is an artistic collaboration. Daniel and Brian have designed the glass with Wathaurong Glass and are collaborating through paid partnerships with Aboriginal community and RAPs (Registered Aboriginal Parties) who will choose the site for the work and install the works. As custodians of Country, the Traditional Owners are recognised as experts in how to best incorporate and manage the installation without disturbing the trees and any Cultural Heritage.

ECONOMIC OUTCOMES FOR A VIBRANT ARTS AND PERFORMANCE SECTOR

Pursuant to Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP),¹⁴³

Indigenous peoples have the right to commercially benefit from their Cultural Heritage, traditional knowledge and traditional cultural expression (otherwise known as Indigenous Cultural and Intellectual Property or ICIP).

Arts, performance, bushfoods and products, tourism on Country and land and water management practices to name but a few, all present opportunities for Aboriginal Victorians to benefit economically and socially from their Cultural Heritage.

Aboriginal Arts and Cultural Centres provide effective working examples of how the practice of Aboriginal arts and Culture can not only provide health and wellbeing benefits to Aboriginal Victorians, but also ensure economic and social benefits to community as well. Fake art and misappropriation of ICIP threatens the important income stream that Arts and Cultural Centres bring to local community members.

RAPs and Traditional Owners and Elders are regularly engaged to provide Welcome to Country, smoking ceremonies and Aboriginal performances at events, openings and launches presenting a unique income stream that connects the wider public to Victoria's diverse Aboriginal Cultures. This extends to licensing of ICIP (knowledge, language, stories, art, plant & animal knowledge, techniques and practices) for use in relation to everything from council and community landscaping, to business branding, tourism, product development, souvenirs and building design and fabrication.

However, Australian laws are limited in their ability to adequately protect Aboriginal Cultural Heritage, including in relation to commercialisation. Without a *sui generis* system for protection, commercial relationships in relation to ICIP must fit themselves within the framework of existing intellectual property, contract, biodiversity, and Cultural Heritage laws.¹⁴⁴ These Western frameworks are not generally an appropriate fit for the effective management and control of Cultural Heritage by Aboriginal peoples.

For example, the requirement under copyright law that a work be in material (tangible/hard copy/written) form in order to gain protection often prevents orally transmitted cultural knowledge from being legally protected. This is because Australian copyright law protects the written expression of knowledge, not the knowledge itself. This has in the past limited Aboriginal peoples' ability under Western laws to protect oral

dreaming stories, songs or dance, and prevent misappropriation.¹⁴⁵ In addition, if a work, film or sound recording incorporates or embodies Aboriginal cultural expression or knowledge, but copyright is not owned by Aboriginal peoples, there is little legal recourse available if the owner of copyright is not willing to follow cultural protocols.¹⁴⁶

Limitations on artists and performers' ability to protect their rights as well as use of their cultural knowledge was raised during our consultations.¹⁴⁷ Caution and reticence surrounded many respondents' willingness to share knowledge or collaborate in creative projects with non-Indigenous entrepreneurs and organisations because of this. Further discussion on how current laws and policies stress or enable cultural rights is discussed further in Part 2.

1.9 ABORIGINAL LANGUAGE REVITALISATION STRENGTHENS CULTURE

Today we are reviving and reawakening our mother tongue languages.

In this process we work with the sounds of our language; the sounds of Country and the knowledge handed down from the Old People. Language is connected to and is the voice of the Country it belongs to, just as we belong to the Country.

We have developed orthographies, sound and spelling systems, so we are able to read and write our language as well as speak it. Through this reclamation and revival process we gather our knowledge through our Elders and community. We re-dream and re-interpret the historical records; those messages left for us by our Old People.

Dr Vicki Couzens¹⁴⁸

Prior to colonisation there were approximately 44 individual Aboriginal languages spoken in Victoria. These languages were (and are) connected to Country. For example, languages from coastal groups incorporated references to complex marine systems.¹⁴⁹

Developed over thousands of years, colonisation caused many Aboriginal language systems to decline as they were no longer regularly spoken.



VICTORIAN ABORIGINAL CORPORATION FOR LANGUAGES AND MELBOURNE MUSEUM – RIVER OF LANGUAGE

In 2019, the Victorian Aboriginal Corporation for Languages (VACL) worked in collaboration with Melbourne Museum and the Bunjilaka Aboriginal Cultural Centre to curate *Ngulu wurneet, galada-al wurrung-u, parniwaru tyalingi, waran woorroong-ee, barringgi dyaling – River of Language*. This vivid mixed-media exhibition encouraged visitors to immerse themselves in Aboriginal ways of Knowing, Being and Doing, and learn through listening and observation.¹⁵⁶

The VACL curatorial working group included Dr Vicki Couzens and Brenden Kennedy, who asked visitors to take the time and “learn to see the world through our eyes, through our words, stories and images”.¹⁵⁷

As expressed neatly by Museums Victoria in the Media Release announcing this collaboration:

“In Aboriginal culture, land and language are inextricably linked. Language is directly connected to place, through the mimicry of animals and nature in dance; the visual language in body art, motifs and symbols in stone etchings, sand paintings and ceremonial ornaments, music and sound vocalisation; and the naming and relationship of all things, embodying the interconnectedness of our existence.

As celebrated Wathaurong Community Linguist, Tarndop David Tournier (dec) so eloquently expressed, “Language is Culture, Culture is Language, Language is Land, Land is Language, Family-Language, Language-Family...one can’t live without the other”.¹⁵⁸

Language is considered an 'Ancestral right', which 'contributes to the wellbeing of Aboriginal communities, strengthens ties between Elders and young people and improves education in general for Indigenous People of all ages'.¹⁵⁰

THE RIGHT TO CONNECT WITH LANGUAGE

A senior Aboriginal language educator consulted for the Report emphasised that as culture is passed with language, the generational learning of language is an essential practice for continuing culture. Stories, both written and oral, poetry and art are maintained and communicated through language.¹⁵¹ Another respondent stated Victorian Aboriginal peoples 'breathe and speak language'.¹⁵²

Several respondents raised that being primary interpreters of your language is a principle of international human rights for Indigenous peoples pursuant to the *United Nations Declaration on the Rights of Indigenous Peoples*¹⁵³ (discussed further in Part 2). Accordingly, language revitalisation is not only a cultural rights issue, but a human rights issue.¹⁵⁴

Language carries stories, dance, music, songlines and knowledge of family and relationships within community. Through revitalisation programs, Aboriginal communities are awakening sleeping languages and associated Aboriginal Cultural Heritage.¹⁵⁵ Several respondents raised that there is need for increased support for language revival, including localised support on Country, provided to smaller Aboriginal-led projects working on language revitalisation as well as the Victorian Aboriginal Corporation for Languages.

1.10 ABORIGINAL KNOWLEDGE MUST BE CARED FOR BY ABORIGINAL PEOPLES IN CULTURALLY SAFE WAYS

Aboriginal peoples have a right to oversee caring for their knowledge, including traditional knowledge and traditional cultural expression (also known as Indigenous Cultural and Intellectual Property or ICIP). This is essential to their cultural safety and the integrity of Aboriginal Cultural Heritage. Aboriginal peoples must be the tellers of their own stories in any

truth telling program. In fact, this is the basis of truth telling, otherwise it would be yet another imposition of non-Aboriginal perspectives on the lives and cultures of Aboriginal peoples.

Further, truth telling by Aboriginal peoples contributes to wider community understanding of Aboriginal Cultural Heritage. This in turn ensures the community is better able to contribute themselves to the care of Aboriginal Cultural Heritage. It is also hoped that greater understanding by the wider community will reduce or avoid situations of cultural risk to Aboriginal peoples: a more informed general public is less likely to inadvertently create situations of cultural risk, for example by misuse of ICIP.

Zena Cumpston's recent *Indigenous plant use*: A booklet was created to share cultural plant knowledge in culturally safe ways that also contribute to understanding of Aboriginal plant knowledge by the wider community.¹⁵⁹

INDIGENOUS PLANT USE BOOKLET

The *Indigenous plant use* booklet was created in 2020 by Zena Cumpston, a proud Barkandji woman and research fellow at the University of Melbourne. The booklet contains over 50 Indigenous plant species and is intended to provide a portal for individuals, schools and community groups in Victoria to engage with Indigenous plants and the complex knowledge of plants developed by diverse Indigenous communities.¹⁶⁰

The *Indigenous plant use* booklet provides information about the cultural, medicinal, nutritional and technological use of Indigenous plants, encouraging readers to recognise the depth and breadth of Indigenous knowledge. The booklet contains labels which can be laminated and displayed in the garden, and useful resources for the community to learn from and engage with the extensive knowledge of Traditional Owners in Victoria.

Themes laid down here, will be picked up again in Part 2, particularly in our discussion of the continuing gaps between Aboriginal and non-Aboriginal understanding of Aboriginal Cultural Heritage. This section will consider aspects of cultural safety further, including what is the right to cultural safety, the role of cultural protocols in navigating cultural risk, cultural safety in truth telling and the role of cultural safety training.

WHAT IS A RIGHT TO CULTURAL SAFETY?

Aboriginal peoples should feel culturally safe in any collaboration with non-Aboriginal partners including businesses, governments and organisations. It is a right, as Aboriginal peoples have the right to be free from any form of discrimination, as well as the right to the dignity and diversity of their cultures, traditions, histories and aspirations.¹⁶¹ Cultural safety is embedded in the principle of respect.¹⁶² This means that an environment and working relationship is built without prejudice, without discrimination, and where Aboriginal peoples are able to feel empowered to be themselves.¹⁶³

In a workplace environment, culturally safe spaces means one in which Aboriginal peoples feel supported, culturally safe and secure,¹⁶⁴ and that their cultural connections to place and belonging are valued and understood.¹⁶⁵ Cultural safety can be promoted through appropriate engagement with Aboriginal peoples and communities, encouraging cultural safety training within an organisation, or through having established ICIP protocols for working relationships, partnerships and collaborations.

WHAT ARE ICIP PROTOCOLS? WHY ARE THEY NECESSARY FOR CULTURAL SAFETY?

Aboriginal peoples have their own established protocols and systems for the protection,

maintenance, access and use of their Cultural Heritage, and Aboriginal knowledge including traditional knowledge and traditional cultural expressions (also known as Indigenous Cultural and Intellectual Property or ICIP).

ICIP refers to the rights of Aboriginal peoples to their heritage. Heritage comprises of all objects, sites and knowledge, the nature and use of which has been transmitted or continues to be transmitted from generation to generation, and which is regarded as pertaining to a particular Indigenous group or its territory. The heritage of Indigenous peoples is a living one and includes:

- Literary, performing and artistic works (including songs, music, dances, stories, ceremonies, symbols, languages and designs);
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and phenotypes of flora and fauna);
- All items of movable and immovable cultural property (including sacred and historically significant sites and burial grounds); and

- Documentation of Indigenous peoples' heritage in archives, film, photographs, videotape or audiotape and in all forms of media.

Aboriginal peoples are concerned that there is little respect for their ICIP in the wider Australian community.¹⁶⁶ There are also concerns as to the efficacy of Australian intellectual property laws and Cultural Heritage laws in their ability to protect ICIP.

Pursuant to Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)¹⁶⁷ (discussed further in section 2.1) and the *Our Culture, Our Future* report, Aboriginal peoples have inalienable rights to their ICIP, including the right to:

- Own and control their ICIP;
- Ensure that any means of protecting ICIP is based on the principle of self-determination
- Be recognised as the primary guardians and interpreters of their cultures;
- Authorise or refuse to authorise the commercial use of ICIP, according to Aboriginal customary law;
- Maintain the secrecy of Aboriginal knowledge and other cultural practices
- Full and proper attribution;
- Receive benefits from the use of their ICIP; and
- Control the recording of cultural customs and expressions, the particular language which may be intrinsic to cultural identity, knowledge, skill and teaching of culture.¹⁶⁸

Aboriginal peoples are concerned that when non-Aboriginal people do not know about cultural protocols, that this leads to misuse of ICIP which in turn leads to cultural risk. The World Intellectual Property Organisation (WIPO) has established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which discusses issues related to the protection of ICIP on a global level and is developing draft articles for the protection of traditional knowledge.

NON-COMPLIANCE WITH PROTOCOLS LEADS TO MISUSE OF ICIP

It was raised in consultations that ICIP is consistently being used without permission.¹⁶⁹ This 'disrespectful' and unauthorised use occurs even after people have engaged with Aboriginal knowledge holders and established a relationship that appears will be based on benefit sharing and co-designed approaches.¹⁷⁰ This has stopped one respondent from disclosing knowledge about scientific plant uses and Sacred

and/or Secret sites due to the risk of that knowledge being misused.¹⁷¹

Another respondent raised that there is no protection against people taking Aboriginal knowledge, whether that relates to arts, medicine, or plant science, and because of this they are often reserved and reluctant to disclose information because of the fear of misuse and misappropriation.¹⁷²

Respondents also raised that the intellectual property laws in Australia are insufficient to prevent misappropriation of ICIP,¹⁷³ leaving access and use of ICIP to be unregulated. Where trade and commercialisation of ICIP is considered an important opportunity for Aboriginal peoples in relation to their heritage, increased legislative protection is required to provide protection and prosecution of those who breach the regulations.¹⁷⁴

NAVIGATING CULTURAL RISK

In the absence of effective Australian laws to protect ICIP, the use of cultural protocols provides an opportunity to develop cultural safety within a community, an organisation, an industry or a project involving Aboriginal peoples. ICIP Protocols have seen success in the arts and entertainment industries as well as in the health, research and GLAM sectors, as a way of ensuring appropriate engagement and respect for Aboriginal peoples and their ICIP.¹⁷⁵

ICIP protocols and respectful collaboration are a means of navigating cultural risk in a safe way. Aboriginal knowledge, including ways of knowing and being, are often recorded, collected and reproduced without respect for cultural protocols, meaning that a lot of contemporary projects are initiated in a context of cultural risk. This is not to say that Aboriginal Cultural Heritage initiatives should be abandoned whenever there is an actual or potential risk of harm. In fact, this would be a regrettable outcome, and could represent a disengagement from Aboriginal peoples that would only perpetuate existing cultural harms. Instead, ICIP protocols are a way to approach the risk of cultural misuse and misappropriation and ensure Aboriginal Cultural Heritage is cared for appropriately.

An example of use of culturally respectful engagement navigating cultural risk is the ceremonial ground in East Gippsland.

CULTURAL SAFETY AND TRUTH TELLING

Respondents raised the importance of truth-telling in promoting Aboriginal Cultural Heritage in culturally safe ways. It was raised that there are extensive maps, books, terminology and resources that promote European ways of understanding, leaving non-Aboriginal people with a lack of information about what they don't know and often an incorrect assumption that their knowledge is the "neutral" or "default" position.

REDISCOVERY OF IMPORTANT ABORIGINAL CEREMONIAL GROUND IN EAST GIPPSLAND

After 140 years, a collaborative project involving researchers from the Gunaikurnai Land and Waters Aboriginal Corporation and the Howitt and Fison Archive project have rediscovered an Aboriginal ceremonial ground in Victoria's East Gippsland. The site was host to the last young men's initiation ceremony of the Gunaikurnai back in 1884, witnessed by the anthropologist A.W. Howitt.

The notes of anthropologist A.W. Howitt recorded this important site as being for young men's initiation ceremony, known as the Jeraill, with significant historical and cultural associations. Howitt's notes recorded the last cultural ceremony held in 1857 before the government restricted the Gunaikurnai people from their cultural practice on this land.¹⁷⁶

By working collaboratively, the partners were able to play to each other's strengths. Incorporating traditional knowledge with western scientific ways allowed a more thorough examination of the interactions between Traditional Owners and Europeans that ultimately led to the rediscovery of this culturally significant site.

Respondents raised that the establishment of the Yoorrook Justice Commission, discussed further at section 2.11 will provide essential service in this area. Yoorrook has been established as an independent body to conduct an inquiry into the historical and ongoing systemic injustices by state and non-state entities against Aboriginal peoples, since colonisation. Respondents raised that it is essential for widespread truth-telling and public awareness and education of accurate histories.¹⁷⁷ In addition, truth-telling must be

embedded in the Australian and Victorian curriculum, tourism, and non-Aboriginal cultural centres and spaces.¹⁷⁸

Several respondents believe that Yoorrook will provide an important basis for threading institutional truths among the wider community and addressing cultural safety across institutions,¹⁷⁹ and will impact cultural safety across education, employment, collaborative projects, and tourism industries.¹⁸⁰

CULTURAL SAFETY TRAINING

It was repeatedly raised within consultations that a lack of knowledge and awareness of Aboriginal Cultural Heritage led to a frustrating and unsafe working and community environment for Aboriginal peoples.¹⁸¹ It was raised by several respondents that it is 'tiring' to be an Aboriginal person 'feeling you constantly have to educate other people and justify your existence'.¹⁸² It was common for respondents consulted to encounter people who held gross misconceptions about Aboriginal culture, including that there is only one Aboriginal language across all of Australia.¹⁸³ Repeated ignorance and misconceptions about Aboriginal Cultural Heritage was raised in almost every consultation.¹⁸⁴ One respondent stated that 'in order to survive and be herself in the world she has had to educate' those around her, which is time consuming and frustrating.¹⁸⁵

Several respondents raised that there is positive momentum towards increasing interest and understanding by non-Indigenous people as to Aboriginal culture, however this has created an increased burden on Aboriginal peoples individually and within their communities, social groups and workplaces to rectify misconceptions and untruths.

One respondent stated that even among those who have undergone cultural safety training, there is not enough information out there, and there is inadequate knowledge,¹⁸⁶ calling for widespread education in schools and workplaces.¹⁸⁷ However, it was emphasised that cultural safety training, by itself, is insufficient to redress the significant lack of education in the wider community and the resulting effect that this has on Aboriginal peoples in those spaces.¹⁸⁸ The importance of wider community understanding was discussed further in section 1.3.

1.11 ABORIGINAL PEOPLES ARE EMPOWERED TO MANAGE CARE OF ANCESTRAL REMAINS

We are very similar in some ways. When an Australian citizen passes away overseas, their families bring 'em back and they are buried in their own country, where they are born. We want nothing less than that, but there's one difference, our people were dug up [and] used for scientific exhibitions. Institutions, Universities, forensic, historical societies - we want 'em back. We wanna return 'em back to the Country. It's not asking too much is it?

Uncle Jim Berg, Gunditjmara Elder and founder of the Koorie Heritage Trust Inc

Like many stories contained in this report, the management and care of Ancestral Remains is a story of Black Excellence.

Aboriginal peoples have been fighting for hundreds of years for the return of their Ancestors, in order to lay their spirits to rest on Country. Many of these Ancestral Remains are still exhibited in museums around the world to this day.¹⁸⁹ The theft and removal of Ancestral Remains for the purpose of 'research' or 'scientific study' is deeply distressing for Aboriginal peoples.

Aboriginal readers are advised that this section may be considered incredibly distressing.

HISTORICAL CONTEXT

The large-scale theft of Aboriginal Ancestral Remains has been occurring since the earliest days of colonisation. Since 1790, Aboriginal Ancestral Remains have been stolen and/or unconscionably acquired for the purpose of 'research' or 'scientific study'. Ancestral Remains were actively acquired and stolen from burial grounds along with associated grave goods and other ceremonial objects. Ancestral Remains were sent to museums and universities across the world, where many are still exhibited today.

It is important to note that non-Aboriginal people have found the use of non-Aboriginal human remains for medical and scientific study outrageous and a moral issue since the practice began. As one legal scholar writes, the earliest legal regulation of human remains for scientific and medicinal purposes occurred with the introduction of the *Murder Act 1751* (UK). This legislation granted sentencing judges the power to sentence a convicted offender to death. One method of using their body was for medicine and scientific study, the other that they should be left to rot. Notably, both were considered additional punishment dependent on the severity of the crime.¹⁹⁰

Until the 20th Century, the use of human remains for scientific purposes was still largely unregulated, however public outcry was recorded and publicly reported. While recognising the need to consider developments in medicine, the public found the practice of grave-robbing and removal of human remains immoral. In particular, the lack of consent and autonomy of the deceased was considered wrong.¹⁹¹ For most people, the sanctity of consent is an inherent right to be protected. As a result, laws were generated to regulate the ability of people to volunteer or donate human remains for the purpose of medical and/or scientific research.¹⁹²

By contrast, the influence of Charles Darwin's theory of evolution fuelled anthropologists and museums to band together to hold the human 'specimens' already in their custody.¹⁹³ The use of Aboriginal Ancestral Remains was not considered alongside legal questions of consent. Instead, anthropologists used Aboriginal Ancestral Remains to study evolutionary links to discover the 'primitive' race.¹⁹⁴

Throughout the 19th and early 20th Centuries, Museums Victoria (then known as the National Museum of Victoria) conducted archaeological digs and encouraged members of the public to hand Ancestral Remains to the Museum in support of 'research'. In addition, the University of Melbourne held over 1,600 Ancestral Remains in the Murray Black and Berry collections. Some of these Ancestral Remains were over 14,000 years old. This encouraged illegal grave-robbing and unlawful acquisition of Ancestral Remains which had been 'buried with care and ceremony'¹⁹⁵ and were forcibly removed to become objects of research and commerce.¹⁹⁶

This historical context demonstrates the severity of the harm caused to Aboriginal peoples and the unlawful and immoral misuse of Ancestral Remains. The above accounts do not scratch the surface of the extent of illegal conduct engaged in for theft of Aboriginal Ancestral Remains. While non-Aboriginal remains were studied for medical purposes, with issues of

consent and autonomy debated, Aboriginal Ancestral Remains were used for cultural collections and anthropology.

Again, many Ancestral Remains are still exhibited globally today.

ABORIGINAL ADVOCACY AND EXCELLENCE

The atrocities that occurred historically highlight the strength of Black Excellence and Aboriginal advocacy for the return and repatriation of Ancestral Remains. The fight has continued since 1790 and in Victoria this work continues predominantly through the Ancestral Remains Unit (ARU) within the Office of the Victorian Aboriginal Heritage Council (OVAHC).

The important work of the Ancestral Remains Unit is built on the advocacy of strong Aboriginal leaders. Uncle Jim Berg,¹⁹⁷ a Gunditjmara Elder, was a leading figure in the legal action brought against the University of Melbourne for the return of Aboriginal Ancestral Remains to Country for reburial. Nicole Cassar, a proud Gunditjmara and Wudjbaluk woman,¹⁹⁸ has professional experience spanning decades across sectors, and was responsible for developing cultural safety products, particularly for the health industry. Sean Fagan,¹⁹⁹ a Wadawurrung man, has worked tirelessly for decades to repatriate Ancestors and strengthen his community. Sissy Pettit, the ARU Manager, has been an advocate for the return of Ancestral Remains for over two decades, and leads the ARU team to ensure Old People are returned to Country, a legacy passed down from her father's own advocacy work to protect Ancestors.

This section has intended to impress upon the reader that, as was raised extensively in consultations, Aboriginal Cultural Heritage is not just stones and bones.

When considering Aboriginal Cultural Heritage and Aboriginal Ancestral Remains, the issue to be considered is whether the wider Victorian community values a person's ability to autonomously consent to what happens to their body after they pass.

Assessing the state of Aboriginal Cultural Heritage and the management and control of Ancestral Remains requires assessment of the following questions:

- Does the wider Victorian community value the inherent cultural responsibility that Aboriginal peoples hold to those who came before them?
- Does the wider Victorian community recognise Aboriginal peoples as the experts of their culture?

- Does the wider Victorian community value Aboriginal peoples' ability to manage, control and repatriate Ancestral Remains, in line with Aboriginal law and custom?²⁰⁵

STRENGTH OF THE CURRENT ABORIGINAL HERITAGE ACT 2006 (VIC) IS BUILT ON BLACK EXCELLENCE

Kow/Ghow swamp, a traditional Aboriginal burial ground, was studied by archaeologists in the late 1960s without the consent of Traditional Owners. This involved digging and removing Aboriginal Ancestral Remains from the sacred place they had been laid to rest in line with cultural practice and Aboriginal law. Archaeologists continued to study Kow/Ghow Swamp despite years of requests by Traditional Owners to stop.²⁰⁰

In the 1980s, Uncle Jim Berg commenced a campaign to repatriate Ancestral Remains in government and academic institutions and have them reburied on Country.²⁰¹ As an inspector under the Archaeological and *Aboriginal Relics Preservation Act 1972* (the Relics Act), Museums Victoria and the University of Melbourne were issued with injunctions to repatriate Ancestors held in their collections as it was an offence to possess or display Ancestral Remains under the Act.²⁰²

This campaign is an example of Black Excellence,²⁰³ with resistance and advocacy creating a movement of Aboriginal-led repatriation and reburial of Ancestors. This movement is now legislated under the *Aboriginal Heritage Act 2006* (Vic) and continued by the Ancestral Remains Unit.

Kow/Ghow Swamp is on the culturally important land of the Yorta Yorta Nation Aboriginal Corporation, who view the Kow/Ghow Swamp as a success story of Yorta Yorta advocacy to gain land rights through Co-operative Management Agreements.²⁰⁴ The Yorta Yorta story of Black Excellence is discussed further in a case study at section 2.6.

PART 1 CONCLUSION

Part 1 of this Report has looked at the ways Aboriginal peoples in Victoria connect with their Cultural Heritage.

We have looked at why and how it is crucial for Aboriginal peoples to be enabled to care for Country, and we have introduced the holistic understanding of cultural flows – a view of water resources very different to the European view of water as a mere commodity.

We have looked at the way Aboriginal peoples express their relationship to plants and animals, and the important well-being outcomes of a sustainable and vibrant arts and performance sector, and the protection of Aboriginal knowledge and Ancestral Remains.

These and all the many ways Aboriginal peoples connect with their Culture form part of the practice of a strong and living cultural practice and identity.

The primary function of Part 1 was explanatory. If this report is to critically assess the current state of Aboriginal Cultural Heritage in Victoria, it must take as its reference the cultural connections most important to Aboriginal peoples. Through our consultations and a review of the relevant academic literature, we were able to build our understanding of *how* Aboriginal peoples connect with, and practice, culture. This has enabled us to assess the stressors and enablers of Victoria's current policy and management actions in Part 2.

A landscape photograph showing a grassy hill in the foreground, a line of trees in the middle ground, and a clear blue sky. The text is overlaid on the lower part of the image.

“

Victorian Aboriginal peoples
connect with Culture as a living practice,
of being and doing, connecting to people
and Country.

”

A landscape photograph of a grassy hill under a blue sky with a line of trees in the distance.

PART 2 PRACTICE CULTURE

PART 2

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HOW EFFECTIVE ARE VICTORIA'S POLICIES & MANAGEMENT ACTIONS?

Part 2 of this Report assesses the enablers and stressors on how Victorian Aboriginal peoples connect to, and practice, Culture; in particular the impact of policies and management actions by the government and private sectors.

As outlined in Part 1, Victorian Aboriginal peoples connect with Culture as a living practice. All ways of being and doing, as well as connecting to people and Country, are an expression of cultural connection. It is essential to this cultural connection that Aboriginal peoples are empowered to be the primary decision makers in relation to their Cultural Heritage.

The current state of Victorian Aboriginal Cultural Heritage is at its strongest when Aboriginal peoples are in charge of their Culture and enabled to practice the cultural connections outlined in Part 1. Conversely, Aboriginal Cultural Heritage is at its most vulnerable where policy and management actions intervene in the relationship between people and Culture; where decision-making power is directed away from Aboriginal peoples, or where key manifestations of culture are separated from Aboriginal custodianship.

This Part incorporates a general analysis of the impact of Victoria's policies and management actions and can be read as a general assessment of enablers or stressors on Aboriginal peoples' connective relationships with their Cultural Heritage.

However, we would also like to note that Victoria is in the vanguard of Aboriginal Cultural Heritage management in Australia. Victorian Aboriginal peoples have been active in challenging colonial heritage management systems. The state has responded in part. For example, Victoria is the first state to link heritage management to Country, and the whole-of-government Victorian Aboriginal Affairs Framework 2018-2023²⁰⁶ aims to enable the advancement of Aboriginal self-determination. With Victoria leading the way in Aboriginal Cultural Heritage management, it is inevitable that as a state, it is uncovering and facing challenges that have yet to be grappled with in other states and territories.

As a result, when attempting to analyse the state of Victorian Aboriginal Cultural Heritage, there is likely to be both stressors and enablers in operation. We ask that the reader interpret each sub-heading as indicative of a general direction of the stated trend as identified during the course of the “Taking Care of Culture” Discussion Paper consultation period.

2.1 THERE IS A GAP BETWEEN ABORIGINAL AND NON-ABORIGINAL UNDERSTANDING OF ABORIGINAL CULTURAL HERITAGE

It is our Cultural Heritage, but if we don't bring other people in, then they won't understand our connection to Country

Mick Harding, Chairperson 2021,
Victorian Aboriginal Heritage Council

A significant gap still exists between the way Aboriginal peoples define and connect with culture and the wider Victorian public's understanding of Culture. As outlined in section 1.3, Aboriginal peoples have a right to respect and understanding from the wider Victorian public. Lack of general understanding can also impact how Aboriginal peoples connect with, and practice, their Culture. There is currently a misconception by the wider Victorian community that Victorian Aboriginal Cultural Heritage is mostly evidence of a historical culture. This is entirely incorrect, and completely misses the fact that Culture lives and grows with its people. Victoria's contemporary Aboriginal Culture is vibrant and dynamic.

This section will start with an overview of the Discussion Paper consultation results that demonstrated this gap in understanding. This lack of understanding is an underlying cause of policies and management actions that intervene in Aboriginal peoples' practice and control of their Cultural Heritage. The current definition of Aboriginal Cultural Heritage in the *Aboriginal Heritage Act 2006* (Vic) (AHA or the Act) is evidence of this. This difference of understanding can have further implications for how heritage significance of place is assessed – particularly when it is assessed by non-Aboriginal persons as part of current management strategies.

There are public awareness programs currently under way in Victoria. In particular, we were informed of several government programs aimed at improving the understanding of the general public about Aboriginal Cultural Heritage, particularly where their own work has the potential to impact areas of Cultural Heritage. Additionally, we received comments that suggested that there have been some improvements in the public's understanding of Aboriginal Cultural Heritage.

Nevertheless, a lack of general public awareness persists, and the burden placed on Aboriginal peoples to educate the public is significant.

ASSESSMENT OF CURRENT LEVEL OF UNDERSTANDING

Responses to our Discussion Paper and surveys, indicated that the wider Victorian public self-assesses their comprehension of Aboriginal Cultural Heritage as relatively low.

The Discussion Paper asked two key self-assessment questions:

What is your current level of understanding of Victorian Aboriginal Culture? and

What level of understanding of Victorian Aboriginal Culture do you think the broader community has?

When the former question is asked of a non-Indigenous organisation or person, it is a self-assessment of their own understanding of Aboriginal Cultural Heritage (**self-assessment**). The second question offered respondents an opportunity to judge how well the Victorian community generally understands Aboriginal Cultural Heritage (**community assessment**).

Self-assessment: The most common response to the self-assessment question was “a little”. This response indicates that many non-Indigenous respondents felt that they had at least some understanding of Aboriginal

MARNGROOK

Marngrook is a sport developed by Aboriginal peoples said to originate around Gariwerd, with particular ties to Moyston. The term Marngrook comes from a Gunditjmara language, meaning “game ball”.²⁰⁹ In what is now known as South-Western Victoria, a possum skin ball was usually used, however in different areas the ball was made from other materials.²¹⁰ Various accounts relay the game being played in different formats.²¹¹

Marngrook was generally played by large teams of both men and women, with up to 50 to 100 players on each side.²¹² Teams were often represented by their totems,²¹³ and competed to catch a ball kicked in the air, with players seeking to jump the highest and take the best ‘mark’. Players that marked the ball are then able to have a free kick. Marngrook games were fairly long, sometimes lasting up to 2 days, with the winning group taking home the ball as a trophy and sharing it with the rest of their community. Even after colonisation, Marngrook was still played on missions and reserves, with many Indigenous peoples seeking to revive the game.²¹⁴ Further, Marngrook served as a social activity that enabled the reinforcing of kinship systems and connections to totems, family and community,²¹⁵ also allowing communities to connect and develop relationships with other groups.

Elements of Australian Rules Football or the Australian Football League (AFL) are said to have originated from Marngrook, with many Traditional Owners, historians and Indigenous organisations highlighting the connections between the two sports. The influence of Marngrook has since been recognised by the AFL itself. In light of the sustained racism directed at Sydney Swans star Adam Goodes, the AFL publicly acknowledged the role of Marngrook in influencing the sport for the first time since its inception.²¹⁶ Marngrook, remains culturally important to many Indigenous Australians.

Cultural Heritage, although it is likely that individuals who have taken the time to respond to the Discussion Paper or survey would consider themselves at least somewhat knowledgeable about Aboriginal Cultural Heritage. This is consistent with the responses given to the question about the definition of Aboriginal Cultural Heritage: most respondents had an understanding of the holistic nature of Cultural Heritage. Nevertheless, the responses also indicate the wider Victorian community can still improve their understanding of Aboriginal Cultural Heritage.

Community assessment: In response to the community assessment question almost all responses were “not much” or “none”. Evidently, the lack of knowledge is stated more clearly in this response [“a little” compared to “none”].

This discrepancy between the self-assessment and community assessment may be because most non-Indigenous respondents to the Discussion Paper worked with Aboriginal Cultural Heritage or Aboriginal peoples regularly. This makes it more likely that the non-Indigenous respondents to the Discussion Paper had above average levels of understanding on Aboriginal Cultural Heritage when compared to the majority of the general public.

In general, there is some understanding of Aboriginal Cultural Heritage among the wider Victorian community. However, it appears that this understanding is held where people work with Aboriginal peoples and organisations regularly and are motivated to improve their cultural awareness. Many people consulted raised comments such as ‘the level of ignorance is still very high’²⁰⁷ and ‘public education is very poor’.²⁰⁸ It may be that this level of understanding reduces among parts of society that have the least engagement with Aboriginal peoples.

HOW LACK OF UNDERSTANDING CAN BE TRANSLATED INTO MANAGEMENT PRACTICES

The responses to the Discussion Paper provided another example of the importance of wider understanding: the lack of understanding has led to the mismatch between legislative definitions of Aboriginal Cultural Heritage and the lived experiences of Aboriginal peoples.

The *Aboriginal Heritage Act 2006* (Vic) [AHA or the Act] defines Aboriginal Cultural Heritage as Aboriginal places, Aboriginal objects, and Aboriginal Ancestral Remains.²¹⁷ Introduced in the 2016 amendments to the AHA, Aboriginal intangible heritage is distinguished from Aboriginal Cultural Heritage. Instead, it is defined as knowledge or expression of Aboriginal tradition (other than Aboriginal Cultural Heritage) that is not widely known to the public.²¹⁸

It is evident from the responses to the Discussion Paper that this is not at all how Aboriginal Cultural Heritage is lived or practiced. Intangible and Tangible Cultural Heritage are directly and intrinsically connected.

A recent research paper co-authored by staff from the Bunurong Land Council Aboriginal Corporation noted that heritage advisors and archaeologists in Victoria (authors of Cultural Heritage Management Plans or CHMPs) sometimes have difficulty defining the Cultural Heritage significance of a place.²¹⁹ The authors suggest that this is because the assessments often focus on the scientific significance of a place or site, and do not recognise that scientific significance is only part of the total cultural significance of a place.²²⁰ These errors become entrenched when new assessments use the existing ones as precedents²²¹ This undermines the effectiveness of the CHMP process,²²² and provides another example of how gaps in understanding can directly result in damage to Aboriginal Cultural Heritage.

This lack of understanding can then become circular and create further misunderstanding. In the Discussion Paper and in this Report, we have used a holistic definition of Aboriginal Cultural Heritage. We have used the term Aboriginal Cultural Heritage to describe all aspects of culture including Country, traditions, art practices, environmental knowledge, and language. All these aspects grow and change with each generation, but they are all Aboriginal Cultural Heritage.

This interpretation sometimes confused people consulted, who were thinking of the limited legislative definition of Aboriginal Cultural Heritage. Under that definition, people might not even consider language to be a part of Aboriginal Cultural Heritage.

GOVERNMENT PROGRAMS TO RAISE AWARENESS

In our consultations and data survey, it was evident that several Victorian government departments were making significant efforts to educate the public about Aboriginal Cultural Heritage. For example, the Department of Premier and Cabinet, through First Peoples-State Relations (formerly Aboriginal Victoria), maintains a website of Aboriginal Cultural Heritage fact sheets, guidelines, forms, practice notes, and other material relating to the administration of the *Aboriginal Heritage Act 2006* (Vic) [AHA or the Act].²²³

The Department of Premier and Cabinet also manages two general enquiry inboxes where the public can submit queries on a range of matters,²²⁴ and regularly delivers presentations to local government authorities, public land management agencies, landcare groups, university students and emergency management agencies on working with the Act. These presentations are a key step towards raising awareness of the land, water and cultural rights of Aboriginal peoples in Victoria, as well as encouraging the support for and celebration of Aboriginal culture, which are both goals of the Victorian Aboriginal Affairs Framework 2018-2023.²²⁵

In 2018, the Department of Premier and Cabinet launched the 'Deadly Questions' campaign offering the opportunity for the public to ask questions of Aboriginal Victorians: their history, culture, connection to place and hopes for the future.²²⁶ Additionally, in February 2021, First Peoples – State Relations (formerly Aboriginal Victoria) launched 'Deadly & Proud' as a platform to share stories of pride in Victoria's rich heritage of Aboriginal cultures, resilience and communities and the path to Treaty.²²⁷

Other government departments also employ the skills of Aboriginal Advisory Committees, reflecting improved recognition that Aboriginal peoples are the primary custodians of their knowledge. Through Aboriginal Economic Development – Employment and Inclusion, the Department of Jobs, Precincts and Regions has:

- The Victorian Aboriginal Employment and Economic Council;
- The First Peoples Directions Circle (established through Creative Victoria), and
- Djakitjuk Djanga Native Foods and Botanicals Project Control Committee.

While these examples demonstrate an improved understanding of the importance of Aboriginal Cultural Heritage and respectful engagement with Aboriginal peoples by the Victorian government, when discussing campaigns and advisory groups in general, there are two things to note. In the first instance, this can place a

significant burden on Aboriginal peoples when it comes to providing formal and informal educative services to the government and public. Additionally, while advisory committees are a great way of ensuring Aboriginal voices are represented, there is the risk that an advisory committee falls short of providing Aboriginal peoples with decision-making powers.

One of our respondents added that RAPs and Traditional Owner groups also conduct public awareness activities. These activities can either be conducted independently, for example, through a community day, or at the request of state entities such as Parks Victoria, DELWP or Catchment Management Authorities. Unfortunately, these activities are often underfunded. Under-resourcing can create a less impactful example of self-determination of a Traditional Owner led community engagement program.²²⁸

LACK OF UNDERSTANDING CAN LEAD TO RACISM AND VIOLENCE

Several respondents to the Discussion Paper raised that they have noticed an increased awareness and openness from the wider community unlike previous times.²²⁹ However, a lack of understanding persists, and there is still a strong sense in the community about Aboriginal Cultural Heritage being about 'stones and bones' and objects, rather than a way of life and relating to each other and Country.²³⁰ While there continues to be this pervasive viewpoint, both Aboriginal and non-Aboriginal people are held back from true reconciliation.

Lack of understanding can lead to misunderstanding and at its extreme, racism and violence. Unfortunately, this was also evidenced in the Discussion Paper responses. Respondents raised that the lack of understanding can lead to aggressive behaviour in the wider community. Shamefully, racially motivated community backlash to Victorian Aboriginal peoples and their cultural rights is still prevalent. One respondent raised how their RAP had put up signs to try and educate the wider community as to the importance of an area for Aboriginal Cultural Heritage, but they were subsequently ripped down by members of the public.²³¹

A consultant pointed out that mainstream media and social media can create an environment that is hostile to any attempt to call out cultural appropriation.²³² Interestingly, the High Court recently dismissed an appeal by several media outlets against a New South Wales Supreme Court ruling that found that media companies are publishers of third-party comments

on their Facebook pages.²³³ This case came about precisely as a result of a hostile and racist online environment.

Dylan Voller brought a defamation case against several media companies over defamatory comments made on their Facebook pages. Mr Voller is a former Northern Territory detainee. His treatment during that time sparked the royal commission into the Northern Territory's youth detention system. However, the media companies made an appeal to the High Court arguing that they were not the publishers of those third-party comments, and therefore not responsible for them. The High Court dismissed their claim and found that the media companies were responsible for the comments. This ruling has implications for media companies that will be felt Australia-wide. It will be interesting to see how media companies respond in future to this ruling, and whether they will be more pro-active and responsible when managing the comments on their social media pages.

Most Aboriginal people consulted believe that there is a need for wider public education and awareness programs about Aboriginal Cultural Heritage. The Victorian Government has set out to implement strategies and mechanisms to address and eliminate racism as a key goal of the Victorian Aboriginal Affairs Framework 2018-2023.²³⁴ Here, the facilitation of cultural awareness training and capacity building of Victorian government staff was identified as such a mechanism to be employed in eliminating racism and delivering culturally supportive services, and continues to be rolled out across the government departments. Another example of mechanisms used to target racism identified in the Framework is cultural safety audits, which are implemented to increase accountability and promote cultural awareness and safety within government departments.

The Greater Gariwerd Landscape Management Plan was, however, met with 'massive furore' amongst rock climbers, with RAPs being 'taken aback' by the aggressive public response.²⁴⁰ One respondent who was involved in creating the Plan explained his surprise, as he believes the plan is an exemplary model of collaboration between RAPs, with a view of protecting Aboriginal Cultural Heritage collaboratively with the non-Aboriginal community.²⁴¹ The response by the rock-climbing community, perceived as a community that advocates for environmental, and therefore cultural rights, was described as 'possessive and racist'²⁴² and 'shocking',²⁴³ given the positive impact that the Plan is likely to have on the environment.

A similar case study occurred when the Barengi Gadjin Land Council Aboriginal Corporation obtained an Interim Protection Declaration to protect the Dyurite cultural landscape.

GREATER GARIWERD LANDSCAPE MANAGEMENT PLAN

In November 2020, Parks Victoria released the draft Greater Gariwerd Landscape Management Plan which seeks to recognise the continued importance of Aboriginal Cultural Heritage at the heart of the Grampians.²³⁶ The Greater Gariwerd Landscape Management Plan outlines what has been described as an 'excellent'²³⁷ proposal for celebrating Aboriginal Cultural Heritage at Gariwerd, including through the recognition of Aboriginal place names, and increased tourist understanding about the cultural significance of the landscape.

The Traditional Owners' Foreword (represented by the Barengi Gadjin Land Council Aboriginal Corporation, Eastern Maar Aboriginal Corporation and Gunditj Mirring Traditional Owners Aboriginal Corporation) states that the plan is a step in the direction of healing from the devastating impact of colonisation on their people, and that 'Gariwerd is a place of healing and spiritual renewal; a place that connects the body, soul and the mind'.²³⁸ The Plan has been described as setting standards in collaborative management between RAPs with a vision for the Plan to be used as a template for other culturally significant sites.²³⁹

DYURITE MOUNT ARAPILES INTERIM PROTECTION DECLARATION

In June 2020, the Barengi Gadjin Land Council (BGLC) Aboriginal Corporation successfully obtained the first Interim Protection Declaration under the *Aboriginal Heritage Act 2006* (Vic) for Dyurite cultural landscape, known as Taylors Rock at Mount Arapiles. Dyurite is a significant cultural site for the Wotjobaluk people. As the representative body for the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia & Jupagalk Aboriginal Traditional Owners, BGLC sought the Interim Protection Declaration after rock climbers continued to ignore the cultural significance of the site and climb over traditional rock art, causing irreversible damage.

The popularity of the site presented problems for the BGLC and their responsibility to protect the cultural significance of the site, which holds a deep 'physical, spiritual and cultural connection' for the Wotjobaluk Traditional Owners.²⁴⁴ BGLC had previously displayed signs and public information around the area which were ignored. Rock climbing on the site was impacting cultural values and damaging many thousands of years' worth of heritage.

