

A VISION
FOR ABORIGINAL AND TORRES
STRAIT ISLANDER HERITAGE
IN AUSTRALIA

REMEMBERING COUNTRY

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Front cover design

Relative Creative

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

Judy Watson

Waanyi People Australia b.1959
sacred ground beating heart 1989

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Pronunciation of Dhawura Ngilan

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

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

Dha-wu-ra

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

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

w is the same as in English 'worry'

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

r is like a Scottish rolled 'r'

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

Ng-ilan

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

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

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

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

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

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

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

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

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

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Part 1: Our Vision

Vision Statement

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

1

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

2

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

3

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

4

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

Connection to Country

Australia is home to the oldest continuous culture on earth. Sixty-five thousand years of uninterrupted heritage, demonstrated by archaeological evidence, makes our continent unique in the world. However, Aboriginal and Torres Strait Islander peoples' view of heritage transcends time into what is widely described as the Dreaming, but better expressed in our many Australian languages through concepts such as Tjukurrpa, a word used by the Anangu People. As Wenten Rubuntja¹, co-artist of the Barunga Statement and a Board Member of the Aboriginal Sacred Areas Protection Authority² described:

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

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



© Namatjira Legacy Trust/Copyright Agency, 2020

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

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

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

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

This has been described as a ‘person-land-ancestral inter-relationship’ (Rumsey 2001, p. 19). It is a living connection between Aboriginal and Torres Strait Islander people today. Australia’s landscape, waters, and seas, collectively referred to as ‘country’, are alive with a profusion of heritage places. Imbued with the essence of ancestral beings that created them, it is through these places that family descent and kinship connections flow. It is this connection that gives owners’ rights, responsibilities and duties to country. This is often described as being a Traditional Owner or Native Title Holder. In this document we use the term Custodians. Often it is the senior Custodians who have the authority to speak for country in their role as repositories of knowledge about places.

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

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

“Passing on knowledge is something that Aboriginal people have been doing for thousands of years and that’s what I’m doing here today. Passing on knowledge (San Miguel & House 2019, p. 231).”

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

Background

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

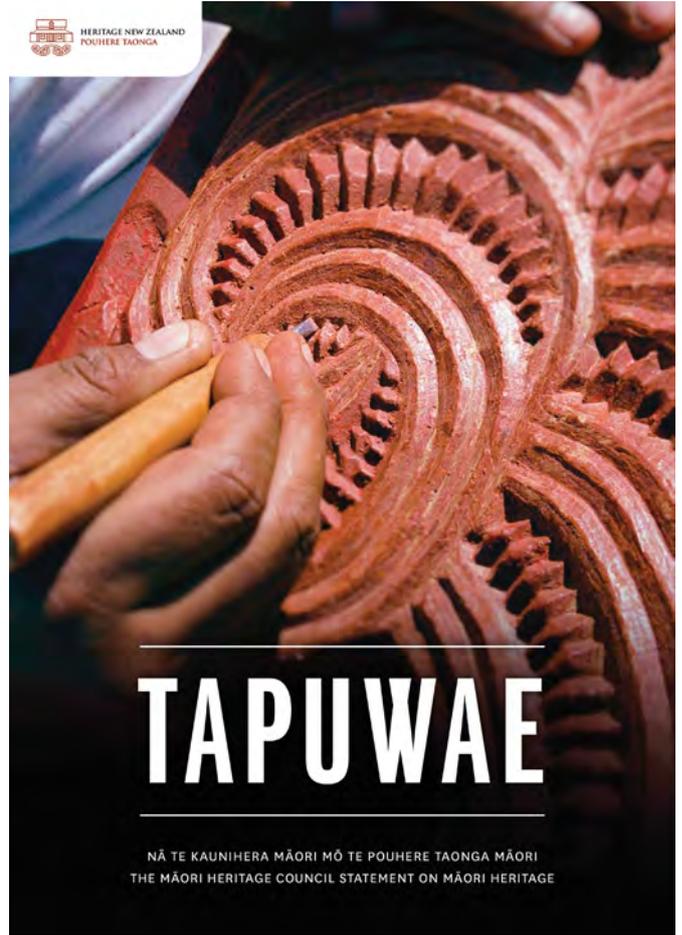
The Australian Heritage Council hosted the meeting. Under its founding legislation, *Australian Heritage Council Act 2003* (Cth), the Australian Heritage Council brings together Aboriginal and Torres Strait Islander heritage with all other Australian heritage as a central element of Australia's nationally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

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

“*The Māori Heritage Council uses this term to symbolise the Māori heritage 'footprints' in the landscape. It is also used to communicate the idea that we can look back to where we have been as we move forward, taking more steps (Māori Heritage Council 2017, p. 4).*”