The BGLC successfully obtained the Interim Protection Declaration following an extended consultation period with local communities. The effect of the Interim Protection Declaration was that people had to seek permission from BGLC to enter Dyurite. The Declaration was for an initial 3-month period to allow the BGLC to consider cultural values and management of the site and caused backlash and anger in the rock-climbing community. BGLC reports that this backlash was unexpected, as the Declaration was sought to protect environmental, and therefore Cultural Heritage.²⁴⁵

During consultations, respondents explained that Victorian Aboriginal peoples are faced with having to protect their Cultural Heritage against deliberate destruction by the wider public, motivated by ignorance and racism. However, when they enforce legal rights provided under the *Aboriginal Heritage Act 2006* (Vic) (AHA or the Act) through expenditure of finances, time and resources, this is often met with local community backlash.²⁴⁶ Many respondents consulted found the public response shocking and upsetting.

Another respondent described illegal conduct of extremist right-wing groups congregating on their Country, ripping down signs that mark Aboriginal Cultural Heritage and land boundaries.²⁴⁷ This example was one of many provided during consultation identifying the prevalence of racism toward Aboriginal peoples, and the regular occurrences of vandalism of Aboriginal Cultural Heritage.

The anger that these protection strategies elicit in the wider public combines with the history of forced displacement from Aboriginal Cultural Heritage in the first place, leading to a hostile environment for many Aboriginal peoples to be engaging in.

Addressing such behaviour and attitudes is outside the scope of this Report, however it is important to remember when considering the responses provided by Aboriginal people consulted for this Report.

THE BURDEN ON ABORIGINAL PEOPLES TO EDUCATE THE PUBLIC

The lack of understanding by the wider Victorian community can prove to be an exhausting and heavy weight for Victorian Aboriginal peoples to carry, as they are constantly having to do the work of educating people about their culture.

First, several respondents raised the significant emotional burden that educating the wider public places on their mental health and wellbeing.²⁴⁸ This goes beyond formal cultural awareness training to general education within Aboriginal peoples own community and friendship groups. There is a consistent and tireless need to educate personal and professional communities which can lead to emotional and physical burn out and stress for many Aboriginal peoples.²⁴⁹

In addition, the lack of understanding amplifies the consistent feeling of reactive rather than proactive management approaches that Aboriginal peoples feel both within and without the RAP structure.²⁵⁰ One respondent raised that there are many people in the wider community who want to know more about Aboriginal Cultural Heritage, however they reach out to RAPs who are already heavily under-resourced and under-funded, and expect the knowledge or information to be provided by the RAPs for free.²⁵¹

2.2 VICTORIA LEADS THE WAY IN HUMAN RIGHTS LAW

In European societies, 'culture' has traditionally been understood as expressions of high art, such as art galleries, opera and theatre. In that line of thinking, culture is thought of as the luxury pastimes of the wealthy. It has also been considered elitist and an "added extra" on everyday life. In fact, this is a complete misconception. It is both a misconception of art and a misconception of the nature of culture. Art is not just for society's elite, and culture is not just about high art. Instead, cultural rights are human rights, and are recognised as such in international law.

This section will consider international law's recognition of cultural rights as human rights. At a Commonwealth level, Australia has been inconsistent in its application of human rights laws in general. This has filtered down to sporadic protection of Cultural Heritage rights. However, even where these protections occur, they are focused on peoples' civil and political rights and do not reflect an understanding of culture as a human right. It remains the case that Australia's heritage laws come from a conventional view of heritage as relics of the past. However, as a state, Victoria has made additional progress in recognising both human rights generally, and the recognition of cultural rights as human rights.

In the Australian context, recognition of culture as a human right is badly needed. Colonisation resulted in the dispossession and theft of a great deal of Aboriginal Cultural Heritage. Assimilation policies further tried to suppress culture and disconnect Aboriginal peoples from their identity and Country. Regrettably, Australia's bloody history is a demonstration of the equivalence of crimes against humanity and crimes against Culture. Colonisers intuited, even if they did not understand, that robbing someone of their Culture was like trying to rob them of their humanity. Colonisers failed in this attempt due to the resilience of Aboriginal peoples, but irreparable damage and disconnection remains.

This is why Australia must recognise cultural rights as human rights, so that future laws and policies developed by governments reflect the need for cultural connections and help rather than hinder rebuilding of community and revitalisation of Culture.

CULTURAL RIGHTS IN INTERNATIONAL LAW

Australia has been inconsistent in its engagement with international human rights law as it has developed over the 20th and 21st Centuries. Australia has often been reticent to commit to key international human rights instruments. Any kind of progress in this area appears to have come in short bursts, rather than through a consistent commitment to progressing respect for human rights and culture. Overall, Commonwealth leadership has been lacking in the field of human rights and the rights of Aboriginal and Torres Strait Islander peoples and Australia remains one of the few liberal democracies with no Bill of Rights.²⁵²

International law has recognised cultural rights as human rights since the 1970s through the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).²⁵³ The ICESCR is an international treaty which sets out basic economic, social and cultural rights that are required to live a life of self-determination and dignity.²⁵⁴

ICESCR works in conjunction with the *International Covenant on Civil and Political Rights* (ICCPR),²⁵⁵ with both Covenants together upholding the universal human rights values established in the United Nations Universal Declaration of Human Rights.²⁵⁶

While the ICCPR sets the standards for civil and political rights, ICESCR governs the economic, social and cultural rights portion, setting international standards on workers' rights,²⁵⁷ education rights,²⁵⁸ and rights surrounding the attainment of health²⁵⁹ and cultural rights.²⁶⁰

Australia has been a signatory of the ICESCR since 1972 (the Treaty entered into force in 1976). ICESCR was one of the 15 international human rights treaties signed by the Whitlam Government in their three years in office.²⁶¹

Australia has been a signatory of the ICESCR since 1972 (the Treaty entered into force in 1976). ICESCR was one of the 15 international human rights treaties signed by the Whitlam Government in their three years in office.²⁶¹

When the UNESCO *Convention for the Safeguarding of Intangible Cultural Heritage*²⁶² was originally voted on in 2003, Australia demurred, and still has not become a signatory. Nor is Canada, New Zealand or the United States, although as of July 2020, 180 other countries have signed on. For a time, the situation was the same for the *United Nations Declaration of the Rights of Indigenous Peoples* (the Declaration or UNDRIP).²⁶³

The Declaration recognises the inherent human rights of the world's First Peoples. The Declaration did not create these rights – they always existed – but they are a clear statement by the signatories that they know these rights to be true. Again, Australia, Canada, New Zealand and the United States all voted 'no' to the Declaration when it was first voted on in 2007 by the United Nations General Assembly. Australia did belatedly endorse the Declaration in 2009 under the Rudd government.

The Declaration recognises Indigenous peoples' rights to self-determination and the right not to be subjected to forced assimilation or destruction of their culture.²⁶⁴ It further recognises Indigenous peoples' rights to practice and revitalise their cultural traditions and customs.²⁶⁵ Article 31 recognises the right of Indigenous peoples to maintain, control, protect and develop their Cultural Heritage, traditional knowledge and traditional cultural expressions. This includes through the manifestation of Aboriginal knowledge in sciences, technologies, genetic resources, medicines, oral traditions, literatures and visual and performing arts. In addition, Article 31 encourages States to take effective measures to recognise and protect the exercise of these rights.²⁶⁶

Article 31 has three key aspects

- **Right to Culture:** The right to maintain, control, protect and develop all aspects of Aboriginal Cultural Heritage;
- **Right to use intellectual property (IP) laws:** In many countries (including Australia) intellectual property (IP) laws are the primary way of regulating economic returns on creative output. As a result, Aboriginal peoples should be empowered to use intellectual property laws to protect manifestations of culture; and
- **Obligation on states:** States that have signed UNDRIP (including Australia) have an obligation to implement measures to give effect to these rights.

As a signatory to The Declaration Australia should be implementing these rights into Australian law but has so far failed to do so. While The Declaration does not provide binding legal protection under Australian law, it provides an endorsement of the international standard of best practice for the rights of Indigenous peoples. Engagement with Aboriginal peoples and their Cultural Heritage and IP must be underpinned by the principles set out in UNDRIP. Australia's sporadic implementation of its international obligations is continued in the next section.

AUSTRALIA IS SPORADIC IN ITS OBLIGATIONS UNDER HUMAN RIGHTS AND CULTURAL HERITAGE LAWS

Commonwealth and state lawmakers are aware of the international law context in which they work. This awareness has not always been reflected in the law. This sub-section will look at the Commonwealth instruments that reflect (in whole or in part) their obligations under human rights law. It will also look at the Commonwealth legislation that aims at protecting Aboriginal and Torres Strait Islander Cultural Heritage. As outlined at the start of this section, human rights law and Cultural Heritage are in fact inextricably linked. However, this is not currently reflected in Australian law. As a result, Acts related to human rights, and Acts related to heritage, are largely separate in Australia.

Australia identified the Closing the Gap Strategy (the Strategy) as the key method of UNDRIP implementation.²⁶⁷ However, that Strategy has been criticised for not having enough engagement with Aboriginal and Torres Strait Islander peoples.²⁶⁸ This may change through the 2019 National Partnership Agreement on Closing the Gap.²⁶⁹ However, it has taken 10 years to see that small amount of progress.

Australia has not included UNDRIP in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). Under this Act, new pieces of legislation must include a statement of compatibility with the listed International human rights instruments, however, UNDRIP is not included in the list of seven instruments.²⁷⁰ Additionally, the *Racial Discrimination Act 1975* (Cth) provides protection of Indigenous peoples' rights, including the right to be free from discrimination on the basis of race.

More progress has been made in relation to Cultural Heritage law.

The Australian government has enacted legislation at the Commonwealth level for protection of Aboriginal and Torres Strait Islander Cultural Heritage. Relevant Acts include the:

- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) – Aboriginal groups can apply to the Minister for a declaration in relation to places or objects. The Minister's declaration can include provisions in relation to protection and preservation of an area or object that are of particular significance to Aboriginals and Torres Strait Islander peoples in accordance with Aboriginal customary tradition.²⁷¹ However, the Minister is only able to make such a declaration if they consider that protection under state or territory legislation is ineffective.²⁷²

- *Protection of Movable Cultural Heritage Act 1986* (Cth) – Aims to ensure that objects that have cultural significance remain in Australia. These objects may include objects relating to Aboriginal or Torres Strait Islander culture.
- *Environment Protection and Biodiversity Act 1999* (Cth) – Indigenous Cultural Heritage may be included on the National Heritage List or the Commonwealth Heritage List (see the Budj Bim case study below).
- *Native Title Act 1993* (Cth) – Aboriginal Cultural Heritage and Country managed through Indigenous Land Use Agreements.

BUDJ BIM CULTURAL LANDSCAPE LISTED AS UNESCO WORLD HERITAGE SITE

In 2019 Budj Bim Cultural Landscape was recognised as having “outstanding universal value” and was listed as a UNESCO World Heritage site. Budj Bim is the first landscape to be listed in Australia solely for Indigenous cultural values.

Budj Bim Cultural Landscape is Gunditjmara Country with an area of over 7,000km² in south-Western Victoria.²⁷³ Budj Bim features a ‘highly productive aquaculture system [which] provided a millennia-long economic and social base for Gunditjmara society’,²⁷⁴ and is recognised by UNESCO for its ‘exceptional testimony to the cultural traditions, knowledge, practices and ingenuity of the Gunditjmara’.²⁷⁵ Some of the features of the World Heritage Site include the aquacultures at Tae Rak (Lake Condah), Tyrendarra and Kurtonitj.²⁷⁶

The continued connection, management and control over the landscape by Gunditjmara people was a feature that amplified UNESCO World Heritage Site recognition, with UNESCO stating that the continued cultural connection to the landscape is an ‘outstanding representative example of human interaction with the environment and testimony to the lives of Gunditjmara’.²⁷⁷ Budj Bim Cultural Landscape is owned and managed with respect to Gunditjmara customary and legal obligations by Gunditjmara Traditional Owners, and was recognised on the National Heritage List in 2004. Budj Bim is also legally protected under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

A more detailed summary of the relevant laws is contained in the Appendix. These Acts have improved recognition of the significance of Aboriginal Cultural Heritage and Aboriginal peoples’ ability to connect with culture. For example, through the *Environmental Protection and Biodiversity Act*, the Budj Bim Cultural Landscape has received national and international recognition for its outstanding cultural value.

Just as importantly, the *Native Title Act* has made progress in recognising Aboriginal peoples’ rights over land. The *Native Title Act* was a result of the High Court’s decision in *Mabo v Queensland* [No 2],²⁷⁸ in which the Court found that where Aboriginal or Torres Strait Islander peoples could demonstrate a continuing traditional connection to the land in question, then land rights continued despite the Crown’s assertion of sovereignty, provided that the connection had not otherwise been extinguished.

Under the *Native Title Act*, Aboriginal and Torres Strait Islander peoples bear the onus of proving that their group has on-going connection to their Country under their traditional laws and customs.²⁷⁹ The Court will then make a determination whether or not native title exists. If it does exist, the Court will then determine who holds the rights, and the nature and extent of those rights and interests.²⁸⁰ There are currently 531 Native Title determinations, with 437 having recognised that native title exists in the entire, or part, of the determination area. There have been three successful determinations from seven applications made in Victoria. As of 2019-20, native title is recognised across 14,899 square kilometres of land in Victoria, with a further 50,976 square kilometres of land recognised under *Traditional Owner Settlement Act 2010* (Vic) agreements.²⁸¹ The state has entered into 3 Traditional Owner Settlement agreements, with Gunaikurnai (2010), Dja Dja Wurrung (2013) and Taungurung (2018).

Given that it has the capacity to recognise Aboriginal peoples ongoing connection to Country, and attach legal rights to that recognition, the *Native Title Act* certainly contributes to Aboriginal peoples ongoing control over their Aboriginal Cultural Heritage. However, there remains a strange inconsistency in Native Title law. While holistic cultural expressions can be used to demonstrate the continuing traditional connections necessary for a recognition of native title – for example through stories, song and dance – actual recognition of community rights over those same stories, songs and dances do not form part of a native title determination.²⁸²

As Australian legal approaches to Cultural Heritage management continue to develop, the sector has contributed policies and guidelines that further

contribute to Aboriginal peoples continuing connection to, and control of, culture. For example, the Dhawura Ngilan Vision, discussed next.

AUSTRALIAN POLICIES AND BEST PRACTICE MODELS

In May 2018, the Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) appointed Aboriginal and Torres Strait Islander Heritage Chairs with a view to creating a united voice for Indigenous Australians' heritage aspirations for the next 10 years.²⁸³

DHAWURA NGILAN

On 16 September 2020, HCOANZ published *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous Cultural Heritage management and legislation* (Dhawura Ngilan).²⁸⁴ It was inspired by the Māori achievements and vision document, *Tapuwae*²⁸⁵ and outlines four key areas of focus and proposes solutions to achieve this vision, including:

1. Aboriginal and Torres Strait Islander peoples 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.²⁸⁶
2. Aboriginal and Torres Strait Islander heritage is acknowledged and valued as central to Australia's national heritage.²⁸⁷
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.²⁸⁸
4. Aboriginal and Torres Strait Islander heritage is recognised for its global significance.²⁸⁹

Dhawura Ngilan includes a chapter on *Best Practice Standards in Indigenous Cultural Heritage Management and Legislation* as an additional practical tool to achieve the vision of the Chairs.²⁹⁰

Dhawura Ngilan provides an Aboriginal and Torres Strait Islander vision for the future of Cultural Heritage management. Dhawura Ngilan principles can be applied when considering the fundamental

principles that must be complied with when working with Aboriginal Cultural Heritage. It is a resource that should be built upon for any person working with Aboriginal Cultural Heritage. It sets standards in the key areas for focus and improvement for engaging with Aboriginal peoples and can be adapted at the Victorian level for any interaction between an institution and the Victorian Aboriginal community.

The principles identified in Dhawura Ngilan align with many of the comments raised in consultation with the Victorian Aboriginal community for this report.

VICTORIA HAS MADE INROADS IN RECOGNISING CULTURAL RIGHTS AS HUMAN RIGHTS

In general, Victoria has been far more open to change and recognition of cultural and heritage rights of Victorians including Victoria's Aboriginal peoples. For example, as referred to above, even though the Commonwealth has declined to become a signatory to the *Convention for the Safeguarding of Intangible Cultural Heritage*, Dr Matthew Storey writes that with the passage of the *Aboriginal Heritage Amendment Act 2016* (Vic), the insertion of section 5A into the Act attempted to 'give at least partial recognition in Victoria' to the Convention.²⁹¹ For further discussion of Victoria's management of tangible and intangible heritage, see section 2.6.

Victoria has also enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) to protect the cultural rights²⁹² and equality of all people before the law including the right to live free from discrimination.²⁹³ This represents an improved level of understanding of the nexus between human rights and cultural rights.

The Charter sets out the basic standards for human rights, freedoms and responsibilities of all people in Victoria.²⁹⁴ The Charter was passed just after the Australian Capital Territory passed the *Human Rights Act 2004* (ACT) and Queensland has since passed the *Human Rights Act 2019* (Qld). The Charter requires public authorities to comply with the human rights in the Charter, including the right to recognition and equality before the law,²⁹⁵ the right to freedom from forced work,²⁹⁶ cultural rights,²⁹⁷ and property rights.²⁹⁸ The Charter protects these rights by requiring that new legislation introduced in Parliament has a compatibility statement stating the extent to which the proposed legislation complies with the Charter, or the reasons for non-compliance.²⁹⁹ In addition, courts and tribunals in Victoria must interpret and apply laws compatibly with the Charter.

However, it should be noted that there has been some criticism of this model of compatibility statements: a statement of compatibility does not amount to an obligation to actually *comply* with the Charter. In addition, there is broad scope for a liberal interpretation of ‘compliance’.

In addition to its progress in the area of human rights law, Victoria has implemented policy actions that reflect a commitment to the principle of self-determination for Aboriginal peoples. The principle of self-determination is the right to exercise choice over one’s own identity and destiny. It is a central human right and cultural right. Both the Victorian government’s Victorian Aboriginal Affairs Framework 2018-2023³⁰⁰ and the Yoorrook Justice Commission and First Peoples’ Assembly of Victoria represent huge strides forward in recognising this fundamental human right for Aboriginal Victorians.

VICTORIAN COMMITMENT TO SELF-DETERMINATION

Traditional Owners of Victoria have never before engaged with Parliament on equal terms. The [First Peoples] Assembly is Parliament’s sovereign equal, comprising democratically elected Members who have been honoured with the responsibility of representing and advocating for Traditional Owners, and the broader Victorian Aboriginal Community.

First Peoples’ Assembly of Victoria,
Annual Report 2019-2020, Co-Chairs’ Foreword

As mentioned in section 1.2, the Victorian government has committed to the principle of self-determination in the Victorian Aboriginal Affairs Framework 2018-2023. The Victorian government originally made the commitment in March 2015.³⁰¹ The Framework seeks to put the principle of self-determination into practice. For example, the Victorian government recognises 11 self-determination guiding principles:

11 self-determination guiding principles

- Human rights
- Commitment
- Partnership
- Empowerment
- Investment
- Accountability³⁰²
- Cultural integrity
- Aboriginal expertise
- Decision-making
- Cultural safety
- Equity

The Victorian government’s self-determination action will be reported to community via an annual tabling of a whole-of-government progress report on the Framework in Parliament.³⁰³ This is significant as it is the first time that government departments and agencies are reporting on what they are doing to action the self-determination enablers identified in the Victorian Government Aboriginal Affairs Annual Report 2020 (the Report).³⁰⁴

The Victorian government’s new operation under the Framework is indicated by Victoria’s record investment of \$356.5 million in Aboriginal Affairs in the 2020/21 State Budget, for the purpose of embedding self-determination.³⁰⁵ The Report found that almost all Victorian departments have put in place self-determination initiatives or strategies that build internal governance to oversee efforts to improve partnerships with community.³⁰⁶

The Report identifies four enablers of self-determination, in which government departments centre their strategies and initiatives around achieving. These enablers are:

1. Prioritising culture, such as through Creative Victoria’s First Peoples Partnership Group;
2. Addressing trauma and supporting healing, reflected in the implementation of the Yoorrook Justice Commission and its truth-telling aims;
3. Addressing racism and promoting cultural safety, for instance through cultural audits and awareness training; and
4. Transferring power and resources to communities. The transfer of power and resources takes many shapes, such as the creation of RAPs and the establishment of the Victorian Aboriginal Heritage Council and the Victorian Aboriginal Employment and Economic Council, with the facilitation of community-led decision-making and resourcing found necessary for genuine self-determination to occur.³⁰⁷

The Framework also incorporates the progression of Victoria’s treaty discussions and navigation following the creation of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), with the 2019/20 State Budget providing \$11 million over two years to support the establishment of elements necessary in Phase 2 of the three-phase Treaty process.³⁰⁸



VICTORIAN TREATY PROCESS

Victoria has become the first state in Australia to progress treaty negotiations with Victorian Aboriginal communities. After years of tireless advocacy from Aboriginal leaders, the first phase of the Treaty process established the First Peoples' Assembly of Victoria (the Assembly) in 2019, who are the voice representing Aboriginal Victorians through the Treaty process.

The second phase of the Treaty process involves establishing a Treaty Authority to provide a mechanism to resolve disputes that may arise during Treaty development and under the Treaty once established. The third phase establishes the Treaty Negotiating Framework, which incorporates elements of phases one and two, and provides a framework that enables Treaty outcomes to be agreed to. The Treaty Negotiating Framework works together with the Treaty Authority, to negotiate the terms of the Treaty and resolve disputes under the Treaty in a culturally appropriate way. The Treaty Authority will facilitate these negotiations and will act as an independent arbitrator in the negotiations with the Victorian Government.

The Assembly is also establishing a Self-Determination Fund which will provide a financial resource for empowering Traditional Owners and Victorian Aboriginal communities in the Treaty-making process.

In partnership with the Victorian Government, the Assembly established the Yoorrook Justice Commission. The Commission's remit is to investigate historical and ongoing injustices committed against Aboriginal Victorians by state and non-state entities.³⁰⁹

We note that while the Victorian government made its commitment to self-determination in 2015, many respondents advocated for further facilitation of self-determination rights. This confirms that there is still more work to be done by both the state government, and the wider Victorian community. This is not particularly surprising. Whilst the Victorian government has undertaken significant efforts to work in support of the right of self-determination, 6 years is not really long enough to overcome 200+ years of systemic oppressions and Western perspectives. Nevertheless, the Victorian commitment to the principle of self-determination is a significant step. The annual whole-of-government reporting

mechanism is an important accountability measure, and the Treaty process marks a commitment to truth telling that has not been seen outside Victoria.

2.3 VICTORIA LINKS HERITAGE TO COUNTRY

We don't have many words that translate as land, we have more words that translate and articulate Country. Country is really important. It is our relationality to the world around us. It is our relationality to each other. It is our relationality to place. And these are very fundamental things to Indigenous culture, but also to Indigenous creative practice

Professor Brian Martin, Associate Dean,
Indigenous, Wominjeka Djeembana,
Monash University

The *Aboriginal Heritage Act 2016* (Vic) (The Act) is unique among all legislation throughout Australia: it links heritage to Country and acknowledges that significance of Culture and heritage is linked to place; that objects do not exist in isolation. The legislation reflects the state's evolving understanding that objects, Culture and Country are all linked and that the significance of a cultural object is impacted when taken off Country or cared for by non-Indigenous people.

The reason why the Act is unique in this way is because it was developed roughly at the same time as Native Title law. However, the Act and the legislature still struggle with how to effectively link people, Culture and Country through legislation. In large part, this struggle is because legislators are most often non-Indigenous people, who do not yet have a strong understanding of how Aboriginal peoples connect to Country and Culture. An additional cause is the damage wrought by colonisation.

Colonisation, and the mission and reserves system, disrupted links to place by displacing people. This then often resulted in new links to place being formed. These different kinds of links to Country are sometimes referred to as *traditional* and *familial* links compared to historical or contemporary links. Since it was passed in 2006, the Act has undergone a number of reviews to further improve its ability to reflect the

holistic nature of Aboriginal Cultural Heritage and facilitate Aboriginal control of Culture (see section 2.4 for further discussion of how Aboriginal peoples are placed as the primary decision-makers for their culture).

This section will consider feedback critical of the current Act, and in particular, issues with the RAP structure and development approvals. We will also consider increasing use of cultural burning. Aboriginal fire management practices connect people, knowledge and Country. Land management authorities are coming to understand the significance of these connections. They are also recognising that cultural burns have far greater positive land management outcomes than conventional hazard reduction burns. Finally, we will consider the issue of data governance and sovereignty, and the importance of Aboriginal control of data about Aboriginal peoples and their Cultural Heritage. As technology develops there are increasing ways to access and store vast amounts of data. Moving data off Country and out of Aboriginal control has implications for cultural safety, and self-determination.

This section should be read with section 2.4 in which we consider the extent to which Aboriginal peoples are empowered as the decision-makers in the management of their Country and Cultural Heritage. This is because these two issues are essentially two sides of the same coin: The Victorian government has started to recognise that Aboriginal Cultural Heritage is indivisibly linked to Country. This is part of them understanding that Aboriginal Cultural Heritage is holistic, and that government laws and policies based on Western ideas of Cultural Heritage and human rights (discussed in section 2.2) will not effectively protect Aboriginal Cultural Heritage. With that understanding, they then recognise that Aboriginal peoples must be the decision-makers in land management and management of all aspects of Aboriginal Cultural Heritage.

THE HISTORY OF THE ABORIGINAL HERITAGE ACT

In Victoria, Aboriginal Cultural Heritage was first dealt with using the *Archaeological and Aboriginal Relics Act 1972* (Vic). This Act viewed Aboriginal Cultural Heritage for its archaeological value and all 'relics' within an area were deemed property of the Crown.³¹⁰

In 1984 the Cain government tried unsuccessfully to pass the *Aboriginal Cultural Heritage Protection*

Bill 1986. Instead, the Cain government asked the Commonwealth government to amend the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to include the provisions that would otherwise have gone into the failed Bill. This resulted in the introduction of Part IIA into the *Aboriginal and Torres Strait Islander Heritage Protection Act* that applied exclusively to Victoria.³¹¹ Part IIA introduced a broader definition of Aboriginal Cultural Heritage compared to the *Archaeological and Aboriginal Relics Act*, including intangible elements of culture. It also established mechanisms for emergency, temporary or permanent declarations in order to protect Aboriginal objects and places.³¹³

The result was that Aboriginal Cultural Heritage in Victoria was managed under a dual system: *Archaeological and Aboriginal Relics Act* & Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act*. During those decades, the wider Victorian public started to understand the importance of Aboriginal peoples caring for Country and Aboriginal Cultural Heritage. It was also in those decades that Native Title law developed. By 2006, the political landscape had shifted enough that the *Aboriginal Heritage Act 2006* (Vic) (the Act or AHA) passed.³¹⁴ The *Archaeological and Aboriginal Relics Act* & Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act* were both repealed. The current Act prioritises place-based heritage.³¹⁵ This is likely to be a reflection of the fact that the AHA was developed contemporaneously with Native Title law.

However, like the *Native Title Act 1993* (Cth) and the *Traditional Owner Settlement Act 2010* (Vic), it still somewhat reflects a serious misconception of Aboriginal Cultural Heritage as having primarily historical significance. The AHA does not reflect an understanding that Victorian Aboriginal Cultural Heritage is connected to deep history whilst also being dynamic and contemporary.

This is a brief summation of the legislative history. However, it gives an indication of the context of the current Act and shows how Victoria became the first state to try and link heritage to Country. It also provides context for a possible tension in the AHA and how it is administered.

Prior to the 2016 amendments, the AHA made a distinction between Aboriginal peoples with *historical* or *contemporary interest* in heritage and place, and peoples with *traditional* and *familial* links to heritage and place.³¹⁶ Historical or contemporary links to place can be a result of complex upheavals and people movement during the reserves system and the movement of people throughout Victoria.³¹⁷

GHOW SWAMP

Ghow (Kow) Swamp is culturally significant to the Yorta Yorta people, and is accepted on a local, state and national level as a high value site of Aboriginal cultural significance.³²⁰

For the Yorta Yorta people, Ghow Swamp is described as a success story³²¹ of Aboriginal advocacy and resistance and a positive example of the Traditional Owners, the Yorta Yorta people, gaining land rights. In 2004, Victoria and the Yorta Yorta Nation Aboriginal Corporation (YYNAC) entered into a Co-operative Management Agreement recognising the Yorta Yorta people as Traditional Owners having deep and inextricable connections to, and responsibility for, Country.³²² The Agreement facilitated the involvement of Yorta Yorta peoples in decisions about the management of its designated areas, in which Ghow Swamp is included. This involvement includes the integration of Yorta Yorta knowledge, internal decision-making processes and perspectives into management planning and programming.

The YYNAC were recognised in 2007 as the Registered Aboriginal Party for the land including Ghow Swamp under the *Aboriginal Heritage Act 2006* (Vic),³²³ creating the need for substantive consultation and partnership with the YYNAC to protect the cultural significance of Ghow Swamp and to increase community awareness and understanding of its significance as Aboriginal Cultural Heritage.³²⁴

This is evidently an effective example of the granting of land rights over sites of cultural significance to Victorian Aboriginal peoples to ensure their protection and maintenance in line with the cultural values and knowledge of the Traditional Owners. The Co-operative Management Agreement also showcases a clear example of how co-management can be effective in formalising First Nations involvement and self-determination in managing Country.



Under the old Part IIA system, Aboriginal community organisations were allocated heritage responsibilities. These organisations were generally cooperatives. Cooperatives were based on location. Their members could be Traditional Owners, or they could be Aboriginal peoples who were not necessarily Traditional Owners of that place, but did have historical or contemporary links to place.³¹⁸ In comparison, the RAP system (prior to the 2016 amendments) gave priority consideration to applications made by groups who represent Traditional Owners – those with traditional or familial links.³¹⁹

The shift towards the law and policies recognising the connections between people, heritage and Country is illustrated by the history of management of Ghow Swamp.

While Victoria has certainly made progress in recognising the links between Aboriginal Cultural Heritage and Country, we still received significant criticism of the AHA during consultations. These criticisms focused on how administration of the AHA disconnects Aboriginal Cultural Heritage from Country and takes decision-making power out of the hands of Aboriginal peoples.

CRITICISMS OF THE RAP STRUCTURE

The current legislative framework is certainly ahead of its time, and one of its strongest features is the distance it goes towards linking Country and cultural heritage management. However, making this link has triggered uncertainty around how the heritage laws operate with native title laws. It also places a great deal of responsibility on the government and the Council to ensure the representative nature of the RAP structure. The enormous diversity of Victorian Aboriginal peoples means diversity of opinions is inevitable, and as one of our consultants stated, an assumption that all Aboriginal peoples will be in complete agreement about so significant a subject as Aboriginal Cultural Heritage is just western arrogance. Nevertheless, in our consultations, we did receive some criticism of the RAP structure. We have reported on these criticisms as they have been reported to us. Some people felt isolated from the current RAP structure. This isolation was deepened by the fact that the government prioritises consultation with RAPs.

RAP boundary variations have also created confusion and tension. In our consultations, respondents pointed out that the RAP structure still relies on a Western idea of land ownership and fixed and precise boundaries around land. The *Aboriginal Heritage Act*

2006 (Vic) (AHA or the Act) has made attempts to resolve this issue. More than one body may be a RAP for a particular area.³²⁵ There is a mechanism within the AHA to allow for variation of RAP registration boundaries, and this can assist in some instances. For example, the Council can propose to vary a RAP registration boundary with consent. On 23 June 2021, the Council announced that consent was received by the Bunurong Land Council Aboriginal Corporation and the Wurundjeri Woi-wurrung Cultural Heritage Aboriginal Corporation to vary a 3,721km² area lying between the existing registration boundaries of these RAPs.³²⁶ We understand that this process is still being resolved.

The Boonwurrung Land and Sea Council has recently taken a native title claim to the Federal Court. When the claim originally came before the Native Title Registrar, the Registrar refused to register the Council's claim over the 13,077km² area from Melton to Wilsons Promontory. The Council denies that they are represented by the Bunurong Land Council, the RAP currently appointed over the Country.³²⁷

Several respondents expressed significant distress and disagreement with the RAP structure. It was raised during consultations that there is an alternative model recognising 38 Nations in Victoria, but the Victorian government only engage with those Traditional Owner clans or groups that have successfully established a RAP (and hold decision-making powers). There is significant disagreement about the "38 clan model" and the suggestions that clan structures are not represented within RAPs. Nevertheless, this raises the question of effective Aboriginal representation, which is discussed further in section 2.8. A consistent theme is that as rights are conferred under the Act to RAPs, those who do not have RAP status have no legal rights granted under the Act. Respondents who spoke about this were emotive at the powerlessness of non-RAP Traditional Owners and Aboriginal peoples in Victoria. One respondent raised that they had been better able to protect their Aboriginal Cultural Heritage under the previous legislative system.

The Victorian Traditional Owners Land Justice Group is an unincorporated body that claims membership from various Traditional Owner Groups around Victoria.³²⁸ In 2012 during the Parliamentary Inquiry into the establishment and effectiveness of RAPs, the Group was critical of the RAP appointment process. In particular, they were critical of the perceived delay in appointment of RAPs across the whole state, which they saw as a result of under resourcing of the process, and insufficient Aboriginal-led decision making.³²⁹

SMALLER RAPs ARE UNABLE TO MEET DEMAND

One respondent from a smaller RAP explained how the Cultural Heritage Management Plans (CHMP) projects undertaken by large corporations or government bodies on their land impede their ability to protect Aboriginal Cultural Heritage. Demand consistently outweighs supply and resources.

When a large water project is conducted on the land, the RAP must send out Cultural Heritage Officers. This uses most of the RAPs Cultural Heritage Officers for the one project, in an attempt to meet the demand of the large corporation, and results in all other work relating to heritage protection that the RAP wishes to proactively engage in being suspended until the work for the large project is completed.

Several problems arise for the RAP. First, it highlights the lack of funding that the RAP receives to run its operations and hire and train Cultural Heritage Officers. Second, it perpetuates the 'reactive, not proactive' response to Aboriginal Cultural Heritage management in Victoria as the RAPs try to meet the demands of large non-Indigenous run projects, but cannot meet their own. Third, it contributes to the workplace fatigue and burnout identified by many respondents to the Report, highlighting the lack of cultural sensitivity and safety within the consultation process.

Another respondent from a different RAP raised a similar concern. The respondent explained that they are constantly so busy with CHMPs that they cannot focus on work that they find exciting and worthwhile for their Cultural Heritage.³³⁰ For example, they are so caught up with the CHMP process that they are unable to engage in the work needed to protect middens that are eroding on Country.³³¹

In addition, one respondent raised that where they come across people or an organisation who seem to be interested in pursuing the right approach, the community group will develop a plan and engage in the work, and then a lot of that work is later used by the other party without acknowledgement or permission.³³²

DEVELOPMENT APPROVALS IMPEDE CONTINUED CONNECTION TO COUNTRY

Cultural Heritage Management Plans (CHMPs) were often cited during consultations as a challenge to cultural practice. Currently regulations await a trigger: some evidence that there is Cultural Heritage on

the site.³³³ However, it would be more appropriate to reverse that onus. In fact, it should be assumed that there is Aboriginal Cultural Heritage on a site, until proven otherwise.³³⁴ Responses further emphasised that the *Aboriginal Heritage Act 2006* (Vic) (AHA or the Act) merely provides minimum standards. Therefore, even with full compliance under the Act, only minimum standards of protection are met.

Many people felt that CHMPs impede Aboriginal peoples' connection to Country because they do not give them enough control over the development of sites. One Aboriginal respondent noted that under the current legal framework sacred sites are still being demolished.³³⁵ The same respondent noted that in recent years due diligence requirements are being used to keep Aboriginal peoples from management of their Country through the CHMP process.³³⁶ From this respondent's perspective, due diligence studies and the CHMP process is actively impeding Aboriginal peoples' control over Country.

The Taungurung Land and Waters Council reported a similar experience where sites of heritage significance are being destroyed without warning to RAPs.

This feedback shows that the way the Act is currently administered, still results in a divide between heritage and Country. The underlying logic of a CHMP is to regulate development and so reduce destruction of Aboriginal Cultural Heritage. The Act has attempted to connect Aboriginal Cultural Heritage to Country by developing a decision-making system in which representative bodies (in particular RAPs) have oversight and decision-making powers when proposed developments impact sites of Aboriginal Cultural Heritage. Victoria is unique in Australia in recognising the inextricable link between people, Culture and Country. Nevertheless, the way the CHMP system is currently operating, means that Aboriginal peoples still do not have sufficient decision-making power in the process. The result is that the current CHMP framework still creates a divide between Aboriginal Cultural Heritage and Country. Further, the criteria for harm reduction during the development process is based on Western ideas of Cultural Heritage. For example, the salvage mentality. Further issues with the Act and CHMP process, and the impediments they present to Aboriginal-led decision making, is discussed in section 2.4.

TAUNGURUNG RESPONSE ON CHMP PROGRAM AND MINIMUM STANDARDS

Taungurung Land and Waters Council (TLaWC) are one of the Aboriginal representative bodies that highlighted the damage to Aboriginal Cultural Heritage by commercial development projects in Victoria.

A common issue is that destruction is occurring that is not endorsed under the Cultural Heritage Plans (CHMP) system. Instead, TLaWC states that 'there is a significant number of activities that have proceeded without undertaking CHMPs when they should have'.³³⁷ TLaWC's research has found that there are currently due diligence studies being approved by statutory planning decision-makers 'without adequate consultation with Traditional Owners',³³⁸ causing damage to Country without any control or transparency to the RAPs.

TLWC suggests that the regulation system under the Aboriginal Heritage Act 2006 (Vic) is insufficient and limited, causing direct harm to Aboriginal Cultural Heritage. Current regulations assume that there are some sites that are considered 'an "OK" sacrifice'³³⁹ when this is not the appropriate lens through which to view Aboriginal Cultural Heritage.

INADEQUATE ONGOING PROTECTION DECLARATIONS

Comments from one of the Aboriginal organisations that responded to the Discussion Paper noted the reduced number of places across the state for which there are Ongoing Protection Declarations.³⁴⁰ Ongoing Protection Declarations are permanent declarations that prevents activities likely to harm the area's Aboriginal Cultural Heritage values. Data from First Peoples-State Relations (formerly Aboriginal Victoria) showed that no Ongoing Protection Declarations have been made by the Minister since 2016. However, there are three proposed Ongoing Protection Declarations being actively pursued for the Kooyang Ceremonial Ground, Ghow Swamp and Lake Boort. The Victorian Aboriginal Heritage Council (VACH) noted that these are all registered places that have sustained damage.³⁴¹ These declarations can be seen as both highlighting the inadequacies of the legislation to protect sites, and as a work around in the absence of prosecutions.

INADEQUATE FIRE PREVENTION STRATEGIES

One of the RAPs reported on their experience during the devastating 2020 summer bushfires.³⁴² That first-hand experience brought home the fact there are currently inadequate fire prevention strategies and lack of culturally driven management of Country in areas prone to large scale bushfires.³⁴³

Cultural burning is an entirely different practice to the hazard reduction burning usually undertaken to reduce fuel for bushfires. Indigenous Fire Practitioner, Uncle Victor Steffensen explains, "The fear of fire comes from detaching yourself from the landscape, and the fear of fire comes from taking people out of the landscape".³⁴⁴ Cultural burning is cool and controlled, focusing on the understory, meaning that it does not indiscriminately scorch large areas of land.³⁴⁵ It has a low flame height and preserves soil nutrients.³⁴⁶ Hazard reduction burns are conducted from the sky, destroying the forest canopy as well as everything in the understory. It is extremely high temperature and causes indiscriminate harm to the plants and wildlife of an area. The plants that grow back are more likely to be plants that thrive on hot fire. Those plants that thrive on hot fire, will grow back quickly, thereby creating more fuel burning loads.³⁴⁷

In contrast, cultural burning is more selective in what it burns, reducing fuel for bushfires but leaving vegetation necessary to support the wildlife in the area. In fact, cultural burning encourages native grasses and herbs to grow. It is also conducted slower than usual hazard burning, meaning that animals have a chance to move out of the path of the fire. The timing of cultural burning is also preferable for a cooler, more controlled burn. Usual hazard reduction burns are undertaken during the hottest part of the day. In comparison cultural burning can be done in the cooler months and during cooler parts of the day, for example, early morning or late evening. Cultural burning techniques are adapted to the particular area and the season.³⁴⁸ Cultural burning is more labour intensive, but it is also far more effective and less destructive.

The Victorian Government Aboriginal Affairs Report 2020 shows an increase in the number of cultural burns conducted with support from Victorian Government agencies. As at 30 June 2020, there had been 8 cultural burns conducted over the previous year, an increase on the 5 conducted in 2019.³⁴⁹ This is indicative of increasing partnerships between Traditional Owners and land management authorities including the Forest Fire Management Victoria, Country Fire Authority, catchment and management

authorities and local governments.³⁵⁰ Dja Dja Wurrung Clans Aboriginal Corporation reintroduced cultural burning in January of 2019, working with Forest Fire Management Victoria.³⁵¹ Prior to this collaboration, cultural burning was generally just conducted on private blocks of land. 27 cultural burns are scheduled for the next 2 years.³⁵² The Report also documented that in the wake of the 2019-20 Victorian bushfires, \$1.75 million in Early Relief and Recovery grants were provided to Traditional Owners to undertake work to heal Country, for example health of Country assessments.³⁵³

Traditional Owner groups are starting to develop strategic planning documents for how Country is cared for, including through fire management practices.³⁵⁴ However, a lack of coordinated strategy across land management authorities has posed a challenge to revitalisation strategies. To try and address this challenge, the Federation of Victorian Traditional Owner Corporations was funded by the Department of Environment and Land, Water and Planning to work with Victorian Traditional Owners, Aboriginal Victorians, and many of the land management authorities listed above, to develop the Victorian Cultural Burning Strategy (the Strategy).³⁵⁵

The stated vision of this Strategy was that:

Future generations of Victorian Traditional Owners will grow-up observing their Elders leading the use of the right fire for Country.

They will be trusted to know the special reasons why fire is used and how it brings health to the land and people.

*Their children and grandchildren will see culturally valuable plants and animals return to Country and know their stories.*³⁵⁶

This Strategy, among other things, promoted networking between Aboriginal knowledge holders to generate information sharing about cultural burning practices.³⁵⁷ The Strategy also identifies the key challenges to promoting cultural burns by Aboriginal peoples. For example, cultural protocols about passing knowledge on to children concerning fire management can be limited by some safety protocols.³⁵⁸ There is also the recurring concern about misappropriation of knowledge and data.³⁵⁹ We discuss issues of data governance and sovereignty, and Aboriginal control of data below.

ABORIGINAL DATA GOVERNANCE AND SOVEREIGNTY

As referred to above, the Victorian Cultural Burning Strategy raises the issue of misappropriation of knowledge and data. This could include data about fire management techniques, but also much more. It could include information about Country, about plants and animals in the area and personal information about knowledge holders.

This triggers issues of Aboriginal data governance and sovereignty. Aboriginal data sovereignty refers to the right of Aboriginal peoples to exercise ownership over data about themselves or their Cultural Heritage, while Aboriginal data governance refers to the more practical application of data, supporting the right of Aboriginal peoples to be the key decision-makers in relation to the ongoing collection, management and use of their Cultural Heritage.³⁶⁰

The 2018 Indigenous Data Sovereignty Communique of Key Principles from the Maïam nayri Wingara Indigenous Data Collective and the Australian Indigenous Governance Institute outlines the rights asserted by Australian Indigenous peoples in relation to their data.³⁶¹

This is a developing area of study and complex. As technology develops, massive amounts of data are being gathered about people, populations and Country. Often this data is gathered and stored by non-Indigenous organisations. For example, the state and Commonwealth governments gather a great deal of personal and sensitive data about individuals and communities, including health and financial information.

In the heritage space, there is a movement towards the use of registers to record objects and places of heritage significance. This movement is now shifting to a focus on the recording of Traditional Knowledge (or ICIP) through databases. The World Intellectual Property Organisation has been working over the past 20 years to improve protections for Indigenous Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources.³⁶² In that space, there is increasing interest in the use of Traditional Knowledge databases – centralised records of the origin and history of Traditional Knowledge. Their motivation is to maintain links between Traditional Knowledge and source communities and prevent misappropriation.