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

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





Part 2: Key Areas of Focus

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

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

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

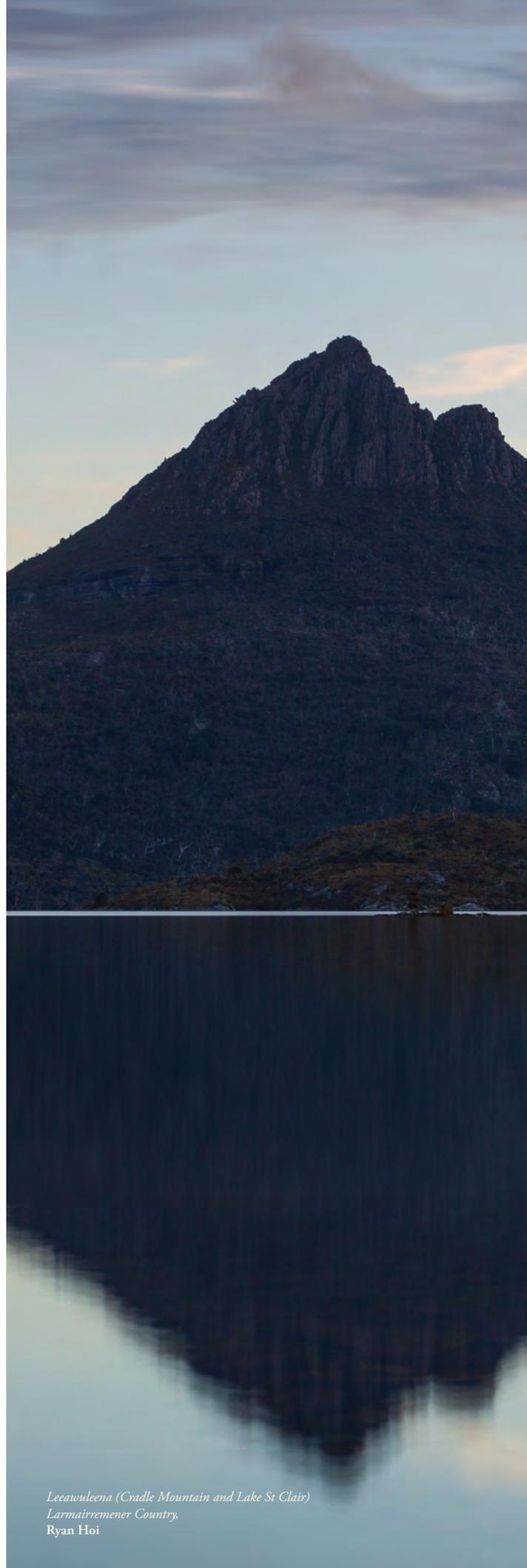
We propose that the following should be key areas of focus to achieve this vision.

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

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

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

5. FPIC is a central component of the [United Nations Declaration on the Rights of Indigenous Peoples](#), adopted on 13 September 2007, viewed July 2020.



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

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

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

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

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

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

Kunama Namadgi (Kosciuszko)
Ngarigo Nation,
Jakub

6. The preservation and maintenance of Aboriginal and Torres Strait Islander languages is funded through the *Indigenous Languages and Arts program* and supported through community language centres. For more information, visit [First Languages Australia](#), viewed July 2020.



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. For an example of content, see [Indigenous Knowledge Resources for Australian School Curricula Project](#), viewed July 2020.

2.4 Jurisdictions consider how to recognise and protect Culturally Significant Species

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

Aboriginal and Torres Strait Islander people attribute tremendous spiritual, cultural or symbolic value to many animals, plants and ecological communities, a value that is critical in their identity, and relationship with and adaptation to Country (IRG of the TSR 2020, p. 1). In Victoria this includes Bunjil, the wedge-tailed eagle, and in the Northern Territory this includes Baru, the saltwater crocodile.

The protection of these cultural and spiritual assets is fundamentally important to maintaining Aboriginal and Torres Strait Islander culture and language. Recognition of Culturally Significant Species⁸ will contribute to the development of a more holistic perspective on biodiversity and ecosystems in Australia and provides all sectors of society with another avenue through which to emphasise the importance of species and communities to the state of the Australian environment (IRG of the TSR 2020, p. 1). Any potential listing or protection regimes should not impinge on any cultural practice of that species, including traditional take, sustainable use and other customary activities (IAC 2020, p. 3).



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



*Uluru,
Yankunytjatjara and Pitjantjatjara People
Serge*

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

It unites, connects and aligns practice.

The Heritage Chairs and Officials of Australia and New Zealand is a valuable mechanism to provide national coordination, particularly for Aboriginal and Torres Strait Islander land and sea country that traverses multiple State and Territory borders. Aboriginal and Torres Strait Islander people have culturally significant sites and cultural materials across various jurisdictions and must negotiate multiple legislative frameworks.

There is an opportunity for jurisdictions to improve processes and align practices to ensure Aboriginal and Torres Strait Islander heritage is protected, and that Aboriginal and Torres Strait Islander people have access to and control over their heritage.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. See [AIATSIS Return of Cultural Heritage Program](#), viewed September 2020.