The *Aboriginal Heritage Act 2006* (Vic) (The Act or AHA) maintains heritage registers for both cultural objects and places, and intangible Cultural Heritage. Both are managed by the Department of Premier and Cabinet. Access to the register is restricted to protect culturally sensitive information.³⁶³ Since 2016, there have been 3,359 Aboriginal places approved and registered on the Victorian Aboriginal Heritage Register, and 2,256 Aboriginal objects registered.³⁶⁴ Access to the register is by application only. RAPs, heritage advisors, members of the Victorian Aboriginal Heritage Council and government employees involved in land management are all people authorised to access the register. There is a prescribed fee for access.³⁶⁵

The register for Aboriginal intangible heritage is discussed further in sub-section 2.6.1.

At the same time, there are already enormous collections of Aboriginal data stored and managed in collecting institutions all around Australia such as galleries, libraries, archives and museums (GLAMs), as well as held by government departments and universities. Data governance in this case engages questions of how to reconnect people to the knowledge and Culture contained in these collections, many of which may have been gathered through inadequate (or totally absent) consent and provenance procedures.

Pressure on GLAMs and universities to effectively address not only the colonial misinterpretation of their Aboriginal collections, but the control, care, management and repatriation of those collections, and material or data containing Aboriginal knowledge, is gaining momentum, and many are starting to listen and implement changes.

The ATSILIRN³⁶⁶ and ATSIDA³⁶⁷ protocols are recognised best practice guidelines for engagement with Indigenous peoples and the preservation, access, reuse and repatriation of Cultural Heritage materials and data, respectively, held in library and archive collections. Both Protocols need updating, and individual institutions have begun developing their own repatriation policies and best practice Cultural Heritage or Indigenous Cultural and Intellectual Property (ICIP) protocols.³⁶⁸ The University of Melbourne recently published its Indigenous Knowledges Research Library Guide, providing an introduction to Indigenous knowledge systems and resources including ethics and research principles and consideration of Indigenous data governance issues.³⁶⁹

It is important to acknowledge that data, like all other aspects of Aboriginal Cultural Heritage is connected to Country. There is increasing need for development of further data governance guidelines

and frameworks. New technologies have immense potential to record and promote Aboriginal Cultural Heritage. In our consultations, a respondent suggested using technology to connect Country and culture, and transferring this knowledge to younger generations, particularly through apps.³⁷⁰

Aboriginal communities are also empowering themselves in the control and management of their Cultural Heritage through the use of online cultural databases and keeping places such as Mukurtu CMS, Ara Iritja (Keeping Place KMS) and the map-based GIS platform, The Keeping Place, as well as Aboriginal Language Centres and community archives.

New technologies are also being explored as a means to implement further protections for Aboriginal Cultural Heritage in the absence of more robust legal protections. Blockchain technology for instance is being explored as a means of authenticating Aboriginal Art, to promote Aboriginal artists work, and reduce the market for fake art.³⁷¹

2.4 ABORIGINAL PEOPLES ARE NOT THE PRIMARY DECISION-MAKERS

Aboriginal peoples must be the primary decision-makers whenever it comes to care of Aboriginal Cultural Heritage.

The importance of this is layered. The principle of self-determination, as codified in *United Nations Declaration on the Rights of Indigenous Peoples*,³⁷² is an essential element. Additionally, Aboriginal-led decision making is a natural consequence of a realisation by the government that Aboriginal Cultural Heritage is lived and practiced in ways entirely different from the Western model of Cultural Heritage.

This leads to the next point: there is huge diversity of Aboriginal cultures across Australia and across Victoria. Actual protocols for caring for Aboriginal Cultural Heritage must follow the internal authority structures of clans and communities. As a result, Victorian government law and policy must facilitate referral of decisions back to the relevant decision-makers, so Aboriginal Cultural Heritage is followed according to relevant Aboriginal law. Later in this section we discuss how the heritage management



METRO TUNNEL PROJECT

An example of positive collaboration was described during consultations as the Metro Tunnel Project, which involved two senior Aboriginal community members being employed by the project at the outset to act as cultural advisors and liaisons with the relevant RAP authorities. This meant that from the beginning, the project was co-ordinating with Victorian Elders and relevant RAPs, as well as conducting consultations and managing the concerns of the Aboriginal community members in a culturally appropriate way. The respondent emphasised that as the two Aboriginal advisors of the project were senior in the community, they had extensive experience in this field which can be difficult to navigate.³⁷³

approvals system is currently undermining this process, and in section 2.8 we discuss challenges in the RAP structure.

The *Aboriginal Heritage Act 2006* (Vic) (the Act or AHA) has started moving towards improved modelling of Aboriginal-led decision-making. This is largely driven by Aboriginal peoples advocating to government for their right to speak for Country, advocating for collaborative management of sites, and enforcing their right to say ‘no’. The Metro Tunnel Project is an example of a development project that has leant into Black Excellence and collaborated with Aboriginal peoples right from the outset of the project. This meant that development of the project from its inception was shaped by Aboriginal perspectives.

However, some challenges remain. This section will start by looking at the decision-making structure established under the Act. In fact, there are still significant issues with how the development approvals mechanism operates through Cultural Heritage Management Plans (CHMPs). We will look more closely at these criticisms, which illustrate the undermining of Aboriginal-led decision making. We will finalise this section by looking at the recent recommendations for reform of the Act.

Victorian planning laws mostly rely on these provisions for protection of Aboriginal Cultural Heritage when consenting to land use and development in the state. As a result, the Act is the principal mechanism for caring for Country as well as for Aboriginal Cultural Heritage as a whole.

THE STRUCTURES OF AUTHORITY UNDER THE ABORIGINAL HERITAGE ACT 2006

Under the Act, the main decision-makers are the Victorian Aboriginal Heritage Council, and the Department of Premier and Cabinet, on the advice of advisory committees.

The Aboriginal Heritage Council

The Act established the Aboriginal Heritage Council as a body corporate.³⁷⁴ The Council consists of up to 11 members, to be appointed by the Minister, for a term of 3 years.³⁷⁵ Council members must be Traditional Owners of an area in Victoria, be resident in Victoria, and have relevant experience or knowledge of Aboriginal Cultural Heritage (as defined in the Act) in Victoria.³⁷⁶

The functions of the Council are summarised in Table 1.

TABLE 1: SUMMARY OF THE DUTIES OF THE VICTORIAN ABORIGINAL HERITAGE COUNCIL	
Primary functions	To be the central coordinating body responsible for overseeing the return of Aboriginal Ancestral Remains in Victoria ³⁷⁷
	To receive and determine RAP applications ³⁷⁹
	To consider Cultural Heritage Management Plans (CHMPs) ³⁸²
	To promote public awareness and understanding of Aboriginal Cultural Heritage ³⁸³
	To report to the Minister every 5 years on the state of Victoria’s Aboriginal Cultural Heritage ³⁸⁴
To advise the Secretary	On establishing guidelines for the payment of RAPs
	On the exercise of powers in relation to CHPs, CHMPs and Cultural Heritage agreements ³⁸⁰
To advise the Minister	In relation to the protection of Aboriginal Cultural Heritage in Victoria ³⁷⁸
	To advise and make recommendations on the exercise of ministerial powers including in relation to protection declarations, CHMPs and Cultural Heritage audits ³⁸¹

The Role of the Department of Premier and Cabinet

The Act is administered by the Department of Premier and Cabinet. Under the Act, the Secretary of the Department of Premier and Cabinet is responsible for:

- Establishing and maintaining the Victorian Aboriginal Heritage Register
- Granting Cultural Heritage permits (where there is no relevant RAP)
- Approving Cultural Heritage management plans (where there is no relevant RAP, or where the RAP has either not given notice of their intention to evaluate the plan, or has given notice that they will not evaluate the plan)
- Developing and distributing materials relating to the protection of Aboriginal Cultural Heritage and the administration of the Act
- Managing enforcement of the Act
- Considering applications for registration of Aboriginal intangible Cultural Heritage and making determinations regarding sensitive Aboriginal Cultural Heritage information (these decisions

are delegated to officers in First Peoples – State Relations (formerly Aboriginal Victoria)).³⁸⁵

In order to carry out its duties, the Department engages numerous Aboriginal advisory committees:

- Aboriginal Executive Council
- Senior Officers Group on Aboriginal Affairs
- Right People for Country Steering Committee
- Secretaries' Leadership Group on Aboriginal Affairs
- The Stolen Generations Repatriation Committee
- Certificate IV in Aboriginal Cultural Heritage Management Advisory Committee - with representation from the Victorian Aboriginal Education Association Inc
- Traditional Owner Reference Group overseeing the development of a Conservation Management Plan for Lake Tyrrell
- Lake Boort Conservation Management Plan Project Control Board.

The Department also maintained a RAP Cultural Heritage Working Group to assist with discussions around legislative and policy changes, particularly in relation to the review of the *Aboriginal Heritage Regulations 2018* (Vic). This ran for about three years.

Each year they consult with RAPs approximately 250-300 times in relation to statutory decisions in addition to approximately 50 more detailed consultations in relation to other matters, e.g. Ongoing Protection Declaration development.

Funding by the Department of Premier and Cabinet facilitates the practice of Culture. In addition to funding RAPs directly, the Department provides funding to Aboriginal peoples without a formally recognised group which supports activities that focus on healing, culture and Country, governance, young people and relationships.³⁸⁶ For example the Strong Roots for Our Futures Program, which is an initiative established to resource activities to support strong self-determining Traditional Owner groups.³⁸⁷ The Traditional Owner Nation-building Support Package supports Traditional Owner groups across Victoria to engage in nation-building and prepare for future treaty negotiations. The Package provides \$13.6 million over two years to enable a range of nation building activities.³⁸⁸

- The Department of Premier and Cabinet also supports the Local Aboriginal Networks and Gathering Places program.³⁹⁸ This program provides space for the Aboriginal community to connect, share, learn and lead.

The objectives are to:

- Set priorities
- Develop community plans
- Improve social cohesion

- Empower Aboriginal Victorians to participate in community life.

The Right People for Country program is run by First Peoples – State Relations, Department of Premier and Cabinet. It supports Traditional Owner groups to prepare for and make agreements between groups (about Country boundaries) and within groups (about representation and membership).³⁹⁰

The Department's support comes in the form of:

- Independent facilitators;
- Training (strategic negotiation, group facilitation and dispute resolution);
- Planning workshops;
- Support to visit and map country; and
- Resources to hold meetings.³⁹¹

The intention is that Aboriginal peoples have decision-making power over defining their borders. These agreements, facilitated by the Right People for Country program, can assist with registration as a RAP as well as negotiation of settlements under the *Traditional Owner Settlements Act 2010* (Vic) or native title determinations.³⁹² However, whilst effective in development of group relationships and dynamics, there has been no resultant successful applications for formal recognition by these groups in the reporting period.

Heritage Services at First Peoples – State Relations, Department of Premier and Cabinet is currently undertaking the CHMP Conditions Review Project. The Project will provide valuable data, previously not collected or enforced, on which to assess the operation of the CHMP system. The Project is still underway, but the Department reported to us, three key aspects:

- A pilot study involved an audit of 400 approved CHMPs. About half of these were found to include archaeological salvage as a condition of the CHMP;
- Heritage Services is recording data about which approved CHMPs include salvage conditions. This data will help them enforce compliance with these conditions. The Department notes a further advantage of this Project – more detailed analysis of Aboriginal places are generally undertaken as part of a CHMP's salvage conditions. This potentially means that ensuring compliance with salvage conditions can result in better Cultural Heritage management outcomes; and
- The audit will identify which CHMPs have resulted in harm avoidance or harm minimisation.³⁹³

THE ABORIGINAL HERITAGE ACT FOCUSES ON RISK REDUCTION NOT CULTURAL CONNECTION

Under the *Aboriginal Heritage Act 2006* (Vic) (AHA or the Act), “Aboriginal cultural heritage” is defined as Aboriginal places, Aboriginal objects and Aboriginal Ancestral Remains.³⁹⁴ This does not include “Aboriginal intangible heritage” which is defined as knowledge of or expression of Aboriginal tradition, other than Aboriginal Cultural Heritage, as well as any intellectual creation or innovation based on that tradition.³⁹⁵

This definition does not reflect the lived experience of Victorian Aboriginal peoples. The tangible and intangible parts of Culture cannot be separated in this way. Instead, they are interconnected, and linked to people and Country.

The Act begins by placing a prohibition on harm to any Aboriginal Cultural Heritage (as defined by the Act) other than when the harm is in accordance with a CHP or approved CHMP, Cultural Heritage land management agreement, or in accordance with Aboriginal tradition.³⁹⁶

The Act established several approval mechanisms relevant to the management of activities and development of Country on which Aboriginal Cultural Heritage is situated:

- Cultural Heritage Permits (CHPs);
- Cultural Heritage Management Plans (CHMPs); and
- Cultural Heritage Management Agreements.

The key aspects of each of these mechanisms are summarised below.

Cultural Heritage Permit (CHP)

A person must apply to the local RAP (or if there is no RAP, then the Secretary of the Department of Premier and Cabinet) for a CHP before carrying on an activity likely to harm Aboriginal Cultural Heritage.³⁹⁷ The approval body may grant or deny the CHP.³⁹⁹ The approval body may also place a condition on the CHP. A CHP cannot be issued for an activity that would require a CHMP.⁴⁰⁰ CHPs are not an alternative to CHMPs, nor are they linked to the approval of CHMPs.

Since 2016, RAPs have granted 183 CHPs, the Secretary of the Department of Premier and Cabinet have granted a further 76, and one has been granted by the Victorian Aboriginal Heritage Council.⁴⁰¹ It is unknown how many CHPs have been declined by RAPs in the same period, but the Secretary has declined two.⁴⁰²

The Department of Premier and Cabinet notes that every application received for consideration by the Secretary is forwarded to the relevant Traditional Owner group for comment, and those comments are taken into consideration.

The Council advised that a Cultural Heritage Permit cannot be issued for something that requires a CHMP (discussed below). If a CHMP has been undertaken, there are contingencies in the CHMP to guide the management of Cultural Heritage found in the course of undertaking the activity (for example, a housing estate or a road).

If a CHMP was not required for that particular activity, but the activity is something that has the potential to harm Cultural Heritage (for example, where there is registered Aboriginal Cultural Heritage at the location), or is an action included in section 36 of the AHA, a permit must be sought by the entity seeking to undertake that activity.

Cultural Heritage Management Plan (CHMP)

A CHMP involves the assessment of an area to determine the nature of any Aboriginal Cultural Heritage present, and any conditions that must be complied with before, during or after an activity.⁴⁰³ The usual sponsors of CHMPs are RAPs or proponents of activities.⁴⁰⁴

A person proposing an activity may prepare a preliminary Aboriginal heritage test (PAHT) for the purposes of determining whether the proposed activity requires the person to prepare a CHMP.⁴⁰⁵ The Secretary (not the RAP or other relevant Aboriginal authority) has responsibility for certifying a preliminary Aboriginal heritage test.⁴⁰⁶

When the PAHT show that a CHMP is required, the person proposing an activity must engage a heritage advisor to assist with the preparation of the plan.⁴⁰⁷

There are certain circumstances in which there must be a CHMP:

- When prescribed under the Regulations⁴⁰⁸
- If an environmental effects statement is required⁴⁰⁹
- It may be required by the Minister.⁴¹⁰

A CHMP is required if the activity is taking place on an area of cultural sensitivity and the activity is a high impact activity, for example, significant ground disturbance for the construction of industry, aquaculture or a freeway,⁴¹¹ or extraction of stone or sand.⁴¹²

There are three levels of assessment that may comprise a CHMP: desktop, standard and complex.⁴¹³

As the name suggests, a desktop assessment is generally limited to a search of the Victorian Aboriginal Heritage Register and a review of published materials that reference the area.⁴¹⁴ A standard assessment includes non-invasive survey techniques, and community engagement.⁴¹⁵ A complex review can involve significant archaeological excavations.⁴¹⁶ The requirement for the CHMP to progress to the next stage will depend on the extent of Aboriginal Cultural Heritage identified at the preceding assessment.⁴¹⁷

The Department of Premier and Cabinet had provided an example of a good CHMP process, the Grampians Wimmera Mallee Water (GWMWater) project. GWMWater worked on a CHMP for the Wimmera Mallee Pipeline with the Barengi Gadjin Land Council Aboriginal Corporation, the local RAP and Aboriginal custodians around the Wimmera River, the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Japagulk Peoples. GWMWater reported that they developed a 'very successful working relationship' with the Land Council on that project, although we were unable to obtain a comment from Barengi Gadjin Land Council Aboriginal Corporation.⁴¹⁸

Presuming the RAP has given notice under section 55 of the Act of their intention to evaluate a CHMP, the sponsor must apply to the relevant RAP/s for approval of the plan.⁴¹⁹ A RAP is only able to refuse to approve a CHMP if:

- The CHMP has not been prepared according to prescribed standards, or
- The CHMP has not addressed the necessary matters, in particular whether the activity avoids harm to Aboriginal Cultural Heritage, or if harm is unavoidable, whether the activity will be conducted in a way that minimises harm to Aboriginal Cultural Heritage.⁴²¹

Non-RAP entities have no status in this approvals process. This supports the decision-making powers of RAPs, and their right to self-determination. The RAPs' powers are procedural and not substantive. RAPs are not able to decline approval of a CHMP solely on the basis that the harm is unavoidable and unacceptable. The proposed activity could wreak significant harm on Aboriginal Cultural Heritage and make minimal effort towards avoiding or reducing that harm – but so long as the Sponsor makes a clear statement about their intended conduct, they have satisfied the requirements of the AHA. The RAP would be forced to approve the plan.

It is important to note that non-RAP Traditional Owner groups have no official decision-making status in this approvals process.

Additionally, the sponsor is able to apply directly to the Secretary for approval if:

- There is no relevant RAP for the area.
- There is a RAP, but they have not given notice to the sponsor of their intention to evaluate the CHMP, or not given that notice within the time required.⁴²²

The sponsor may agree to accept the decision of a RAP to approve the plan or refuse the plan.⁴²³ It is open to the sponsor to have the decision reviewed by Victorian Civil and Administrative Tribunal (VCAT).⁴²⁴

Since 2016, RAPs have approved 1,535 CHMPs, and the Secretary of the Department of Premier and Cabinet has approved a further 1,193. The Victorian Aboriginal Heritage Council (the Council) has approved one CHMP. Seventeen CHMPs were jointly evaluated between RAPs and the Secretary.⁴²⁵ There is no data available on how many CHMPs have been declined. The Department of Premier and Cabinet notes that CHMPs may be declined for a variety of reasons.

Between 2007 and 2016, sub-divisions and dwellings were the most common activity types that sought CHMP approval (34% and 13% respectively). Utility installation, pipelines and roads made up the next largest proportion of 26%. Nearly three quarters of the total number of CHMPs were sponsored by industry.⁴²⁶

Feedback provided by the Council raised several points regarding the refusal of a CHMP during the approval process:

- During the CHMP process, a RAP may decide not to approve a CHMP. Usually this is because the CHMP is not up to the required standards, not because of the outcome of the management conditions relating to Cultural Heritage (as discussed above). In usual circumstances, these mostly minor changes are made by the Heritage Advisor and the CHMP is resubmitted.
- RAPs do not feel as though they are supported by the AHA to outright refuse, or veto, a CHMP based on the outcomes of the complex assessment or resulting management conditions. The CHMP process includes multiple meetings with the RAP. The meeting that occurs after the fieldwork has been undertaken is the results meeting. It is usually at this meeting that the Sponsor and their Heritage Advisor meet with the RAP to discuss not only the results, but how they want to manage what they have found. It would be at this point that the RAP would have the chance to state they wish to salvage the site/s or make it known they wish to retain the site/s. If the Sponsor does not want to retain the site/s identified by the RAP and no agreement can be reached, and the Sponsor then instructs their Heritage Advisor to include management conditions

that are in conflict with the RAPs wishes, the RAP would then have no choice but to refuse to approve the CHMP. But the reality is, for reasons explained below, RAPs simply believe they cannot demand management conditions that do not in some way accommodate the needs of the Sponsor.

The above-mentioned scenario, where a RAP refuses to approve a CHMP, almost never happens for the following reasons:

- First, the Sponsor would most likely not accept the decision of the RAP and would appeal to the VCAT.
- Second, the RAPs feel that they are not supported in the VCAT process and would be involved in a costly process with no hope of winning. RAPs have raised with Council that they feel this way because they have no faith that, if called upon, the industry or the Department would support their view that a particular site is worth saving. Council stated that except for some rare instances, RAPs feel like they have no option but to salvage all (or at most a representative sample) of what they find.

Cultural Heritage management agreements under the Aboriginal Heritage Act

Cultural Heritage management agreements are between two or more persons relating to the management or protection of Aboriginal Cultural Heritage, for example, for rights of access to, or use of Aboriginal places or objects by Aboriginal peoples.⁴²⁷ The relevant RAP must consent to any Cultural Heritage agreement that relates to an Aboriginal place.⁴²⁸ A land manager may enter into a Cultural Heritage land management agreement with a RAP.⁴²⁹

There is only one known Cultural Heritage agreement entered into since 2016.⁴³⁰

Other mechanisms for the protection of Aboriginal Cultural Heritage

Cultural Heritage audits: An assessment of the impact of an activity on Aboriginal Cultural Heritage, for example if it is reasonably believed that the sponsor of a CHMP or holder of a CHP has, or is likely, to contravene any conditions on their CHMP or CHP.⁴³¹

Stop orders (including 24 hour stop orders): May be issued by the Minister if the Minister is satisfied that there are reasonable grounds for believing that an act is harming, or is likely to harm, Aboriginal Cultural Heritage, and the order is necessary to prevent that harm.⁴³²

Interim protection declarations: Can be made in relation to an Aboriginal place or object stipulating the measures to be taken for the protection of the

Aboriginal place or object. An interim protection declaration can only apply for a maximum of 6 months.⁴³⁴

Ongoing protection declarations: Before making, amending or revoking an ongoing protection declaration, the Minister must consult with the Victorian Aboriginal Heritage Council.⁴³⁵ The protection declaration does not take effect until it has been published in the Government Gazette.⁴³⁶

Since 2016, there has been one interim protection declaration made. This was for Dyurite, discussed in section 2.1. Although it should be noted that interim protection declarations are not usually necessary – stop work orders followed by on-going protection declarations can avoid the need for the interim protection declaration. That said, there have been no ongoing protection measures since 2016. However, there are three proposed Ongoing Protection Declarations currently being pursued: Kooyang Ceremonial Ground, Ghow Swamp and Lake Boort.⁴³⁷

This was a brief overview of the main ways the Act regulates activities on Country that could impact Aboriginal Cultural Heritage. The primary function of these controls is to reduce or minimise harm to Country. It is a risk reduction model, rather than a care-based model.

The feedback from the consultations raised other criticisms of the Act.

LACK OF PENALTY AND ENFORCEMENT MEASURES

Each year approximately 600 Cultural Heritage Management Plans are undertaken to manage the protection of our Cultural Heritage. Stronger enforcement measures came into effect with the 2016 amendments to the Act. But our heritage is still being destroyed and it breaks my heart.

Ron Jones, Member 2016-2019,
Victorian Aboriginal Heritage Council⁴³⁸

It was raised repeatedly in consultations that there is a lack of enforceability measures which prevents Aboriginal peoples from protecting their Cultural Heritage under the *Aboriginal Heritage Act 2006* (Vic) (The Act or AHA). While environmental legislation has strong penalty provisions in Victoria, many respondents raised that there should also be criminal penalty provisions under the Act.

Several respondents raised this case as an example of how environmental legislation has greater methods



WEDGE-TAILED EAGLE

In October 2019, a Victorian landowner and his farmhand pleaded guilty to charges brought by the Department of Jobs, Precincts and Regions for misusing agricultural chemicals.

The landowner used the chemicals to kill 420 wedge-tailed eagles over an 18-month period. The *Wildlife Act 1974* (NSW) imposes a maximum fine for this offence would be \$354,397 and/or six months imprisonment, as wedge-tailed eagles are a protected species under the Act.

of enforcement than the Act. While environmental legislation recognised the need for penalty provisions and sanctions, respondents raised that there should be an avenue for prosecutions for religious crimes protected under the Act, as the Wedge-tailed Eagle is the creator spirit. This event caused immense distress for the custodians of that particular Country, the Wurundjeri Woi-wurrung people. As a respondent explained, killing those birds was destruction of their Cultural Heritage and was devastating to their living cultural practice.⁴³⁹

In addition, one respondent raised that Aboriginal Heritage Officers should be given more administrative powers under the Act.⁴⁴⁰ This respondent stated that Aboriginal Heritage Officers need to be able to go out on Country and physically stop people from breaching the Act in order to protect Aboriginal Cultural Heritage.⁴⁴¹

Another respondent raised that the limited powers that are currently provided under the Act in the form of interim protection declarations are insufficient.⁴⁴² This respondent explained that an interim protection declaration only lasts for 3 months with only one additional option for renewal, with a total of 6 months protection available under the Act. However, the declarations are granted in order for a RAP to undertake cultural surveys of a site and assess the cultural significance. The respondent raised that 6-month protection is simply not enough time to carry out this important work, and as a result, the RAP has to rely on erection of their own, unenforceable signs in order to carry out the required work. Compliance is then entirely dependent on the good-will of the public.

HERITAGE MANAGEMENT APPROVALS UNDERMINE ABORIGINAL-LED DECISION-MAKING

It has been argued that the use of CHMPs in the Cultural Heritage management process does not currently take sufficient account of Aboriginal perspectives in the assessment of significance or the subsequent management outcomes.⁴⁴³ Although consultation with Aboriginal communities is required by the CHMP process, the nature of this consultation and the extent to which the perspectives ascertained inform the management outcomes vary, generally resulting in minimal consideration.⁴⁴⁴

The power imbalance, and the lack of qualified Aboriginal Heritage Advisors, ultimately create situations in which it becomes rare for Aboriginal perspectives to be incorporated in any meaningful way and for the outcome of a CHMP to be the protection of a site due to its significance.⁴⁴⁵ Therefore, the regulatory

processes of the Act can be seen to undermine the respect for, and empowerment of, Aboriginal peoples and perspectives.

It was raised in almost every consultation that the state of Victoria's Aboriginal Cultural Heritage is 'reactive, not proactive'. Under-resourced, under-funded RAPs and Traditional Owner groups are constantly trying to keep up with demands from external parties and are unable to focus on the work that they may want to prioritise.⁴⁴⁶

As well as calling for increased funding, respondents raised that the systems provided under the Act, whether the Victorian Aboriginal Heritage Register or CHMP system, are difficult to navigate and unnecessarily complex. They are also not Aboriginal-led, and this is reflected in the often unsatisfactory outcomes that result. Respondents also stated that there is a lack of culturally appropriate management approaches, which take up additional and precious time and resources.

CONSULTATION COMES TOO LATE

One respondent likened the current CHMP system to a digestive system with a blockage.⁴⁴⁷

As there is no requirement for early consultation with Traditional Owners at the outset of a project, the RAP will often receive a notice of intention (NOI) to prepare a CHMP from a Sponsor after the project has already gained momentum.

This has the consequence of the RAP being engaged too late in the process. This exposes the RAP to additional difficulties of significant time and financial pressure to complete the CHMP within the developer's protracted timeframe, and within the budget constraints set by the heritage advisor who has been awarded the contract. The respondent stated then where there is delay in the RAP's response, the developer will just push on without the RAP's approval.⁴⁴⁸

As a result, in order to comply with obligations to protect Aboriginal Cultural Heritage under the Act, the RAP may then be required to obtain legal action such as an interim injunction against the continuation of the project.⁴⁴⁹ This presents a failed opportunity for meaningful collaboration between the developer and the RAP and is costly and time consuming for the RAP. It does not respect self-determination or engender trust if Aboriginal peoples have to, of their own volition, bring legal action to enforce the obligations of sponsors under the AHA. It means the AHA is failing in its remit.

It was suggested that to rectify this issue, best practice requires early and meaningful consultation with Aboriginal community members. In addition, employing Aboriginal peoples from the outset of the project to act as cultural liaisons and advisors will provide an opportunity for best practice engagement with the RAPs and the holders of relevant cultural authority. But it is more than this. The Act engenders a system that goes against the inherent rights of Aboriginal peoples to protect, manage and control their Cultural Heritage. The system itself requires decolonisation.

CULTURALLY APPROPRIATE MANAGEMENT APPROACHES

Another respondent raised that Aboriginal peoples merely want the ability to say 'you can't build there, you have to go the other way' on a proposed development. Instead, RAPs are faced with extensive documents and procedural requirements that are difficult to navigate for people with relevant training, let alone community members who have not received adequate training.⁴⁵¹

This lack of clarity and culturally appropriate management in the CHMP process results in the entire process being undertaken through a lens that does not align with Aboriginal cultural values and ways of being and relating to Country. A respondent raised that in some circumstances it may be more appropriate to walk the land and map out the area, showing the culturally appropriate way that the work could be done, using a procedure that is culturally safe.⁴⁵²

As it stands, one respondent stated that RAPs must engage with a process that is not theirs. This was raised several times in consultations both with regard to the CHMP process and the laws under the Act.⁴⁵³

THE RIGHT TO SAY 'NO'

Respondents consistently raised the importance of the right to say 'no'.⁴⁵⁴

This is a critical right desired by Victorian Aboriginal peoples. Without the right to say no, Aboriginal peoples are forced to work with a Western process that is not designed by them, without adequate consultation, and a hidden power imbalance that exists throughout the entire Cultural Heritage process. For example, when a potential Sponsor knows that ultimately the Aboriginal party cannot say no to a proposed CHMP, both parties are going through the CHMP process based on the goodwill of the proponent.

The right of veto over CHMPs has been identified consistently as an essential right that must be incorporated into the Act.⁴⁵⁵ In the absence of the right to say 'no' respondents have raised that they are 'managing destruction' of heritage,⁴⁵⁶ not preservation.

Removing the right to say no goes against the principle of self-determination of Aboriginal peoples pursuant to UNDRIP⁴⁵⁷ and the Victorian Government's Aboriginal Affairs Framework 2018-2023, and goes against the purpose of the Act to 'empower traditional owners as protectors of their Cultural Heritage'.⁴⁵⁸

WESTERN HIGHWAY DUPLICATION PROJECT

The Western Highway Duplication Project has gained national attention due to the destruction of the Djap Wurrung Trees. For the Djap Wurrung traditional owners, these trees are culturally sacred, they are part of a songline and a series of sacred trees and artifacts of significant cultural value to the Djap Wurrung people.⁴⁵⁹

However, it is important to note that the Eastern Maar Aboriginal Corporation, who have statutory responsibility for the Country on which the trees stand as the RAP, do not consider the trees to hold the same cultural significance, and approval under the *Aboriginal Heritage Act 2006* (Vic) was sought and provided by the Corporation for the development.

The Project involved a 12.5 kilometre section of the highway being duplicated between Ararat and Buangor.⁴⁶⁰ While a CHMP and consultation with the Eastern Marr Aboriginal Corporation, and the previous RAP for the area, occurred, it was determined by the Djap Wurrung people that the consultation process undertaken was not appropriate, and a Federal Court injunction was placed on the proposed works.⁴⁶¹

The effect of the Project on Aboriginal Cultural Heritage was raised as a significant issue as early as when it started in 2008.⁴⁶² The CHMP and consultation process was followed according to the Act, and as a result the Project was given approval.



WATER FOR VICTORIA

Water for Victoria is a long-term initiative by the Victorian Government, planning for a future with less available water due to climate change. The *Water for Victoria* program has several key initiatives for working with Traditional Owners, including ongoing capacity building to increase Aboriginal participation in water management as outlined in the July 2021 Water for Victoria Action Status Report.⁴⁶⁵ The Status Report outlines that funding has been provided since 2016 for Aboriginal Water Officers, who are recognised as playing a critical role in developing and maintaining partnerships between the Aboriginal Water Network, Traditional Owners, and Government. This relationship aims to facilitate two-way learning between Traditional Owners and Government to manage the Victorian water framework.

In addition, the 'Water for Victoria' strategic plan outlines the ongoing commitment to recognising and managing Aboriginal values including 'cultural mapping, seasonal watering plans, water management plans, and research of cultural and environmental flows'.⁴⁶⁶ In addition, the project has funded an additional eight Aboriginal Waterway Assessments, with amendments made to existing legislation to recognise Aboriginal cultural values, and increased participation of Traditional Owners in water policy and strategy development.⁴⁶⁷

As part of this initiative, the Victorian government committed \$5 million to create a 'Roadmap for Aboriginal Access to Water for Economic Development',⁴⁶⁸ with Phase 1 of this Project being the *Cultural Water for Cultural Economies Project*.⁴⁶⁹ This Project builds on the work of the National Cultural Flows Research Project, to identify pathways to increase water access for Traditional Owners in Victoria.⁴⁷⁰

2.5 WATER AND CULTURAL FLOWS AS ABORIGINAL CULTURAL HERITAGE ARE GAINING MOMENTUM

Water is a living being and should be treated accordingly. Many of our ancestral beings are created by and live-in water

Echuca Declaration 2010, Murray Darling River Indigenous Nations

Victoria has made positive steps in recognising the importance of cultural flows and Aboriginal rights over waterways. Victoria has several key policy initiatives including *Water for Victoria*⁴⁶³ and the *Yarra Strategic Plan*,⁴⁶⁴ which embed Aboriginal cultural relationships to water in the future of the management of Victorian waterways. Victoria has also been the base location for developing research and advocacy by Aboriginal peoples in cultural flows, and the state recently re-allocated water for this purpose. In addition, Victoria is leading in Australia and even internationally in the recognition of Aboriginal cultural connections to waterways with the enactment of the *Yarra River Protection (Wilip-Gin Birrarung Murrumbidgee) Act 2017* (Vic).

However, in addition to the initiatives discussed in this section, there are still pressures with regard to the state of Victoria's relationship with waterways as Aboriginal Cultural Heritage.

First, the separation of water and Country in legislative regimes demonstrates an underlying colonial framework that sets apart water relationships from land-based relationships. This differs to Aboriginal views and understanding of waterways and requires Aboriginal peoples to mould Aboriginal water management strategy into non-Aboriginal methods of management, care and control of waterways.

Second, there is a lack of legal obligation in Victoria's legislation, including the most recent amendments. The inclusion of Aboriginal cultural values and management of waterways to promote water unity and river health is a positive step, yet there are doubts as to the legal enforceability.

Finally, there should be more collaboration with Aboriginal communities to increase the use and allocation of cultural flows.

THE LEGISLATION REGARDING WATER AND ABORIGINAL CULTURAL HERITAGE REQUIRES FURTHER DEVELOPMENT

Due to the legal fiction of *terra nullius* and the doctrine of reception, English common law rights, known as riparian rights, ruled the allocation of water in Victoria until the introduction of the *Irrigation Act 1886* (Vic). Under English common law, water rights were linked to the possession of land.⁴⁷¹ The *Irrigation Act* was largely procedural, enshrining the common law principles vesting water rights in the Crown, the Victorian public authority. This had the legal effect of complete dislocation of pre-existing Aboriginal rights to water.

Today, while land-based Aboriginal Cultural Heritage falls under the scope of the *Aboriginal Heritage Act 2006* (Vic) (the Act or AHA), the situation for water is different. The *Water Act 1989* (Vic) and the *Water Industry Act 1994* (Vic) govern the laws relating to water in Victoria, including water conservation, sustainability and the use, conservation and management of water resources.⁴⁷² The *Catchment and Land Protection Act 1994* (Vic) sets up a framework for the management of catchments and the community participation of land and water resources.⁴⁷³

As is described in section 2.1, consultations for this Report found there is a lack of understanding by the wider Victorian public about Aboriginal Cultural Heritage. One area where the lack of understanding is high is the Aboriginal control, management and care of waterways. Aboriginal peoples relate to waterways culturally, which includes ways of promoting and protecting the health of the river and the management and allocation of water to sustain community health. Many cultural relationships to waterways hold knowledge of aquaculture farming practice and sustainable management of waterways.

Pressure – lack of binding measures

The laws governing the allocation and management of water in Victoria has undergone several important amendments in recent years. The *Water and Catchment Legislation Amendment Act 2019* (Vic) provided positive amendments to the *Water Act 1989* (Vic), enshrining Aboriginal cultural values and uses of waterways.⁴⁷⁴ This was through modifying the purpose of the Water Act to 'ensure that Victoria's water resources and waterways are managed in a way that considers Aboriginal cultural values and uses of waterways'.⁴⁷⁵

YARRA RIVER PROTECTION (WILIP-GIN BIRRARUNG MURRON) ACT 2017 (VIC) - PREAMBLE

The Yarra River is of great importance to Melbourne and Victoria. It is the intention of the Parliament that the Yarra River is kept alive and healthy for the benefit of future generations. This Act recognises the intrinsic connection of the traditional owners to the Yarra River and its Country and further recognises them as the custodians of the land and waterway which they call Birrarung.

In the Woi-wurrung language of the traditional owners, Wilip-gin Birrarung murrong means "keep the Birrarung alive". The following statement (in the Woi-wurrung language [left] and in English) is from the Woi-wurrung—

Woiwurrungbaluk ba Birrarung wanganyinu biikpil

*Yarrayrapil, manyi biik ba Birrarung, ganbu
marram-nganyinu*

*Manyi Birrarung murrondjak, durrung ba murrup
warrongguny, ngargunin twarnpil*

Birrarungwa nhanbu wilamnganyinu

Nhanbu ngarn.ganhanganyinu manyi Birrarung

*Bunjil mungany biik, wurru-wurru, warriny ba yaluk,
ba ngargunin twarn*

Biiku kuliny mungany Bunjil

Waa marrnakith-nganyin

*Balliyang, barnumbinyu Bundjilal, banyu bagurk
mungany*

Ngarn.gunganyinu nhanbu

*nyilam biik, nyilam kuliny – balit biik, balit kuliny:
balitmanhanganyin manyi biik ba Birrarung.*

*Balitmanhanganyin durrungu ba murrupu,
ba nhanbu murrondjak!*

"We, the Woi-wurrung, the First People, and the Birrarung, belong to this Country. This Country, and the Birrarung are part of us.

The Birrarung is alive, has a heart, a spirit and is part of our Dreaming. We have lived with and known the Birrarung since the beginning. We will always know the Birrarung.

Bunjil, the great Eagle, the creator spirit, made the land, the sky, the sea, the rivers, flora and fauna, the lore. He made Kulin from the earth. Bunjil gave Waa, the crow, the responsibility of Protector. Bunjil's brother, Palliyang, the Bat, created Bagarook, women, from the water.

Since our beginning it has been known that we have an obligation to keep the Birrarung alive and healthy—for all generations to come."

In addition, section 189 of the *Water Act* was amended to state that authorities have obligations to identify and plan for community needs relating to the uses and values of waterways and land, including Aboriginal cultural values and uses amongst other community needs.⁴⁷⁶

These amendments are a positive step in recognising Aboriginal cultural relationships with water as they promote Ministerial consideration of Aboriginal cultural values in decision-making processes. In addition, incorporating Aboriginal cultural values into the purpose of the *Water Act* provides a role in statutory interpretation to assist the courts. However, the language of obligation remains open ended.

The *Water Act* could go further to value Aboriginal cultural relationships to water and self-determination. The amendments that require cultural land management agreements for registered waterways under the AHA presents a barrier, as the waterway must be registered under the AHA. This subjects the community to a registration system before a land management agreement is required to be established. In addition, there are no minimum standards as to what must be contained within the land management agreement, such as free, prior and informed consent, access and benefit sharing, and the level of Aboriginal management and control. Waterways that are not registered on the Aboriginal Heritage Register remain vulnerable to lack of Aboriginal management based on these amendments.

While the AHA amendments made positive steps through linking heritage to land (discussed in section 2.3), waterways are not included in this framework. This has the effect of removing waterways from Country with a separate legal and policy regime to manage waterways. This separation is an inherently Western viewpoint and has caused pressures for Aboriginal community members who advocate for increased enforceable rights over management of waterways.

THE YARRA RIVER PROTECTION (WILIP-GIN BIRRARUNG MURRON) ACT 2017 (VIC) IS WORLD LEADING

The Yarra River flows through Melbourne CBD and is 242 kilometres in length.⁴⁷⁷ The Yarra River flows from the head waters in the forest areas in the east of the state, traverses the suburbs and the centre of Melbourne, and flows out at Port Phillip Bay.⁴⁷⁸ The Yarra River supplies 70% of Melbourne's drinking water.

It was therefore momentous when the Victorian parliament introduced a new landmark piece of legislation in 2017, the *Yarra River Protection Act (Wilip Gin Birrarung murrun) Act 2017* (Vic).

This Act was the first legislation in Victoria to be co-titled in an Aboriginal language. The title and preamble of the *Yarra River Protection (Wilip-gin Birrarung murrun) Act* are also written in Woi-wurrung language. When the Act was introduced in Parliament, the Act was delivered with a speech from Aunty Alice Kolasa, a Wurundjeri Elder. The Act has put Victoria on the international map as a leader in the recognition of a waterway as 'one living and integrated natural entity'.⁴⁷⁹

Water is life, and Aboriginal cultural, scientific and economic relationships to water have been continuously overlooked, including in Victoria. As the global community faces environmental crises, many jurisdictions globally have reconsidered the legal classification of nature, with the growing Rights of Nature movement.⁴⁸⁰ Several other jurisdictions including Ecuador, Bolivia, Mexico, Colombia, New Zealand, Bangladesh, India and Canada have also released legislation that reconsiders the relationship between the waterways and the community.

In comparison with these jurisdictions, the *Yarra River Protection (Wilip-gin Birrarung murrun) Act* is leading in its own right.⁴⁸¹ While the Act does not grant legal personhood to the Yarra River, it does provide significant legal rights to protect the health and unity of the Yarra, as well as the Traditional Owner's cultural relationship to the Birrarung.

The Birrarung Council

The *Yarra River Protection (Wilip-gin Birrarung murrun) Act* establishes the Birrarung Council.⁴⁸² The Birrarung Council champions the interests of the Yarra River/Birrarung as a living entity and provides an independent voice for the Yarra River. The Birrarung Council is an independent body⁴⁸³ working with Elders to protect the river and its heritage. The Birrarung Council is made up of 12 stakeholders, with two designated positions for Traditional Owners. The Birrarung Council is considered a positive step as it advocates for the River, however, it is not the legal guardian of the river and is not automatically entitled to initiate legal proceedings to protect the Yarra River, as is seen with the Te Pou Tupua, the legal guardians of the Whanganui River in New Zealand.⁴⁸⁴

Notwithstanding this, the Birrarung Council does permit the Wurundjeri Traditional Owners generally to have direct representation of their interests, as direct representatives on the Council that provides

independent recommendations and advice to the Minister. However, questions around enforceability of obligations arising under the Act remain, as the Birrarung Council does not have the power to exercise rights or take responsibilities for any liabilities of the Yarra River.

Cultural Principles

Section 12 of the *Yarra River Protection (Wilip-gin Birrarung murrong) Act* outlines the cultural principles which must be considered by public entities who are responsible for performing functions or duties or exercising powers in relation to the Yarra River land. While the principles are not binding, they apply to the surrounding land, including Crown land and local council land that touches and concerns the Yarra River.

SECTION 12 – CULTURAL PRINCIPLES

- (1) Aboriginal cultural values, heritage and knowledge of Yarra River land should be acknowledged, reflected, protected and promoted.
- (2) The role of the traditional owners as custodians of Yarra River land should be acknowledged through partnership, representation and involvement in policy planning and decision-making.
- (3) The cultural diversity and heritage of post-European settlement communities should be recognised and protected as a valued contribution to the identity, amenity and use of Yarra River land.

Under section 13(3) of the Act, these principles are a baseline and authorities interacting with Yarra River land should go beyond mere compliance, and instead should aim for continuous improvement extending beyond the outlined legal measures. However, these cultural values are not binding, and time will tell as to the incorporation of these cultural values in the planning and management of the Yarra River land by relevant authorities.

The Yarra Strategic Plan

In addition, the *Yarra River Protection (Wilip-gin Birrarung murrong) Act* provides for the development and implementation of the Yarra Strategic Plan.⁴⁸⁵ This Plan is an overarching policy and planning framework in relation to the Yarra River and certain land in its vicinity. As a part of this process, the Wurundjeri Woi-wurrung Traditional Owners have created the *Nhanbu narrun ba ngargunin twarn Birrarung Ancient Spirit & Lore of the Yarra* input into the Strategic Plan.

The Strategic Plan outlines a space which will incorporate the policy principles developed by the Wurundjeri Woi-wurrung Traditional Owners in their response.

YARRA RIVER STRATEGIC PLAN

The draft Yarra Strategic Plan was published in 2021. This Strategic Plan is designed to guide the future use and development of the Yarra Strategic Plan area and identify areas for protection within the Yarra Strategic Plan area.⁴⁸⁶ Still in the process of finalisation, the Strategic Plan recognises the custodianship of the Wurundjeri Woi-wurrung people to the Birrarung, and the essential and fundamental connection of Aboriginal and non-Aboriginal people to the Birrarung.

NHANBU NARRUN BA NGARGUNIN TWARIN BIRRARUNG ANCIENT SPIRIT & LORE OF THE YARRA

The Wurundjeri First Peoples input into the Strategic Plan was published in 2021 and outlines the Wurundjeri voice and interests for the Yarra Strategic Plan. The Wurundjeri peoples outline general positivity toward the *Yarra River Protection (Wilip-gin Birrarung murrumbidgee) Act* but call for expansion of the objectives of the Act, 'especially around education and economic development'.⁴⁸⁷

The Wurundjeri peoples also call for increased land catchment falling under the scope of the Act, and a commitment to genuine collaboration with effective input from the Wurundjeri peoples, which is foreshadowed in the Act. This includes participation in the decision-making process, including the planning and development decisions that concern the Birrarung system.

The Wurundjeri peoples are working towards the development of a Wurundjeri River Management and Access Plan to enable the Wurundjeri peoples to carry out their responsibilities effectively in Cultural Heritage, natural resource management and other areas to fulfil cultural obligations.⁴⁸⁸ *Nhanbu narrun ba ngargunin twarin Birrarung* outlines the Wurundjeri performance objectives and targets, and identifies several key objectives that the Wurundjeri peoples are working towards for a healthier, cleaner river.⁴⁸⁹

THE ALLOCATION OF WATER IS A DECOLONISING PRACTICE

Victoria has made positive steps in the allocation of water, built on the extensive advocacy of Aboriginal peoples.

The colonisation of water and the importance of allocation of water rights is often overlooked by non-Indigenous people who prioritise the commodity-value of water. Water resources have been considered in relation to their ability for people to use water resources, including for health, sanitation, agriculture or commercialisation. This perspective of water as a resource exclusively for exploitative purposes reflects the Western viewpoint of commodification of land and waterways. One of the respondents in this Report, noted that waterways in Victoria were modified for public planning purposes to meet the needs of the

township.⁴⁹⁰ Many modifications of this type occurred at the expense of the health of the river.

The Victorian Parliament recognises that water in Australia, and particularly in Victoria, is a scarce resource.⁴⁹¹ Re-allocation of water resources has impacts on communities and the social structures of towns.⁴⁹² In addition, the threat of drought and environmental disasters is a continuous pressure on water rights and allocation.⁴⁹³

There is movement underway in the understanding of how important it is to allocate water to Aboriginal communities for cultural use. It is important to note that Aboriginal peoples in Victoria have been calling for an allocated cultural flow, in addition to allocation of water for commercial and/or economic use.⁴⁹⁴

CULTURAL FLOWS

"For First Nations People, water is a sacred source of life. The natural flow of water sustains aquatic ecosystems that are central to our spirituality, our social and cultural economy and wellbeing. The rivers are the veins of Country, carrying water to sustain all parts of our sacred landscape. The wetlands are the kidneys, filtering the water as it passes through the land."

National Cultural Flows Research Project,
A Pathway to Cultural Flows in Australia⁴⁹⁵

Cultural flows have been the topic of discussion and endorsement in recent years. In addition to promoting Aboriginal cultural relationships to waterways and Country, cultural flows have been recognised as a holistic, equitable and sustainable means of managing water resources.⁴⁹⁶ The allocation of water rights is built upon the above-mentioned colonial allocation of waterways through common law rights. These common law rights were based on the possession, and dispossession, of land.⁴⁹⁷

In 2018, the National Cultural Flows Research Project, a project driven by and for Aboriginal peoples seeking to embed Aboriginal water allocations in Australia's water management, released a national framework for cultural flows. This framework provided a means of describing and measuring the values of cultural water use for the first time, enabling a more culturally appropriate method for planning, delivering and assessing cultural flows, and showing that it is possible to measure and deliver cultural flow outcomes.

The Murray Lower Darling River Indigenous Nations identified, and the Murray Darling Basin Commission subsequently recognised, the inherent need for the identification of cultural flows within the Living Murray project. Here, it was acknowledged that sufficient environmental, social and economic water flows and volumes must be allocated to the river and to Indigenous Nations to sustain the cultural economy of each Nation in the River system.⁴⁹⁸ Moreover, the Murray Darling Basin Plan, which is informed by the Living Murray project, incorporates Aboriginal peoples' views on cultural flows as a consideration for governments and authorities.

THE LIVING MURRAY PROGRAM

Due to the declining health of the Murray River system spanning across Victoria, and the subsequent threat posed to industries, communities and natural and cultural values, the Murray-Darling Basin Ministerial Council established the Living Murray program in 2002. The program is a joint initiative of the Murray Darling Basin Commission, the Murray-Darling Basin Authority and Australian state and federal governments, funded by the Victorian, New South Wales, South Australian, Australian Capital Territory and Commonwealth governments. The program is one of the world's key river restoration projects.

The goal of the initiative is to achieve a healthy, working river for the benefit of all Australians.⁴⁹⁹ To do so, the program targeted six iconic sites along the river, including forests, lakes, wetlands and channels, seeking to attain environmental benefits and maintaining the healthy aspects of the site as a catalyst for addressing the decline of the river as a whole. Here, the health of these sites was improved through the increasing of environmental water flows to the sites to benefit the plants, animals and communities that the river supports.⁵⁰⁰

The National Cultural Flows Research Project ultimately showcased the ability to measure and deliver cultural flow outcomes and developed the capacity of Aboriginal communities to articulate their water needs and advocate for cultural water allocations for their benefit.

ABORIGINAL WATERWAYS ASSESSMENT PROJECT

The Victorian Government granted the Murray Lower Darling River Indigenous Nations (MLDRIN) funds to undertake Aboriginal Waterways Assessment (AWA) projects in Victoria in May 2016.⁵⁰² These projects were developed and delivered in partnership between the MLDRIN, the Murray Darling Basin Authority, and the Northern Basin Aboriginal Nations, as well as three participating Nation groups, being Wemba Wemba and Barapa Barapa, Gamilaraay and Dhudhuroa and Waywurru communities.⁵⁰³ Together, these representative organisations facilitated and authorised the design and implementation of the project.

The AWA project tested and adapted a Māori-originated water assessment tool to suit the needs and preferences of First Nations peoples in the Murray-Darling Basin.⁵⁰⁴ This tool was developed to consistently measure and prioritise the health of rivers and wetlands in order to ensure the effective participation of First Nations communities in water planning and management in the Basin.⁵⁰⁵ The research conducted found that the relevant First Nations groups recognised and agreed that the tool, and its accompanying processes, are a culturally appropriate, safe and necessary way to assess and subsequently ensure the health of rivers and wetlands in the Murray-Darling Basin.⁵⁰⁶

As of April 2016, the tool has been applied five times across the Basin, including three pilot projects in 2015 in Wamba Wamba, Dhudhuroa/Waywurru and Gamilaraay Country.⁵⁰⁷ The project has continued to be rolled out as a partnership between Aboriginal representative organisations, First Nations communities and Basin authorities and agencies. Whilst the tool represents one methodology that may not be suited to all First Nations groups or places, it provides a useful starting point in collaborating with First Nations groups when working together on Country to identify waterway objectives to ensure the health of waterways and subsequently First Nations cultures across the Basin.

This Project, along with the Living Murray Program, the Aboriginal Waterways Assessment and many other waterway maintenance and revitalisation projects in Victoria, directly and indirectly assist Victoria's

'Water for Victoria' Plan. This Plan is Victoria's response to the impacts of climate change on waterways in the state. Many of these projects rely on the Aboriginal Waterways Assessment, a tool developed by the Murray Lower Darling River Indigenous Nations, in collaboration with the Murray Darling Basin Authority, and the Northern Basin Aboriginal Nations,⁵⁰¹ used to identify and examine the values and cultural and environmental aspects of each waterway prior to undertaking action.

Initiatives such as the Living Murray Program and the Budj Bim Restoration Projects utilise both the Aboriginal Waterways Assessment and the findings of the Cultural Flows Research Project to inform their restoration activities with regards to the cultural significance and values that each site has for its Aboriginal custodians. The use of Aboriginal Waterways Assessment and Cultural Flows measurement are an increasingly significant mechanism to be used by authorities and management bodies due to the need for consultation with Aboriginal communities, which facilitates the identification and safeguarding of Aboriginal cultural values and needs in each project.

Aboriginal management of water and waterways

The United Nations has published on the increased recognition of water rights for Indigenous peoples and the ability for Indigenous peoples to have meaningful and enforceable rights in the management, control, and allocation of water. In addition, the United Nations has affirmed the necessity for Indigenous peoples to maintain cultural rights to water and waterways, including cultural flows.⁵⁰⁸

Aboriginal peoples in Victoria and around Australia have been advocating for increased water resource rights, and more involvement in decision-making and management of waterways for generations.⁵⁰⁹

Aboriginal peoples must have control and management of their waterways in order to practice Aboriginal Cultural Heritage. Empowering Aboriginal peoples to care for water and waterways requires that Aboriginal peoples be provided with meaningful and enforceable rights over waterways.

Waterway Management

The Department of Environment, Land, Water and Planning (DELWP) holds the Water and Catchments portfolio. Through this portfolio, DELWP is increasingly recognising the important economic and cultural connections that necessitate Aboriginal voices in all discussions of waterway management.

Water is essential to Aboriginal peoples for their cultural, economic and spiritual practice.

Aboriginal Cultural Heritage cannot be separated from the cultural connection to water and waterways and is a living cultural practice. With the increase of environmental disasters around the globe, Western law and policy makers are finally listening to the tireless advocacy of Indigenous peoples on the vitality of water health to sustain life. It is essential to the life of all Victorians that waterways are cared for appropriately, and in the past ten years there has been a significant shift in international and domestic laws as they relate to Indigenous cultural flows and water management practices.

ABORIGINAL WATER PROGRAM RUN BY THE DEPARTMENT OF ENVIRONMENT, LAND, WATER AND PLANNING (DELWP)

The Department of Environment, Land, Water and Planning (DELWP) Aboriginal Water Program runs a number of projects, including the Dja Dja Wurrung Clans capacity building project at Bendigo Creek, and the Gunditj Mirring and Barengi Gadjin Land Council Aboriginal Corporation Towards Cultural Flows Project at the Glenelg River.⁵¹⁰ The Aboriginal water program aims to better include Victorian Aboriginal peoples in the way water is managed in Victoria and to empower community connection to water for cultural, economic, customary and spiritual purposes.⁵¹¹

Phase one of the Aboriginal Water Program in Victoria is worth \$9.7 million over 2016-2021. It included funding five RAPs and three catchment management authorities to better define and document Aboriginal values, uses and aspirations of Victoria's waterways and catchments. Over 80 Aboriginal Waterway Assessments have been conducted since 2016. The Program also includes funding 11 pilot projects to explore opportunities for Aboriginal peoples to access water for economic development and inform planning for future investment. Seventeen Aboriginal Water Officers have been employed and an Aboriginal Water Officer Network has been developed.⁵¹²

The Aboriginal Water Program is the first stage for DELWP. The second stage will be known as the Water, Country Community Program, and will be worth \$18 million.

The Aboriginal Water Program is a good example of positive progress currently underway in Victoria. DELWP further notes increased representation of Aboriginal peoples on water sector boards, committees and Ministerial Advisory Councils. DELWP strives to embed Aboriginal voices in strategies and policies including the Victorian Waterway Management Strategy, Regional Catchment Strategies, Regional Sustainable Water Strategies, the Northern and Wimmera-Mallee Water Resource Plans, Integrated Water Management Forums and urban water policies such as the Yarra Strategic Plan, Waterways of the West and Barwon Ministerial Advisory Councils.

Waterway Naming

The *Our Places Our Names* case study (below) is a good illustration of how unnamed waterways are often overlooked places. Waterway naming reinforces the connection between Country, culture and language and corrects the lie that unnamed waterways are somehow blank spaces.

Consultation with Aboriginal communities and custodians, and subsequent recognition of their inherent connection to waterways, is a crucial step in decolonising waterways and appreciating Aboriginal Cultural Heritage. Here, Aboriginal perspectives must be integrated in order to move away from the Western paradigm of commodifying water and facilitate deep and lasting connections with waterways in Victoria.

Although positive steps have been made by both the Victorian government and the private sector in recognising cultural flows and the cultural significance that waterways have for Aboriginal communities, more must be done to ensure sufficient recognition and protection of Aboriginal uses and values.

Legal and policy frameworks and instruments implemented by the Victorian government, such as the *Yarra River Protection (Wilip-Gin Birrarung Murron) Act 2017* (Vic), have pioneered increased recognition of Aboriginal Cultural Heritage and, particularly, Aboriginal values and uses of water. Further, research and restoration projects conducted by private and public sector organisations have both identified and measured cultural values and encouraged consultation with Aboriginal communities. As such, Victoria is leading the way in Australia and laying the groundwork for other Australian states to follow, providing a precedent for decolonising practices surrounding water allocation.

However, the current Western understanding of Country and waterways reflected throughout the relevant legislation, frameworks and instruments limits their effectiveness and application. Authorities

must move away from this understanding in order to effectively encompass and reflect Aboriginal perspectives and connections. Further, the lack of explicit and enforceable obligations to consider and implement cultural flows, and the values of Aboriginal communities, hinders the effectiveness of legislation and policy to care for Aboriginal Cultural Heritage. Whole-of-government understanding and consistency in required.

OUR PLACES OUR NAMES – WATERWAYS NAMING PROJECT

The *Our Places Our Names – Waterways Naming Project* is a project designed by the Victorian Aboriginal Heritage Council to assist RAPs in navigating the complex legislative framework to change the names of waterways in Victoria.⁵¹³ Under the *Aboriginal Heritage Act 2006* (Vic), a RAP can submit a proposal to name an unnamed waterway or add Aboriginal names to currently existing named waterways.

The renaming of waterways using appropriate Aboriginal language names is an important process of decolonising the Victorian landscape. Changing the registered name and updating the VICNAMES dataset reasserts Aboriginal custodianship of the waterways and will ensure that language names appear on such things as road signs and Google Maps.⁵¹⁴ The naming of currently unnamed waterways will afford a level of protection for a vast number of unregistered places and sites currently not recognised.

REFORM RECOMMENDATIONS WILL IMPROVE CONNECTIONS BETWEEN COUNTRY AND CULTURE

It has been recommended previously by the Victorian Aboriginal Heritage Council (VAHC or the Council) that the Act could easily be amended to include veto power over CHMPs. As is mentioned section 2.4 above, the VAHC recommended that the Act be amended to allow RAPs the power of Cultural Consent where a CHMP threatens Aboriginal Cultural Heritage.⁵¹⁵ This veto power would be similar to that already established under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) which grants the Aboriginal Areas Protection Authority veto power where it believes there will be a threat of harm to sites of Cultural Heritage

significance. This amendment would align with the concerns raised in consultations.

In June 2020, the VAHC published *Taking Control of our Heritage*, a Discussion Paper⁵¹⁶ on the legislative reform of the AHA. There followed a consultation period with community and review of submissions responding to the Discussion Paper and subsequent Proposals Paper released in September 2021. The Council released its formal recommendations for reform of the Act in October 2021.⁵¹⁷ The recommendations are grouped around three key themes:

- Further self-determination for RAPs
- Increasing the autonomy of the Council
- Recognising, protecting and conserving Aboriginal Cultural Heritage.

It is relevant to note that the proposal includes the assertion that RAPs should have responsibility to prepare CHMPs and have an elective power to act as Heritage Advisors in the preparation of CHMPs.⁵¹⁸ In response to concerns that the due diligence process was circumventing RAPs, it was recommended that RAPs should be consulted in the due diligence assessments.⁵¹⁹ It was further recommended that RAPs have veto powers to CHMPs.⁵²⁰ It was also recommended that the Council should take over the management of the Cultural Heritage Register.⁵²¹

Interestingly, many of the Council's recommendations reflect constructive feedback we received in the preparation of this Report. This is most likely because the *Taking Control of Our Heritage* discussions received feedback similar to the feedback that came to this Report and reflect an assertion of self-determination, Aboriginal control of culture and holistic care of Culture.

2.6 THERE IS WORK TO BE DONE IN THE MANAGEMENT AND CONTROL OF ABORIGINAL CULTURAL HERITAGE

Aboriginal Cultural Heritage is intangible and tangible heritage. While tangible heritage involves the physical world, intangible Cultural Heritage is the knowledge, stories passed down (and to be passed on), resources and knowledge systems that are expressed through the tangible heritage.⁵²² This includes Aboriginal languages, scientific, agricultural, technical and ecological knowledge, spiritual knowledge, Indigenous Ancestral Remains, cultural environment resources,

literary, performing and artistic words, and human genetic material.⁵²³

The tangible expression of intangible heritage crosses many Western fields, from arts to sports to science. While the Western perspective classifies and divides, the Aboriginal perspectives view the intersecting fields as all falling within Aboriginal Cultural Heritage.

Intangible Cultural Heritage is understood globally amongst Indigenous communities and engaged with and practiced according to Aboriginal law and custom. As intangible Cultural Heritage is conceptually misaligned with Western ways of understanding and preserving Cultural Heritage, Aboriginal peoples must be recognised as the experts of their own heritage.

As was outlined in sections 1.7 and 1.8, Aboriginal peoples have been leading in the management and control of tangible and intangible Cultural Heritage for thousands of years. Since colonisation, this has been a fight for cultural survival. The legal framework under the *Aboriginal Heritage Act 2006* (Vic) that deals with intangible and tangible Cultural Heritage is a response to the hundreds of years of advocating for legal protection to ensure the survival of Aboriginal Cultural Heritage.⁵²⁴ However, many Aboriginal peoples still have criticisms of the current models that are in place for the management and control of Aboriginal Cultural Heritage in Victoria.⁵²⁵

2.6.1 THE ABORIGINAL HERITAGE ACT IS LEADING THE WAY IN PROTECTING ABORIGINAL INTANGIBLE HERITAGE

The *Aboriginal Heritage Act 2006* (Vic) (AHA or the Act) is the first legislation in Australia that allows for the recognition and registration of Aboriginal intangible heritage, in addition to Aboriginal tangible Cultural Heritage.⁵²⁶ This is an important step, as Victoria has led Australia in implementing the basic safeguarding measures of the UNESCO *Convention on the Safeguarding of the Intangible Cultural Heritage*.⁵²⁷

The Convention was adopted by the UNESCO General Conference on 17 October 2003, and formally recognises the importance of intangible Cultural Heritage, and the role that Indigenous communities play in the 'production, safeguarding, maintenance and recreation of intangible Cultural Heritage'.⁵²⁸

Historically, there has been a prioritisation of tangible heritage, and the concept of intangible Cultural Heritage is relatively new under Western legal

thought.⁵²⁹ It is important to note that Australia has not ratified the Convention, so the measures taken in Victoria are progressive and follow international best practice despite a lack of national action.

WHAT IS AN INTANGIBLE CULTURAL HERITAGE REGISTER?

An Intangible Cultural Heritage register is a statutory registration system where Aboriginal peoples can choose to register and record their intangible heritage. The ability to record Aboriginal intangible heritage on a register aims to establish a mechanism for the safeguarding of intangible heritage. This is one of the key measures encouraged by the UNESCO Convention for signatories to implement domestically, to ensure the viability of intangible Cultural Heritage, 'including through the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage'.⁵³⁰

Intangible heritage is generally not protected by Western laws. As outlined in section 1.7, Western ontologies prioritise safeguarding of heritage through restricting access, including land and object-based approaches. The Cultural Heritage is placed in a legal and managerial time-capsule, to be safeguarded for future generations as fixed in time and static.

When considering preservation, the dynamic, living nature of intangible heritage must be considered. This is where registers can be useful, as they enable registration of knowledge held by Aboriginal peoples, including recording processes and cultural revitalisation to reconnect Aboriginal communities with their Cultural Heritage. In addition, access is restricted to the relevant community and knowledge holders, as is appropriate under customary law.

In addition, registers provide a useful resource preventing to some extent misappropriation and misuse of Aboriginal knowledge. For example, if someone were to attempt to patent an invention based on Aboriginal knowledge that is registered, this would be a breach of the particular Aboriginal community's rights without an access and benefit sharing (ABS) agreement and free, prior informed consent. The registration of the particular intangible heritage on the register would then be a consideration for IP Australia in determining whether the patent satisfies the inventive step threshold and is registrable.

ABORIGINAL INTANGIBLE HERITAGE UNDER THE ABORIGINAL HERITAGE ACT

The 2016 amendments to the AHA introduced the system for recording Aboriginal intangible heritage as a sub-set registration on the Victorian Aboriginal Heritage Register (VAHR), as well as making it an offence to use registered intangible Heritage for commercial purposes without consent. First Peoples-State Relations (formerly Aboriginal Victoria) manages the Register.

Intangible heritage is provided for under Part 5A of the AHA. Section 79B(1) defines Aboriginal Intangible Heritage as:

"... 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."

Section 79B(2) confirms that this includes any intellectual creation or innovation derived from this knowledge.⁵³¹ The process for registration on the VAHR is pursuant to section 79C, which was inserted pursuant to the 2016 amendments to the AHA. Under section 79G, it is an offence to 'knowingly' exploit registered Aboriginal intangible heritage for commercial purposes without the consent of the relevant registered Aboriginal party. The AHA also prohibits 'reckless' use of registered intangible heritage.⁵³²

CRITICISMS OF REGISTRATION OF ABORIGINAL INTANGIBLE HERITAGE

Several criticisms were raised during consultations regarding the registration of intangible heritage under the AHA in Victoria:

Many people are hesitant to disclose culturally sensitive information

Respondents stated that they found the registration process for Aboriginal intangible heritage on the VAHR onerous, and expressed concern and hesitation over registering culturally sensitive, Secret or Sacred knowledge with a government authority to manage. In order to register, an Aboriginal party can apply to have details of their intangible heritage registered on the VAHR. This requires the prescribed form to be filled out including any details of consultation undertaken

by the applicants with the relevant community stakeholders and custodians.

One respondent stated that Aboriginal peoples are scared to put things on the register.⁵³³ Given the history of colonial misappropriation, theft and misuse of Aboriginal Cultural Heritage, many Aboriginal peoples are hesitant to disclose their knowledge to a government body as a method of safeguarding that knowledge.

One method that has been used at an international level to address this concern is a secret register where ownership and control of the register is retained by community. This may be particularly effective for Secret or Sacred knowledge that communities would otherwise not wish to disclose. It is important to note that the VAHR is not publicly accessible as it contains culturally sensitive information.⁵³⁴ However, there is work to be done to rectify the baseline distrust of disclosure of culturally sensitive information to a government authority.

A registration system is a Western concept

In addition to the fear of continued misappropriation of Aboriginal knowledge, the process of registration was described during consultations as complex and difficult to understand. One respondent working in Cultural Heritage management emphasised that it is almost impossible to register intangible heritage under the current system. This respondent raised that registration system operates out of a Western ontological framework, and therefore is at odds with Aboriginal ways of knowing from the outset.⁵³⁵ Accordingly, there is a translation process that must occur, trying to fit the intangible heritage into a registration system that is underpinned by Western ideologies of ownership and protection.

According to data provided by First Peoples-State Relations (formerly Aboriginal Victoria), there is currently only one registration of intangible heritage under section 79C of the AHA. Understandably, there are calls for a change to the system of registration, with increased collaboration with Aboriginal peoples in order to meet the objectives of the intangible Cultural Heritage system.⁵³⁶ A theme in consultations was that the system must be led by Aboriginal peoples, including RAPs and Traditional Owner groups.⁵³⁷ A respondent stated that the forms for recording intangible heritage on the VAHR are too specific, and there is no allowance for stories.⁵³⁸ The respondent suggested there should be broader categories for registration, that allow Aboriginal peoples to tell their story in a way that suits them, rather than trying to mould their story into a Western registration system.⁵³⁹

Publicly available information cannot be included on the Register

Information that is 'widely known to the public' is not able to be included on the VAHR to gain protection.⁵⁴⁰ This prevents the registration of intangible Aboriginal Cultural Heritage that has been widely misappropriated and/or adapted by external parties from being retrospectively protected.⁵⁴¹ This has a devastating impact on the ability of Aboriginal Victorians to protect the wealth of knowledge that has historically been, and continues to be, taken by non-Indigenous people and used for their own purposes, whether with consent or otherwise. It is a clear example of how the current system is at odds with Aboriginal ways of knowing.

It was suggested during consultations that there is scope under the AHA to argue that an aspect of Aboriginal Cultural Heritage that is in the public domain but not widely known, should be registered.⁵⁴² Regardless of whether reinterpretation of the Act is possible, the AHA should be amended to provide a more appropriate and considered system of registration and protection of intangible heritage.

Some knowledge should not be registered

An Aboriginal respondent stated that some knowledge cannot and should not be registered. This provides a significant concern for the protection of intangible heritage as the current system is not equipped to deal with knowledge that is not appropriate to be disclosed. It was suggested during consultations that this could be improved through the Aboriginal management, control and ownership of any intangible heritage register.

2.6.2 REPATRIATION OF CULTURAL OBJECTS

Since colonisation, Aboriginal peoples in Victoria have had their cultural objects stolen in the name of science, anthropology and archaeology. The theft of cultural objects and Secret and/or Sacred Cultural Objects has been for "research", posterity, commercialisation and exhibition, and thousands of objects are still housed in institutions, art galleries, museums, archives and private collections in Australia and around the world today.⁵⁴⁵

Beginning in the 1980s, there has been a push to repatriate Indigenous cultural objects to their rightful home, however the Victorian Aboriginal Heritage Council states that there are still an overwhelming

number of cultural objects yet to be repatriated in Victorian communities.⁵⁴⁶

MUSEUMS VICTORIA REPATRIATION OF ABORIGINAL CULTURAL OBJECTS

After the 2016 Amendments, Museums Victoria established the *Repatriation of Indigenous Cultural Property Policy*,⁵⁴⁷ establishing clear principles for the repatriation of Ancestral Remains, grave goods, secret-sacred objects and other cultural property.

The policy outlines the clear principles of Museums Victoria, namely, to comply with all relevant legislation, and recognises that the removal of Ancestral Remains, grave-goods and secret-sacred objects by museums, private collections and private collectors was culturally inappropriate. The policy states that the repatriation of these objects and remains helps to promote healing and reconciliation.⁵⁴⁸

The *Aboriginal Heritage Act 2006* (Vic) (the Act or AHA) contains provisions dealing with Aboriginal objects, defined generally as an object in Victoria or the coastal waters of Victoria, relating to Aboriginal occupation of any part of Australia (both pre and post impact), that is of cultural heritage significance to Aboriginal people.⁵⁴⁹ Notably, the definition of Aboriginal cultural objects does not include objects that have been, or are likely to have been, made for the purpose of sale.⁵⁵⁰

Division 4 of the AHA governs the reporting requirements where an Aboriginal object is found on private land. Under section 24, a person who discovers what they know to be an Aboriginal object must report it to the Secretary of the Department of Premier and Cabinet as soon as practicable.⁵⁵¹ This requires the person to have knowledge that the object is an Aboriginal object. Under section 24(2) a person must report the discovery of the Aboriginal object as soon as practicable, unless the person had reasonable cause to believe that the Heritage Register contained a record of the place or object. Failure to comply with section 24 results in 60 penalty units for a person, and 300 penalty units for a body corporate.⁵⁵²

The AHA also deals with the possession of Aboriginal objects under section 33, and states that a person must not have an Aboriginal object in their possession if they know, or reasonably ought to know, that the object is an Aboriginal object. Failure to comply with section 33 incurs a penalty of 120 penalty units for a person, and 600 penalty units for a body corporate.

However, under section 33(2)(b) the person does not commit an offence if they are the owner of Aboriginal Cultural Heritage.

Respondents provided interesting commentary on the above provisions. First, respondents outlined that as opposed to Secret and/or Sacred Aboriginal Objects (discussed below), the sale of Aboriginal cultural objects is still permitted. This could be due to the defence against the penalty of possession of Aboriginal cultural objects under section 33(2)(b) and could apply to purchased cultural objects that were historically stolen. One respondent raised that she often sees Aboriginal cultural objects being sold on eBay.⁵⁵³ These objects are permitted to be bought and sold provided they have a Cultural Heritage Permit (CHP).⁵⁵⁴ In addition, respondents raised that while there must be a permit for the control and management of Aboriginal objects, relevant authorities are under-resourced in managing that compliance.⁵⁵⁵

Data provided by the Department of Premier and Cabinet (DPC) indicates that 6,095 Aboriginal cultural objects have been registered under the AHA (not limited to the 2016 amendments).⁵⁵⁶ This number includes the total number of object collections received since the AHA came into operation in May 2007. One respondent stated that within any single object collection, there can be hundreds if not thousands of individual objects.⁵⁵⁷

In addition to the registration of Aboriginal cultural objects, it is necessary to consider where registered objects are then held, cared for and managed. Data provided by the DPC broke down how many collections of Aboriginal objects are held by:

- **Victorian government agencies** - there are 436 Aboriginal cultural object collections held by Government/Agencies with 13 transferred to RAPs/TOs and 81 reburied.
- **Not-for-profit and private organisations** - there are 186 Aboriginal cultural object collections held in private organisations with two collections transferred to RAPs/TOs and 116 collections reburied.
- **Aboriginal organisations including RAPs and other TO organisations** - there are 494 Aboriginal cultural object collections held by RAPs and TO organisations.

Since the implementation of the AHA in 2006, there has been a move toward repatriation of Aboriginal Cultural Heritage back to community, with a total of 197 registered collections reburied on Country. It was raised in the data sets provided that the assessment of the return of Aboriginal cultural objects must be supported with adequate resources and training for the housing and care of hundreds or thousands of objects

which may be held in various collections. As the legislation encourages the return of objects to RAP and Traditional Owner organisations, these organisations must be resourced to be able to appropriately hold and care for these objects. Often, cultural objects require secure storage facilities and may require additional resources to assist with temperature, humidity and infestation control. Resource allocation must be arranged in collaboration with the relevant RAP or Traditional Owner group as the storage requirements will vary depending on customary law of each Traditional Owner group and their specific location.

More work is still required to ensure that the general public are aware of their obligations regarding repatriation under the AHA, in particular private collections. Concerns raised by respondents about the defences available for those who 'own Aboriginal cultural objects' or where the objects are made for the purpose of sale need to be addressed. On the one hand it is evident that this definition is intended to create opportunity for Aboriginal peoples to create cultural objects for economic and commercial benefit, however respondents raised that as people are buying and selling culturally significant objects on eBay, there may be necessity to tighten these provisions to prevent misuse and misappropriation.

2.6.3 SECRET AND/OR SACRED MATERIAL

Secret and/or Sacred Objects are a big part of who we are. They carry the stories that shape us, and we, and future generations, in turn shape them. They need to be with their rightful custodians so they can keep carrying our stories and our connections with them.

Jennifer Beer, Member 2011-2021,
Victorian Aboriginal Heritage Council

Secret and/or Sacred Objects hold cultural significance for Aboriginal peoples, generally specific to a particular group or community. Objects are Secret and/or Sacred as defined under Aboriginal customary law, with each law governing how those objects relate to the community, and can include:

- Objects that are associated with traditional burials;
- Objects that are created for ceremonial, religious or burial purposes;
- Objects that can only be seen by certain people; and
- Objects that may be sourced from, or contain, materials that only certain members of the community can use or see.⁵⁵⁸

In contrast to Aboriginal cultural objects discussed above, the regulation of Secret and/or Sacred material under the AHA appears more aligned with international obligation and best practice. Under the AHA, ownership of Secret and/or Sacred material is deemed to be vested in the Aboriginal peoples who are the custodians of those objects. The Traditional Owners of an area in which a Secret and/or Sacred Aboriginal Cultural Object is deemed to have originated from, are the owners of that object.⁵⁵⁹

The ownership, transfer and return of Secret or Sacred Aboriginal Objects is managed under Division 3 of Part 2 of the AHA. The inclusion of section 21A in 2016, makes it an offence to fail to recognise the Traditional Owners of an area in which the object originated as the rightful owners of Aboriginal Sacred and/or Secret objects. Under section 21A(3) of the AHA, any person who is in possession of a Secret and/or Sacred Object must transfer to Council.

Since 2016, the Victorian Aboriginal Heritage Council has overseen the task of repatriation of Secret and/or Sacred Objects under the AHA. Once the VAHC has received an Aboriginal object that is sacred or secret, it must transfer the object to a willing and entitled Aboriginal person or RAP, the Museum Board or deal with it as it determines appropriate.⁵⁶⁰

The AHA also allows for an Aboriginal person to request that any Sacred and/or Secret Object that is in the hands of the state, such as the Museum Board, be returned or that they continue to be the custodian of the object.⁵⁶¹

The Council reported that as at 2020, they had taken custody of ten objects under the AHA provisions and are currently working towards the repatriation of those objects, although the COVID-19 pandemic has limited efforts to identify the relevant RAP body or Traditional Owner groups.⁵⁶²

Respondents raised in consultations that there are processes and Aboriginal law and custom that must be followed when repatriating Secret and/or Sacred Objects. These processes require resources, time, and cultural authority.⁵⁶³

INSTITUTIONAL COLLABORATION WITH ABORIGINAL PEOPLE

As outlined above and in section 1.7, Galleries, Libraries, Archives and Museums (GLAMs), as well as universities, have had a role in colonial dispossession of cultural objects and Secret and/or Sacred material from Aboriginal people.

Accordingly, as holders of a considerable amount of Aboriginal Cultural Objects and Secret and/or Sacred objects, GLAMs and universities have a unique opportunity to work towards collaborative management of objects with Aboriginal communities to prioritise the Aboriginal management, care and control of Aboriginal Cultural Heritage.

As was outlined in section 1.7 and the case study of the Gunditjmara possum skin cloak, many GLAMs and universities such as Museums Victoria, the National Museum of Australia and the University of Sydney, have implemented collaborative measures and innovative engagement with Aboriginal communities. Aboriginal-led and controlled programs and projects concerning Aboriginal cultural material held in institutional collections, like Bunjilaka, ensure truth-telling of collections, Aboriginal engagement, interpretation and attribution, and appropriate cultural conservation and management practices.

BUNJILAKA

Bunjilaka Aboriginal Cultural Centre is situated within Museums Victoria and celebrates the vibrant cultures of Aboriginal peoples through performance, storytelling, artwork and exhibitions.⁵⁶⁴ Bunjilaka also runs school programs and provides teacher's resources.

Bunjilaka's longstanding exhibition *First Peoples* was co-curated with Museums Victoria, Yulendj Elders and Victorian community representatives and creates a space for learning, listening, and celebrating the cultural and historic knowledge of the Yulendj community.⁵⁶⁵

Bunjilaka contains the Birrarung Gallery, which is a gallery space dedicated to portraying Victorian Aboriginal art and public education in Aboriginal culture.⁵⁶⁶ The Birrarung Gallery celebrates Victorian Aboriginal culture and displays established and emerging Victorian Aboriginal artists. The gallery also hosts three community art program exhibitions a year, displaying mixed-media work from First Nations artists.

As Aboriginal conservators, Bennion and Kelly-Mundine state that through consideration of the opposing world views of Aboriginal and settler communities, 'a holistic approach to conservation [can be used] to reconcile these ontologies, enabling a two-way approach to cultural conservation, shifting focus from a materially based model to a relationship-

based model'.⁵⁶⁷ Bennion and Kelly-Mundine explain how the smoking ceremony used for the Gunditjmara and Yorta Yorta possum-skin cloaks (case study in section 1.7) demonstrates a holistic model of conservation that 'moves beyond the parameters of traditional Western methodologies'.⁵⁶⁸ From a Western conservation perspective, the smoking ceremony could be considered a threat to the preservation of a work, but for Aboriginal custodians the ceremony provides 'a means of cleansing energy, engaging spirit and interacting with ancestors'.⁵⁶⁹ Kelly-Mundine and Bennion explain this theoretical shift moves from conservation of material alone, to 'a form of cultural and spiritual conservation central to First Nations customary cultural practices'.⁵⁷⁰

PRESSURES TO MANAGEMENT OF ABORIGINAL OBJECTS AND SECRET/SACRED MATERIAL

However, the following pressures were raised during consultations as to the management of Aboriginal Cultural Objects and Secret and/or Sacred material:

Lack of transparency

As was noted in section 1.7, many respondents criticised that Aboriginal cultural objects are held in collections around Victoria, Australia and internationally without Aboriginal knowledge.⁵⁷¹ One respondent noted, 'how are we able to connect to our Cultural Heritage if we don't even know what it is and what is out there?'⁵⁷² It was suggested that this could be rectified through improving procedures required by Aboriginal peoples to access collections, as well as increasing the transparency of inventories used that display and record Aboriginal cultural objects.⁵⁷³ In addition, respondents raised that further education, awareness, and training and employment of Aboriginal GLAMs and university staff would assist with connecting Aboriginal peoples to the collections held in these institutions.⁵⁷⁴

More Aboriginal governance

Respondents raised that they want more Aboriginal-led governance in institutionalised decision-making when it relates to Aboriginal cultural objects,⁵⁷⁵ as well as two-way caretaking between Aboriginal peoples and Cultural Heritage staff (discussed further at section 3.3).⁵⁷⁶ In addition, Aboriginal respondents raised that they want more resources and funding allocated to Aboriginal Cultural Centres and Aboriginal-led initiatives, especially in regional areas.⁵⁷⁷

Two-way caretaking of Aboriginal cultural material both embeds the inherent rights of Aboriginal peoples to care for, manage and control Aboriginal Cultural Heritage under the *United Nations Declaration on the Rights of Indigenous Peoples*,⁵⁷⁸ and assists RAPs and Traditional Owners bodies to manage repatriated material where they do not have the resources or personnel to adequately maintain Aboriginal Cultural Heritage. Data provided by the Department of Premier and Cabinet outlined that several cultural object collections that have been repatriated to RAPs or Traditional Owner groups have been collaboratively held and managed with GLAMs that have more resources to assist, at the request and direction of the particular Aboriginal group.

Truth telling

GLAMs are known to be an educational resource for the wider Victorian community and hold a responsibility to ensure Aboriginal truth-telling of Australia's history and the Aboriginal cultural objects in their collections. In many circumstances, a GLAM is the place where members of the wider Victorian public may interact and be educated about Aboriginal Cultural Heritage. As a result, it is crucial that the stories being told emphasise truth telling and Black Excellence.

As one respondent stated, in many areas the stories that have been told about Aboriginal Victorians is that there is no remaining Aboriginal culture. This presents many serious problems for Aboriginal peoples when they must prove continued cultural connection to access collections or obtain RAP status. As is discussed further at section 2.7, the 'evidence' of cultural continuity is essential for claims to repatriate Aboriginal Secret and/or Sacred material including Aboriginal Ancestral Remains that exist in other jurisdictions.

2.7 ANCESTRAL REMAINS AND REPATRIATION UNDER THE ABORIGINAL HERITAGE ACT

Our spirit cannot rest when our Old People's remains are not in place. By repatriating their remains to rest, we reset time and space to allow the spirit to continue its journey.

Without resting, their spirit is unable to be free. It is captured in darkness and cannot continue to its dreaming. There is a cycle for everyone and everything, including the human spirit, and when the cycle is incomplete or interfered with there are consequences.

For Aboriginal people there is a deep spiritual connection to the universe through our religious beliefs. All is connected. Nothing stands alone and nothing can succeed alone.

Sissy Pettit, Ancestral Remains Unit Manager, Office of the Victorian Aboriginal Heritage Council

The removal of Aboriginal Ancestral Remains as a colonising practice has caused intergenerational harm to Aboriginal communities.⁵⁸¹ As discussed above in section 1.11, Ancestral Remains were stolen and removed from Aboriginal communities under the guise of medical research or scientific purposes,⁵⁸² causing ongoing trauma for Aboriginal peoples.

There has been extensive Aboriginal advocacy and Aboriginal-run initiatives campaigning for the return of Ancestors, with evidence in literature of Aboriginal advocacy for repatriation dating back to at least 1825.⁵⁸³ In 2019, the Melbourne-based Return Reconcile Renew Project went live, providing a resource that aims to raise awareness and assist people in their efforts to repatriate ancestors.⁵⁸⁴

As of July 2021, there remains more than 105,000 cultural items held overseas in collecting museums according to the Australian Institute of Aboriginal and Torres Strait Islander Studies.⁵⁸⁵

Over the past 10 years, 1,500 Ancestors have been returned.⁵⁸⁶ However, Project Lead and Associate Professor Cressida Fforde of the Australian National University states that 'despite successful campaigns from Indigenous peoples from the 1970s leading to a significant change in policies, many museums around the world still refuse to repatriate Ancestral

Remains'.⁵⁸⁷ This suggests that legislative approaches to repatriation (like in Victoria) are required, as policy change may not be sufficient to achieve Aboriginal empowerment over the control and care of Ancestral Remains.

Legal framework

"This is a national issue and needs to be treated with the upmost haste and importance. There should be no question about returning Indigenous Ancestral Remains to Indigenous communities that wish to return their Ancestors back into the ground"

Mark Grist, Manager, State-wide Heritage program, Aboriginal Affairs Victoria (2006)

Pursuant to Article 12 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP),⁵⁸⁹ Indigenous peoples have the right to the repatriation of Ancestral Remains. In addition, states should enable the access and/or repatriation of Ancestral Remains through fair, transparent and effective mechanisms developed in conjunction with Indigenous peoples.⁵⁹⁰ However, UNDRIP is not legally binding.

At a Commonwealth level, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) has some application to Ancestral Remains, as does the *Protection of Moveable Cultural Heritage Act 1986* (Cth). However, without a national uniform law, the effectiveness of Commonwealth legislation is limited by jurisdiction.

In addition, if there are not supportive policies and legislation in place in a particular international jurisdiction allowing for the repatriation of Ancestral Remains, UNDRIP, the Commonwealth and Victorian legislation cannot compel the return of Ancestors.⁵⁹¹

ANCESTRAL REMAINS UNDER THE ABORIGINAL HERITAGE ACT

Aboriginal Ancestral Remains are governed by Part 2, Division 2 of the *Aboriginal Heritage Act 2006* (Vic) (AHA) and as discussed in section 1.11, is managed by the Aboriginal Remains Unit (ARU). The underlying principles are outlined in section 12 of the AHA, namely, that Aboriginal Cultural Heritage should be owned by and returned to Traditional Owners of the area from which the Aboriginal Cultural Heritage has originated from.⁵⁹⁴

Under the AHA, an individual or corporation who is in possession of Aboriginal Ancestral Remains must take all reasonable steps to transfer the remains to the custody of the Victorian Aboriginal Heritage Council (VAHC or the Council) as soon as practicable.⁵⁹⁴ All public entities and Universities were given 2 years to notify the VAHC and transfer the custody of any Ancestral Remains in their possession.⁵⁹⁶ Failure to notify is an indictable offence and subject to a fine of up to \$495,000 AUD.⁵⁹⁷ The VAHC is responsible for taking the Ancestral Remains into custody and must then work to repatriate those remains to the relevant Aboriginal community or RAP.⁵⁹⁸

In its 2020 Annual Report, the VAHC stated that they had actively managed 70 new cases of Ancestral Remains since 2019.⁵⁹⁹ The Council reported that ten cases of ex-situ Ancestral Remains had been returned by a private organisation to an Aboriginal group,⁶⁰⁰ and most of the Ancestral Remains cases currently managed by Council are the result of the 2018 transfer from Museums Victoria.⁶⁰¹

In order to correctly provenance and accurately repatriate Ancestral Remains and associated objects, it may be necessary to undertake extensive research and data analysis. As discussed above, this work is undertaken by the Council's Ancestral Remains Unit (ARU) in collaboration with Aboriginal community members.⁶⁰² Once custody of the Ancestral Remains has been transferred to Council, Council via the delegated representatives within the Ancestral Remains Advisory Committee (ARAC) will determine who are the rightful owners of the Ancestral Remains and whether the relevant Aboriginal community or RAP is able and willing to take possession, custody and control of their Ancestors. These decisions based on collated research, data and engagement are undertaken by the ARU. Alternatively, if provenance data is limited or inconclusive, Council may request the Museum's Board of Victoria to hold the Ancestral Remains for safekeeping on behalf of Council.⁶⁰³ All Ancestors are cared for and managed by ARU staff in a culturally appropriate manner and access to the Ancestors is limited to ARU staff and select Museum staff.