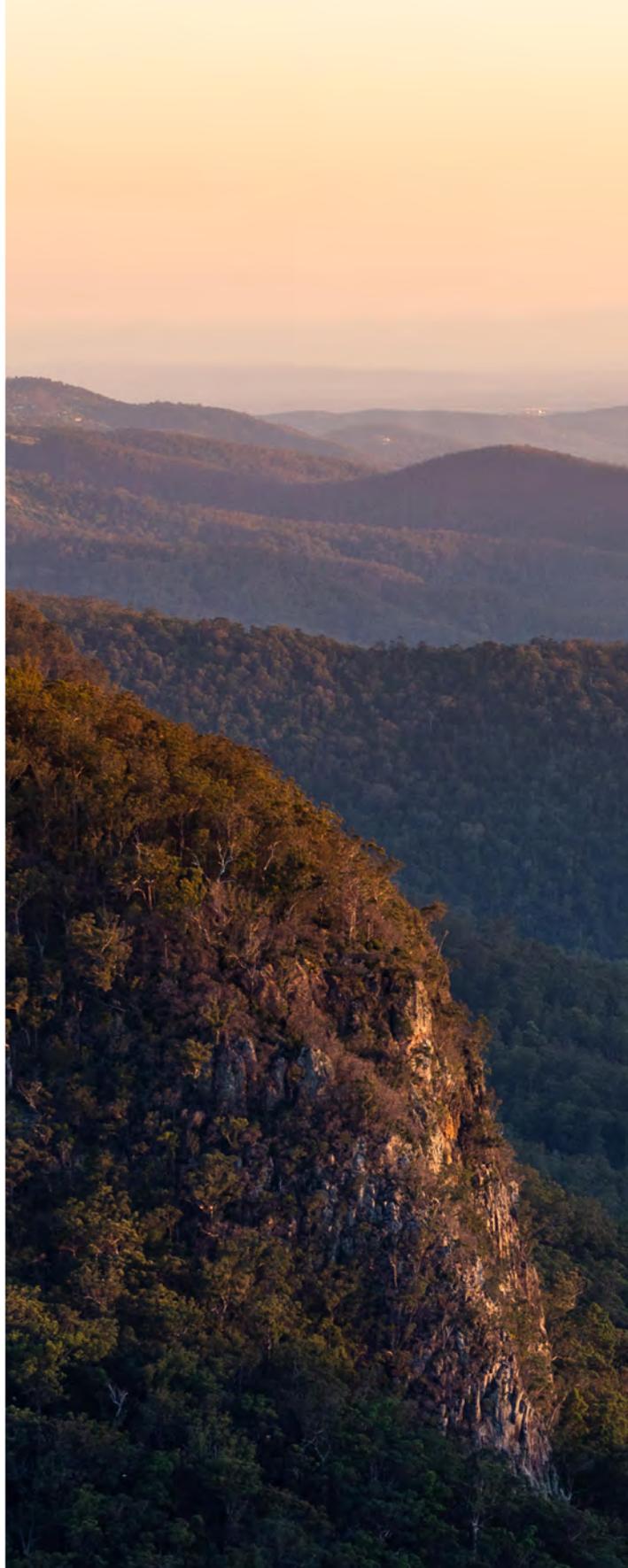
3.6. The rights of Aboriginal and Torres Strait Islander people to access and repatriate secret sacred materials held in Australia, both by institutions and private collectors, must be recognised and prioritised

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

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

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

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



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

Marc Llewelyn



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

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

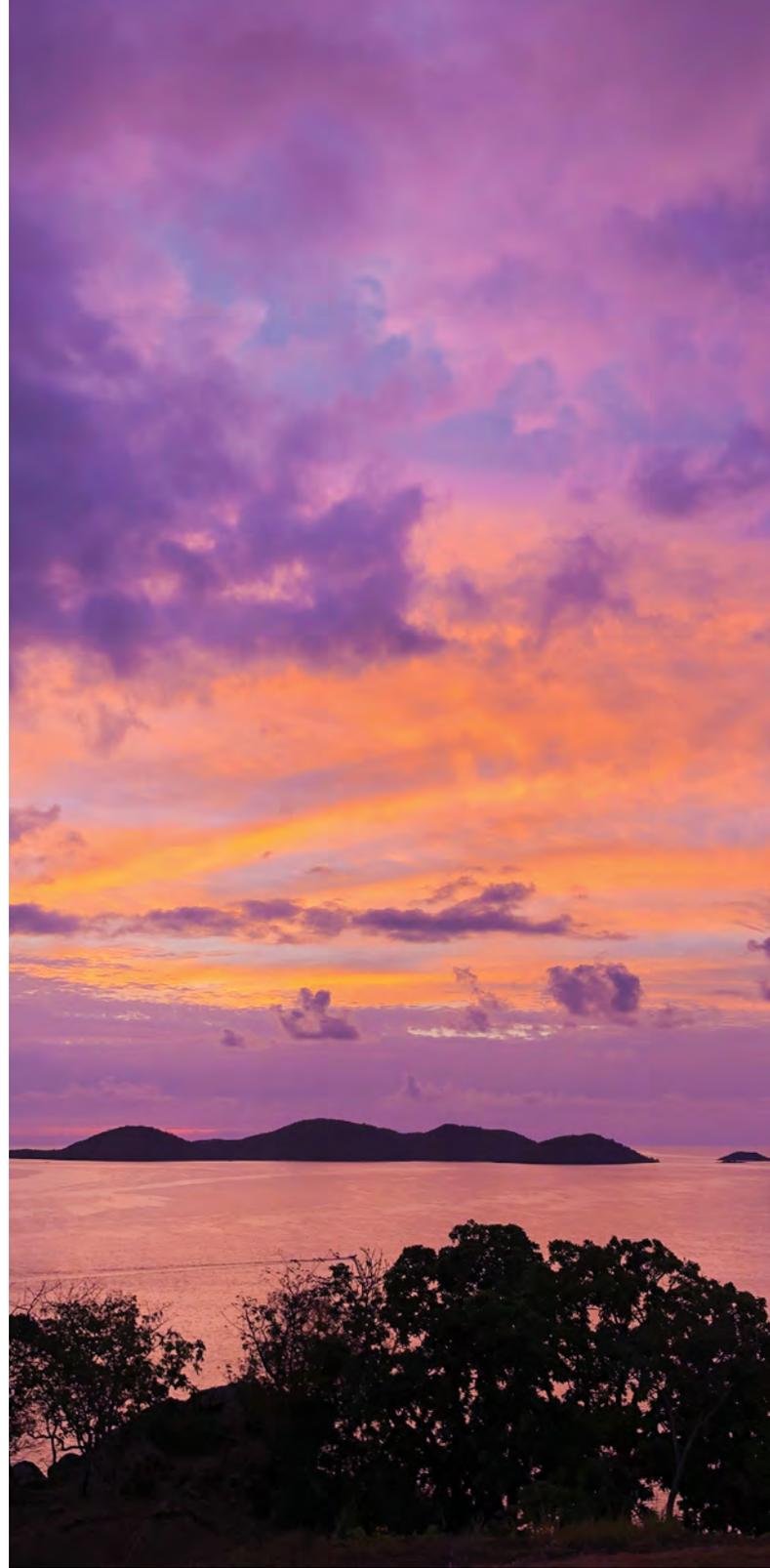
Support for World Heritage listing is one way that Heritage Chairs can assist in achieving this vision. The path to World Heritage listing is long and complex. To achieve the goal requires the support of both State and Territory heritage authorities as well as Commonwealth support. The Heritage Chairs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