Many of the Ancestors now in the ARU's care had been 'stored in boxes or left on shelves for decades'.⁶⁰⁴ With the ARU taking custody of these Ancestral Remains, they are now held by an Aboriginal-led team, working in strict accordance with the AHA, the Council's own policies and UNDRIP. All actions resulting from decisions made by the Council with respect to the management of Ancestral Remains and sacred objects, is done so only with the free, prior and informed consent of Traditional Owners and communities impacted.



RETURNING OUR ANCESTORS

Premiering in August 2021, *Returning our Ancestors*⁵⁹² is a landmark 28-minute documentary film that promotes awareness, respect and a call for action to return and protect Ancestors.

The Victorian Aboriginal Heritage Council states that Aboriginal people's fundamental wellbeing is intrinsically linked to the return of their Old People, and shows how the repatriation process allows communities the essential process to heal and grieve.

The film features the words of Aboriginal advocates who have fought for understanding of the importance of returning Ancestors to Country, and the enormous emotional toll that this work takes on Aboriginal peoples.⁵⁹³

The ARU manages both provenanced and unprovenanced Ancestral Remains. The ARU is currently furthering work to repatriate Ancestors with known provenance and initiating consultation with Traditional Owners for the ongoing management of unprovenanced Ancestors. In previous years, those Ancestors whose remains cannot be traced to a particular group have been repatriated to Country at Kings Domain, Melbourne and Weeroona Cemetery.

AREAS FOR IMPROVEMENT UNDER THE ABORIGINAL HERITAGE ACT

The Aboriginal Remains Unit (ARU) is a story of Black Excellence. It is due to the success of Aboriginal advocacy that the control of Ancestral Remains under the AHA is now with the ARU.⁶⁰⁵ However, respondents raised several pressures that require consideration regarding the repatriation and return of Ancestral Remains under the AHA.

Re-traumatising work

Aboriginal peoples involved in the repatriation, return and reburial of Ancestors expressed that the process is re-traumatising, as it raises many emotional and distressing issues.⁶⁰⁶ It was raised that, historically, it was up to the role of individual clan groups and families to repatriate Ancestors, which spread the burden of the trauma among communities.⁶⁰⁷ The families were involved in the cultural practice for the dead, and it was a way of sharing the burden among communities.⁶⁰⁸

Now, the ARU is the responsible statutory entity, involved in the repatriation and return of all Ancestral Remains. Those consulted mentioned that this is privileged and important work, however the repatriation process involves acquiring and processing knowledge of how Ancestral Remains were acquired, and how they are currently housed. This is a 're-imposition of trauma and a reinstatement of generational trauma'.⁶⁰⁹

As one respondent stated, 'culturally, it is a really heavy obligation to have'.⁶¹⁰

Clinical experience

Respondents raised that while the current statutory framework and establishment of the ARU is a positive step, the legislative framework is still built on a Western understanding of governance.⁶¹¹ It was raised that the current process is 'clinical', and that the determination of the rightful community for return of Ancestral Remains is based on a structured process

that is done through the government system.⁶¹²

The reason for this is that prior to the establishment of the ARU, the system for determining provenance and return of Ancestral Remains was already established and run by non-Aboriginal bodies. The system was established using a Western way of understanding, which the ARU inherited upon its creation.⁶¹³

Respondents raised that the system would benefit from more incorporation of Aboriginal ways of repatriating Ancestors, using Aboriginal law to govern the process. This would also encourage self-determination of Aboriginal peoples, being able to repatriate and return Ancestors in a way that is governed by Aboriginal law and cultural practice.⁶¹⁴

The ARU was described as a 'huge celebration' for many Aboriginal people,⁶¹⁵ and respondents raised that they believe this celebration would be amplified by the removal of the clinical restraints that they have to navigate and incorporating Aboriginal ways of repatriation into the process.⁶¹⁶

Jurisdictional limitations

As briefly noted above, Commonwealth and international law cannot compel the return and repatriation of Aboriginal Ancestral Remains across jurisdictions. This is an important issue, as each jurisdiction has its own laws and policy with varying efficacy⁶¹⁷ that may lack cultural sensitivity. This means that while the Victorian legislation may be leading the way domestically and even internationally in the repatriation and return of Ancestral Remains, ultimately the enforceability of the regime is limited.

For example, the British Museum's 2015 publication on the repatriation of Ancestral Remains to claimant groups in Oceania describes their policy for assessing claims by Aboriginal communities for the return of Ancestral Remains held by the museum. The policy involves weighing up the evidence provided by each Traditional Owner claimant group, and considering whether the 'cultural and spiritual significance of the remains to [the claimant group] outweigh the public benefit of retaining them'.⁶¹⁸ The Museum Trustees assess the strength of the evidence provided by the Aboriginal community, including whether they can prove 'cultural continuity' and importance of the Ancestral Remains.⁶¹⁹ The evidence provided generally is assessed based on historical anthropological and archaeological accounts, which are almost exclusively non-Aboriginal, and ultimately the decision is determined by the Museum.⁶²⁰

These discretionary policies are problematic. The British Museum rejected a claim by the Māori community in New Zealand for the return of seven

toi moko heads on the basis that the Māori community could not adequately trace any heads back to a specific location in New Zealand or a particular tribe.⁶²¹

Yet, for the purposes of display and exhibition within the Museum, the *toi moko* heads are published as being from the Māori community in New Zealand.⁶²²

The trauma of the destruction of burial grounds and removal of Ancestors from Country cannot be undone. However, respondents stated that there is opportunity to build on the legacy of Black Excellence and continue Aboriginal-led repatriation and return of Ancestral Remains.⁶²³ Returning Ancestral Remains to Country in a dignified manner promotes collaborative relationships between government agencies and Aboriginal Victorians.⁶²⁴

2.8 THERE IS WORK TO BE DONE IN REPRESENTATION

Aboriginal Victoria is a diverse group of peoples with alternative models recognising 30-300 clans in Victoria.⁶²⁵ When we consider the state of Victoria's Aboriginal Cultural Heritage, it is essential to consider the perspectives of all Aboriginal peoples in Victoria. The diversity of Aboriginal Cultural Heritage has been discussed already in this report, including aquaculture engineering systems on Guntijmara Country, cultural flows on Murray Lower Darling Rivers Indigenous Nations (MLDRIN) nations, cultural burning practices of Wurundjeri Woi-wurrung, to name a few. The representation of Aboriginal diversity is to be celebrated, with one respondent stating we should emphasise *equity* among diversity of Aboriginal Victorians.⁶²⁶

This report has so far demonstrated how Victoria is making positive steps, and in many circumstances, leading the way with strong Aboriginal Cultural Heritage management practices. However, one area of considerable pressure that was raised in consultations is the representation of Aboriginal diversity.

It was raised consistently throughout consultations is that many Aboriginal people and Traditional Owners do not feel represented in the current structure of Aboriginal Cultural Heritage management. Some respondents raised that this was due to the RAP structure, which presents issues for Traditional Owner groups who are not recognised through the statutory process as having RAP status. Others raised concerns with how boundaries are mapped, with

many maps having been designed by non-Indigenous anthropologists, with minimal Aboriginal input and control.

However, other respondents stated that the RAP structure is a key strength of the *Aboriginal Heritage Act 2006* (Vic) (AHA or the Act), as it embeds Aboriginal self-determination through an appropriate and workable representative structure. One respondent also highlighted that a representative structure is promoted under the *United Nations Declaration on the Rights of Indigenous Peoples* and that disagreement of the operation of a structure does not necessarily de-legitimise the structure.⁶²⁷

The following assessment of the RAP and mapping systems are symptoms of a larger issue. Ultimately, Victorian laws may not appropriately engage with the diversity of Aboriginal Victorians. While the Victorian legislative structure values hierarchy (founded on the Parliamentary supremacy of the Westminster system), Traditional Owner groups have their own methods of legal governance. Respondents raised that there are continuous attempts at moulding, pushing Aboriginal governance structures into a singular Western hierarchical distribution of power. As a result, law and culture clashes, and divisions arise.

The below section assesses the key pressures that were identified by Aboriginal peoples when asked about the management, control and care of Aboriginal Cultural Heritage based on governance structures currently in place.

DIFFICULTIES WITH THE RAP STRUCTURE

As one respondent stated, "while there are 38 recognised clans, there are 11 RAPs",⁶²⁸ identifying a potential lack of connection between the diversity understood to exist amongst Aboriginal Victoria, and the legislative structures that distribute rights. This raises concerns for appropriate representation of Aboriginal peoples in Victoria.

Victoria has a unique system of recognising Aboriginal land under the RAP structure and the *Traditional Owner Settlement Act 2010* (Vic) (TOSA). Under section 155 of the AHA, once a RAP is registered, the Victorian Aboriginal Heritage Council (VAHC) has discretionary authority to make variations to the RAP's registration, subject to consent by the relevant RAPs.

Many respondents raised that they want increased powers granted to RAPs, including increased autonomy, additional resources for the training of employees and management of the high demand

of Cultural Heritage-based work. Many RAPs feel that they are unable to undertake important work in managing Country and community because of these limitations.

Many Traditional Owners did not raise issue with the RAP structure during our consultations, demonstrating that there are evident successes under this structure as well. However, there was a consistent and pervasive frustration raised by Aboriginal peoples and Traditional Owners whose clans and language groups are not recognised as a RAP.

Key themes arising from consultations were:

Unregistered Traditional Owners feel that they have little to no rights

Statutory rights are conferred upon registration and granting of RAP status. Many people raised a strong dislike of this process, as they felt that failure to be registered as a RAP meant that they were limited in their rights and ability to care for, control and maintain Aboriginal Cultural Heritage.

Some respondents raised that they felt they had no rights. One respondent was so concerned about raising their criticism of the RAP structure that they asked to remain anonymous.⁶²⁹ This person stated that as so much power is granted to the RAPs, a power imbalance has led to some Aboriginal businesses being reliant on the authority of a RAP to continue to engage in business. Another respondent raised that the RAP structure is causing significant harm and continued destruction of Aboriginal Cultural Heritage as it is pushing out unregistered Aboriginal groups from practicing their culture. This person raised that this is due to some Aboriginal Cultural Heritage being protected through statutory rights, at the expense of others.⁶³⁰

While the application of laws may differ to these opinions, the fear to speak up about inadequacies in the system demonstrates an inherent power imbalance and tense relationships. There may be work to be done in the public's understanding of the laws in place, and engagement with their implementation and operation.

Community division

Several respondents raised that the RAP structure is causing division within the community. The main reason provided for this was because of the government-controlled approach to determining a RAP and granting the RAP powers. One respondent raised that 'the Victorian Government has the control'. Another stated that 'the Government says self-

determination, but they determine who are the people [with the rights]'.⁶³¹

The resulting division among community members was raised as a significant issue preventing Aboriginal peoples in Victoria from exercising their rights, with many respondents saying that their vision for the future involves more harmony between the RAPs and other Traditional Owner groups. One respondent raised that while many Aboriginal peoples want increased autonomy and rights granted to the RAPs, this could amplify these issues.

There is also disagreement as to whether the scope of the definition of Aboriginal Cultural Heritage should be expanded. For example, one respondent raised that there have been discussions about expanding the AHA to include arts and performance within the definition of Aboriginal Cultural Heritage.⁶³² This respondent stated that this would have dire consequences for those belonging to communities who are not registered in the RAP process, and instead use arts and performance as a method of connecting to their Cultural Heritage. If the definition of Aboriginal Cultural Heritage under the AHA is expanded, it was suggested that non-RAPs will be pushed out of their connection to their practices, intergenerational knowledge sharing and connection to culture, although how was not explained.

One respondent raised that the RAP structure has 'created more problems than it solves'.⁶³³ Several Traditional Owners raised that they would like to see the RAP and TOSA systems abolished in favour of Native Title.⁶³⁴ This comment came from Traditional Owners who belonged to a community that is not a recognised RAP, as well as some that are from a recognised RAP.

Smaller RAPs are struggling to meet the high demands of work

Representatives from smaller RAPs felt that they require additional resources, training and support to meet the demands of their workload. In addition, smaller RAPs feel underrepresented compared to larger RAPs.

A smaller RAP that provided a response to the Discussion Paper stated that any amendments to the structure of the Victorian Aboriginal Heritage Council should consider appointing a member for each RAP. The smaller RAP was concerned with adequate representation and voice for smaller RAPs compared to larger RAPs, and also acknowledgement that one RAP cannot speak for another. In addition, smaller RAPs stated that any consideration about broadening powers for RAPs should be considered alongside the need for increased resources and funding, as many

smaller RAPs are finding it difficult to cope with the large amount of work required.

Conflicts of Interest

Several respondents throughout consultations raised that they had issues with regards to conflicts of interest and impartiality. They stated that they often saw the same people represented on multiple bodies and boards, and as a result they felt concerned that the wider Aboriginal interests may not be independently represented.

The AHA takes a strict view of conflicts of interest in section 142. That section states that if a member of the VAHC has a pecuniary or personal interest in the subject-matter of a decision that is to be made by the VAHC, then the member must declare this interest, and take no further action in making the decision. This means that it is not sufficient to merely declare an interest and have the conflict waived by the other members, nor is it acceptable to rely on the fact that the member is acting in a different role or capacity when they are sitting on the Council.

While this may be a disputed concept, the perception of a conflict of interest is as important as an actual conflict. Good governance requires transparency, and perceived conflicts can undermine the impact and effectiveness of what an organisation or body is trying to achieve.

DIFFICULTIES WITH MAPPING BOUNDARIES

Another pressure identified concerning representation, is the mapping of Country and language groups. Many consultants raised that the RAP structure is preventing them from exercising their rights. This is due to the often-contentious drawing of boundaries, and disputes between Traditional Owner groups as to where the boundaries lie.

It is important to note that the drawing of boundaries is a legislative requirement under the AHA in order to award RAP status. It is a manifestation of a Western system, and therefore may not reflect the true nature of Aboriginal peoples understanding of Country. This goes to the heart of issues identified during consultations – that the RAP and TOSA systems are requiring Victorian Aboriginal peoples to assimilate or integrate into a system that is fundamentally different from their own.

It was also suggested during consultations that where the boundary of a RAP may be varied, or increased powers are given to a RAP, this leaves non-RAP Aboriginal businesses vulnerable to the consent of the RAP to practice on that area of land. The Victorian Aboriginal Heritage Council (VAHC) has confirmed that this is not legally correct and that any entrepreneur or Traditional Owner can undertake their business in a RAP area without consent.⁶³⁵ However, while legally this may be correct, culturally the question remains whether consent is required from the recognised Traditional Owners.

Several respondents raised that there is an issue with the mapping of Aboriginal language groups within Australia, with too much priority given to the AIATSIS Map which fails to adequately recognise all language groups.⁶³⁶ It was raised by respondents that this perpetuates misinformation in the wider public, and is also often at odds with state-based maps. This respondent raised that their community is recognised on the Victorian map, but not recognised on the AIATSIS map.⁶³⁷ The harm caused by the incorrect mapping of Aboriginal language groups is amplified by the fact that these systems are predominantly based on research conducted by non-Indigenous anthropologists and perpetuate Western ways of seeing Aboriginal Australia. It should be noted that the RAP boundary decisions are not based solely on the AIATSIS map.

As with the above case study, it was raised by several respondents that these maps are written by non-Indigenous people generally without consultation with the Aboriginal community or without consultation with all of the appropriate communities. As a result, one respondent raised 'they are in danger of losing who they are because somebody – a modern day historian and the courts – have the power to write them off the map'.⁶⁴³

Several respondents raised that the focus of any mapping of Traditional Owners groups must be on moving forward and engaging and collaborating with Aboriginal peoples as the decision-makers. Aboriginal peoples must have the right to say what their Culture is and to maintain it.⁶⁴⁴

As is outlined above, representation of the diverse perspectives and groups of Aboriginal peoples in Victoria requires careful consideration and there are many different perspectives and differing opinions. Consultations we engaged in with Aboriginal Victorians were often emotional and concerns were regularly raised about confidentiality.

AIATSIS MAP

The AIATSIS map was created by David R Horton in 1996, and attempts to represent the entirety of language, social and nation groups of Aboriginal Australian communities.⁶³⁸ The map is widely used as a resource to demonstrate the diversity of Aboriginal Australia, and to identify the different Aboriginal clans and language groups across Australia.

However, issues have been raised by community groups who have not been correctly identified by the map.⁶³⁹ For example, the Wadawurrung people, whose Country covers over 10,000 square kilometres including Geelong and Ballarat on the Western side of Melbourne, have recently attempted to change the spelling of their language group on the AIATSIS map, stating that the current label 'Wathaurong' on the map is not a recognised alternate spelling.⁶⁴⁰ In fact, this spelling is culturally offensive to Wadawurrung Traditional Owners.⁶⁴¹

However, in order to change the map, AIATSIS has stated it would require significant research and funding as the current map is based on published resources from between the 18th Century and the 1990's.⁶⁴² Appropriate consultation and free, prior informed consent should be undertaken with Traditional Owner groups to ensure the integrity and accuracy of any map of Aboriginal groups in Australia.

2.9 COLLABORATIVE RELATIONSHIPS

It was clear from respondent feedback, as well as our own research into current initiatives and case studies, that cultural practice is at its strongest when projects for the care of Culture are Aboriginal-led and where there are genuinely collaborative relationships between Aboriginal organisations and non-Indigenous partners.

Victoria has a number of extremely active Traditional Owner organisations, including:

- RAPs
- Independent Traditional Owner groups
- Aboriginal Community Controlled Health Organisations
- The First Peoples' Assembly of Victoria
- The Federation of Victorian Traditional Owner Corporations
- Victorian Aboriginal Corporation for Languages
- Victorian Aboriginal Education Association Inc
- Independent community, wellbeing, language and cultural entities.

These Traditional Owner organisations, and all Aboriginal Victorians, connect with culture by asserting their rights as knowledge holders. When asserting their rights as knowledge holders, Aboriginal peoples keep Culture strong and growing. Where cultural practice overlaps with commercialisation of Aboriginal Cultural Heritage, Aboriginal peoples also have the opportunity to assert their rights to economic prosperity, and the wider Victorian community is enriched by being invited to share in Culture.

This section will look at some collaborative relationships in which Aboriginal peoples are leaders in caring for Culture. We also consider the issue of funding: how it is allocated, and how it should be allocated. Given the right to self-determination and economic prosperity, funding and other supports seem to work best when they are used to build capacity and opportunities aimed at greater Aboriginal control of Cultural Heritage. This section will conclude with case studies of collaborative relationships with government that relate to collaborative management of Country, setting up the state for a future that has been co-built with Victorian Aboriginal peoples.

ABORIGINAL PEOPLES ARE ASSERTING THEIR RIGHTS AS KNOWLEDGE HOLDERS

Aboriginal peoples are the knowledge holders when it comes to Aboriginal Cultural Heritage. Aboriginal peoples already know this, however, genuinely collaborative relationships require that the non-Indigenous partner also knows this. There is evidence that positive collaborative relationships are being built in education, research and the bushfoods industry, as well as the arts and culture sector.

Education Initiatives

The Victorian Aboriginal Education Association Inc (VAEAI) is the peak Aboriginal education and training body in Victoria. VAEAI formed over 40 years ago to address the 'complete lack of cultural understandings in schools' and the 'extremely poor education outcomes for Koorie communities'.⁶⁴⁵

VAEAI creates extensive resources to support Koorie education in Victoria. Recently, they created the Koorie Outreach Support Program to support Koorie learners and their families during remote learning in the COVID-19 pandemic Stay at Home restrictions in Victoria.⁶⁴⁶ There are also the Aboriginal Early Childhood Cultural Protocols which aim to facilitate respectful and courteous teaching by non-Aboriginal staff for Koorie children in the early childhood sector.⁶⁴⁷ In 2016, the Department of Education and Training worked with VAEAI to create the *Marrung Aboriginal Education Plan 2016-2026* (Marrung).⁶⁴⁸ Marrung was designed in collaboration with Victorian Aboriginal community members and sets out a 10-year shared vision where Aboriginal knowledge and experience is celebrated by the wider Victorian community.

Marrung sets out the vision for the future of Koorie Education, including specific outcomes and actions that the Department of Education will take to achieve these outcomes. For example, Marrung's first outcome is for Koorie children and learners of all ages to be strong in their identity within all services, and for all Victorians to understand and respect Koorie culture and history.⁶⁴⁹ In order to achieve this outcome, Marrung looks at practical strategies including expanding education of local Koorie history and culture through increased visibility and use of Koorie Education Workforce.

The Department of Education and Training has protocols for teaching Aboriginal and Torres Strait Islander culture, the Koorie Cross-Curricular Protocols.⁶⁵⁰ Koorie Education Coordinators offer guidance and support in their specific region and can be contacted through the Koorie Education Coordinators (KEC) with enquiries. The KEC will then look at arranging a Regional Koorie Engagement

Support Officer (KESO) where requested. The KESO's can provide culturally appropriate understanding of Aboriginal culture and history and can act as a liaison and co-ordinate education activities and support Koorie student learning and engagement.⁶⁵¹

Plant knowledge and the bushfoods industry

One of the negative outcomes of the gaps in protection of Aboriginal Cultural Heritage under the intellectual property law system in Australia is that Aboriginal peoples are frequently denied economic outcomes of commercialisation of aspects of flora and fauna. Aboriginal peoples want to be able to control the use and commercialisation of knowledge related to plants and animals, and to share in the economic opportunities of culturally appropriate commercial ventures.

Discussion Paper responses were in agreement that Aboriginal peoples should run the businesses involved in the commercialisation of flora and fauna.⁶⁵² Unfortunately this is not currently the case. The 2020 Australian Native Foods and Botanicals Market Study estimated that the Australian native foods industry is worth \$21 million annually at the farmgate.⁶⁵³ However, Aboriginal enterprises represent less than 15% of the Australian native food producers and associated businesses.⁶⁵⁴

There is recognition amongst the wider community that this needs to change. The native foods industry must be led by Aboriginal peoples whose knowledge and resources are the foundation of the industry. There are over 6,500 native plants in Australia, and yet less than 15 have been effectively developed as part of the Australian native food and botanicals industry in domestic and international markets.⁶⁵⁵

An industry led by the original knowledge holders will contribute to the growth and sustainability of the industry, with positive environmental, social, economic and cultural outcomes. It will also ensure that Aboriginal peoples are able to financially and commercially benefit from the use of their Aboriginal Cultural Heritage.

Sharing Culture in the sector

Section 1.8 discusses the right of Aboriginal peoples to benefit from a sustainable and vibrant Arts and Performance sector. Creative Victoria has established embedded Aboriginal voices within Victoria's creative industry. Here, a First Peoples Directions Circle was appointed to instil self-determination and community voice for the benefit of Aboriginal peoples in Victoria.

THE VICTORIAN TRADITIONAL OWNER FOOD AND BOTANICALS STRATEGY

The Victorian Traditional Owner Food and Botanicals Strategy (the Strategy) is an initiative of the Victorian state government and the Federation of Victorian Traditional Owner Corporations,⁶⁵⁶ and aims to decolonise the bushfood and botanicals industry by creating a system of certification and government policy that allows Traditional Owner's (TO) to reclaim ownership of Indigenous cultural practices and intellectual property which the industry has historically exploited.

The mission of the Strategy is to empower a native foods industry that is nurtured, cultivated and sustained by First Nations people whose Indigenous Culture and Intellectual Property (ICIP) is the foundation of traditional knowledge relating to Australian native foods.

The Strategy recommends ways for addressing TO concerns of exploitation and theft of ICIP by transforming the bushfoods industry into a sustainable industry, empowering TO's as individuals and nations to lead the industry by economic and cultural participation, and resulting in Indigenous communities cultivating their traditional practices and leading the market. The lives of all Victorians will be enriched by sharing Indigenous Knowledges to transform the Victorian economy and environment through its sustainable bushfoods sector.⁶⁵⁷

The Strategy will result in TO's creating economic and cultural opportunities to become leaders in the Australian native food and botanicals industry by having legal avenues and marketing opportunities to enforce their ICIP rights.⁶⁵⁸



COLLABORATIVE RELATIONSHIPS – ‘EMU SKY’ EXHIBITION, SCIENCE GALLERY MELBOURNE

The ‘Emu Sky’ exhibition brings together over 30 Aboriginal community members to tell the story of Aboriginal knowledge of Country through art works, research and storytelling.

Opening in November 2021 at the Old Quad, University of Melbourne, this exhibition is the result of a collaboration between Science Gallery Melbourne, The Clean Air Urban Landscapes Hub and Aboriginal community, aiming to interrogate the lens through which Aboriginal knowledge is perceived.

All of the many works within the show are newly commissioned, empowering and resourcing Aboriginal collaborators to tell their stories, their way and to share and celebrate their living culture and knowledge.

Curated by Barkandji woman Zena Cumpston, ‘Emu Sky’ centres itself through multiple works shared by Wurundjeri Woi-wurrung Elders, artists and community, on whose Country the Old Quad stands, creating a culturally grounded foundation for other collaborating Aboriginal artists and community members from across south-eastern Australia.

This exhibition is a reciprocal exchange – empowering Indigenous community, giving them voice to speak directly to the audience, whilst also providing rich learning opportunities for the university community and beyond.

This initiative stems from the Victorian Government’s *First Peoples Action Plan for the Creative Industries*, which was launched by the Minister for Creative Industries Martin Foley in 2018.⁶⁵⁹

The Directions Circle aims to reflect the needs of Aboriginal artists, creators, audiences and leaders living in Victoria by informing and guiding Creative Victoria’s future programs and activities, including the implementation and delivery of Victoria’s creative industries strategy from 2020-2024. The members of the Directions Circle possess decades of collective experience in the Arts and Education sectors, representing a diverse range of creative industries and bringing firsthand experience of the needs and interests of creative practitioners.⁶⁶⁰ Further, many members are Elders and mentors in community.

This project involves working with Creative Victoria and with First Peoples living in Victoria to advise on the development and delivery of new creative industries priorities by, with and for the benefit of First Peoples in Victoria.⁶⁶¹ The Directions Circle is also tasked with providing advice on further investigation and development of strategies and actions regarding First Peoples and the creative industries in Victoria and championing development throughout their respective networks.

A key aspect of a sustainable and vibrant arts and performance sector is sharing expressions of cultural experience and knowledge, with the wider community, as in the Living Pavilion and the ‘Emu Sky’ exhibition.

Given that arts and performance necessarily involve sharing Culture with audiences, it may be little surprise that it is the Arts and Performance sector that has embraced cultural and ICIP protocols with enthusiasm. Many will already be aware of key arts industry protocols including the Australia Council for the Arts, *Protocols for using First Nations Cultural and Intellectual Property in the Arts and Screen Australia’s Pathways & Protocols: A Filmmaker’s guide to working with Indigenous people, culture and concepts*. ICIP protocols are also a feature within the Victorian arts sector, for example the ILBIJERRI ICIP Protocols.

ILBIJERRI ICIP PROTOCOLS

ILBIJERRI demonstrates best practice engagement with First Nations people, by ensuring that all ICIP is retained by the First Nations peoples with whom the story belongs. This includes both tangible and intangible forms of ICIP. To ensure best practice recognition of ICIP, ILBIJERRI adheres to the Australia Council’s *Protocol for using First Nations Cultural and Intellectual Property in the Arts*, incorporating these Protocols into artist agreements and contractual arrangements. This demonstrates how protocols can be effectively used to uplift and support First Nations storytellers where established intellectual property protection fails.

In addition, ILBIJERRI uses the principles outlined in the *United Nations Declaration on the Rights of Indigenous People* by ensuring free, prior and informed consent of the appropriate First Nations peoples when seeking approval for the use of ICIP. The collaborative relationship extends throughout the production, including determining the appropriate form of attribution. By engaging with and implementing ICIP protocols, ILBIJERRI endeavours to showcase authentic and culturally respectful productions.

THE LIVING PAVILION

The Living Pavilion was a collaborative design project featured at the University of Melbourne for CLIMARTE's 'ART+CLIMATE=CHANGE' festival from 1 – 17 May 2019.

It was a multidisciplinary arts, performance, science and ecological space built on the land of the Wurundjeri peoples of the Woi-wurrung language group, who have been the custodians of the land the University of Melbourne Parkville campus is on for 65,000+ years.⁶⁶²

Zena Cumpston, research fellow at the Clean Air Urban Landscapes Hub, is a proud Barkandji woman, and was the Lead Artist and Lead Researcher for The Living Pavilion. Zena describes how through this project, they reinstated 40,000 plants native to the Kulin peoples, to 'literally breathe new (ancient) life into the site'.⁶⁶³

In her foreword for the research report, Zena writes how The Living Pavilion brought forward the University of Melbourne's Parkville campus as an Aboriginal place, reflecting on the waterway that once flowed through the site:

'Like many of the swamps, creeks and rivers which were once dotted all over what is now our city centre, this creek was covered over, negated, annulled, denied.'

'This creek was once a vital part of the Wurundjeri world and the ecosystems of the mighty Birrarung, acting as a lung to clean and renew, a pathway, a water source for all living things, a place of abundance, teeming life. Now concrete'.⁶⁶⁴

Urban landscapes are too often falsely divorced from the continued custodianship of Traditional Owners. The Living Pavilion was about illuminating the Aboriginal belonging and continuing custodianship of the Parkville campus, putting a crack in the colonial landscape to let cultural stories shine through. The Living Pavilion showed how reinstating plants to the environment where they have thrived for thousands of years opens up cultural knowledge, reactivating cultural narratives, inviting all to see the space they live, study and work in within a richer context.

FUNDING AND RESOURCES ARE USED STRATEGICALLY TO BUILD ABORIGINAL CONTROL

Continued challenges to resource allocation

Funding issues were often raised during our consultations. For example, many respondents reported that more funding is required to meet the extensive and necessary work being undertaken by the Victorian Aboriginal community. In relation to language, more funding is required to meet the amount of work that must be undertaken to research and revitalise languages. In addition, this funding would assist with educating Aboriginal peoples in their languages to develop more educators who can then go out into the community to teach students.⁶⁶⁵

With regards to the management and control of Aboriginal cultural objects, further funding is required in decentralised areas outside of metropolitan Melbourne to support the smaller Aboriginal-run cultural and arts centres and projects.⁶⁶⁶ This would assist with the ability of regional Aboriginal centres to maintain and control their Aboriginal Cultural Heritage, to continue to provide employment opportunities to community, and to manage repatriated cultural objects and Ancestral Remains.⁶⁶⁷

Respondents from many professional backgrounds raised that there is too heavy a reliance on voluntary and underpaid work in this sector.⁶⁶⁸ Linguists are providing their time for free to undertake the extensive process of researching and engaging community for language revitalisation programs.⁶⁶⁹ Elders and representatives are expected to give their time to educate the wider public without compensation.⁶⁷⁰ Aboriginal knowledge of scientific, agricultural and/or artistic value is being used without adequate compensation from private partnerships.⁶⁷¹ In public and private relationships, there is a consistent need for additional funding to meet the demand of the work involved.

The lack of resources was raised by several respondents particularly in three main areas:

1. repatriation of Ancestral Remains and cultural objects;
2. management of culturally significant sites; and
3. revitalisation and education of language.

In addition, many respondents raised that RAPs want additional resources in order to be able to manage their own culturally significant sites. Several respondents raised that they would like to see the control and management of these sites move away from the domain of Parks Victoria, and instead to the

RAP body.⁶⁷² In addition to cultural connection, this would provide increased tourism and commercial opportunities for RAPs to be able to then generate their own resources more efficiently.⁶⁷³ One respondent took the view that this could be managed through increased legal rights and legislative systems to promote Aboriginal control and ownership.⁶⁷⁴

Other respondents raised issue with the systemic distribution of government resources, which prioritise metropolitan-based cultural centres rather than rural based centres.⁶⁷⁵ In addition, respondents raised that there is a prioritisation of Cultural Heritage resources being pooled within a few institutions due to the lack of Aboriginal peoples in decision-making positions advising on the allocation of resources.⁶⁷⁶

Language revitalisation and education were raised as areas that are significantly under-resourced. One respondent stated that with the little funding that comes in, there are significant caveats on that funding that are very onerous.⁶⁷⁷ Language revitalisation programs require working collaboratively with representatives that are trained in many different areas, as well as providing programs for those in metropolitan and rural areas.⁶⁷⁸

It was raised that while many people want to receive a Welcome to Country at an event, what they don't realise is the extensive behind-the-scenes work that goes into just one such ceremony.⁶⁷⁹ In addition, many language groups are 'extremely generous' with their time and effort given the work that goes on behind the scenes that remains under-funded.⁶⁸⁰

When considering the provision of resources for Aboriginal Cultural Heritage, it is important to remember the significant emotional toll that this work may have on Cultural Heritage workers. One respondent raised that while it is a significant privilege to be able to do the work they do, it can be 'bittersweet', as they are constantly engaging and re-engaging with traumatic events.⁶⁸¹ While purely an economic consideration for government funders, for many Aboriginal peoples working in this space they are often engaging in revival projects relating to traumatic events that removed that culture in the first place.⁶⁸² In addition, it was raised that for many heritage workers they may find unknown or lost familial connections and relatives in the course of conducting their work. These non-financial factors should be considered when resources and funding are allocated to these programs and workers.⁶⁸³

Trends toward capacity building

There are certainly continuing issues related to funding and resource allocation. However, at the same time

there has been a trend towards capacity building initiatives in recent years. These projects and initiatives focus on developing strategies for the future that will build capacity for Aboriginal peoples, communities and businesses. Building employment opportunities for Aboriginal peoples further strengthens people and culture. For example, cultural ranger programs were cited by more than one Aboriginal respondent as an effective tool for Aboriginal peoples to care for Country, providing diverse skill development for youth and ongoing opportunities to care for cultural and natural resources.⁶⁸⁴

Victorian government departments have a significant role to play in this capacity building process. They can do this by leveraging their funding programs. This means that direct and indirect funding is directed towards projects that:

- Build skills and/or educational opportunities for Aboriginal peoples to build rewarding careers in roles that involve them working and caring for Aboriginal Cultural Heritage;
- Help new and small Aboriginal businesses build growth strategies for the future, allowing the business to plan for the future, employ more people and continue their work with Aboriginal Cultural Heritage; and
- Assist Aboriginal businesses to enter new markets, particularly markets that involve working with Aboriginal Cultural Heritage.

The ultimate outcome of a capacity building project is that the funding recipient gets more than just money out of the relationship. Instead, the money is used as leverage to promote self-determination on an individual and organisational level.

For this Report data was collected from the Department of Jobs, Precincts and Regions (DJPR), Department of Environment, Land, Water and Planning (DELWP), Department of Education and Training (DET), and Department of Premier and Cabinet (DPC). We collected data from these Departments in particular because they are the Departments that have provisions for programs and/or statutory responsibilities related to Aboriginal Cultural Heritage.

In Victoria, the majority of funding comes from First Peoples - State Relations (formerly Aboriginal Victoria) in the Department of Premier and Cabinet. First Peoples - State Relations receives its base operations funding and then is allocated additional funds for specific budget outcomes. The 2016/2017 budget included funds for nomination of the Budj Bim Cultural Landscape to the World Heritage List. It appears that the allocation of funds for specific budget outcomes has reduced in recent years. In 2015/2016 the state

budget provided \$20.9 million in budget outcome funding. This additional funding was allocated to support the implementation of the Victorian Aboriginal Cultural Heritage Strategy including:

- Operational funding to support RAPs to undertake their functions under the *Aboriginal Heritage Act 2006* (Vic) (AHA or the Act);
- The Right People for Country program;
- The Certificate IV in Aboriginal Cultural Heritage Management, including two introductory workshops per annum;
- Support for major project facilitation;
- Establishment of an Enforcement and Compliance Unit; and
- Funding to implement new provisions arising from proposed amendments to the AHA, including new functions for the Victorian Aboriginal Heritage Council and an Aboriginal Ancestral Remains system and Consultation and Return Fund (to be managed by the Victorian Aboriginal Heritage Council).

In 2016/2017 that funding was \$9.047 million. In 2017/2018 it was \$5.682 million and the following year it was \$3.982 million. It increased to \$5.1 million in 2019/2020. However, in 2020/2021 it came back down to \$2.846 million. This funding was designated for the purpose of reducing delays and addressing demand for Aboriginal heritage approvals including:

- Funding for additional staff in the Heritage Registry;
- Development of an Aboriginal intangible heritage database;
- Legacy records audit project; and
- Development of a compliance and enforcement tracking database.

The Department of Premier and Cabinet supports several Aboriginal Cultural Heritage Projects which will build the capacity of Aboriginal peoples and organisations:

- Certificate IV in Aboriginal Cultural Heritage Management and two Past and Present introductory workshops per annum (\$461,000);
- 16 capacity building activities with RAPs; and
- Grant funding for Traditional Owner groups to define and register intangible Cultural Heritage as required.

Table 2 provides an overview of the total funding allocated by the Department of Premier and Cabinet to RAPs since 2016.

Additionally, the Department of Premier and Cabinet allocated \$673,720 to the preservation of Aboriginal Cultural Heritage, directly to several Aboriginal Corporations for specific initiatives.

A positive and substantial change in funding has occurred according to the 2020 Aboriginal Affairs Report.⁶⁸⁸ The 2020/2021 State budget provided a record investment of \$356.5 million over 4 years into Aboriginal affairs to support Aboriginal Victorians progress treaty and further Aboriginal self-determination efforts.

Since 2019, DELWP has provided \$150,000 per annum to each RAP for DELWP Liaison Officers. In 2020–2021 DELWP also provided \$120,000 to each RAP under the Forest, Fire and Regions Group portfolio for Country and Planning Engagement Officers.⁶⁸⁹ It was suggested throughout consultations that having Aboriginal Officers is a positive step toward providing culturally safe and effective work relationships. For example, the training and appointment of Authorised Officers and Aboriginal Heritage Officers allows for enforcement of the AHA and helps ensure compliance with CHMPs and CHPs. However, it was consistently raised that these Officers need increased powers under statutory frameworks to allow for effective Aboriginal control and positive outcomes.⁶⁹⁰

DELWP is also a conduit for ranger program funding, linked to ranger programs that are funded as part of the *Traditional Owner Settlement Act 2010* (Vic). Currently, this includes:

- Gunaikurnai Joint Management Rangers (up to eight rangers, approx. \$1m p.a.)
- Dja Dja Wurrung Joint Management Rangers (three rangers, approx. \$380,000 p.a.)
- Taungurung Joint Management Rangers (up to six rangers, approx. \$800,000 p.a.).

The Department of Jobs, Precincts and Regions has established the Victorian Aboriginal Employment and Economic Council (the Council), aimed at improving employment and economic outcomes for Aboriginal peoples in Victoria. The Council is comprised of 20 appointed Aboriginal community members, propounding the principles of self-determination, as well as Executive Board members from the DJPR and Executive officers of State and Federal government agencies.⁶⁹¹

The role of the Council is to advise and guide government departments and agencies on particular matters that affect Aboriginal Victorians in employment, business, tourism, culture, and broader economic development. In line with the aforementioned principles of self-determination, the Council also ensures that Aboriginal communities, through the Council's Indigenous caucus, are able to directly participate and provide input into the creation, implementation and evaluation of policies, programs and procedures tailored to driving Aboriginal economic

TABLE 2: DEPARTMENT OF PREMIER AND CABINET FUNDING TO RAPS SINCE 2016

	2016	2017	2018	2019	2020	2021
Aboriginal Cultural Heritage Management Training Program	\$0.43m	\$0.458m	\$0.479m	\$0.478m	\$0.506m	No data
Budj Bim World Heritage Program (World Heritage Officers)	No data	\$0.077m	No data	\$0.192m	\$0.219m	\$0.073m (YTD)
Lake Condah Estate Management Program	No data	No data	No data	\$0.050m	\$0.050m	No data
RAP Operation Program (including Aboriginal Heritage Officer funding)	\$0.772m	\$3.034m	\$4.610m	\$3.816m	\$4.843m	\$1.200m (YTD)
Nation Building Support Package	No data	No data	No data	\$13.580m	No data	\$11.124m (YTD)
COVID-19 Aboriginal Community Response and Recovery Fund	No data	No data	No data	No data	\$10m	No data

prosperity. For instance, in its first 12 months, the Council has led on the development and monitoring of the Victorian Aboriginal Employment and Economic Development Strategy.⁶⁹² Ultimately, the Council provides an avenue for ensuring the awareness and capability of government agencies to address key issues and strategies surrounding Indigenous employment and economic development in Victoria.

The Jobs Victoria Employment Network (JVEN) program is another initiative that the Victorian Government funds, including several training and employment linkage programs to support Aboriginal jobseekers in Australia. In 2019, 303 Aboriginal jobseekers secured JVEN placements, an increase of 24.1% from 2018.⁶⁹³

In 2020, the Victorian government established the COVID-19 Aboriginal Community Response and Recovery Fund, committing \$10 million to support Aboriginal communities to develop culturally safe responses to coronavirus impacts.⁶⁹⁴ This is in addition to the Aboriginal Community COVID-19 Taskforce, established in March 2020 to disseminate public health information in a local and community-driven manner.⁶⁹⁵

Funding and resources also come in the form of commercialisation, collaborations and government use of Aboriginal businesses as service providers. There has been a perceived increase in collaborative relationships between the Victorian Government and Aboriginal businesses. The number of Aboriginal businesses that the Victorian Government entered into a purchase agreement with increased by 35% in 2019-2020 from the 2018-2019 period.⁶⁹⁶ In this same period, the total value of procurement from Aboriginal businesses was \$46.1 million, an increase of 176% from \$17.6 million.⁶⁹⁷

The recent federal funding to Dja Dja Wurrung Clans Aboriginal Corporation is a good example of funding used to build economic prosperity and Aboriginal control of Cultural Heritage.

DJA DJA WURRUNG CLANS ABORIGINAL CORPORATION'S KANGAROO GRASS RESEARCH

In 2019, the Dja Dja Wurrung Clans Aboriginal Corporation received \$1.82 million in federal funding to research the viability of growing Kangaroo Grass to assist the agriculture industry adapt to climate change. Kangaroo Grass is a significant plant for the Dja Dja Wurrung people and doesn't need artificial fertilisers or pesticides to grow.⁶⁹⁸ The central Victorian research project is one of the first of its kind to research the agriculture applications of a native Australian plant, and aims to consider the plant in agricultural contexts such as a grain crop like canola or barley. The project is being led by the Dja Dja Wurrung Clans Corporation in partnership with La Trobe University.⁶⁹⁹

COLLABORATIVE STATE BUILDING

Government department support for establishing on-going relationships between Aboriginal organisations and government departments, or through employment relationships, is another aspect of capacity building. This section looks more closely at these long-term relationships that ultimately work towards a future that has been collaboratively built with, and by, Aboriginal peoples.

The Transport Portfolio Aboriginal Self-Determination Plan 2020-2023 is a further example of collaborative state building. The Plan was designed with reference to the national 'Closing the Gap' agreement, the Victorian Aboriginal Affairs Framework 2018-2023 and the Victorian Government's Self-Determination Reform Framework.⁷⁰⁰ The Transport Portfolio works with RAPs when carrying out its transport activities, including construction. The Transport Portfolio also employs cultural heritage advisors to strengthen the Portfolio's cultural capacity.⁷⁰¹ The Plan acknowledges Whole-of-Country Plans (like the Gunaikurnai Whole-of-Country Plan, below) as a valuable resource and basis for partnership relationships.⁷⁰² Central to the Self-Determination Plan is a layered management approach. Appended to the Plan will be Regional Chapters (or action plans), designed in consultation

with the local Aboriginal communities. RAPs will also be invited to co-design partnerships with the Transport Portfolio.⁷⁰³

The Department of Environment, Land, Water and Planning (DELWP) also has the *Pupangarli Marnmarnepu 'Owning Our Future' Aboriginal Self-Determination Reform Strategy 2020-2025*. The Strategy follows the Victorian Aboriginal Affairs Framework to guide corporate business planning at DELWP. The Strategy works in conjunction with their yearly implementation plan that will help embed the priorities set out in the Strategy into the yearly business plan.