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

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

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

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



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

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

Statutory Framework

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

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

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

It should be noted that whilst Dhawura Ngilan references legislation which is currently in force for the management of Aboriginal and Torres Strait Islander cultural heritage across jurisdictions, it is imperative that all legislation drafted into the future that may have impact on or is related to Aboriginal and Torres Strait Islander cultural heritage should follow a collaborative process with the Chairs. Furthermore,

where possible, amendments to existing legislation that does not include references to Aboriginal and Torres Strait Islander heritage should be assessed. For example, while the *Underwater Cultural Heritage Act 2018* (Cth) could, via Ministerial declaration, protect Aboriginal and Torres Strait Islander heritage that is in Commonwealth waters, there is no specific reference made to Aboriginal and Torres Strait Islander heritage. The Best Practice Standards in Indigenous Cultural Heritage Management and Legislation (Part 3) provide clear guidance on how these outcomes can be achieved.¹²

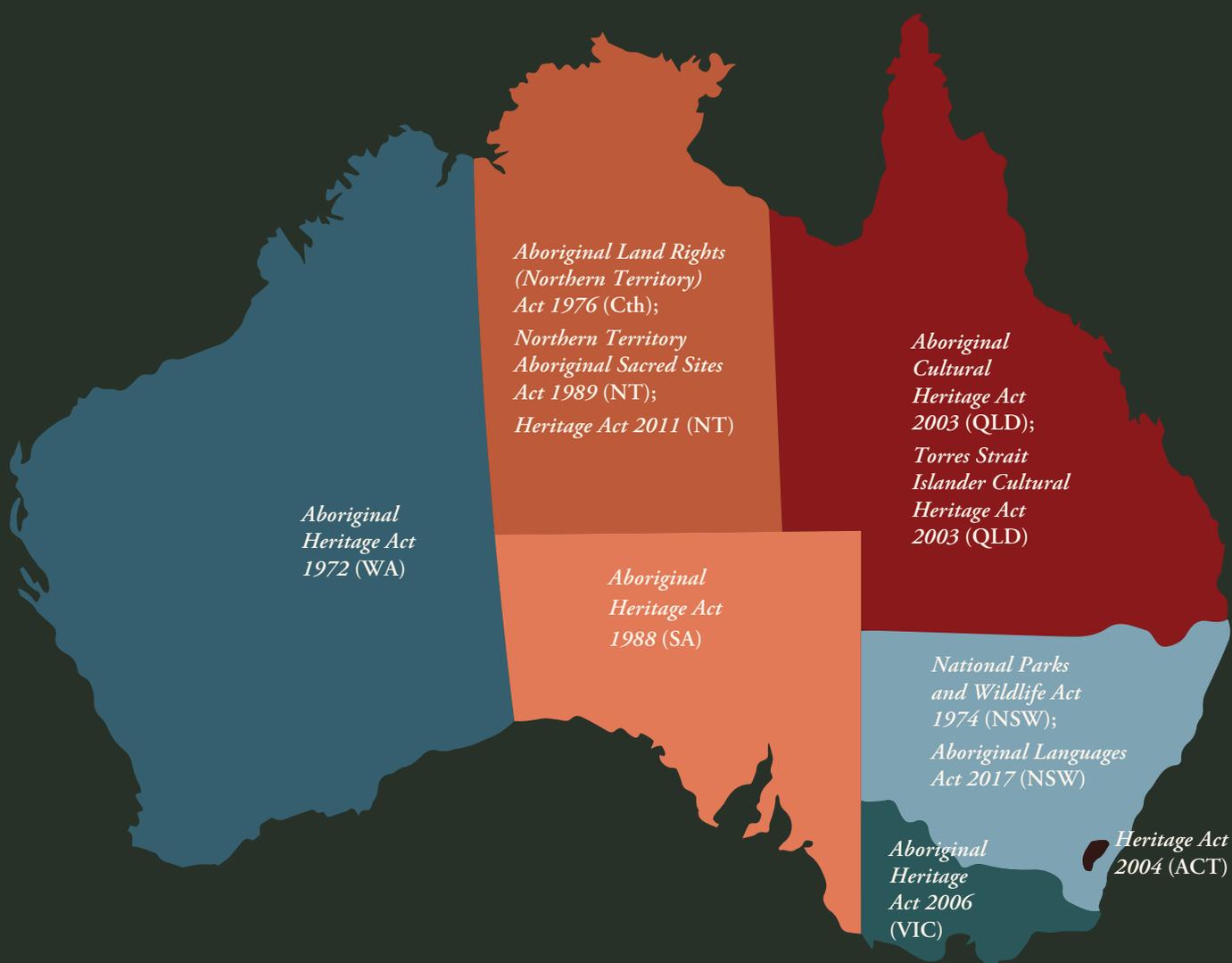
There are also statutory councils and authorities in each state and territory and at the Commonwealth level which provide advice to governments on Aboriginal and Torres Strait Islander heritage-related matters.

Heritage Chairs and Officials of Australia and New Zealand

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

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

Legislation relating to Aboriginal and Torres Strait Islander heritage in Australia



Cultural Heritage Protection Legislation Australia Wide

- Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*
- Environment Protection and Biodiversity Conservation Act 1999 (Cth)*
- Protection of Movable Cultural Heritage Act 1986 (Cth)*
- Underwater Cultural Heritage Act 2018 (Cth)*
- Native Title Act 1993 (Cth)*



Part 3:

Best Practice Standards in Indigenous Cultural Heritage Management and Legislation

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

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

Josef



1. Background

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

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

2. Basic principles

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

Corporation, the Equator Principles, the International Council of Mines and Metals and the UN Guiding Principles on Business and Human Rights are merely some examples of this general acceptance.

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

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

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

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

3. Best Practice Standard: Basic structures

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

4. Best Practice Standard: Definitions

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

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

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

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

The Aboriginal Heritage Act 2006 (Vic) (AHA) has the following definitions:

(AHA s 4) Aboriginal cultural heritage means Aboriginal places, Aboriginal objects and Aboriginal ancestral remains

(AHA s 5) What is an Aboriginal place?

(1) For the purposes of this Act, an Aboriginal place is an area in Victoria or the coastal waters of Victoria that is of cultural heritage significance to Aboriginal people generally or of a particular community or group of Aboriginal people in Victoria.

(2) For the purposes of subsection (1), area includes any one or more of the following—

- a. an area of land;*
- b. an expanse of water;*
- c. a natural feature, formation or landscape;*

- d. an archaeological site, feature or deposit;
- e. the area immediately surrounding anything referred to in paragraphs (c) and (d), to the extent that it cannot be separated from the thing without diminishing or destroying the cultural heritage significance attached to the thing by Aboriginal people;
- f. land set aside for the purpose of enabling Aboriginal ancestral remains to be re interred or otherwise deposited on a permanent basis;
- g. a building or structure.

Aboriginal tradition means—

- a. the body of traditions, knowledge, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people; and
- b. any such traditions, knowledge, observances, customs or beliefs relating to particular persons, areas, objects or relationships

The Northern Territory Aboriginal Sacred Sites Act 1989 utilises the following definitions of ‘Aboriginal tradition’ and ‘sacred site’:

Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.

sacred site means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.

The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (ATSHIPA) adopts a similar definition of ‘Aboriginal tradition’:

...the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular

community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

The term ‘area’ is defined to include a ‘site’ and a ‘significant Aboriginal area’ is relevantly defined to mean ‘an area of particular significance to Aboriginals in accordance with Aboriginal tradition’. The term ‘significant Aboriginal object’ is defined in similar terms.

ATSHIPA subsections 3(2) and 3(3) provide the definitions of ‘injury’ or ‘desecration’ which also acknowledge that these acts should be determined by how Aboriginal or Torres Strait Islander people today perceive them. They are in the following terms:

(2) For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:

- a. in the case of an area:
 - i. it is used or treated in a manner inconsistent with Aboriginal tradition;
 - ii. by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or
 - iii. passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or
- b. in the case of an object—it is used or treated in a manner inconsistent with Aboriginal tradition; and references in this Act to injury or desecration shall be construed accordingly.

At times case law may have given an over emphasis to the historical components of tradition. However, the essential aspect of the definitions provided, all of which were developed in consultation with Traditional Owners, is that the central lynchpin is how Traditional Owners today perceive their cultural heritage which is the crucial issue.

A similar issue arises in the context of intangible ICH. The only example of a legislative definition of

intangible ICH in Australia is in Part 5A of the Victorian AHA which (relevantly) provides:

- (1) ... **Aboriginal intangible heritage** means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.
- (2) Aboriginal intangible heritage also includes any intellectual creation or innovation based on or derived from anything referred to in subsection (1).

This definition then also adopts the key definition of 'tradition' with its reliance on a contemporary Traditional Owner understanding of its content.

3. Best Practice Standard: Incorporation of principles of self-determination

The key to UNDRIP is the principle of self-determination. In the context of ICH, this principle requires that the affected Indigenous Community itself should be the ultimate arbiter of the management of the ICH aspects any proposal that will affect that heritage.