The Victorian government has also committed to the Strategic Framework for Strong Relationships and Engagement between the Victorian Government and Traditional Owners of areas without formal recognition through the RAP system, the *Native Title Act 1993* (Cth) or *Traditional Owner Settlement Act 2010* (Vic). The Framework is currently in draft form. The Framework is due to be completed later this year.⁷⁰⁴

While the Aboriginal Affairs Report 2020 states that employment in the Victorian Public Service as a whole has remained steady at 1.2% in 2018 and 2019,⁷⁰⁵ for the Departments from whom we collected data, there has been an increase in the number of full time Aboriginal staff, particularly full time Aboriginal staff that are women.

The Department of Education and Training is the largest employer of Aboriginal peoples. Most of these are women, employed in a full time or part time/casual role.

The Department of Jobs, Precincts and Regions was inceptioned in 2019. They reported on their Aboriginal Recruitment & Career Development Strategy, which commits to:

- Achieving a minimum 2% Aboriginal employment by 2022 with 20% of this target to be achieved by Victorian Public Sector (VPS) level and above;
- Achieving an equitable spread of employment opportunities across regional and metropolitan areas;
- Supporting Aboriginal staff to build rewarding career pathways;
- Creating culturally inclusive and safe working environments for all employees;
- Building a deeper understanding of Aboriginal peoples and communities; and
- Positioning the Department as an employer of choice for Aboriginal peoples.⁷⁰⁶

2000-YEAR-OLD BOGONG MOTH REMAINS HELP TO UNCOVER THE STORY OF THE OLD PEOPLE AT CLOGGS CAVE NEAR BUCHAN

The Gunaikurnai Land and Waters Aboriginal Corporation (GLaWAC) have partnered with Monash University to better understand how long ago the Old People came to Cloggs Cave near Buchan in East Gippsland and what they did there.

During the research, a small sandstone grindstone was discovered to have been put in the cave by the Old People sometime between 1,600 and 2,100 years ago. When examined further, the grindstone contained large amounts of residue trapped in microscopic holes, including partly burned, partly crushed Bogong moth wings and legs.

Bogong moths were an important food source for the Old People who would target their large numbers and high fat content as the insects migrated to the region each year. The damaged moth remains found on the grindstone are what would be expected when lightly cooking and grinding them into a paste for food.

These findings represent the first archaeological remains of Bogong moths in Australia, and, as far as we know, of the remains of insect foods on stone artefacts anywhere in the world. They provide insights into the antiquity of important Aboriginal dietary and cultural practices that have until now remained archaeologically invisible.

Russell Mullett, RAP Manager at GLaWAC notes that “The world has become a different place, but for 2,000 years this grindstone has been sitting idle with a story to tell. A single artefact has sparked the rebirth of knowledge that helps to tell the story of the Gunaikurnai people.”

28,000 YEARS OF HISTORY AT RAYMOND CREEK 2 ROCK SHELTER

A rock shelter located on Gunaikurnai Country has been revealed to contain highly significant cultural heritage deposits dating back many thousands of years before the height of the last Ice Age.

The shelter is situated in the Mitchell River National Park in East Gippsland and has not previously been recognised to hold any archaeological evidence.

The discovery was made as part of a long-term study by Gunaikurnai Land and Waters Aboriginal Corporation in partnership with the Monash University Indigenous Studies Centre at Monash University, and the Australian Research Council Centre of Excellence for Australian Biodiversity and Heritage (CABAH).

While it is widely recognised that members of the Gunaikurnai community have deep ancestral, spiritual and broader cultural connections with the Mitchell River landscape, less than 1% of the National Park has been surveyed for cultural sites. This study reveals that cultural deposits ranging from before the last Ice Age to very recent times are present in rock shelters within the Park.

Excavated remnants provide an insight into what the landscape used to look like with evidence of an array of locally extinct mammals found, including the Tasmanian pademelon and the Long-tailed mouse, which are both now confined to Tasmania. The bones of Australian bass fished 850 years ago together with stone artefacts that likely originated from the Mt Hotham/Dargo area help to draw a picture of the traditional practices that the Gunaikurnai used to sustain the land for thousands of years.

The study provides clear evidence of a long period of cultural occupation and indicates the significance of the Mitchell River National Park to the Gunaikurnai community. “Identifying evidence of animal and plant remnants can tell us about who was around over a long period of time; it helps to tell the broader story of the changing environmental landscape over many thousands of years,” says Russell Mullett, RAP Manager at GLaWAC.

A full-page photograph of a lush forest scene. A stream flows through the center, surrounded by dense green ferns and other vegetation. A wooden bridge with railings spans the stream in the background. The scene is captured in a high-angle, slightly tilted perspective, emphasizing the natural beauty and tranquility of the environment.

WURUNDJERI WOI-WURRUNG ABORIGINAL CORPORATION RANGER PROGRAM

The Wurundjeri Narrap Team is a ranger group that conducts a range of activities on Country in accordance with cultural practice and local council bylaws. The Narrap Team works with restoration and regeneration of landscapes, establishment of biodiversity corridors, fencing, managing the impact of feral animals and pests, environmental weed control, and ecological and cultural burns.⁷⁰⁹

The Narrap Team is engaged by clients and is a part of the natural resources services provided by the Wurundjeri Woi-wurrung Cultural Heritage Aboriginal Corporation RAP.

Returning to the Victorian Public Service as a whole, while the employment figures have remained steady over the last couple of years, this figure may increase in future due to the Barring Djinang Aboriginal Staff Strategy. The 5-year Strategy includes 16 initiatives intended to increase recruitment and retention of Aboriginal staff.⁷⁰⁷ Actions towards this Strategy over 2020 include the welcoming of 34 Aboriginal interns to a variety of public sector agencies, launch of the Aboriginal Cultural Capability in the Workplace Program, and 12 Aboriginal graduates entered the Victorian Government Graduate Program via its Aboriginal Pathway.⁷⁰⁸

Collaborative caring for Country

Aboriginal Victorians taking control of caring for Country is essential to any vision for the future. This means entering into collaborative relationships with Traditional Owners, in which the Traditional Owners take a leadership role. The Gunaikurnai partnerships are examples of this, as is the Wurundjeri Woi-wurrung Aboriginal Corporation Ranger Program.

Parks Victoria is committed to improving the management and protection of Aboriginal Cultural Heritage on the Parks estate, which covers 18% of the state (4 million ha). Parks Victoria currently manages 72% of registered Aboriginal places on public land and is responsible for the management of 31.8% of all registered Aboriginal places listed on the Victorian Aboriginal Heritage Register.⁷¹⁰ Established as an independent statutory body, one of its key objectives is to recognise and support Traditional Owner involvement with Parks Victoria managed land.

Parks Victoria have joint management partnerships with Traditional Owners, established under the *Traditional Owner Settlement Act 2010* (Vic). Where the land is subject to a native title determination, the partnership is referred to as co-management. As of August 2019, there are 16 parks and reserves jointly managed by Traditional Owners with Parks Victoria, totalling approximately 122,188 ha.⁷¹¹ These joint management agreements are with Dja Dja Wurrung Clans Aboriginal Corporation, Gunaikurnai Land and Waters Aboriginal Corporation and Yorta Yorta Nation Aboriginal Corporation. Co-management agreements with Barengi Gadjin Land Council Aboriginal Corporation, Gunditj Mirring Traditional Owners Aboriginal Corporation and Yorta Yorta Aboriginal Corporation cover 213,380 ha.⁷¹² Currently, the three greatest threats to Traditional Owner cultural values across the parks network are damage to cultural values by visitors, illegal activities, and lack of knowledge/expertise.

The most recent *State of the Parks* report by Parks Victoria noted that over the assessment period of 2013-2018 the organisation improved their management actions by appointing Cultural Heritage officers, making an organisational commitment to stronger partnerships with Traditional Owners, and developing the *Managing Country Together Framework*.⁷¹³ The framework focuses on strengthening partnerships between Parks Victoria and Traditional Owners, improved protections for Aboriginal Cultural Heritage, and supporting Aboriginal peoples to work and thrive in the park management sector.⁷¹⁴ Parks Victoria is also developing an Aboriginal Cultural Heritage Management Plan (still in draft form). However, on-going challenges included limited knowledge or monitoring of significant sites, limited awareness and understanding of intangible Cultural Heritage and lack of Traditional Owner engagement.⁷¹⁵

In 2018, the Commissioner for Environmental Sustainability Victoria released the Victorian State of the Environment 2018 Report. One of the recommendations coming from that Report was that the role of Victoria's Traditional Owners be enhanced in cultural landscape health and management.⁷¹⁶ The recommendation was to develop, in consultation with Traditional Owners, contemporary cultural indicators to inform future environmental reporting. The indicators are to reflect the priorities of Traditional Owners. The Report acknowledges that there needs to be a transition from a singular focus on Aboriginal Cultural Heritage to one that reflects a more holistic view of culture and incorporates social, economic, spiritual, cultural, environmental and health and wellbeing values of Victorian Traditional Owners, RAPs and Aboriginal Victorians.⁷¹⁷ The Report has designed future themes to reflect this more holistic view and included indicators within each theme. For example, one of the themes is connection to Country, Cultural Knowledge, Protocols and Practices. This theme can be measured through Traditional Ecological Knowledge projects on Country, cultural harvesting practices and protection of cultural heritage sites on Country.⁷¹⁸

Victoria's Climate Change Adaptation Plan 2017-2020 was produced by DELWP and recommends a specific cultural focus. It notes that adaptation responses should "value and respect the knowledge and perspectives of Traditional Owner groups and Aboriginal Victorians."⁷¹⁹

2.10 LANGUAGE KEEPS CULTURE STRONG

Consultations identified that Aboriginal Victoria has approximately 44 recognised Aboriginal languages,⁷²⁰ and that language is extremely important to Aboriginal peoples in Victoria,⁷²¹ demonstrating that the work to be done in this space is vast and diverse.

Aboriginal respondents raised the desire to see increased use and speaking of languages, to see more people learning Aboriginal languages within the Victorian curriculum, and to see their children and grandchildren speaking language fluently.⁷²² One respondent stated that 'language carries stories, knowledge, connection to family and Culture'.⁷²³ These stories are passed down through art, poetry and continued use of language, as a way of ensuring the succession and continuation of Aboriginal knowledge.⁷²⁴

This section identifies comments raised by Aboriginal respondents and language workers when considering the efficacy of management of Aboriginal languages in Victoria. This section also outlines comments raised by respondents regarding the intentions behind funding language programs, and the consideration of the available resources to meet the intentions of language programs. There were vast responses around language in consultations, including disagreement as to the efficacy of certain programs. As one respondent raised, 'disagreement just means people are speaking from the heart'.⁷²⁵ They stated that speaking from the heart is Black Excellence.⁷²⁶

THERE IS A DISCONNECT BETWEEN GOVERNMENT FUNDING AND ABORIGINAL PERSPECTIVES OF THE EFFICACY OF LANGUAGE REVITALISATION PROGRAMS

The Victorian Aboriginal Corporation for Languages (VACL) is the peak body for Aboriginal language revitalisation in Victoria and has identified that there are around 44 Aboriginal languages being spoken with over 15 dialects. As noted above by Dr Couzens in section 1.9, Victoria is made up of a linguistically diverse Aboriginal Cultural Heritage.⁷²⁷ The process of reviving and reawakening languages awakens sounds of Country and knowledge handed down through generations.⁷²⁸

Data provided by the Department of Education and Training outlined several initiatives currently being

undertaken in the field of Aboriginal language revitalisation. This includes the inclusion of Koorie Education Managers, Coordinators and Support Officers within the Department to support education outcomes and Aboriginal and Torres Strait Islander engagement in schools and early childhood education.⁷²⁹ From 2018, the Department facilitated a Certificate IV in Teaching an Endangered Aboriginal Language, and a Certificate III in Learning an Endangered Aboriginal Language.⁷³⁰

In 2019, the Department of Premier and Cabinet provided a \$720,000 grant to VACL for the Language Key Initiatives Project. This Project supports the work required to reclaim, revive and maintain Aboriginal languages in Victoria until the end of 2021.⁷³¹

These initiatives provide a positive picture of the development of education and training programs for Aboriginal language revitalisation in Victoria. However, consultations with Aboriginal community members and language and education professionals paint a different one. Respondents to the consultations said that the funding provided to language revitalisation programs in Victoria is 'tokenistic',⁷³² and 'woefully lagging behind' other states and territories.⁷³³

One respondent identified that many local Aboriginal-led language revitalisation projects are funded without government support, that they rely on grants and institutional funding by universities, and that there are many projects where workers aren't paid at all.⁷³⁴ One reason for this is that Aboriginal language revitalisation and education programs often fall outside pre-determined categories for government funding, being multi-disciplinary projects that include working with Elders and community, conducting research, translating, educating, and learning language. Therefore, this work doesn't fall into any particular basket, and payments for 'translators' neglect to recognise the extensive research and work that goes on behind the scenes to revitalise language as well as provide translating services.⁷³⁵

MORE UNDERSTANDING OF THE PROCESS OF REVITALISATION IS NEEDED

It was raised consistently during consultations that language revitalisation programs are underfunded and under-resourced. One reason for this is the lack of understanding about the 'painstaking effort' required to undertake the research and revitalisation of dormant Aboriginal languages.⁷³⁶ As a result, one respondent stated that funding is allocated to Aboriginal language programs as if they are teaching French or Russian, and as if the language is already established.⁷³⁷

One respondent stated that there are language revitalisation programs currently underway with every university in Victoria. This work is not supported by government resources and is being undertaken instead by linguists and cultural workers within educational institutions.⁷³⁸ Respondents expressed their gratitude for the voluntary work of many archivists and linguists assisting with the revitalisation of Aboriginal languages, however it was also raised that Aboriginal peoples would like to see additional community training to support Aboriginal-led language revitalisation.⁷³⁹

In addition it was raised that, in many circumstances, funding that is provided comes with onerous caveats.⁷⁴⁰ Further, funding may be provided without consideration that the language workers are going to rural areas and may not even have access to broadband in communities.⁷⁴¹ One respondent stated that there may be the best of intentions funding an online education platform and online resource, however these initiatives must be met with the understanding that people need access to technological devices and broadband.⁷⁴²

PERSONAL TRAUMA AND EMOTIONAL EXPERIENCE WITH LANGUAGE REVITALISATION

One respondent stated that there is a lack of understanding around the level of support required for the revitalisation of Aboriginal languages.⁷⁴³ In some cases, this is due to the requirement for counselling and emotional support after a language worker has had a traumatic or emotional reaction to revitalisation work. As the respondent explained, a lot of lost language is connected to traumatic incidents of displacement and dispossession from Country and Culture.⁷⁴⁴ For some people, there may be the need for cultural leave or support after engaging in a traumatic event that they were exposed to indirectly through their work.⁷⁴⁵ Many Aboriginal language workers are dealing with the trauma of their own families, which only becomes apparent after they go deep into a research process.⁷⁴⁶

Accordingly, the process was described as 'bittersweet', as Aboriginal language workers find more relatives and connections, and on the other hand experience incredible sadness when they find what they come across.⁷⁴⁷ This respondent emphasised this information demonstrates the highly specialised nature of language revitalisation.⁷⁴⁸

THERE IS DISAGREEMENT AROUND COLLABORATION FOR CERTIFICATE PROGRAMS

One respondent stated that the Certificate III was based on a South Australian teaching program that was radically re-modelled for Victoria. This was done by a Steering Committee with representatives from the Department of Education, VAEAll, VACL and the Victorian School of Languages who were teaching the course. The students themselves also provided ongoing feedback about the study design.⁷⁴⁹ The Certificate IV was also modified through a co-design process, with the students providing ongoing feedback and discussion about the study design.⁷⁵⁰

However, it was also raised during consultations that the Certificate programs for teaching Aboriginal languages provided a top-down approach, with minimal consultation from Aboriginal community members, built for Aboriginal peoples without their involvement. A respondent raised that this has created division within the community.⁷⁵¹ The theme of top-down approaches and lack of collaboration and meaningful engagement was raised repeatedly.⁷⁵² A top-down approach lacks engagement and collaboration with Aboriginal people, undermining Aboriginal self-determination.

As identified here, there was some disagreement among respondents as to the extent of collaboration undertaken with Aboriginal community in relation to the Certificate programs. Therefore, further consideration and consultation with Aboriginal Victorians may be required.

LANGUAGE IS IMPORTANT TO ABORIGINAL VICTORIANS

Language revitalisation was a consistent theme that arose in several consultations as a vision for the future for Victorian Aboriginal peoples: through increased funding, increased programs, increased awareness of the wider community as to the diversity of Aboriginal languages in Victoria, and a vision where children were speaking in language on Country.

One vision raised in consultations was the desire for a *wurrung wurn*; a "language home" in the Dhauwurd Wurrung language of the Gunditjmarra people. A *wurrung wurn* is where Aboriginal peoples could go on Country and speak and connect with their language.



NYERNILA – LISTEN CONTINUOUSLY CREATION STORIES FROM VICTORIA

In 2014, the Victorian Aboriginal Corporation for Languages published *Nyernila – Listen Continuously: Aboriginal Creation Stories of Victoria*. This unique resource uses Victorian Aboriginal languages to tell Aboriginal language stories. The resource sourced knowledge from community knowledge holders and custodians of the approximately 44 languages and that exist across Victoria.

Many of the languages are endangered and the process of creating this resource involved working with the language sound, developing orthographies, and sound and spelling systems.⁷⁵³ The tireless work of VACL and impassioned individuals has led to continued revitalisation work, including recording of languages for posterity, safe keeping and revival amongst Aboriginal communities.

The publication is a step toward reclaiming stories and language for Victorian Aboriginal communities as they tell their stories in their own languages and voices.

Without appropriate funding and community support to save what knowledge is still held by Elders in community, Victorian Aboriginal languages will continue to be lost - another irreversible consequence of colonisation and government practices.

2.11 TRUTH TELLING AND TREATY

Victorian Aboriginal peoples are currently engaged in treaty negotiations with the state government. While an in-depth examination of the treaty process is outside the scope of this report, given the currency, it is important to note treaty as it was raised several times in consultations.

The themes of Black Excellence, Aboriginal self-determination and Aboriginal governance have been raised throughout this report. Aboriginal peoples assert the right to control and manage Aboriginal Cultural Heritage, and for their rights, advocacy and expertise to be recognised.

Recently, the Yoorrook Justice Commission was established, which is an inquiry body with Terms of Reference responsible for answering the decades-long call of Aboriginal peoples for the truth of colonial impact to be widely known and understood from an Aboriginal perspective.

Aboriginal peoples have endured enormous trauma at the hands of colonisation. In other colonised nations such as New Zealand, the United States of America and Canada, treaties have been used to varying degrees of success to recognise the extent of trauma caused, as well as the sovereignty of Indigenous peoples.

TREATY

Victoria has made notable steps toward meaningful Aboriginal self-determination through the establishment of the Treaty Negotiating Framework and the Yoorrook Justice Commission. This makes Victoria the only Australian jurisdiction that has actioned the 'treaty' and 'truth' elements of the Uluru Statement from the Heart.⁷⁵⁴

"My hope is that a Treaty will benefit present and future generations of our people. Formalising a Treaty could mean having a platform to vocalise issues, opportunities to create change in our communities and the recognition of our history. It's empowering to know that our people have successfully fought to be heard and included in these processes – especially those involving our mob. I'm hopeful that my children and grandchildren will benefit from this Treaty."

Victorian Aboriginal Young Person, First Peoples Assembly of Victoria Consultation 2020.⁷⁵⁵

A treaty is a negotiated instrument establishing a framework for the relationship between a government and Indigenous peoples. As treaties are negotiated instruments, the parties to the treaty determine the rights arising out of the treaty, as well as the obligations.⁷⁵⁶ Treaties generally are negotiated based on the dynamic of the parties, as a result of the historical, social and political environment in which the treaty is negotiated.⁷⁵⁷

Treaties are recognised as a positive tool to promote Indigenous self-determination globally. They exist in other colonised nations around the world, including New Zealand, Canada and the USA.⁷⁵⁸ However, at the time of colonisation, there were no treaties made with Aboriginal or Torres Strait Islander peoples in Australia.⁷⁵⁹

Commentators have raised concerns that a 'modern-treaty' would cause division within the community, or even legal pluralism.⁷⁶⁰ However, research conducted by the Harvard Project on American Indian Economic Development found that where Indigenous peoples are granted the ability to manage their own development, Indigenous peoples 'consistently out-perform' external decision-makers.⁷⁶¹

A treaty provides a 'practical and tangible framework for collaboration between Aboriginal peoples and the Victorian Government.'⁷⁶² Creating a framework and obligations recognises and reflects the right of Aboriginal Victorians to self-determination. A treaty is also a political agreement, and the terms of a treaty will generally include practical rights and compensation, as well as a process for reconciliation.⁷⁶³

THE TREATY PROCESS

PHASE 1

This phase is complete and involved the passage of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), outlining the process for establishment of the treaty between Aboriginal peoples and the Victorian Government. The Victorian government committed to discussing treaties with Victorian Aboriginal peoples in early 2016. The Aboriginal Treaty Working Group was established in July 2016 to consult with Aboriginal communities on the development of an Aboriginal representative body and to provide advice to community and government on the next steps in the treaty making process. The Aboriginal Treaty Working Group led 16 community consultations across Victoria to seek the community's guidance on how an Aboriginal representative body should operate and how it should represent community.⁷⁶⁴

In January 2018, the Victorian Treaty Advancement Commission commenced its operations and continued the work started by the Aboriginal Treaty Working Group. In March 2018, the Aboriginal Treaty Working Group handed over its final report to the Victorian Treaty Advancement Commission, delivering key recommendations on the design of the Aboriginal Representative Body.⁷⁶⁵

PHASE 2

This phase commenced in December 2019, when the First Peoples' Assembly of Victoria (the Assembly) was declared to be the Victorian Aboriginal Representative Body, independently reporting to the Victorian Parliament each year on the progress of treaty negotiations. Phase 2 also involves setting up the treaty elements. The Assembly is tasked with the role of establishing the Treaty Authority, the treaty negotiation framework, and the self-determination fund, by agreement with the State.⁷⁶⁶ Once the treaty elements are in place, phase 3 can commence.

PHASE 3

This phase involves treaty negotiations between the Victorian Government and the Assembly on the terms of the treaty. The terms are to be negotiated by the parties and may include transfer of decision-making powers to Victorian Traditional Owners on matters that affect them, truth-telling and formal apologies.⁷⁶⁷

WHERE IS THE ASSEMBLY AT NOW?

The Assembly has made significant progress in 2020, negotiating the first major treaty milestone with the Victorian Government.⁷⁶⁸ This is the interim dispute resolution process, which will underpin the design of the Treaty Authority.

The Assembly is currently undertaking the process of establishing the Treaty Negotiating Framework. Once the framework is in place, the terms of the treaty can be negotiated, and the treaty outcomes can be agreed upon.

Victorian State Government Commitment to Treaty Process

The 2021/22 State Budget announced \$11.124 million for projects relating to the preservation of Aboriginal culture to be distributed over 2 years for nation building and projects that support stronger, more inclusive Traditional Owner groups and corporations, including the treaty process.⁷⁶⁹

This State Budget allocation is on top of an existing \$13.58 million delivered over 2 years announced in the 2019/2020 State Budget.⁷⁷⁰ The 2019/2020 allocation was to support nation building for Victorian Aboriginal peoples and prepare for the future treaty negotiations, and to assist with statutory and cultural responsibilities.⁷⁷¹

Additionally, as stated in the Aboriginal Affairs Report 2020, the Victorian Government is also working internally to ensure whole-of-government participation in treaty discussions, including a Treaty Interdepartmental Committee to assist with procedural and substantive issues that may arise as the Treaty process develops.⁷⁷²

The Victorian Government has committed to the treaty negotiation process through enacting legislation, allocating funding, and developing internal and external bodies to assist with the establishment of the Treaty. In addition, the process allows for collaboration between the Assembly and Victorian Government as to any disputes that may arise in negotiations.

CRITICISMS OF THE TREATY PROCESS

While the above outlines a well-funded process that is backed by legislative measures, some Aboriginal peoples consulted for this report raised concerns and doubt over the Treaty process.⁷⁷³

There should be 38 different treaties

Aboriginal respondents stated that the idea that all Aboriginal Victorians are one group of people is a Western way of governance and understanding Aboriginal Victoria. One respondent stated that the Treaty process '[uses] white man's law and not Aboriginal law'.⁷⁷⁴

It was asserted during consultations that Aboriginal Victoria has 38 recognised clan groups, some of which are recognised as part of the 11 RAPs holding statutory authority, but others that were not. One respondent suggested that having one treaty with all Aboriginal Victorians has 'no consideration of clans', stating that '[The Government] only want to deal with one law, imposed on the rest of us. But it always comes back to Aboriginal law'.⁷⁷⁵

Accordingly, these respondents recommended that 38 different treaties be negotiated to better align with Aboriginal ways of governance, recognising that each Aboriginal clan group in Victoria is governed by different law and custom.

A treaty is not a recognised instrument under Aboriginal law

Respondents also raised issue with the fact that the Treaty is an instrument of Western law and is not a document that is recognised under Aboriginal law. This is an issue as many Aboriginal advocates and leaders are working to decolonise the system by managing and governing Aboriginal affairs in a way that is recognised by Aboriginal law, rather than Western law.

One respondent raised that as an Aboriginal person, she is constantly subject to two separate legal systems. She has Western legal obligations and cultural obligations. While the Western law does not grant weight to Aboriginal custom and law, this does not mean that Aboriginal Victorians are not subject to these laws and customs.⁷⁷⁶

Accordingly, it is only the Western legal system that ignores the validity of Aboriginal law. As a result, many respondents feel that using a Western legal instrument (alone), cumulating Aboriginal communities into one body, is at odds with the point of a treaty, namely, to recognise Aboriginal self-determination.

Concern over representation of diversity

One respondent stated that 'the principle of inclusiveness will be what determines the success of the Treaty'.⁷⁷⁷ Similar to the above-mentioned criticisms and the discussion at section 2.8, some Aboriginal peoples are concerned that the Treaty

will not be representative of all Aboriginal Victorians because it is with Traditional Owners only. If Aboriginal Victorians feel they are not represented, either directly, or through a representative model in which they have confidence, this presents a critical issue, causing feelings of anger as well as conflict and divide within the community.

The same respondent raised that the only time that Aboriginal peoples came together in Victoria was for ceremony.⁷⁷⁸ Outside that, Aboriginal clans were self-governing with clan Country and boundary agreements. This respondent recognised that there were disagreements, conflict and requirements for dispute resolution under Aboriginal law and recognition of the different clan groups. This point demonstrates that the approach of a one-size-fits-all treaty with a diverse group of nations may not truthfully reflect the will and nationhood of all Aboriginal Victorian groups.

YOORROOK JUSTICE COMMISSION

In June 2020, the First Peoples' Assembly of Victoria passed a resolution formally calling for a Justice Commission.⁷⁷⁹ The Yoo-rrok Justice Commission (Yoorrook) was established on 12 May 2021, tasked with undertaking an inquiry into the truth of Victoria's colonial history, treatment of Aboriginal people, and Aboriginal strength and resilience in line with its Terms of Reference. Yoorrook will also make recommendations as to how to better implement these truths into the wider Victorian public's understanding of, and engagement with, Aboriginal Victorians.⁷⁸⁰

Yoorrook is the first Truth Telling Commission established in Australia, drawing on the principles of the Makarrata Truth Telling Commission which was called for under the Uluru Statement from the Heart.⁷⁸¹

Yoorrook will examine the extent and impact of systemic injustice against First Peoples in Victoria and will recommend appropriate forms of redress and other steps to address systemic injustice.⁷⁸² Yoorrook will work in parallel and independently to the Treaty process, with its powers of investigation akin to a royal commission inquiry process.

Under the Terms of Reference, Yoorrook will investigate and report on objectives under the *Inquiries Act 2014* (Vic) and outline the key areas that it will investigate. They include:

- Historical systemic injustice perpetrated by state and non-state entities against First Peoples since the start of colonisation. In this category, Yoorrook will inquire as to the extent of cultural violations and the denial of First Peoples' law,

the theft, misappropriation and destruction of cultural knowledge and property, unfair labour practices, and practices of structural and systemic exclusion of First Peoples from Victorian economic, social and political life;

- Inquiry into the ongoing systemic injustice perpetrated by state and non-state entities against First Peoples, including areas such as economic, social and cultural life and the invasion of privacy and the collection, possession and use of information and data about First Peoples;⁷⁸³
- Inquiry as to the causes and consequences of systemic injustice, including a historical analysis of the impact of colonisation and an evaluation of the contemporary relationship between First Peoples and the state of Victoria, how historical and ongoing systemic injustice can be effectively and fairly acknowledged and redressed.

After the inquiry process, Yoorrook will make recommendations as to how culturally appropriate methods of redress may assist with the Treaty process, including recommendations for reform to existing institutions, law, policy and practice, and considering how the state of Victoria can be held accountable for addressing injustice.⁷⁸⁴

MOVING FORWARD

Throughout consultations for this Report, Aboriginal peoples consistently raised the desire for enforceable, robust measures to assert Aboriginal self-determination. By passing legislation to establish Yoorrook and the Treaty process, the Victorian Government has made legally enforceable commitments to Victorian Aboriginal peoples concerning their cultural and human rights.

However, as is outlined above, there are strong criticisms of how these legal measures have been carried out, and a call for more integration of Aboriginal law and custom, as well as the suggestion that individually negotiated treaties would better reflect the diverse groups of Aboriginal peoples in Victoria. One respondent stated:

"We need to think broader, we are just reaching the top of the trees and not the skies in the vision of what this has to be... We need to look up, we are looking on the ground, keep your vision higher and higher, you can talk to the head of the snake, but we are always talking to the tail."

Taking Care of Culture Discussion Paper
Consultation, 17 September 2021

PART 2 CONCLUSION

This Part has looked at how Aboriginal peoples are currently asserting their rights to practice Culture.

Our analysis focused on the effectiveness of the Victorian government's policies and management actions. We gather data from the Departments that work closely with Aboriginal Cultural Heritage, and we survey relevant policy frameworks and guidelines. We looked in some detail at key legislative instruments, in particular the *Aboriginal Heritage Act 2006* (Vic). This information gathering process allowed us oversight of the legal and policy leavers currently at work in the state.

We are indebted to our consultants, in particular our Aboriginal consultants, for the analytical overlay of this Part 2. Having shared with us the myriad ways they connect with and practice Culture (Part 1), they reported to us the stories, case studies and personal accounts of how the legal and policy leavers are enabling or impairing their cultural practice. The result was a snapshot of the current state of Victoria's Aboriginal Cultural Heritage. We now turn to look at a model for the future.

A wide-angle photograph of a sunset over a calm body of water. The sky is filled with soft, pink and orange clouds, reflecting on the water's surface. A long, straight path of dark, jagged rocks or driftwood leads from the foreground into the distance, creating a strong sense of perspective. The horizon is low, with a few silhouetted trees visible on the left.

“

The future focuses on the arts,
education, language, politics,
science and Cultural Heritage
sectors with Aboriginal leadership,
economic prosperity, Aboriginal
control over cultural practice and
education, health and wellbeing.

”



PART 3 FUTURE CULTURE

PART 3

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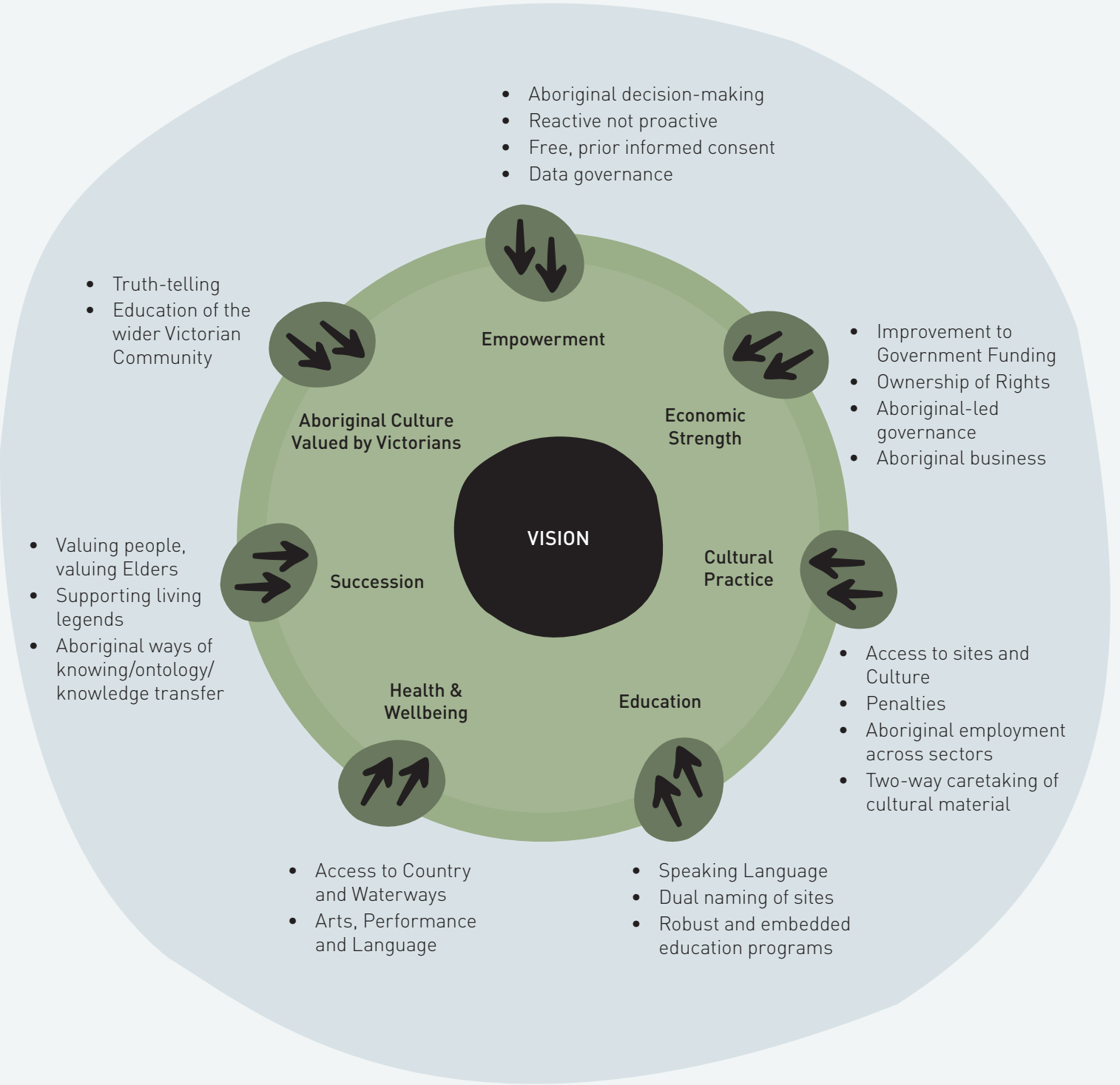
MODEL FOR THE FUTURE

Considering all the responses provided as part of the consultation and feedback process for this report, including the issues identified and discussed above, the following seven key themes have been identified to form a holistic vision for the future management and control of Aboriginal Cultural Heritage in Victoria.

This model for the future would uplift the Black Excellence that is already the defining feature of Victorian Aboriginal Cultural Heritage. As was outlined at the start of this report, Black Excellence is seen in the arts, education, language, politics, science and Cultural Heritage sectors. This model for the future focuses on Aboriginal leadership in all these sectors by integrating these areas to tell a story of economic prosperity, Aboriginal control over cultural practice and education, health and wellbeing models that align with Aboriginal frameworks and future planning.

If effected, this model would be the next step in Victoria's commitment to Aboriginal self-determination, as set out in the Victorian Aboriginal Affairs Framework 2018-2023. Most importantly, it would create a good state of Aboriginal Cultural Heritage in Victoria.

FIGURE 3: Model for the Future



3.1 EMPOWERMENT

ABORIGINAL PEOPLES MUST BE EMPOWERED BY DRIVING DECISION-MAKING THAT AFFECTS ABORIGINAL CULTURAL HERITAGE

ABORIGINAL DECISION-MAKING

Aboriginal peoples in Victoria want to be in the driver's seat of decision-making. As one respondent said, 'no decisions about us, without us'.⁷⁸⁵ Decision-making must be addressed holistically, with embedded practice within government, heritage protection organisations, workplaces and institutions that ensure Aboriginal Cultural Heritage outcomes are Aboriginal-led or involve appropriate consultation and free, prior and informed consent with Aboriginal Victorians. Additionally, Aboriginal peoples want to create the frameworks that govern Cultural Heritage decision-making, whether that is through improved legislation, government positions, Aboriginal community mediation or dispute resolution processes, or best practice protocols.

REACTIVE NOT PROACTIVE

It was consistently raised throughout the consultation process that Aboriginal peoples and the wider Victorian community are reactive and not proactive when it comes to Aboriginal Cultural Heritage. Yet, respondents emphasised the principles outlined in *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)⁷⁸⁶ and the rights asserted by Aboriginal peoples to protect, maintain, control and develop their Aboriginal Cultural Heritage.⁷⁸⁷ Respondents from large RAPs, small RAPs and Traditional Owners groups without RAP status, shared the perspective that Aboriginal peoples are constantly reacting to non-Aboriginal development, projects and demand through the current Western system, rather than proactively protecting and maintaining their Cultural Heritage as they want to.⁷⁸⁸

Many factors were raised as contributing to the current reactive system of heritage management. Part 2 identifies issues including the lack of Aboriginal decision-making, lack of resources, lack of funding and the difficulty with the RAP and CHMP structures.

Aboriginal peoples want proactive management of Aboriginal Cultural Heritage, with appropriate resources and funding to ensure Aboriginal-led governance and prioritisation of Cultural Heritage protection.⁷⁸⁹

FREE, PRIOR AND INFORMED CONSENT

Free, prior informed consent (**FPIC**) is a specific right pertaining to Indigenous peoples which is recognised in the UNDRIP. FPIC concerns the right of Indigenous peoples to give or withhold consent to a project, activity, system or process that may affect them, their knowledge or their Country.⁷⁹⁰ FPIC must be sought when engaging with Aboriginal peoples to obtain consent for a particular process, project or endeavour involving Aboriginal communities, knowledge or Country (or ICIP), and also relates to the right of Aboriginal peoples to conduct their own independent and collective decision-making processes.

Undertaking appropriate consultation, collaboration and seeking FPIC allows Aboriginal peoples to engage in decision-making in a culturally appropriate way, setting their own criteria for whether they provide consent, in their own language, with sufficient time for cultural authority and consideration. Crucially, FPIC enables Aboriginal peoples to withhold consent, and assert their right to say "no". Seeking FPIC does not guarantee that consent will be granted if it is not appropriate for the relevant Aboriginal community.

Importantly, FPIC is Aboriginal-led and ensures self-determination and respect for Aboriginal peoples and their Culture. Complete transparency with community members and sufficient time for consideration are required to undertake the process appropriately. It may involve negotiation or change to the parameters of a particular project. These negotiation processes should not be culturally inappropriate, intimidating or convey power imbalances. Time must be granted for communities to conduct their own cultural consultations, where appropriate and relevant. FPIC processes may change conditions of a potential project and influence how the engagement proceeds to ensure collaboration and self-determination. In addition, once FPIC is given, it can also be withdrawn at any time.

Aboriginal peoples in Victoria want FPIC to be embedded in Western frameworks and within legislation, policies and procedures that involve Aboriginal peoples or their Cultural Heritage.

GOVERNANCE OF DATA

Aboriginal peoples assert their right to control data collected about them or their Cultural Heritage.

Collection of heritage means collection of data. Aboriginal peoples, Traditional Owner groups and RAPs may hold their own databases, archives and keeping places, collecting and managing information relating to their own families, community and Cultural Heritage. There are, of course, databases and collections owned and managed by government and state institutions, holding extensive data concerning Aboriginal peoples and their Cultural Heritage. Both the state and the Commonwealth government will continue to manage databases that include the economic and health information of Aboriginal Victorians.

When we talk about data, we refer to information that is either “born digital”, for example a computer record, or digitisation of existing data including legacy material. Aboriginal data encompasses data about Aboriginal individuals, family, clan and language groups, as well as information about Country and Cultural Heritage more generally. It is therefore imperative that the international obligations of data governance and sovereignty of Aboriginal peoples are enforced in relation to Australian data collections.

In the absence of *sui generis* laws in Australia, the articles of the UNDRIP, the CARE Principles for Indigenous Data Governance⁷⁹¹ and the Indigenous Data Sovereignty Communique Key Principles⁷⁹² should be utilised to recognise Indigenous peoples’ right of control over their data.

As discussed in section 2.3 above, the Indigenous Data Sovereignty Communique Key Principles outlines the rights asserted by Aboriginal peoples in relation to their data. The CARE Principles are recognised at an international level and are aimed at increasing Aboriginal self-determination over the use of data, especially in relation to innovations based on Aboriginal knowledge, and to apply appropriate limitations to the more data-centric FAIR data principles,⁷⁹³ which support knowledge discovery and innovation. The CARE Principles also recognise Indigenous peoples’ right to share in the benefits that may flow from innovation based on their data.⁷⁹⁴

Protection and management of Aboriginal data creates the need for data sharing agreements and best practice protocols, in particular between database managers and third-party users of a database incorporating information concerning Aboriginal peoples or their Culture. Where possible, Aboriginal groups should ensure they have appropriate protocols and Research, Access & Benefit Sharing, and Data Agreements in place to ensure the maintenance of control between Aboriginal knowledge holders and subsequent users of data.

3.2 ECONOMIC STRENGTH

ABORIGINAL PEOPLES MUST BE ECONOMICALLY STRONG

IMPROVEMENT TO GOVERNMENT FUNDING

Government funding should be geared towards building longer term growth strategies for Aboriginal groups and businesses, as was seen in the Budj Bim Cultural Landscape initiative. In the 2016/17 State Budget, \$9.047 million was allocated to support Victoria’s Aboriginal Cultural Heritage management system and the nomination of the Budj Bim Cultural Landscape to the World Heritage List. This included the development of the Budj Bim Master Plan.⁷⁹⁵ The Master Plan is a detailed strategic vision for the conservation and sustainable use of the Budj Bim Landscape for cultural, tourism and community purposes.⁷⁹⁶ It includes an analysis of tourism opportunities and site development opportunities. It further plans for the Gunditj Mirring Traditional Owners Aboriginal Corporation to establish private sector partnerships and business networks for tourism.⁷⁹⁷

Government expenditure in Aboriginal sectors has increased over the years. This is reflected by the Victorian Government’s record investment in the 2020/2021 State Budget of \$356.5 million over 4 years into Aboriginal affairs.⁷⁹⁸ This reflects a large commitment by the Victorian Government to provide support to Aboriginal communities and represents genuine steps towards self-determination and Treaty implementation.

However, it may be necessary to reduce barriers to funding. Creative Victoria's First Peoples Plan notes the need for new pathways for applications from Aboriginal peoples, making sure applications are fairly assessed and eliminating barriers to participation.⁷⁹⁹ This may take the form of inclusive grant opportunities and peer-to-peer assessment processes.⁸⁰⁰

To ensure Aboriginal communities have sufficient control and autonomy in government or agency funded projects and initiatives targeting the maintenance of Cultural Heritage, it is imperative that amendments be made to the funding model to incorporate economic independence of Aboriginal custodians.⁸⁰¹ Historically poor resourcing and economic problems have often limited the potential of Aboriginal Cultural Heritage advances to be realised and put into practice.⁸⁰² Where such funding is granted, the conditions attached to such funds may heavily restrict the autonomy and control that the Aboriginal custodians have over these projects, and therein their effectiveness.