Application of the UNDRIP is, in a practical sense, dependent upon the ability of the affected Indigenous Peoples to act collectively and independently. Thus, in the crucial UNDRIP Article 32, reference is made to Indigenous Peoples acting through 'their own representative organisations'. The identification of a legitimate 'representative organisation' capable of exercising an Indigenous community's rights and responsibilities with respect to their ICH is a fundamental component in any comprehensive ICH legislation. It is for the Indigenous community to decide who represents them, consistent with FPIC.

In the context of ICH in Australia, the rigorous processes associated with the appointment of Prescribed Bodies Corporate (PBCs) under the *Native Title Act 1993* (Cth)

can ensure that such organisations, where they exist, satisfy the definition of 'representative organisations' under UNDRIP. In Victoria, the *Aboriginal Heritage Act 2006* provides for the legal recognition of Traditional Owner corporations with responsibilities for managing and protecting the cultural heritage of the Traditional Owners they represent. Further, in the Northern Territory, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) provides the Land Councils a statutory function to assist Traditional Owners to protect their sacred sites, both on and off Aboriginal land. In *New South Wales the Aboriginal Land Rights Act 1983* provides Aboriginal owners with direct membership of Aboriginal Land Councils and provides those Councils with the function to protect Aboriginal cultural heritage. This Act is currently being reformed to enhance its operation particularly in relation to the management of Aboriginal cultural heritage.

Thus, where a PBC, Aboriginal Land Council or an organisation that is representative of Traditional Owners exists, Indigenous cultural heritage legislation should vest in that organisation control of the management of the Indigenous cultural heritage aspects of any proposal that will impact upon the Indigenous cultural heritage of those Traditional Owners.

Where such an organisation does not yet exist, it may be that there are Traditional Owner organisations that can be legitimately characterised as 'representative organisations'. The Commonwealth Indigenous cultural heritage legislative regime should consider including mechanisms for the identification and appointment of such organisations to undertake this role. In areas where no PBC, Aboriginal Land Council or other organisation representative of Traditional Owners has been established, a Native Title Representative Body may have authority to perform this role or, alternatively, to serve as the accountable Indigenous structure as discussed below.

Greater difficulty arises where a 'representative organisation' does not yet exist. ICH legislation should include mechanisms for the identification and

appointment of an organisation that can genuinely be accepted as the 'representative organisation' of the affected Indigenous community to undertake this role.

4. Best Practice Standard: Process

The role of ICH in the process of consideration of development proposals in a jurisdiction is important. So, is the process of consideration of the management of ICH in the context of a specific proposal. A central component of the principle of Free, Prior and Informed Consent under UNDRIP is that the affected Indigenous community has adequate information and adequate time to consider that information in making any decision that may affect their ICH. This fact impacts upon two aspects of a jurisdiction's development proposal consideration process. First, decisions regarding ICH management cannot be left to be the last consecutive approval required in the assessment of a development proposal. Rather, ICH consideration must be integrated as early as possible into development proposal assessment time frames. This ensures both adequate time to consider a proposal and that ICH considerations are not perceived as the 'last impediment' to development proposal approval. This principle is already incorporated into many existing government policies. The Commonwealth Government's Engage Early - Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and *Biodiversity Conservation Act 1999* (Cth) and Ask First - A guide to respecting Indigenous heritage places and values are examples of such policies.

This temporal integration of process should also strive to ensure that consideration of ICH is included as a first component in other development proposal approval regimes such as town planning, environmental assessment and National Heritage considerations. An example is section 52 of Victoria's *Aboriginal Heritage Act 2006*, which states:

The decision maker must not grant a statutory authorisation for the activity unless a cultural heritage management plan is approved under this Part in respect of the activity.

This structural barrier ensures that land development activity must address Aboriginal cultural heritage impacts before development can begin. It is critical that Aboriginal cultural heritage assessment occurs early, and that all the relevant information about the heritage to be impacted is known, to facilitate prior and informed consent.

The second component is that, consistent with the principles of UNDRIP, the ultimate decision regarding whether interference with ICH is acceptable or not, must rest with the affected Indigenous community. However, a jurisdiction's ICH regime can maximise the likelihood of consent to a development proposal being granted if the management regime within ICH legislation identifies interference with ICH as the last resort in regime that requires identification, recognition, conservation and protection as preferable approaches to the management of ICH.

A third component of the process around an effective ICH regime is of such importance as to warrant separate attention. This is the matter of resourcing. There are two aspects of this component: participation and enforcement.

5. Best Practice Standard: Resourcing; participation

First, there must be acceptance that the Indigenous representative organisation engaging with proponents and assessing their proposals are performing a statutory function under the relevant jurisdiction's project assessment and approval regime and must be adequately resourced to perform this function. An Indigenous representative organisation undertaking these functions should not be forced to subsidise these statutory obligations from their own resources. The resources provided should extend to undertaking identification, protection, promotion,

maintenance and intergenerational transmission and similar functions. Desirably the undertaking of these statutory obligations should facilitate opportunities for the Indigenous representative organisation involved to develop its independent economic activities.