A recent market study sponsored by ANFAB indicated significant market growth in native foods and botanicals.⁸⁰³ The Department of Jobs, Precincts and Regions (DJPR) provided funding to the Federation of Victorian Traditional Owner Corporations that was used to develop the Traditional Owner Native Foods and Botanicals Strategy.⁸⁰⁴ The Federation of Victorian Traditional Owner Corporations have also developed Djakitjuk Djanga.⁸⁰⁵ This program is designed to overcome barriers to Aboriginal peoples' entry into the native foods industry. Applicants can apply for grant funding of up to \$200,000 to develop or expand existing commercial native food production. Grant money can be used to hire technical staff or consultants, or to purchase or lease equipment involved in native food production, for example, fencing, digital technology or pest management materials.

In our consultations, it was reported that Registered Aboriginal Parties (RAPs) have been considering options for business models for their Cultural Heritage. In particular, their vision includes:

- More control over the development consent process under the *Aboriginal Heritage Act 2006* (Vic) (the Act or AHA). Respondents wanted to see RAP groups with complete capacity to be able to engage in the entire process, and for RAPs to be funded well enough and have the capacity within them to be able to drive Cultural Heritage management required under the AHA itself. It must be the right amount of capacity and funding, with Aboriginal peoples at the front and centre of this process.⁸¹⁰
- To see RAP capabilities expanded to include the provision of Heritage Advisor services (for CHMPs undertaken both within Country and externally).⁸¹¹

DJAKITJUK DJANGA NATIVE FOODS AND BOTANICALS PROJECT

The Djakitjuk Djanga Native Foods and Botanicals industry development project is a joint initiative between Agriculture Victoria and the Federation of Victorian Traditional Owner Corporations to support Traditional Owners and other Aboriginal Victorians in leading the development of Victoria's native food and botanicals industry.

Djakitjuk Djanga, or "Country's Food" to the Djaara (Dja Dja Wurrung) people,⁸⁰⁶ seeks to support the development of bushfood crops and the industry as a whole by granting eligible Aboriginal businesses and organisations up to \$200,000 to overcome resource-related barriers to commercially producing native resources for use as food and botanicals.⁸⁰⁷ Djakitjuk Djanga also establishes a Community of Practice for the development of native plant production to help progress Aboriginal leadership of Victoria's native food and botanicals industry. The Project Control Committee is tasked with implementing and overseeing the strategy and its outcomes, seeking to ensure that the project upholds and reflects Aboriginal traditional knowledge on native plants and botanical resources.

The Project provides Indigenous recipients with the resources necessary to cultivate and manage Country, in order to create and develop a thriving and culturally authentic bushfoods industry. This is a key initiative of the Federation and Agriculture Victoria due to the growing demand for, and the recognised potential for the development and sustainability of, bushfood and native botanical products in Victoria and Australia as a whole. Further, the program seeks to build on cultural knowledge of traditional knowledge-holders and practice to help create sustainable food systems that are climate-aware, innovative, nutritious and resilient.⁸⁰⁸

Through the Project, thirteen Aboriginal Victorian-owned businesses were awarded grants collectively worth \$2 million to support the development of their native food and botanical businesses.⁸⁰⁹ These grants have been used to expand operations and trial commercial production of native plants for food and botanicals. As a result, the foundations for a thriving Aboriginal-led bushfoods industry have been laid, centred around the empowerment of Aboriginal businesses and the use of their traditional knowledge.

- More resources directed to RAPs in order to fulfill their obligations. These resources are necessary to be able to proactively protect Aboriginal Cultural Heritage, rather than responding to development work through the CHMP process. RAPs envisage having their own archaeological schools within community and teaching younger Aboriginal kids how to do Cultural Heritage surveys.⁸¹²

OWNERSHIP OF RIGHTS

Aboriginal peoples assert their rights to control, management and interpretation of their Culture. Several respondents raised issues with the failure of current Aboriginal Cultural Heritage laws to adequately protect Aboriginal heritage, knowledge and cultural expression (or ICIP). In addition, biodiversity, heritage and intellectual property laws are insufficient to adequately protect the substance and control of ICIP. The implementation of adequate *sui generis* legislation is necessary. Aboriginal peoples in Victoria assert the right to commercially benefit from their ICIP and engage in exclusive control over their Culture, including heritage sites, education programs, and tourism and other economic ventures to financially, socially and culturally empower communities.

ABORIGINAL-LED GOVERNANCE

Aboriginal peoples assert the right to lead both a top-down and bottom-up approach for decisions related to Aboriginal peoples and Aboriginal Cultural Heritage. This means that, understandably, Aboriginal peoples want Aboriginal legislators involved in every step of the process where legislation or government policy is being drafted about Aboriginal peoples.⁸¹³

Aboriginal peoples must speak for themselves.⁸¹⁴ Article 19 of the UNDRIP enshrines that the state will consult and cooperate with Indigenous peoples through their representative institutions in order to obtain free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.⁸¹⁵

Sui generis legislation to enshrine the rights of the UNDRIP in Australian law is essential and overdue.

Aboriginal peoples want to see Aboriginal languages incorporated into legislation, with variations for different language groups.⁸¹⁶ One respondent expressed their vision of seeing younger generations educated about law, right and wrong, through legislation created by Aboriginal peoples with variations in Aboriginal language.⁸¹⁷

Many respondents supported the Yoorrook Justice Commission and the Treaty process as representing positive steps toward Aboriginal self-determination and legal decision-making. However, there were other respondents who were cautious and concerned to ensure that all Aboriginal peoples are represented and consulted in the Treaty process, not just those Aboriginal Victorians represented by RAPs.

ABORIGINAL BUSINESS

Aboriginal peoples envisage a strong, long-term economic future for Aboriginal peoples and their Cultural Heritage. They want to build strong business models in which Aboriginal peoples run, manage and are employed in businesses relating to the management and protection of Aboriginal Cultural Heritage. They want to profit from commercial ventures on Country, support their communities to be strong and resilient, and plan for long-term economic growth and sustainability for future generations.

Many Aboriginal groups who are managing Country seek to engage in for-profit ventures as a means of achieving this. For example, Aboriginal-led tourism businesses are desperately needed to fulfil demand from local and international tourists who wish to participate in authentic Aboriginal experiences on Country. The COVID-19 pandemic has seen local tourism increase. In addition, research projects, carbon offset initiatives, joint management of parks and bushfood businesses all provide opportunities for Aboriginal groups to build economic strength and sustainability. In addition, Aboriginal arts and design businesses across all mediums continues to grow and ensure the creative development of Aboriginal Cultural Heritage.

The procurement of goods and services by the Victorian Government directly from Aboriginal businesses increased from \$16.7 million in 2018-19 to \$46.1 million in 2019-20, with a further \$58.3 million indirectly spent in 2019-20 with Victorian Aboriginal business and organisations through major road and rail projects under the Department of Treasury and Finance's Social Procurement Framework.⁸¹⁸

It is important that Aboriginal businesses form strong economic relationships that protect their intellectual property and their Cultural Heritage (and ICIP). Contracts are an important and necessary tool for all Aboriginal organisations and businesses to use to protect their interests. In addition, implementation of Access & Benefit Sharing (ABS) legislation and agreements, free, prior informed consent processes, and best practice ICIP protocols can ensure third

party compliance for Aboriginal organisations and businesses in the use of their Cultural Heritage.

Artist Mick Harding explained that he uses commercial licence agreements to protect his ICIP and ensure his cultural knowledge is passed onto his children, “knowing that IP laws are very limited” and “being mindful that he is trying to protect these things for future generations as well”.⁸¹⁹

3.3 CULTURAL PRACTICE

ABORIGINAL PEOPLES MUST HAVE RIGHTS OVER THE ACCESS, CONTROL AND MANAGEMENT OF ABORIGINAL CULTURAL HERITAGE

ACCESS TO CULTURE

Many respondents raised that in addition to access, Aboriginal peoples want to be able to practice their Culture on Country. This includes being on Country as well as traditional cultural practices such as ceremony. One respondent raised their vision as being able to practice Culture, for example a smoking ceremony or fire, on Country on Crown Land without someone calling the police.⁸²⁰

It was raised that the practice of walking on Country connects Aboriginal peoples to knowledge of all plants and uses of those plants, including medicinal and health benefits. Being able to walk on Country connects Aboriginal peoples to how their Old People used to walk the land, connecting them to Ancestors and Cultural Heritage.

Respondents identified that Aboriginal peoples are best placed to identify and protect cultural sites. However, registration of sites, such as on the Victorian Aboriginal Heritage Register, may not be appropriate in the circumstances, and protection should be afforded regardless.

It was also raised that Aboriginal peoples want further rights on Country, including the practice of cultural burning.⁸²¹

PENALTIES

Many respondents raised that they want more accountability where Aboriginal Cultural Heritage is damaged or destroyed.⁸²² There is significant emotional and cultural loss caused by damage to Aboriginal Cultural Heritage. Accordingly, Aboriginal respondents want to see increased civil and criminal penalty provisions in the *Aboriginal Heritage Act 2006* (Vic) (AHA) where damage and destruction is caused to Aboriginal Cultural Heritage.⁸²³

Prosecution powers were raised by the Victorian Aboriginal Heritage Council (VAHC) in the *Taking Control of Our Heritage Report*.⁸²⁴ The VAHC recommended the current prosecution powers under the AHA be amended so that the rights and responsibilities of prosecution move from the Department of Premier and Cabinet to the VAHC.⁸²⁵ This move would be in line with other statutory authorities who have prosecutorial powers, including the Environmental Protection Agency and the Royal Society for the Prevention of Cruelty to Animals.⁸²⁶ These recommendations are consistent with the vision raised by respondents in consultation for this report and it is recommended that further community consultation be sought.

The VAHC also recommended increased powers be granted to Aboriginal Heritage Officers and Authorised Officers under the AHA to enable infringement notices to be issued for minor offences.⁸²⁷ This comment was raised by several respondents during consultations.

ABORIGINAL EMPLOYMENT ACROSS SECTORS

Employment of Aboriginal peoples across all industries and sectors that work with Aboriginal Cultural Heritage will increase Aboriginal peoples' capacity to practice Culture. The CHMP process has been discussed at several points in this report. Having Aboriginal peoples more directly involved in their preparation is an achievable goal. Aboriginal peoples may be involved in the CHMP process in their capacity as RAP employees, or they could be independent heritage advisors engaged to conduct the surveys and reviews.

Increasing avenues for Aboriginal peoples to work in all levels of government and private sector is another long-term strategy that ensures that Aboriginal peoples are placed as decision-makers in relation to the many aspects of their Cultural Heritage. It is also proactive: rather than reacting to Aboriginal Cultural Heritage and then seeking consultation and consent,

having Aboriginal peoples already working in industries that work with Aboriginal Cultural Heritage means their concerns and needs are represented even at the very earliest stages of any project or development. We have already referred to RAPs, but this strategy applies across all industries. For example, having more Aboriginal peoples employed in the Galleries, Libraries, Archives and Museums (GLAMs) sector.

There have already been developments in this area, for example the Barring Djinang Aboriginal Employment Strategy. The Strategy was discussed in section 2.9. The Strategy includes 16 initiatives designed to enhance attraction, recruitment and retention of Aboriginal staff. Thirteen of the 16 initiatives have already been implemented including an internship program, a program to build skills and support for Aboriginal staff to take on leadership roles, and staff networking initiatives.⁸²⁸ Further, the Department of Environment, Land, Water and Planning has established the Aboriginal Self-determination Reform Branch which includes an Aboriginal Employment and Cultural Strategy unit.⁸²⁹

Ensuring cultural safety will be an important consideration in any initiative aimed at increasing Aboriginal employment in government departments, and we have previously discussed the importance of cultural auditing being undertaken within departments and agencies. In addition to increasing employment within the government, departments should be considering more co-management partnerships with existing service providers. For example, partnering with Aboriginal training providers. This too will increase employment opportunities for Aboriginal peoples working with Cultural Heritage.

TWO-WAY CARETAKING OF CULTURAL MATERIAL

Two-way caretaking of Aboriginal cultural material has been identified as a method for GLAMs, universities and private collections to ensure that Aboriginal peoples control the management and care of their cultural objects historically held in state and Commonwealth and university collections.⁸³⁰

Two-way caretaking is driven by relationship building and understanding between non-Indigenous and Aboriginal community members, opening up collections and allowing Aboriginal peoples to have a say in the management and control of their cultural material.⁸³¹

Two-way caretaking may include several strategies:

- **Repatriation:** GLAMs and universities are instituting repatriation policies for the return of cultural objects to identifiable custodians and acknowledging provenance. Repatriation may involve cultural objects remaining with the institution, or where possible, being returned to Country where artefacts can be housed appropriately.
- **Truth telling:** Ensuring that the interpretation of Aboriginal peoples is actively sought by GLAMs, universities and private collections to express the true history of Australia and colonisation.
- **Relationship Agreements:** Relationship agreements are one method through which collecting institutions can enter into arrangements with Aboriginal communities to establish long-term relationships. These agreements include terms for mutual benefit sharing for how collections and cultural objects will be cared for and maintained. Relationship agreements are designed to build trust between the Aboriginal community and the institutions holding the material.⁸³²
- **Inventory:** Inventories are key to the transparent management and care of Aboriginal Cultural Heritage. Organisations who hold Aboriginal cultural objects must provide accessible inventories so that Aboriginal peoples are able to see what items are held in a collection. Where provenance is unknown, collaborative working relationships and extensive research should be undertaken with Aboriginal peoples according to cultural protocols.⁸³³
- **Education and Awareness:** GLAMs, universities and private collections must train Aboriginal communities in collection management, repatriation and developing resources for care and control of cultural objects. This may include through appropriate digitisation of collections and increased use of technology, with the free, prior informed consent of the custodians of the material.⁸³⁴

3.4 EDUCATION

ABORIGINAL PEOPLES MUST BE ABLE TO ACCESS AFFORDABLE AND APPROPRIATE EDUCATION CONCERNING ABORIGINAL CULTURAL HERITAGE

SPEAKING LANGUAGE

Aboriginal peoples want to be able to speak and converse with their children in Aboriginal language.⁸³⁵ Many respondents raised the desire to speak in language fluently, to revive language, and to access the stories contained within language that would connect them to their Ancestors before them.

Responses included the desire to see Aboriginal peoples speaking their own language,⁸³⁶ and seeing more Aboriginal peoples who live in the city reconnected with their Country.⁸³⁷ One respondent referred to their Ancestors building language nests (“*Wurrung Wurn*” or “house of language” as understood in the Dhauwurd Wurrung language of the Guditjmara people), enabling the transmission of knowledge to younger generations, and a culturally safe place for learning language.⁸³⁸ Another respondent discussed the language revitalisation work he is doing, and the vision for his children to speak language fluently with him, on Country.⁸³⁹

DUAL-NAMING OF SITES

Respondents raised the need for dual-naming of sites, in particular to address non-Indigenous community awareness to the cultural significance of a particular site.⁸⁴⁰ Dual-naming would also provide recognition to the Traditional Owners, enabling them to assert their rights over access and use of cultural sites. One respondent’s vision for the future is for Aboriginal and non-Aboriginal people to know the Aboriginal names for all sites in Victoria, and for non-Aboriginal people to know the significance of these sites, where appropriate, and to want to care for them too.⁸⁴¹

ROBUST AND EMBEDDED EDUCATION PROGRAMS

As was discussed in section 2.9, funding and resources are required to conduct appropriate education programs, in which Traditional Owners and knowledge holders pass knowledge to the current and next generations. This education includes all aspects of cultural practice and could include land management, truth telling and languages.⁸⁴² It is essential that Aboriginal peoples control these education programs for truth telling and self-determination. It is also essential because it is really only through Aboriginal education models that Aboriginal knowledge can be passed on with authenticity and integrity.

Senior Educators in Aboriginal language in Victoria raised the point that when working with Aboriginal languages, it is crucial to remember that it is not like teaching French or Spanish. Instead, extensive funding and resources are required to undertake appropriate research to achieve the vision of revival of dormant Aboriginal languages.⁸⁴³

In addition to the above, Worawa Aboriginal College is developing an Aboriginal Resource Centre (the Centre), which will involve the fit out of an existing building on the College campus and act as a centrepiece for Aboriginal Cultural Heritage programs. These programs will promote broader community understanding and appreciation of Aboriginal history, culture and traditions.⁸⁴⁷ The entire Centre provides an immersive and holistic experience for people wanting to learn more about Victoria’s Aboriginal history and living heritage.⁸⁴⁸ Combined with the above initiatives, Worawa Aboriginal College is a nation-wide leader in embedding Aboriginal-led education initiatives and celebrating Black Excellence.

Many Aboriginal respondents raised that they want language education embedded in the Victorian curriculum and workplace culture and management practices. As the above example highlights, this must be an Aboriginal-led initiative with truth-telling principles determined with cultural authority. Community initiatives built on Aboriginal advocacy like the Aboriginal Change Makers Program are aiming to achieve the vision of embedding knowledge within the wider curriculum.

As part of the 2020/21 State Budget, \$7.5 million has been allocated over two years “to support the delivery of Marrung: Aboriginal Education Plan 2016-2023 to improve the educational outcomes of Aboriginal students in Victoria.”⁸⁴⁹ The number of schools teaching an Aboriginal language grew from one in 2010 to seventeen in 2019, while the number of Aboriginal peoples on school councils increased from 164 in 2018



ABORIGINAL CHANGE MAKERS⁸⁴⁴

Worawa Aboriginal College has recently partnered with the Parliament of Victoria to create a resource for the Victorian curriculum called 'Aboriginal Change Makers', which aims to embed truth-telling into the Victorian education system, by educating all students in precious narratives of Aboriginal advocates, and the truth of colonial impact from an Aboriginal perspective.⁸⁴⁵

'Aboriginal Change Makers' has been an Aboriginal-led process, with Dr Lois Peeler, Principal of Worawa Aboriginal College, explaining that the resource has been created to embed once-hidden information into the minds of Victorian school students. The program is a step toward decolonising history as it is taught in Victorian schools, by educating through truth-telling, so that students look at the past with clarity to fully understand the present and future. The 'Aboriginal Change Makers' Program tells the stories of strength, resistance and advocacy of Aboriginal peoples who fought for Aboriginal rights, established Aboriginal education and resistance groups, and campaigned for improvements in housing, education, welfare and human rights.⁸⁴⁶

to 374 in 2019 across 114 schools.⁸⁵⁰ More support is needed to help Aboriginal students transition to high school with a gap of 6.6% in 2019 between Aboriginal and non-Aboriginal students school attendance across all school years.⁸⁵¹ Aboriginal students completing their school certificates more than doubled between 2011 and 2019, with a significant increase in the proportion of leavers going on to further education, training and employment.⁸⁵²

EMBEDDING EDUCATION IN THE CURRICULUM

Embedding education about Aboriginal Cultural Heritage is also desired by respondents to this report to bolster Aboriginal knowledge about Aboriginal Cultural Heritage. Respondents raised the importance of language education, and one respondent raised that they would like to see as many people as possible speaking language, even if they are not Aboriginal, to keep languages going and ensure their revival.⁸⁵³

It was also raised that education materials must extend beyond the classroom, connecting more people to Country and Aboriginal Cultural Heritage through personal experience and engagement with Aboriginal peoples. Fair payment should be made for the contribution of Traditional Owners.⁸⁵⁴

3.5 HEALTH AND WELLBEING

ABORIGINAL PEOPLES MUST BE PHYSICALLY, CULTURALLY AND MENTALLY HEALTHY

HEALTH, WELLBEING AND SAFETY OF ABORIGINAL PEOPLE

The *Korin Korin Balit-Djak: Aboriginal health, wellbeing and safety strategic plan 2017-2027* and *Balit Marrup: Aboriginal social and emotional wellbeing framework 2017-2027* are Victorian initiatives that work together in providing an overarching strategy and subsequent framework for driving action to improve the health, wellbeing and safety of Aboriginal Victorians.

These plans were developed by the Victorian Government in collaboration with Aboriginal communities, community organisations and mainstream service providers.⁸⁵⁵

Both *Korin Korin Balit-Djak* and *Balit Marrup* are high-level strategies seeking to reform the health and human services sector which have historically failed many Aboriginal Victorians with regards to their provision of culturally safe and protective health and wellbeing services. These reforms seek to advance Aboriginal self-determination in health, wellbeing and safety through a key systems transformation strategy prioritising governance and self-determination, funding and commission reform, cultural competency, data and knowledge management and ownership, and leadership and workforce outcomes.⁸⁵⁶

These plans ultimately seek to improve the outcomes for Aboriginal Victorians seeking health services in terms of their safety and emotional and physical wellbeing, and acceptance of and adherence to treatment.

However, the physical, mental and cultural health and wellbeing of Aboriginal peoples is linked to more than just access to appropriate and culturally safe services.

ACCESS TO COUNTRY AND WATERWAYS

Access to land and control over Aboriginal Cultural Heritage sites was a prominent vision for the future as identified in this Report.⁸⁵⁷ One respondent stated 'we should have rights to all of Country, even if on someone else's land. Better to have these sacred sites managed by us rather than stuck on someone's private land'.⁸⁵⁸ This respondent raised that access to Country allows access to cultural practice, including fire and cultural burning, as well as ensuring health and wellbeing.

It was identified that currently, there are too many loopholes that Aboriginal peoples have to go through to practice Culture on Country and connect to Country,⁸⁵⁹ with cultural loss and disconnection where Aboriginal peoples are not able to access their Country. This has impacts on culture, health and wellbeing, and connection to family and community.⁸⁶⁰ One respondent raised that having access and connection to Country, being around family and knowing history is all Aboriginal Cultural Heritage.⁸⁶¹

In addition, respondents raised that many Aboriginal peoples in Melbourne don't have enough access to Country outside of the CBD, and that there needs to be more access for Aboriginal peoples to get out to Country and connect to their Cultural Heritage.⁸⁶²

One respondent raised that there were more people living off Country than on Country, and to maintain connection, Traditional Owner groups should ensure that Aboriginal peoples living off-Country are just as included as those living on-Country. It was raised that without being able to walk on Country, connection and practice is denied.⁸⁶³

Gathering places that deliver health and support services seek to provide such connection for those living away from Country across Victoria or in inner-city and metropolitan areas.⁸⁶⁴

However, these facilities and locations often cannot substitute the deep connection to Country sought by Aboriginal peoples.

Access to and Caring for Country has significant impacts on the health and wellbeing of Aboriginal and Torres Strait Islander peoples Australia-wide. This notion of wellbeing does not refer to the rigid Western understanding, which has been reduced to a matrix of standard socio-economic indicators and bio-medical measures rather than integrating complex Aboriginal concepts.⁸⁶⁵ Instead, the focus is shifted to the more holistic Aboriginal definitions of wellbeing, which revolve around cultural factors including social relationships, connection to Country, kinship, Aboriginal knowledge, reciprocity, identity, accountability and physical, social, spiritual and emotional wellbeing.⁸⁶⁶

In 2005, a cross-sectional study of Aboriginal adults in an Arnhem Land community identified the significant positive association that Caring for Country had with the health and wellbeing of the participants. Those who participated more in Caring for Country activities were significantly associated with more frequent exercise and better diet through bushfood consumption, as well as lower body mass index's, less abdominal obesity and lower systolic blood pressure and diabetes rates.⁸⁶⁷ The risk of cardiovascular disease and coronary heart disease was also lower compared to those who participate in such activities less,⁸⁶⁸ and Caring for Country was not associated with smoking or alcohol use.⁸⁶⁹

As discussed in section 2.5, the recognition and implementation of cultural flows and cultural flows frameworks also demonstrate a mechanism that can be utilised to foster cultural wellbeing, with regards to incorporating the cultural benefits that arise from Aboriginal peoples' connection to waterways.

Therefore, access to Country and waterways have significant impacts on the health and wellbeing of Aboriginal peoples, providing a driving force for Aboriginal wellbeing.⁸⁷⁰

ARTS AND PERFORMANCE

The Aboriginal visual Arts and Performance sector have 'very significant economic, social and cultural benefits' for Aboriginal people,⁸⁷¹ the Australian and international community. In addition to traditional notions of Aboriginal Cultural Heritage, respondents raised the importance of language, arts practice, performance and access and control over Aboriginal Cultural Heritage to Aboriginal health and wellbeing. This includes improved mental and physical health, self-esteem, intergenerational learning, transmission and maintenance of Culture and identity.

Studies conducted by Deakin University found that collaborative and accessible arts programs that are created with Aboriginal communities improve physical health, mental wellbeing, and social inclusion.⁸⁷² Many respondents emphasised that they themselves obtain health and wellbeing outcomes through different arts practices, performance and speaking in language and identified the need for an increased ability to continue such practices for their sense of cultural, mental and physical wellbeing.

An example of the use of arts and performances for improving the health and wellbeing of Aboriginal peoples is 'Stigma Stories.'

ILBIJERRI 'STIGMA STORIES'

The ILBIJERRI Theatre Company, in partnership with Dr Sarah Woodland, a Research Fellow in the Faculty of Fine Arts and Music at the University of Melbourne, has developed 'Stigma Stories' to address challenges facing young Aboriginal peoples surrounding sexually transmitted infections (STIs) and sexual health. 'Stigma Stories' is a theatre work utilising performance to engage their audience and create a culturally safe space to discuss these issues.

The 'Stigma Stories' work fosters collaboration with young Aboriginal communities, working with the community to embed their own experiences into the performance as part of a more interactive and participatory work.⁸⁷³ Here, ILBIJERRI researches the health concern through consulting advisory groups and other stakeholders before working with the community to make the performance from scratch.⁸⁷⁴ This involves taking their experiences and engaging with their Elders to pass on knowledge between the generations.

Ultimately, this work effectively breaks down the stigma and reluctance to talk about STIs in the community by encouraging discussions and creating an environment where young Aboriginal peoples can talk about their issues and concerns.

3.6 SUCCESSION

ABORIGINAL ELDERS' KNOWLEDGE MUST BE VALUED AND SUPPORTED

Respondents raised the importance of valuing the knowledge passed down to them by their Elders and in turn, passing their knowledge onto future generations. For example, it was raised by one respondent that she wanted the ability to access Country in the way her Old People did, to be able to walk the land and learn.⁸⁷⁵

Projects being undertaken with cultural institutions are about connecting Aboriginal peoples to the valuable knowledge of Elders that came before. For example, the thriving practice of possum skin cloak making has built upon the knowledge of Elders and revival of stories contained in cloaks held in the Melbourne Museum.

In addition, it is important to recognise the inherent value in the knowledge held by Aboriginal Elders, as living legends, whose stories and position in community have great value. This is not always recognised however, and without significant funding and State-supported programs for the culturally appropriate transfer, recording, storage and curation of Aboriginal Cultural Heritage, knowledge will continue to be rapidly lost.

When engaging in any form of cultural education with Aboriginal peoples, RAP bodies or Traditional Owner groups, adequate financial compensation should be negotiated with the knowledge holder where appropriate.

3.7 ABORIGINAL CULTURE RECOGNISED BY VICTORIANS

ALL VICTORIANS HAVE A RESPONSIBILITY TO RESPECT AND PROTECT ABORIGINAL CULTURAL HERITAGE

HOW TO RECOGNISE ABORIGINAL CULTURAL HERITAGE

The appropriate acknowledgement and respect of Victoria's Aboriginal history and Aboriginal Cultural Heritage needs to be encouraged and reaffirmed for all Victorians. This can be achieved with the appropriate application of the following principles and protocols:

- Enacting and enforcing domestic legislation that ratifies UNDRIP;
- Upholding cultural rights under the Victorian Human Rights Charter;
- Implementing collaborative ICIP Protocols when working with Aboriginal people;
- Implementing ICIP protocols for industries dealing with Aboriginal Cultural Heritage, including in relation to development, research and native foods;
- Utilising access & benefit sharing arrangements and free, prior informed consent procedures to inform best practice when engaging with Aboriginal peoples or their Cultural Heritage.

TRUTH-TELLING AND WIDER PUBLIC EDUCATION

Respondents raised how vital truth-telling is before we can fix the present and future systems of Aboriginal rights in Victoria. Respondents stated this requires proper engagement with Aboriginal people, including listening, transparency and reflection on the truth of colonisation.

There is still generational trauma continuing today in the Victorian Aboriginal community. Respondents raised that while these issues may not be important to non-Aboriginal people, they are important to Aboriginal peoples. Aboriginal ways of being and communicating are important to Aboriginal peoples. In order for any development or future vision to occur, Aboriginal

peoples must be consulted meaningfully with free, prior informed consent.⁸⁷⁶ In addition, respondents raised that a Treaty cannot be effective without healing the past.⁸⁷⁷

Aboriginal peoples want non-Aboriginal people to have a true reflection of the history of Australia. Respondents stated they want increased education and understanding in the wider Victorian community about Aboriginal Cultural Heritage, with a view to fostering understanding between Aboriginal and non-Aboriginal people.⁸⁷⁸ One respondent stated that wider education and truth-telling will be a step in the right direction for working against the “us and them” mentality.⁸⁷⁹ It was raised that increasing education is essential in fostering acceptance and working together for the maintenance of Aboriginal Cultural Heritage.⁸⁸⁰ Several respondents raised that instead of having so many children learning European languages and cultures in schools, they should be learning Aboriginal languages and the truth of Australia’s past, as well as Aboriginal stories and the importance of Culture and Country.⁸⁸¹

EMBEDDING EDUCATION

A significant amount of Aboriginal peoples spoken to for this report stated that they want to make sure that Aboriginal Cultural Heritage is in the Victorian education curriculum.⁸⁸² This includes educating non-Aboriginal people, starting at a primary school level or even commencing as early as day-care.⁸⁸³ As was raised in section 2.1, many Aboriginal peoples feel a heavy emotional and intellectual burden that they must constantly educate non-Aboriginal people about Australia’s history and Aboriginal Culture.

It is important to acknowledge that Victorian schools and institutions often do incorporate Aboriginal studies, but there is a significant need to ensure that the material delivered is produced in close consultation with Aboriginal people, includes local content and accurately details history (truth telling) rather than glossing over Australia’s colonial legacy.

The vision raised by respondents involves increasing resources and funding of education programs within the curriculum and employing Aboriginal peoples and Aboriginal-led processes to do so. It is anticipated that better education of non-Aboriginal people will bolster the communities understanding of Aboriginal Cultural Heritage,⁸⁸⁴ and help with cultural understanding between Aboriginal and non-Aboriginal people and acceptance of cultural diversity.⁸⁸⁵

HOW TO BUILD AWARENESS AND MEASURE IMPROVEMENTS

In determining how improvements in understanding should be measured, one of the Aboriginal respondents had a very clear answer: “Make [Aboriginal Cultural Heritage] a part of education in every year level. Have a national [holiday] that has the whole of Australia stop to celebrate. Have more Aboriginal faces [in the public], not just on NITV”.⁸⁸⁶

The Discussion Paper responses appeared to focus on practical action and demonstrable change. For example, improved information sharing practices⁸⁸⁷ and legal recognition of Aboriginal ownership and control over Culture, were identified.⁸⁸⁸ Another common response was that all Victorians should recognise Aboriginal Cultural Heritage as part of the heritage of the land that all Victorians live on.⁸⁸⁹ A similar suggestion came from a non-Indigenous organisation. This organisation suggested interpretive signage, Acknowledgement of Country, and celebration of Aboriginal heritage in Australia.⁸⁹⁰ Dual naming of key Aboriginal sites was also recommended.⁸⁹¹ These responses all allude to the need for connection.

One of our respondents referred to community engagement and consultation as a key factor in building Victorian cultural awareness.⁸⁹² This response suggests that establishing ongoing collaborative relationships will improve awareness of the wider community. Best practice consultation requires the establishment of ongoing relationships. Consultation is not a tick-box exercise completed near the end of a project. It is an ongoing process, promoting improved understanding and cultural awareness in the wider Victorian community.

Another comment focused on education and capacity building by the wider community. This respondent argued that organisations must have cultural competency training, and there must be better education of adults and children.⁸⁹³ The respondent commented that with the number of materials now available, ignorance is no longer an excuse.⁸⁹⁴ This comment reflects that there is a responsibility on the part of Victorians to be active in their own self-education, rather than passive in its reception.

Active truth telling was also recommended to improve understanding by the wider community. One of the Aboriginal respondents referred to the importance of truth telling, particularly to young people. Truth telling needs to be direct and frank, and not “sugar coated” or “denialist”.⁸⁹⁵ Truth telling to children, particularly in schools, will mean children are better equipped to connect to Country and understand the stories of the Traditional Owners of the land.⁸⁹⁶

The respondent was referring specifically above to Aboriginal children and their right to grow up in truth. However, the reference to schools also raises the point that all Australian children should be told the truth of Australia's history. This will be key to the understanding by the wider Victorian community. The importance of truth telling is already being acknowledged in the arts, entertainment, GLAM and university sectors. In recent years GLAMs and universities have made a concerted effort at reinterpretation and truth telling in relation to their collections. Truth, and not denial, will engender change.

PART 3 CONCLUSION

We would like to acknowledge and thank all the people and organisations who provided feedback to us on the *Taking Care of Culture* Discussion Paper.

It was their generosity and expertise that allowed us to prepare this whole report, and in particular this model for the future. In short, this report was made possible by Black Excellence.

With this model for the future, we have been guided by the reports to us of how Aboriginal Victorians define and connect with Culture. With that foundational insight, we were able to analyse current policy and legal management actions through an Aboriginal lens to determine the key stressors and enablers. This led us to this model for the future that is essentially a vision for how law, policy and the wider community can work together to uplift the Black Excellence that defines Victorian Aboriginal Cultural Heritage.

“

Victoria is a trailblazer for Aboriginal Cultural Heritage protection, making ground-breaking progress in the recognition of Aboriginal peoples' rights.

”





CONCLUSION

THE STATE OF VICTORIA'S ABORIGINAL CULTURAL HERITAGE

PAVING THE WAY

Victoria is a trailblazer for Aboriginal Cultural Heritage protection, making ground-breaking progress in the recognition of Aboriginal peoples' rights. Notably, Victoria is the first Australian state with a realised Treaty process. It has included Aboriginal languages in the title and preamble of legislation for the first time in Australia. Also, the establishment of the Yoorrook Justice Commission paves the way for independent truth-telling bodies to provide insight into, and recognition of, the history of Aboriginal peoples and the impacts of colonisation on Aboriginal and Torres Strait Islander communities and Australia as a whole.

Victoria is the first Australian state to link Aboriginal Cultural Heritage to Country through the operation of the *Aboriginal Heritage Act 2006* (Vic). The Victorian Government has also made tremendous steps in committing to self-determination of Aboriginal Victorians, with the reporting of a significant increase in progressive programs and initiatives that have driven the empowerment of Aboriginal individuals, communities and organisations in Victoria, and directly and indirectly facilitated early steps towards effective and genuine self-determination. This includes the many positive case studies showcased throughout this report.

Victoria's commitment to providing an investment into Aboriginal affairs reflects increased funding into self-determination and Treaty progression initiatives that empower Aboriginal Victorians in maintaining, practicing, commercialising and protecting their Cultural Heritage.

These are integral steps that represent Victoria's recognition of Aboriginal Cultural Heritage and commitment towards developing their understanding and mechanisms that protect it, with self-determination often at the very core of discussions surrounding Aboriginal Cultural Heritage in Victoria. The commitment to self-determination provides a positive foundation for discussions on Aboriginal issues and empowerment of Aboriginal peoples within Victoria.

HOLISTIC AND UNIFIED APPROACH

More work must be done to ensure culturally safe and Aboriginal-led understanding, practice and protection of Aboriginal Cultural Heritage and self-determination in Victoria. In order to do so, a more holistic and unified approach is required.

This includes promoting a deeper understanding of the facets and interconnections of Aboriginal Cultural Heritage, as defined by Aboriginal peoples. This understanding is not only required of the Victorian government and its departments and agencies, but also by the wider Victorian community. This was a key area raised in the consultations, which emphasised the need for an improved and concerted effort to ensure widespread and culturally respectful understandings of Aboriginal heritage and Culture.

Lack of education and understanding can have dangerous ramifications. Where non-Aboriginal peoples and organisations do not understand the significance of Aboriginal Cultural Heritage, including Country, sites, objects, language and knowledge and the connection Aboriginal Victorians have to their Culture, they are more likely to disregard or damage Culture and Country, or engage in racist behaviour.

Education programs that promote a respectful and true understanding of Aboriginal heritage and Culture must be incorporated into school curriculums and everyday practices to ensure that they are understood and respected by all Victorians. These mechanisms have been abundantly proposed in the consultations to this report, with calls for Aboriginal Cultural Heritage, languages and truth-telling regarding Australia's history to be included in the curriculum. The knowledge of Aboriginal Elders must also be valued by all Victorians.

Victoria must also recognise the interconnection and importance Aboriginal Cultural Heritage holds in relation to Country and waterways, plants and animals, arts and performance, language and songlines, which together provide significant health and wellbeing outcomes for Aboriginal Victorians that are currently being overlooked and under-utilised. These notions of health and wellbeing again must be understood from the holistic and community-based Aboriginal perspective, not from a Western one.

In overcoming this education and understanding impasse, Aboriginal Cultural Heritage should be incorporated into everyday life and practice, particularly with regards to the cultural knowledge of Aboriginal custodians. But this sharing of Aboriginal knowledge must be Aboriginal-led. For instance, Aboriginal fire prevention strategies could be further utilised as a means of primarily delivering a government service, through collaborative partnerships with Traditional Owner organisations. Aboriginal leadership would ensure the integrity of the process and educate Victorians as to the process and its use and origin.

Further, as it stands Victoria's Cultural Heritage management efforts are reactive, in the sense that decisions are made by non-Aboriginal Victorians with often limited understanding and consideration of the Aboriginal issues and cultural and heritage concerns that underlie each decision. Here, Aboriginal peoples must have genuine self-determination and the ability to make decisions affecting them and their Cultural Heritage. This includes ensuring Aboriginal peoples are employed in institutions and agencies that currently make the decisions concerning Aboriginal Cultural Heritage. Aboriginal Cultural Heritage must be Aboriginal-led, with decisions being made by Aboriginal peoples.

Whilst government and agency funding has increased support for RAPs and initiatives targeting self-determination, empowerment and Treaty progression, concerns were raised about appropriate representation of the diverse clans and groups of Aboriginal peoples in Victoria. These concerns were expressed in our consultations with a frequency that indicates that it is currently a significant issue. It is possible that Aboriginal Victorians who felt most isolated from the current representative bodies may not have felt motivated to consult on this report. Further consideration of workable mechanisms for entire community engagement in Aboriginal decision-making should be Aboriginal-led.

There is more to do to ensure the economic empowerment and independence of Aboriginal Victorians. Here, the barriers to funding and the lack of economic independence and control of resources have hindered the progression of the promising investments. Aboriginal organisations seek to have control of sustainable resourcing when exploring and engaging in Cultural Heritage initiatives, projects and programs. Aboriginal organisations, as well as communities and individuals, also seek to foster long-term relationships for the growth of the organisation, community, partnership or industry.

Ultimately, funding and partnerships must support the economic prosperity and empowerment of Aboriginal peoples. This includes safeguarding the right of Aboriginal peoples to use their Cultural Heritage for economic benefit, through mechanisms such as partnerships, Access and Benefit Sharing arrangements and free, prior informed consent and consultation processes. RAPs and Traditional Owner groups throughout Victoria must also be empowered to build infrastructure and resourcing frameworks to provide sustainable growth and opportunity for communities.

Moreover, there are barriers to Aboriginal Cultural Heritage that prevent effective practice and management of Culture in some circumstances. This includes access to Country and sites of cultural significance to Aboriginal communities, and those living away from Country. Connection to Country must be encouraged and supported, particularly for those living in metropolitan areas of Victoria. These barriers are also prevalent within the structure and operation of the AHA, with the minimal consideration of Aboriginal perspectives and Culture within the AHA procedures and CHMP processes.

The AHA and CHMP processes currently do not require appropriate and timely consultation with Aboriginal communities and authorities, with a lack of penalties and enforcement measures significantly impeding its effectiveness. Effective and meaningful consultation must occur with the relevant Aboriginal parties prior to undergoing programs and plans impacting Aboriginal Cultural Heritage, Country and Aboriginal communities. This incorporates the need for free, prior informed consent and effective and ongoing consultation as paramount requirements for these processes. Appropriate penalties must also be put in place to prevent and deter transgressions from the current and emerging Aboriginal Cultural Heritage regime. These penalties should be administered by VAHC, rather than the Department of Premier and Cabinet.

The progress of the whole-of-government Aboriginal Affairs Framework and self-determination goals has been significant. To ensure momentum continues, programs, processes and procedures and the allocation of funding for the support of Aboriginal Victorians must be led and guided by Aboriginal Victorians. Recognition of this from government agencies and the wider Victorian community is necessary. In addition to cultural awareness and safety training, cultural audits of government bodies managing and engaging with Aboriginal Cultural Heritage should be a key accountability measure.

Aboriginal peoples holding decision-making power is essential for the self-determination of Aboriginal peoples. The UNDRIP should continue to be an important guide for recognition of Indigenous rights, and the Yoorrook Justice Commission and Treaty process will also be important for future management of Aboriginal Cultural Heritage.

GOALS AND RECOMMENDATIONS

This report identifies the following recommendations as a means of achieving these outcomes. These recommendations stem from five key goals concerning Aboriginal Cultural Heritage that are crucial in its protection, understanding and recognition:

1. Aboriginal Cultural Heritage has no barriers;
2. Aboriginal Cultural Heritage is holistic;
3. Aboriginal Cultural Heritage is Aboriginal-led and decisions made by Aboriginal people;
4. Aboriginal Cultural Heritage supports economic prosperity;
5. Aboriginal Cultural Heritage is better understood and respected by all Victorians.

The following recommendations are not necessarily new and ground-breaking, with some already existing. However, these recommendations are ongoing and imperative for the maintenance and protection of Aboriginal Cultural Heritage in Victoria and can become the benchmark to be revisited and measured in the next report on the state of Victoria's Aboriginal Cultural Heritage in 2026.

GOALS	RECOMMENDATIONS
1. Aboriginal Cultural Heritage has no barriers	<ul style="list-style-type: none"> • Government management practices, both internal and external, facilitate greater connection and practice of Aboriginal Cultural Heritage; • Practice and engagement with Aboriginal Cultural Heritage is culturally safe and Aboriginal-led; • Engagement with Aboriginal Victorians to strengthen Aboriginal Cultural Heritage registers and encourage practical application and enforcement, and to better reflect Aboriginal community requirements and obligations; • AHA reflects empowerment and self-determination of Aboriginal peoples to their Cultural Heritage, with the <i>Taking Care of our Heritage</i> principles implemented; • Operation of CHMP process reconsidered, moving away from harm minimisation towards a care model, including veto power for Traditional Owners; • Aboriginal-designed best practice protocols for AHA-related projects and developments; • Aboriginal-designed protocols, guidelines and frameworks in industries managing and utilising Aboriginal Cultural Heritage.
2. Aboriginal Cultural Heritage is holistic	<ul style="list-style-type: none"> • Aboriginal Cultural Heritage is defined and recognised through Aboriginal perspectives and ways of knowing; • Definition of “Aboriginal cultural heritage” and “Aboriginal intangible heritage” under the AHA are amended to better reflect its true nature of Aboriginal Cultural Heritage; • Improved understanding of the connection between human rights and Aboriginal Cultural Heritage management; • Recognition that Aboriginal knowledge is connected to all aspects of Aboriginal Cultural Heritage; • Aboriginal health and wellbeing is directly connected to Aboriginal Cultural Heritage, and must be defined and applied through Aboriginal perspectives and understandings; • Measures of Aboriginal wellbeing must be assessed through an Aboriginal definition of health and wellbeing; • Aboriginal cultural practice, including arts, performance, languages, caring for Country and ceremonies, are inherently linked to Victorian Aboriginal identity.
3. Aboriginal Cultural Heritage is Aboriginal-led and decisions made by Aboriginal people	<ul style="list-style-type: none"> • Continued implementation of whole-of-government Aboriginal self-determination framework; • Move to Aboriginal decision-making model for the future management of Aboriginal Cultural Heritage; • Development of <i>sui generis</i> laws for protection of Indigenous Cultural and Intellectual Property (ICIP) enshrining the rights identified in the UNDRIP; • Cultural auditing of government bodies managing Aboriginal Cultural Heritage; • Cultural models which enable revitalisation of practice, passing on of Culture; • Consideration of effective representation of all Victorian clan groups, including in handling of perceived, potential or actual conflicts of interest and in relation to the Treaty process; • Encouragement and emphasis of Aboriginal law and custom within the framework of repatriating Aboriginal Ancestral Remains and cultural objects.

GOALS	RECOMMENDATIONS
4. Aboriginal Cultural Heritage supports economic prosperity	<ul style="list-style-type: none"> • Government funding and partnerships to provide appropriate financial support and capacity building for RAPs and Traditional Owner groups managing protecting and engaging with Aboriginal Cultural Heritage; • RAPs and Traditional Owner groups empowered to build infrastructure and resourcing for sustainable community growth and opportunity; • Statutory functions undertaken by RAPs to be fully funded by Government; • Right of Aboriginal peoples to commercialise Aboriginal Cultural Heritage through Access and Benefit Sharing and free, prior informed consent processes; • Barriers to government funding are reduced, and funding is focused towards fostering long-term growth and economic independence of Aboriginal initiatives, entrepreneurs, organisations and partnerships.
5. Aboriginal Cultural Heritage is better understood and respected by all Victorians	<ul style="list-style-type: none"> • Aboriginal Cultural Heritage and truth-telling incorporated into all Victorian schools and as part of the curriculum; • Wider education and awareness by all Victorians to ensure the better protection of Aboriginal Cultural Heritage; • A good state of Victoria's Aboriginal Cultural Heritage is valued by all peoples – Aboriginal and non-Aboriginal; • Aboriginal and non-Aboriginal people understand and respect Black Excellence.

Whilst the state of Victoria's Aboriginal Cultural Heritage has certainly improved, there is still work to be done to progress to a stage of sufficient, effective and meaningful understanding, recognition and protection of the heritage and Culture of Aboriginal Victorians, and appropriate implementation of genuine self-determination.

The goals and recommendations set out in this report have been developed through consultation and workshops involving both Aboriginal and non-Aboriginal individuals, organisations, institutions and government bodies. These consultations identified the key areas in need of improvement, which have subsequently been targeted for positive action. There is a pressing need to address these areas of concern to ensure the continuing practice of the oldest living Culture in the world.

Without a unified and holistic effort to these goals and recommendations, Aboriginal Cultural Heritage is at risk of harm and exposure to sometimes racist understandings and actions. It is imperative that Aboriginal Victorians are empowered to engage in genuine self-determination concerning issues that affect them and their Culture, as Aboriginal Cultural Heritage cannot be effectively recognised, understood and protected under rigid Western frameworks and understandings that do not account for Aboriginal perspectives and voices.

Therefore, the Victorian Government and the Victorian community **as a whole** must commit to the ongoing advancement of these goals and recommendations in order to achieve the outcomes sought by Aboriginal Victorians state-wide.

ANNEXURE: SURVEY OF RELEVANT LEGAL INSTRUMENTS

INDEX

The legal instruments listed below are those that are relevant to the issue of Aboriginal Cultural Heritage, however not all of these instruments are directly referred to in the Report.

<i>International Union for Conservation of Nature (IUCN)</i>
<i>UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972</i>
<i>UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003</i>
<i>UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970</i>
<i>UNESCO Convention on the Protection of Underwater Cultural Heritage, 2001</i>
<i>United Nations Convention on Biological Diversity, 1992</i>
<i>United Nations Declaration on the Rights of Indigenous Peoples, 2007</i>
<i>United Nations Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention of Biological Diversity, 2010</i>
<i>United Nations International Covenant on Economic, Social and Cultural Rights</i>
<i>Aboriginal and Torres Strait Islander Act 2005 (Cth)</i>
<i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)</i>
<i>Australia State of the Environment 2016 Report</i>
<i>Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act)</i>
<i>National Heritage List</i>
<i>National Museum of Australia Act 1980 (Cth) and Archives Act 1983 (Cth)</i>
<i>Native Title Act 1993 (Cth)</i>
<i>Protection of Moveable Cultural Heritage Act 1986 (Cth)</i>
<i>The Burra Charter, The Australia ICOMOS Charter for Places of Cultural Significance</i>
<i>Uluru Statement from the Heart</i>
<i>Underwater Cultural Heritage Act 2018 (Cth)</i>
<i>Charter of Human Rights and responsibilities 2006 (Vic)</i>
<i>Aboriginal Heritage Act 2006 (Vic)</i>
<i>Aboriginal Lands Act 1970 (Vic)</i>
<i>Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic)</i>
<i>Museums Act 1983 (Vic)</i>
<i>Public Records Act 1973 (Vic)</i>
<i>The Value of Heritage: Summary Report, January 2018</i>
<i>Traditional Owner Settlement Act 2010 (Vic)</i>
<i>Victorian Aboriginal Heritage Register</i>
<i>Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017 (Vic)</i>

INTERNATIONAL INSTRUMENTS

INTERNATIONAL UNION FOR CONSERVATION OF NATURE (IUCN)

The International Union for Conservation of Nature, established in 1948, is a democratic union aimed at conserving nature and advancing the transition to sustainable development. The Union is comprised of roughly 211 states and government agencies, along with over 1,200 NGOs and Indigenous peoples' organisations forming part of the network.

The Union is the global authority on the status of the natural world and the measures needed to safeguard it. Its experts are organised into six Commissions dedicated to species survival, environmental law, protected areas, social and economic policy, ecosystem management, and education and communication. The key functions of the Union are data gathering and analysis, research, field projects, advocacy, and education.

The Union has observer and consultative status at the United Nations and plays a role in the implementation of several international conventions on nature conservation and biodiversity. In terms of governance, the World Conservation Congress is the Union's highest decision-making body, convening every four years.

UNESCO CONVENTION CONCERNING THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE, 1972

The World Heritage Convention came into force in 1975. Australia became one of the first countries to ratify the Convention, having done so in August 1974. The Convention recognises the interactions between people and nature, and the fundamental need to preserve the balance between the two, aimed at promoting international cooperation to protect heritage that is of such outstanding universal value that its conservation is crucial for current and future generations.

The Convention covers the duties of State parties surround the identification of potential heritage sites and their role in protecting and preserving them. Each State signing the Convention pledges to conserve not only the World Heritage sites situated on its territory, but also to protect its national heritage. This is largely accomplished through the World

Heritage List, which is a key mechanism implemented through the Convention. Inscription of a site on the World Heritage List not only brings an increase in public awareness of the site and of its outstanding values which in turn facilitate its protection and preservation, but also boosts the economy by increasing the tourist activities at the site. The Convention defines the kind of natural or cultural sites which can be considered for inscription on the World Heritage List.

Additionally, the Convention imposes reporting requirements on each State party. Here, State parties must report to the World Heritage Committee on the state of conservation of their World Heritage properties. These reports are imperative as they allow the Committee to assess the conditions of the sites, decide on specific programme needs and resolve recurrent problems.

The Convention gained significant support from its signatories as a result of the benefits of ratification. A key benefit provided by the Convention is access to the World Heritage Fund, which enables financial assistance in protecting and preserving heritage sites. The Convention provides the details of the use and management of the Fund, along with the conditions in which international financial assistance may be provided. Generally, US\$4 million is made available to assist States Parties in identifying, preserving and promoting World Heritage sites. Further, emergency assistance is also made available for urgent action necessary to repair damage caused by human-made or natural disaster.

UNESCO CONVENTION FOR THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE, 2003

Adopted in 2003 as an instrument of the UNESCO, the Convention for the Safeguarding of the Intangible Cultural Heritage came into force in 2006. As of November 2019, roughly 178 States have signed on. Australia has not yet signed on to the Convention, and consequently is not a State party.

This Convention was developed to recognise the importance of, and subsequently protect, cultural sites and practices that comprise intangible Cultural Heritage worldwide. The stated purposes of the Convention are to safeguard intangible Cultural Heritage globally, to ensure respect for the intangible Cultural Heritage of the communities, groups and individuals concerned, and to raise awareness of the importance of intangible Cultural Heritage and

to ensure its mutual appreciation. A big emphasis of the Convention has been facilitating the provision of international cooperation and assistance on efforts to achieve these purposes.

The Convention defines such intangible Cultural Heritage as “the practices, representations, expressions, knowledge, and skills, as well as the instruments, objects, artifacts and cultural spaces associated therewith, that communities, groups and, in some cases, individuals recognize as part of their Cultural Heritage”.

The Convention works on both national and international levels, requiring that State parties at a national level take necessary measures to ensure the safeguarding of the intangible Cultural Heritage present in its territory. These measures include identification of the intangible Cultural Heritage that exists in its territory, adoption of appropriate policies, and the promotion of education. The Convention also encourage State parties to ensure the participation of communities, groups, and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.

At an international level, the Convention promotes and facilitates international cooperation, including the exchange of information and experience and establishment of mechanisms of assistance between State Parties.

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970.

This Convention is an international treaty entered into force in April 1972. Australia is a party to the Convention. The Convention seeks to combat the illegal trading of cultural property, encouraging State parties to take appropriate measures to prohibit and prevent the illicit trafficking of cultural property. The Convention is largely centred on prevention.

The Convention provides the State parties with a common framework including the necessary measures required to prohibit and prevent the import, export and transfer of cultural property. Further, through Articles 7(b)(iii) and 13(b) the Convention facilitates the repatriation of illicitly traded cultural property.

The Convention also encourages the strengthening of international cooperation between State parties, with Article 9 providing that State parties must “undertake to participate in a concerted international effort to determine and to carry out the necessary concrete measures” where concerns among affected State parties arise.

Effectively, the Convention imposes on State parties the need to adopt protection measures within their territories to prohibit and prevent illicit movement of cultural property, as well as control the movement of cultural property and where necessary return stolen property.

Article 16 of the Convention also creates an obligation on State parties to submit to UNESCO reports on the legislative and administrative provisions that they have adopted and any other measures taken to implement the Convention.

UNESCO CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE, 2001

The *UNESCO Convention on the Protection of Underwater Cultural Heritage* is aimed at enabling improved protection of the submerged Cultural Heritage of each nation State, providing widely recognised practical rules for the treatment and research of underwater Cultural Heritage. Australia has ratified the Convention, in turn leading to the enacting of the *Underwater Cultural Heritage Act 2018* (Cth).

The Convention was created to protect underwater Cultural Heritage, which is defined as all traces of human existence which have cultural, historical or archaeological character that lie or have lain underwater, including an estimated three million shipwrecks. The preservation of such underwater Cultural Heritage has been deemed significant as it serves a greater purpose in allowing for the retelling of numerous historical events.

The Convention sets out the basic principles for the protection of underwater Cultural Heritage and facilitates a detailed cooperation system between State parties reliant on information sharing. Further, the Convention also provides recognised rules and standards for the treatment and research of underwater Cultural Heritage, including the established preference for on-site preservation.

Ultimately, the Convention creates an obligation on State parties to preserve underwater Cultural Heritage, by taking the necessary actions and preventing the commercial exploitation of such heritage for trade or speculation.

UNITED NATIONS CONVENTION ON BIOLOGICAL DIVERSITY, 1992

The Convention on Biological Diversity was entered into force on 29 December 1993. Australia is a party to the Convention, ratifying it on 18 June 1993. The Convention emerged through the Rio Earth Summit held in 1992, and is a legally binding treaty aimed at conserving biological diversity, ensuring the sustainable use of its components and facilitating the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.

The Convention is the key document concerning environmental and biological sustainability, defining biological resources as “genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity”. This definition is commonly used and adapted in national legislation and initiatives concerning the subject area.

The implementation and advancement of the Convention is governed by the Conference of the Parties, which undertakes periodic meeting to decide courses of action and strategy. The Conference of the Parties sets targets for biological preservation, pursuant to the Convention, for the State parties to strive to achieve.

The Convention is a ground-breaking mechanism in the area of biological sustainability and preservation, paving the way for other instruments both domestic and international, including the *Nagoya Protocol* concerning access and benefit sharing.

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 2007

Adopted by the United Nations General Assembly in September 2007, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) has been described as the most comprehensive international instrument on the rights of Indigenous peoples (United Nations Department of Economic and Social Affairs, Indigenous Peoples [A/RES/61/295]). UNDRIP is legally non-binding, however the Australian government announced its support in 2009.

Indigenous peoples were directly involved in the drafting of this instrument, which has been created and implemented to address both individual and collective rights and outlaw discrimination against Indigenous peoples. The UNDRIP also promotes the full and effective participation of Indigenous persons in all

matters that concern them through the process of self-determination.

UNDRIP establishes a framework of minimum standards for the survival, maintenance and well-being of Indigenous peoples globally, with most articles in UNDRIP providing aspirations for how the rights of Indigenous peoples should be promoted and protected.

For instance, Articles 23 and 46 of UNDRIP are examples of articles that set out how States should interact with the declaration. Most of the articles attempt to lead to States working in conjunction with Indigenous peoples. UNDRIP also provides suggested measures that have somewhat been implemented by member States, such as the returning of land under Article 26, and the repatriation of ceremonial objects and human remains under Article 12.

Ultimately, UNDRIP is aimed at protecting and upholding the rights of Indigenous individuals and peoples world-wide, emphatically advocating for the facilitation of self-determination practices in its member States.

UNITED NATIONS NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILIZATION TO THE CONVENTION OF BIOLOGICAL DIVERSITY, 2010

The Nagoya Protocol is an international agreement entered into force in October 2014. The Nagoya Protocol is a supplementary agreement of the *Convention on Biological Diversity*, implementing the access and benefit sharing obligations that it created. Australia is not currently a party to the *Nagoya Protocol*, however Australia's existing domestic measures are consistent with the Protocol.

Given the increasing value of biological resources and the benefits in which they convey, the fair and equitable sharing of these benefits is a priority for biodiversity-rich countries, such as Australia, and the international community. This idea benefit-sharing also contributes to the conservation and sustainable use of biodiversity.

The *Nagoya Protocol* establishes a framework that assists researchers in accessing genetic resources for research, development and other activities, in exchange for a fair share of any benefits arising from their use. This framework is highly significant in Australia in terms of the use of traditional knowledge of Indigenous peoples pertaining to biological

resources, particularly in terms of bush foods and medicines. Here, Indigenous and local communities may receive benefits through a legal framework that respects the value of traditional knowledge associated with genetic resources.

Australia has both national legislation, being the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and its associated regulations, and state and territory legislation in place consistent with the obligations under the *Nagoya Protocol*.

Ultimately, the *Nagoya Protocol* seeks to establish greater legal certainty and transparency for both providers and users of genetic resources by ensuring more consistent and predictable conditions for access to genetic resources, and helping to ensure benefit-sharing for the use of genetic resources.

UNITED NATIONS INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) is an international treaty which entered into force in 1976. ICESCR sets out basic economic, social and cultural rights that are required to live a life of self-determination and dignity.⁸⁹⁷

ICESCR works in conjunction with the *International Covenant on Civil and Political Rights* (ICCPR), with both Covenants together upholding the universal human rights values established in the United Nations Declaration of Human Rights.

While the ICCPR sets the standards for civil and political rights, ICESCR governs the economic, social and cultural rights portion, through setting international standards on workers' rights,⁸⁹⁸ education rights,⁸⁹⁹ and rights surrounding the attainment of health,⁹⁰⁰ and cultural rights.⁹⁰¹ Australia ratified ICESCR in 1976, the same year ICESCR came into force. By ratifying ICESCR, Australia voluntarily accepts the legal obligations under international law that are set out in the treaty.

Relevantly, Article 15 ICESCR recognises the rights of everyone to take part in cultural life, and requires steps to be taken by the State to achieve the full realisation of this right.⁹⁰² ICESCR is seen to be generally implemented domestically through Australia's existing legislation. One example of this is through the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) which came into force in 2012, requiring

that all legislation introduced into the Australian Parliament is accompanied by a statement setting out its consistency with Australia's obligations under the seven core United Nations human rights treaties it has signed.⁹⁰³ There is extensive and ongoing legal debate as to the efficacy of human rights protection through this mechanism. Notably, UNDRIP is not one of the instruments listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*.⁹⁰⁴

AUSTRALIAN LEGISLATION AND RELATED REPORTS AND GUIDELINES

ABORIGINAL AND TORRES STRAIT ISLANDER ACT 2005 (CTH)

The *Aboriginal and Torres Strait Islander Act 2005* (Cth) is aimed at facilitating self-government and self-sufficiency of Aboriginal and Torres Strait Islander peoples, along with the economic and cultural development and use of lands by Indigenous peoples Australia-wide. Therein, the Act established the Torres Strait Regional Authority (TSRA), an Indigenous Land and Sea Corporation and Indigenous Business Australia.

The TSRA is the leading Commonwealth representative body for Torres Strait Islander and Aboriginal peoples living in the Torres Strait, tasked with formulating and implementing programs and in particular a plan to guide the progress of the Torres Strait region. The functions of the TSRA are outlined in Section 142A of the Act, and include, among other things, advisory, oversight and policy roles. These functions must be carried out in accordance with the seemingly far-reaching powers of the TSRA set out in Section 142C of the Act.

The Act created the Indigenous Land and Sea Corporation, altering the then Indigenous Land Corporation, to assist Aboriginal and Torres Strait Islander peoples in acquiring and managing land and water-related rights and interests. Part 4 of the Act also establishes Indigenous Business Australia as a body corporate aimed at promoting and encouraging self-management, self-sufficiency and economic independence for Aboriginal and Torres Strait Islander peoples, as well as engaging in commercial activities.

ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1984 (CTH)

This Act is aimed at preserving areas and objects in Australia and Australian waters, being areas and objects of particular significance to Aboriginal and Torres Strait Islander peoples in accordance with tradition and custom, and protecting such areas and objects from injury or desecration. The Act was designed to intervene where state and territory laws cannot or do not provide effective protection of such heritage. As such, the Act allows the Environment Minister, on the application of an Aboriginal or Torres Strait Islander person or group of persons, to make a declaration for an area, object or class of objects to be protected from threats of injury or desecration. In this sense, the Act enables Commonwealth intervention as a last resort for heritage protection where state or territory protections are unsuccessful.

An area or object can be considered injured or desecrated if it is or has been used or treated in a manner inconsistent with Aboriginal or Torres Strait Islander traditions or customs. The threat of such injury or desecration must be specific. The Act and its provisions somewhat overlap with other state and commonwealth heritage legislation, but create an effective response to historically inadequate mechanisms for protection. However, the Act overrides state and territory laws in situations where a state or territory has approved an activity, but the Minister prevents the activity from occurring by making a declaration to protect an area or object.

AUSTRALIA STATE OF THE ENVIRONMENT 2016 REPORT

The Australia State of the Environment 2016 Report is an independent comprehensive assessment of the state of the Australian environment. The Report builds on the internationally accepted approaches for reporting on the environment in structuring its assessments, including the breaking down of the drivers and pressures on environmental degradation and change. The 2016 Report identifies the key drivers of environmental change as population growth and economic activity, the extent to which they lead to environmental impact being reliant on a range of specified factors. The key challenges to the effective management of the Australian environment are also included in the Report, alongside key recommendations aimed at addressing these challenges.

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH) (EPBC ACT)

The EPBC Act provides the Australian Government's legal framework for protecting and managing nationally and internationally important matters of environmental significance, ecological communities and heritage places. Importantly, the EPBC Act recognises the role of Aboriginal and Torres Strait Islander peoples in the conservation and ecologically sustainable use of biodiversity and promotion of Aboriginal and Torres Strait Islander knowledge of biodiversity in cooperation with the traditional knowledge-holders.

The EPBC Act lays the foundation for access and benefit sharing in conjunction with international instruments such as the *Convention on Biological Diversity* and the subsequent Nagoya Protocol. As a result, where access to biodiversity resources on Crown land is required for commercial or potentially commercial purposes, the parties seeking access must enter into a benefit-sharing agreement with the access provider. The EPBC Regulations provide the requirements for the substance of such benefit-sharing agreements. In particular, such agreements must provide for:

- A statement of any use of Aboriginal or Torres Strait Islander knowledge;
- Details of the source of that knowledge;
- Evidence of agreements to use the knowledge (with the access provider, but also with other Aboriginal and Torres Strait Islander groups, where other groups are involved); and
- A statement of the benefits in return for the use of the knowledge.

The access and benefit sharing provisions of the EPBC Act and Regulations protect ICIP only where:

- Biological resources to be accessed are in a Commonwealth-owned area;
- The access sought is for commercial purposes; and
- There is Aboriginal or Torres Strait Islander knowledge associated with the access and use of the biological resources.

Where the land is Aboriginal or Torres Strait Islander people's land and the access provider is the owner or native title holder of that land, that land owner must give informed consent to the benefit sharing agreement. Though the EPBC Act and Regulations list certain criteria for the Minister to determine whether 'informed consent' has been given, they do not provide any guidance to conducting consultation and obtaining consent from knowledge holders.

In addition to the provisions in the EPBC Act and Regulations on access and benefit sharing, the EPBC Act also has certain protections for tangible heritage, establishing the World Heritage List, the National Heritage List, and the Commonwealth Heritage List.

NATIONAL HERITAGE LIST

Established under the EPBC Act, the National Heritage list documents the natural, historic and Indigenous places of outstanding significance to Australia. After being assessed against the specified criteria, once a place is put on the National Heritage List the provisions of the EPBC Act apply. This means that the listed entrants on the List are subject to the protection provided by the EPBC. The aforementioned criteria and assessment are implemented and undertaken by the Australian Heritage Council. The criteria itself are set out in the EPBC Act.

NATIONAL MUSEUM OF AUSTRALIA ACT 1980 (CTH) AND ARCHIVES ACT 1983 (CTH)

The *National Museum of Australia Act 1980* (Cth) is the key enactment defining the broad functions and activities of the National Museum of Australia. Per the Museum's administration, the Act establishes the Museum as a Commonwealth Statutory Authority, defining its role, functions and powers in conjunction with the *National Museum of Australia Regulations 2019*. In particular, section 6 of the Act sets out the Museum's functions as being, among other things, to develop and maintain a collection of historical material, exhibit such material, conduct necessary research and disseminate information.

The *Archives Act 1983* (Cth) is the paramount enactment governing access to Commonwealth archival records, establishing the National Archives of Australia and providing for the preservation of the archival resources of the Commonwealth. The Act allows for most Commonwealth records to be accessed in the open access period, that is, it provides the public generally with a right of access to most Commonwealth records that are more than 30 years old. The Act does, however, provide exemptions to open access, typically around personal information, court and other records, and information around the security of the Commonwealth and its residents.

NATIVE TITLE ACT 1993 (CTH)

The Native Title Act codified the *Mabo v Queensland* decision, ultimately recognising the existence of native title in Australia. The Act protects pre-existing Aboriginal and Torres Strait Islander rights and interests in lands and water according to traditional laws and customs, aimed at providing a federal system for recognising and protecting native title and enabling co-existence with the national land management system.

The Act establishes a process for claiming and recognising native title lands and waters in Australia, providing specific native title rights to traditional custodians as provided by the acknowledgement and observance of traditional laws and customs respectively. Common native title rights include the right to:

- Maintain and protect sites;
- Use the land for hunting and ceremony;
- Camp and live on the land;
- Share in money from any development on the land; and
- Have a say in the management or development of the land.

The Act also established the Aboriginal and Torres Strait Islander Land Fund to assist Aboriginal and Torres Strait Islander peoples in buying and maintaining land. The Act provides for the establishment of a Prescribed Body Corporate (PBC) by native title holders, where native title determinations are made, in order to manage and protect their rights and interests. These PBCs must be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). A native title group can either create a new PBC or nominate an existing Aboriginal or Torres Strait Islander corporation to manage their native title interests. All PBCs must be registered with the National Native Title Tribunal.

PROTECTION OF MOVEABLE CULTURAL HERITAGE ACT 1986 (CTH)

This enactment regulates the exportation of moveable cultural property to ensure the maintenance and safeguarding of items of cultural significance to Australia. However, the Act only applies to Aboriginal and Torres Strait Islander cultural artefacts to the

extent that they are not adequately represented in Aboriginal and Torres Strait Islander community collections or public collections in Australia. This somewhat undermines the level of protection of Indigenous heritage afforded by the Act.

Nonetheless, the Act provides two lists in relation to protected objects, being the Natural Heritage Control List and the Prohibited Exports Register. The Natural Heritage Control List provides for the protection of two classes of cultural objects. Class A cultural objects are expressly prohibited from being exported, expressly including Aboriginal and Torres Strait Islander objects such as Sacred and/or Secret ritual objects, bark and log coffins used as traditional burial objects, human remains, rock art and carved trees. Class B cultural objects require permission to be exported, recognising Aboriginal and Torres Strait Islander objects as a category of heritage material protected under the Act. Additionally, the Prohibited Exports Register contains a record of the cultural objects that have been denied export out of Australia.

There are limits to the protection afforded by the Act. Here, protection only extends to Aboriginal and Torres Strait Islander cultural objects that are:

- Of importance to, or relating to members of Aboriginal and/or Torres Strait communities;
- Not created specifically for sale;
- At least 30 years old; and
- Not adequately represented in Aboriginal or Torres Strait Islander community collections or public collections in Australia.

Therefore, the provisions and operation of the Act imply that Aboriginal and Torres Strait Islanders which are 'adequately represented' in Australian collections are not subject to protection under the Act.

THE BURRA CHARTER, THE AUSTRALIA ICOMOS CHARTER FOR PLACES OF CULTURAL SIGNIFICANCE

The Australia International Council on Monuments and Sites Charter for the Conservation of Places of Cultural Significance, known as the Burra Charter, was first adopted at Burra, South Australia, in 1979. The Burra Charter is a set of principles adopted to create a nationally accepted standard for heritage conservation practice in Australia.

The Burra Charter is periodically reviewed and updated to reflect the developing understanding of the theory and practice of Cultural Heritage management. The most recent update took place in 2013.

The Burra Charter defines the fundamental principles and procedures that should be followed in conservation activities on heritage sites and places, that can be applied to monuments, buildings, gardens, shell middens, rock art sites, archaeological sites, or whole regions. These principles are often referred to as the Burra Charter process, outlining the steps to be taken in planning for and managing a place of cultural significance. There are several steps in this process, the first being to understand the place and its cultural significance before commencing decision-making.

The Burra Charter is centred upon guiding and ensuring the ongoing effective and responsible conservation and management of places of cultural significance, and is based on the knowledge and experience of Australia ICOMOS members. The Burra Charter defines a standard of practice for those seeking to provide advice, make decisions about, or undertake works on places of cultural significance, including owners, managers and custodians.

ULURU STATEMENT FROM THE HEART

The Uluru Statement from the Heart, issued in May 2017, is a document created through extensive consultation with over 1,200 Indigenous Australians nation-wide that calls for structural reform, including constitutional change. The document expresses the sovereignty of Aboriginal peoples, and how their sovereignty can be recognised and supported in Australia. The Statement emphasises the need for reform in order to ensure that Aboriginal and Torres Strait Islander peoples have a greater say in, and authority over, decisions and actions that affect them.

The Statement calls for a constitutionally enshrined First Nations Voice to Parliament and a Makarrata Commission to supervise a process of agreement-making with Australian Governments and truth-telling regarding Australia's history. A constitutionally enshrined First Nations Voice seeks to empower First Nations politically, establishing a permanent institution for expressing Indigenous views to the Parliament and Governments on key issues affecting First Nations peoples.

UNDERWATER CULTURAL HERITAGE ACT 2018 (CTH)

Generally, the *Underwater Cultural Heritage Act* ensures the protection of Australia's shipwrecks, sunken aircraft and other types of underwater Cultural Heritage, ratifying Australia's obligations under the UNESCO *Convention on the Protection of the Underwater Cultural Heritage*. The Act sets out the jurisdictional arrangements for protecting and managing Australia's underwater Cultural Heritage.

This Act is significant for the protection of Cultural Heritage as it broadens the protection available under the enactment to other types of underwater Cultural Heritage not commonly associated with the prior legislative framework, and allows underwater Cultural Heritage of significance to Australia, including Aboriginal and Torres Strait Islander peoples specifically, to be declared protected outside Australian Waters. Before being declared protected, such heritage must be located and assessed for heritage significance, with declaration generally occurring on an individual basis.

As part of this scheme, the Federal Government has responsibility for the identification, protection, management, conservation and interpretation of all underwater Cultural Heritage outside of state and Northern Territory coastal waters and to the edge of the continental shelf. The states and Territories retain their responsibility for all underwater Cultural Heritage (except shipwrecks) within states coastal waters and within the limits of the state.

VICTORIAN LEGISLATION

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES 2006 (VIC)

The *Charter of Human Rights and Responsibilities 2006* (Vic) (**the Charter**) sets out the basic standards for human rights, freedoms and responsibilities of all people in Victoria.⁹⁰⁵ The Charter was passed just after the ACT passed the *Human Rights Act 2004* (ACT) and Queensland has since passed the *Human Rights Act 2019* (Qld). The Charter requires public authorities to comply with the human rights in the Charter, including the right to recognition and equality before the law,⁹⁰⁶ the right to freedom from forced work,⁹⁰⁷

cultural rights,⁹⁰⁸ and property rights.⁹⁰⁹ The Charter protects these rights by requiring that new legislation introduced in Parliament has a compatibility statement stating the extent to which the proposed legislation complies with the Charter, or the reasons for non-compliance.⁹¹⁰ In addition, Court and Tribunals in Victoria must interpret and apply laws compatibly with the Charter.

ABORIGINAL HERITAGE ACT 2006 (VIC)

The *Aboriginal Heritage Act 2006* (Vic) came into force in 2007 and has since been the subject of various amendments, notably in 2016. The 2016 amendments to the Act included pioneering legislation for protection of Aboriginal intangible Cultural Heritage within Australia. This action has been the catalyst for discussion and the consideration of change Australia-wide.

The Act seeks to protect Aboriginal Cultural Heritage in Victoria, facilitating a cooperative approach allowing various groups and organisations to connect and better implement and maintain heritage policies. In particular, the Act established the Victorian Aboriginal Heritage Council, which is a statutory authority created to empower Traditional Owners to manage Country and Cultural Heritage at a local level.

The Act also introduced the Cultural Heritage management plans and Cultural Heritage Permits systems to manage activities that may impact Aboriginal Cultural Heritage, as well as increased penalties and stop orders, particularly around commercial use of registered heritage without permission, to ensure the protection of intangible heritage. Definitions within the Act were also expanded by the amendment and terms were closely aligned with Aboriginal concepts and understandings.

Further protection is also offered for Secret and/or Sacred information, with the Secretary to the Department of Premier and Cabinet able to, upon the recommendation of the Aboriginal Heritage Council or a registered Aboriginal party, categorise certain information on the Register as sensitive Aboriginal heritage information. The Secretary must then prevent any access to the sensitive information without the written approval of the relevant registered party or Council.

ABORIGINAL LANDS ACT 1970 (VIC)

This legislation was introduced in response to the Lake Tyers and Framlingham Aboriginal communities' struggle for land rights. The Act, administered by the Minister for Aboriginal Affairs and First Peoples-State Relations, granted freehold title over the two former mission sites to the residents of the respective communities. The members of the communities present at the date stipulated were recorded as members of either the Framlingham or Lake Tyers Aboriginal Trusts and were subsequently allocated shares.

Essentially, this Act enabled the community members to attend and vote at meetings of the Trusts, and receive dividends from profits gained from economic activity on the Trust. The Act itself does not mention much about the residents, instead providing the Trusts' main service in the form of monitoring and maintaining housing for the residents. Ultimately, the Act was the first enactment to recognise Aboriginal people's entitlement to land in Victoria.

This Act has been independently reviewed after the Victorian Government published a Discussion Paper in 2017. The objects of this review were to support improved governance and to advance self-determination for the Aboriginal owners of the Lake Tyers and Framlingham Aboriginal communities. An options paper was presented by the reviewers in 2019 detailing the options for amending the Act.

ADVANCING THE TREATY PROCESS WITH ABORIGINAL VICTORIANS ACT 2018 (VIC)

This enactment is Australia's first ever treaty law. Ultimately, the Act sets out a roadmap towards treaty negotiations, with the Victorian Government not only recognising that the Aboriginal peoples of Victoria never ceded sovereignty, but also that treaties are necessary to address past wrongdoings. As such, the Act is highly significant, not only in this light, but also in respect of its advancing and laying of the foundation necessary to support future treaty negotiations between Aboriginal Victorians and the state.

The Act establishes an Aboriginal Representative Body to act as the sole representative of Aboriginal Victorians, as recognised by the state, requiring that the Body and the state cooperate in establishing elements necessary to support future treaty negotiations and establishing an independent Treaty Authority by agreement. This Treaty Authority, once established, is tasked with facilitating and overseeing

and administering treaty negotiations, resolving disputes arising from such negotiations and carrying out all necessary research.

The Act also sets out the guiding principles for the treaty process and the framework for treaty negotiation. In addition, a Victorian Treaty Advancement Commissioner has been appointed under the Act, along with a self-determination fund aimed at providing Aboriginal Victorians with an independent financial resource to support equal standing with the state in negotiations.

MUSEUMS ACT 1983 (VIC)

The *Museums Act 1983* (Vic) established, among other things, Museum Victoria and the Museums Board of Victoria. The Act sets out the process for which Museums in Victoria must respond to requests for the return of Ancestral Remains which form part of Museum Victoria's collection prior to the commencement of the *Aboriginal Heritage Act 2006* (Vic), and indirectly provide standards for maintaining and managing holdings of Aboriginal Cultural Heritage in the museum.

PUBLIC RECORDS ACT 1973 (VIC)

The *Public Records Act 1973* (Vic) established the Public Record Office of Victoria, introduced as the state archival authority. In doing so, the Act sets out the particular requirements for the effective management of public records, and provides the governing framework for the Public Record Office. The Act also provides for the preservation, management and utilisation of Victoria's public records, whilst also limiting access to certain records. Here, the Act provides that public records containing 'personal or private' material may be closed to public inspection for a certain period. This is especially significant for records relating to children and young people, and adapted to sacred or private Aboriginal heritage material.

THE VALUE OF HERITAGE: SUMMARY REPORT, JANUARY 2018

The Value of Heritage Summary Report, prepared by SGS Economics and Planning for the Department of Environment, Land, Water and Planning in 2017,

was created to provide an insight into the significance and ultimately the benefits of the heritage places and objects around Victoria. These benefits are broken down into economic, social and environmental benefits for Victorians. These benefits are said to promote the value of conserving and interpreting heritage to governments, businesses and communities, and provide an important platform for the facilitation and development of businesses seeking investment in Victoria's Cultural Heritage places and objects.

This project is the result of the need for updated research stemming from the report *Valuing the priceless: the value of historic heritage in Australia*, produced by the Allen Consulting Group in 2005. This report also provides a tool to enable the practical valuation of specific heritage assets in order to ensure continued credibility when demonstrating why Victoria's heritage is important to the economic growth of Victoria, the social capital of communities and the state's environmental sustainability objectives.

TRADITIONAL OWNER SETTLEMENT ACT 2010 (VIC)

The *Traditional Owners Settlement Act* was implemented to provide an alternative system for Traditional Owner groups to resolve native title claims in Victoria outside of Court. The Act was introduced as a comprehensive process for non-litigated claims to provide alternatives to native title that Traditional Owners can utilise to attain rights to country and settle lengthy and expensive claims. As a result of this Act, the Victorian Government can recognise rights in Crown land, such as recognition of country, funding, and use and management of natural resources.

This Act is significant because it recognises self-determination and partnerships as fundamental to its implementation and operation. Further, this Act eases the filling and backlog of Courts as, in return for the recognition and protection of the aforementioned rights through entering settlement, the Act requires that Traditional Owners withdraw any native title claim that they have lodged under the *Native Title Act 1993* (Cth), as well as refrain from making any further native title claims.

Under the Act, a settlement package can include a variety of agreements to recognise traditional owners' rights over Crown land, including allowing traditional owners to comment on or consent to certain activities on public land and to provide input into the management of land and natural resources.

These Recognition and Settlement Agreements established under the Act are attractive alternatives to pursuing native title claims as they are an expedited and cost-effective approach to settling such claims by negotiation, and incorporates contemporary outcomes in favour of Aboriginal peoples to ensure access to land and increase economic and social opportunities in Victoria.

VICTORIAN ABORIGINAL HERITAGE REGISTER

The Department of Premier and Cabinet is required to maintain the Register under the *Aboriginal Heritage Act 2006* (Vic), and so far over 39,000 Aboriginal objects and places have been recorded.

First Peoples-State Relations (formerly Aboriginal Victoria), within DPC, maintains the Register as a central repository of Aboriginal heritage information. This is a closed register recording details about the particular Aboriginal places, objects, and knowledge. Aside from waterways, most information is not publicly accessible due to the cultural sensitivity of information.

The Aboriginal Heritage Register can only be accessed by those specified in the Act who need detailed information on Cultural Heritage places and objects. The Secretary must not allow any person who is not permitted to access the register without the permission of the relevant RAP, or Council.

Along with storing information and details of heritage, the Register also holds Cultural Heritage Permits, Cultural Heritage Management Plans and Aboriginal Heritage Protection Declarations.

YARRA RIVER PROTECTION (WILIP-GIN BIRRARUNG MURRON) ACT 2017 (VIC)

The *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) is a landmark piece of legislation, being the first legislative enactment in Australia to be co-titled in a Traditional Owner's language, translating to 'keep the Birrarung alive' in Woi-wurrung, the traditional language of the Wurundjeri Woi-wurrung people. The Act is also an Australian first in legally identifying a large river and its corridor, which transverses many boundaries, as a single living and integrated natural entity for protection.

The Act is centred around protecting the Yarra River, stipulating the development of a long-term Community Vision and the Yarra Strategic Plan. With regards to the Yarra Strategic Plan, the Wurundjeri Woi-wurrung peoples place based water policy responses to the Act are incorporated to provide an additional platform for the voice of the Aboriginal custodians. The Draft Yarra Strategic Plan was released for public comment in January 2020, and was introduced as a guide for future land use and development along the river.

Further, the Act also establishes the Birrarung Council as a statutory body being the first independent voice of the Yarra River. The Council provides independent advice to the Victorian Government on the implementation of the Act. Traditional Owners have a permanent voice through the Act's requirement that at least two members of the Birrarung Council must be nominated from the Wurundjeri Woi-wurrung Cultural Heritage Aboriginal Corporation.

The Act prescribes the development of the Yarra River 50 Year Community Vision, which was launched in May 2018, as the first of its kind for an urban waterway in Australia. It articulates the community's expectations for the entire length of the river and provides the foundation from which the overarching strategic framework to protect the waterway, the Yarra Strategic Plan, was developed. There was extensive engagement and consultation with the community as part of this Vision, with over 2000 Victorians engaged to inform its development from the period of August 2017 to May 2018.





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Aboriginal peoples holding
decision-making power is essential
for the self-determination of
Aboriginal peoples

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GLOSSARY OF TERMS

The following are terms and acronyms commonly used by the Victorian Aboriginal Heritage Council and in this Report.

TERMS	MEANING
Aboriginal	In this Report, refers to both Australian Aboriginal and Torres Strait Islander peoples and is reflective of the terminology used by the VAHC and the Victorian Government. In this Report, Aboriginal also refers to First Nations peoples, First Peoples and Indigenous peoples.
Aboriginal Cultural Heritage	<p>Aboriginal Cultural Heritage refers to the knowledge and lore, practices and peoples, objects and places that are valued, culturally meaningful and connected to identity and Country.</p> <p>It shapes identity and is a lived spirituality fundamental to the wellbeing of communities through connectedness across generations.</p> <p>Aboriginal Cultural Heritage has been passed from the Ancestors to future generations through today's Traditional Owners whose responsibilities are profound and lifelong.</p> <p>Aboriginal Cultural Heritage incorporates tangible and intangible Cultural Heritage.</p>
Aboriginal Heritage Act, AHA or the Act	<i>Aboriginal Heritage Act 2006</i> (Vic).
Ancestors	<p>We respectfully refer to Aboriginal Ancestral Remains as Ancestors. They are the whole or part of the body of an Aboriginal person from the past and are the relatives of today's Traditional Owners.</p> <p>The <i>Aboriginal Heritage Act 2006</i> provides protection for Ancestors and says that Ancestral Remains should be owned by and returned to Traditional Owners of the area they came from.</p> <p>Under the Act it is an offence for anyone who is not the Aboriginal Traditional Owner to have Ancestors in their possession.</p>
Country	Country refers to the lands, waterways and seas to which Aboriginal peoples are connected, and describes Aboriginal peoples ideas and understanding of law, spirituality, cultural practices, place, customs, family and identity. ¹
CHMP	Cultural Heritage Management Plans as defined under the AHA.
CHP	Cultural Heritage Permits as defined under the AHA.
Culture	Culture refers to the living practices of Aboriginal peoples including all connections to family, Country, community as defined in Part 1.
Cultural Heritage	See Aboriginal Cultural Heritage.
Discussion Paper	<i>Taking Care of Culture</i> , Discussion Paper for the State of Victoria's Aboriginal Cultural Heritage Report 2016-2021, January 2021.
First Nations	See Aboriginal.
First Peoples	See Aboriginal.
Free, Prior Informed Consent or FPIC	Free, prior and informed consent, as that term is understood in relation to the UN Declaration and the Convention on Biological Diversity, 1992. ²
Indigenous	Refers to Australian Aboriginal and Torres Strait Islander peoples.

TERMS	MEANING
Indigenous Cultural and Intellectual Property or IICIP	The right of Australian Aboriginal and Torres Strait Islander peoples to their heritage, which comprises all objects, artefacts, sites, language, techniques, know how, knowledge and works, the nature or use of which has been transmitted or continues to be transmitted from generation to generation, and which is regarded as pertaining to a particular Australian Aboriginal and Torres Strait Islander group or its territory. The heritage of Australian Aboriginal and Torres Strait Islander peoples is a living one and includes objects, languages, techniques, know how, knowledge and works which may be created in the future based on that heritage.
Intellectual Property or IP	Copyright, patents, plant breeders' rights, registered and unregistered trade marks registered designs, trade secrets, know-how, and other rights resulting from intellectual activity.
Registered Aboriginal Parties or RAP	RAPs are a representative Aboriginal corporation, inclusive of all Traditional Owners of an identified Country and registered under the AHA by the Council. They have gone through a process of rigorous review, in which their relationship to Country, the inclusivity of their membership and relationship to Ancestors have been considered. Whilst RAPs have inclusive and representative membership structures, all individuals can choose to become, or not become, members. As cultural responsibility is collective right, individuals' family groups, Cultural responsibilities and Country are still protected and represented by the RAP, regardless of their membership.
Report	State of Victoria's Aboriginal Cultural Heritage Report 2016-2021, pursuant to the AHA.
Sacred Objects	Sacred Objects are those that have profound significance to Traditional Owners in understanding Country, living Culture and incorporation into spiritual and ceremonial practices. Secret and/or Sacred Objects are defined in the Act however Council has an inclusive and holistic lived understanding of Sacred Objects that includes and provides lived experience to the Act's definitions.
Self-determination	The principle of self-determination is enshrined in the UN Charter 1945, the <i>International Covenant on Economic, Social and Cultural Rights</i> (ICESCR), and the UNDRIP. It is the right of Aboriginal peoples to make decisions about their economic, social and cultural development, without interference. This includes the rights to make decisions, about their Cultures, Countries and Communities.
Traditional Owner or TO	Traditional Owners are Aboriginal peoples with particular knowledge about traditions, observances, customs or beliefs associated with particular Country; and have responsibility under Aboriginal tradition for significant Aboriginal places located in, or significant Aboriginal objects originating from, this Country. The AHA recognises Traditional Owners "as the primary guardians, keepers and knowledge holders of Aboriginal Cultural Heritage".
TOSA	Traditional Owner Settlement Act 2010 (Vic).
VAHC or the Council	Victorian Aboriginal Heritage Council.
VAHR	Victorian Aboriginal Heritage Register.
UNDRIP or the UN Declaration	<i>United Nations Declaration on the Rights of Indigenous Peoples</i> , 2007.

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PHOTOGRAPHY

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VICTORIAN ABORIGINAL
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Level 3, 3 Treasury Place, East Melbourne, Victoria, 3002
www.aboriginalheritagecouncil.vic.gov.au