6. Best Practice Standard: Resourcing compliance and enforcement

The second but existential aspect of the processes attached to ICH legislation is the regime around compliance and enforcement. In turn there are three issues in relation to this aspect. First, wherever possible, affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions. Second though, is the realisation that the structure of ICH legislation is dependent upon proponents understanding that interference with ICH without an authorisation or a failure to comply with the terms of the authorisation will result in a significant sanction. This is true whatever organisation or agency is undertaking compliance and enforcement functions. This understanding by proponents will only occur if there are sufficient resources allocated to enforcement regimes for these to constitute a real deterrent to non-compliance. Third, there is a need to ensure there is national consistency in both the structure and penalty regime of ICH offence provisions. The severity of penalties needs to ensure the effective operation of the legislative regime.

7. Best Practice Standard: Indigenous Ancestral Remains

The presence of Indigenous Ancestral Remains (IAR) in country is the clearest and most poignant illustration of an Indigenous People's ongoing association with their traditional lands. As such IAR are an aspect of ICH of such importance as to warrant particular

attention in these best practice standards. The issue of IAR are specifically addressed in UNDRIP Article 12.

The fundamental principle applicable to this area is that, wherever possible, IAR identified in country should be left in country and these resting places protected as 'Aboriginal or Torres Strait Islander places' (howsoever described) in the legislation. Processes and protocols with agencies involved with the management of IAR must be built around this principle and adequate resources must be allocated to accommodate the effective implementation of these processes and protocols. Implementation of these measures may require review and amendment of other legislation (for example coronial) and processes.

The second fundamental principle in regard to IAR is that their management is the right and duty of the Indigenous community of origin of the ancestor in question. Again, processes, protocols and resources must be incorporated within an IAR regime to accommodate this principle. So too must the principle of self-determination; such that where there is no possible alternative to the relocation of IAR, this relocation takes place in accordance with the wishes of the affected community. Attention also needs to be paid to the care of IAR where no Indigenous community of origin can be immediately identified.

A further issue that arises with regard to IAR is the definitional one. Existing legislation in various jurisdictions provides various examples of definitions of IAR. The Victorian AHA provides one of the most comprehensive and yet workable definition. The relevant provision (in s 4) is as follows:

Aboriginal ancestral remains means the whole or part of the bodily remains of an Aboriginal person but does not include—

- (a) a body, or the remains of a body, buried in a public cemetery that is still used for the interment of human remains; or
- (b) an object made from human hair or from any other bodily material that is not readily

recognisable as being bodily material; or

- (c) any human tissue—
- i. *dealt with or to be dealt with in accordance with the Human Tissue Act 1982 or any other law of a State, a Territory or the Commonwealth relating to medical treatment or the use of human tissue; or*
 - ii. *otherwise lawfully removed from an Aboriginal person*

The Victorian definition was adapted from the very similar definition in ATSHIPA. (Although note in ATSHIPA Aboriginal ancestral remains are managed within the regime applicable to Aboriginal objects). The Victorian definition provides an important precedent in the development of appropriate definitions. However, in each jurisdiction consultation with Traditional Owners must always take place to ensure that local views around matters such as appropriate care of material containing human hair and other human components are incorporated.

Finally, the IAR regime included within ICH legislation must provide an effective regime for the expeditious return to the affected communities of IAR held in institutional and other 'collections'. Wherever possible such provisions should have extra-jurisdictional application.

8. Best Practice Standard: Secret and sacred objects

Some movable ICH (objects) will be considered secret or sacred by the Indigenous community of origin. It is inconceivable that ICH that is secret or sacred could ever have legitimately entered the realm of commercial transactions. It is for this reason that in addition to the relevant provisions of UNDRIP a body of internal law has developed around this topic. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property as too is the 1995 UNIDROIT Convention on the Return of

Stolen or Illegally Exported Cultural Objects.

As such, ICH legislative regimes must acknowledge that property in secret and sacred objects can only legitimately vest in the community of origin of the object and deploy mechanisms to achieve the repatriation of these objects. This vesting must occur irrespective of the identity of the organisation or individual currently in possession of these objects. In addition, resources to facilitate the repatriation of objects must be provided to support the operation of these provisions. The ICH regime must acknowledge the role of Indigenous tradition as understood today in the definition of secret or sacred for these purposes. The Victorian AHA (s 4) provides a further example that incorporates the earlier definition of Aboriginal tradition:

sacred means sacred according to Aboriginal tradition;

secret means secret according to Aboriginal tradition

The (practically) similar definition of significant Aboriginal object in ATSHIPA has been noted above.

Further, ICH legislative regimes regarding regulation of the trade in movable ICH must incorporate mechanisms to prohibit trade in secret or sacred objects and to allow a potentially affected community to determine the status of an object proposed to be traded. To be effective these mechanisms must be nationally uniform or supported by Commonwealth legislation or both.

9. National legislation and Intangible Indigenous Cultural Heritage

Intangible ICH can exist independently of the association of this ICH with particular lands. The management, protection and promotion of this form of cultural heritage can provide particular challenges in a legislative context. This noted, the importance of this manifestation of ICH is indicated by the number of international instruments, in addition to

UNDRIP, that address this topic. The 2003 UNESCO Convention for the Safeguarding of the Intangible Heritage, the Convention of Biological Diversity, and (to some extent) the 1996 WIPO Performances and Phonograms Treaty are examples of this international attention. Regrettably Australia is not yet a party to the first of these instruments. Becoming so would demonstrate a concrete commitment to the protection and preservation of intangible heritage, Indigenous and non-Indigenous.

The Indigenous Chairs recommend that HCOANZ state its belief that it is desirable that this form of ICH be recognised and protected by Indigenous communities for their benefit and that of the broader community, and that HCOANZ congratulate those jurisdictions that have established regimes for the recognition and protection of intangible ICH. However, the Indigenous Chairs also acknowledge that, given the constitutional arrangements in Australia, it is desirable that measures in this respect are supported by Commonwealth legislation, and recommend that the HCOANZ states its support for the development of national legislation in regard to the recognition and protection of intangible ICH.

Annexure: Extracted articles from the UN Declaration on the Rights of Indigenous Peoples

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their

free, prior and informed consent or in violation of their laws, traditions and customs (emphasis added).

Article 12

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

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

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

State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including 14 those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect 16 their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

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

Article 31

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

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

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (emphasis added).
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.



Judy Watson

Waanyi People, Australia b.1959

sacred ground beating heart 1989

"Through paint and pigment, Judy Watson offers evidence of intimate encounters with the heat, air, moisture and pulse of the earth – the geographical emblems of her heartland. These emblems are linked with Australian Aboriginal totemic beings or culture heroes, who metamorphosed into landscape features, such as hills and rocks, and who continue to manifest their presence in meteorological or astral phenomena.

The unstretched canvas has been stained by layers of wet and dry pigment, creating a velvety, sensuous surface, which is then marked by distinct touches of colour. The imagery suggests an aerial perspective of parched land, a depiction of distant homelands or a material translation of an emotional state" (QAGOMA 2019).

Appendix A: The Barunga Statement

The Barunga Statement provides a framework for considering this vision in its assertion of rights:

- to the protection of and control of access to our sacred sites, sacred objects, artefacts, designs, knowledge and works of art
- to the return of the remains of our ancestors for burial in accordance with our traditions
- to respect for and promotion of our Aboriginal identity, including the cultural, linguistic, religious and historical aspects.





Appendix B: The Darwin Statement

The Heritage Chairs and Officials of Australia and New Zealand came together for an historic meeting of cultural heritage leaders in Darwin on 22 May 2018.

The Heritage Chairs were joined by representatives of Aboriginal and Torres Strait Islander heritage from the Commonwealth, states and territories and have taken the opportunity to work together in advancing a shared approach to Australia's cultural heritage.

This was welcomed by Heritage New Zealand Pouhere Taonga.

The group agreed to implement best practice cultural heritage principles including:

- sharing the comprehensive Australian heritage story
- inclusion and engagement with Aboriginal and Torres Strait Islander people
- co-operation and collaboration.

The Chairs acknowledged the critical importance of recording and sharing the stories of Aboriginal and Torres Strait Islander cultural heritage.

Ngurrungurrudjba (Yellow Water)
Larrakia Nation
Relative Creative

Appendix C: Truth Telling

Australia and New Zealand's contact history, like that of many colonial countries, is one of intense conflict, displacement and trauma for Indigenous Peoples. Truth telling about the history of colonisation and its impacts today should be shared as part of the comprehensive Australian and New Zealand heritage story. Aboriginal, Torres Strait Islander and Māori Peoples have oral histories, songs, art and dance that depict often untold and unrecognised perspectives of colonial history. In line with the principles of United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), we support Indigenous peoples to share the stories they want to tell, in the ways they want to tell them.

Australian and New Zealand governments are moving to prioritise recognition of the trauma and discrimination faced by Indigenous Peoples today and in the past. There is still much to learn, however, about culturally sensitive recognition and acceptance of the stories of First Peoples. In addition, jurisdictions differ in their approaches to recognition, protection and interpretation of contact history. Through truth telling, we hope to ensure Australians can be proud of their Indigenous heritage and see it as part of Australian culture. It is not about dwelling on the past, but about reflecting and moving forward into a more positive future.

Telling the truth means recognising the loss of life and land that has affected all of Australia's Indigenous Peoples.

Recent mapping of massacre sites, for example, does not tell the whole story of this loss. The maps only mark places where six or more people were killed, when in fact there were countless other aspects of displacement, loss, active resistance and death outside of massacres that were equally destructive.

Telling the truth means framing these histories in ways that recognise Indigenous perspectives. Indigenous Peoples remain traumatised by the difficulty of finding evidence for historically documented massacres and other destructive acts. There are many more events, however, that exist in the memories of Indigenous Peoples that are today without documentation. It is important to consider Indigenous ways to memorialise all the truths of Australia's past through culturally sensitive approaches and creative interpretation. Memorialisation itself should be considered sensitively. There is great diversity amongst Aboriginal and Torres Strait Islander people, as demonstrated by the more than 250 different language groups spread across Australia. Each group's experience of colonial contact is different, and each group discusses and represents it in variety of ways.

Telling the truth about Indigenous history is the foundation for a full understanding on the basis of which all Australians can come together in acknowledgement of a shared past and a shared future.

(Charles Knife Canyon)
Thalanyji Nation
Christian B





Appendix D: Endorsements & Consultation by Organisation

Endorsed by:

- National Native Title Council and First Nations Heritage Protection Alliance, which combined represent every major Aboriginal Land Council and Native Title body in Australia
- Indigenous Advisory Committee through the EPBC Act
- Threatened Species Scientific Committee through the EPBC Act.

Consulted with:

- Kimberley Aboriginal Law and Culture Centre
- Parks Australia
- Great Barrier Reef Marine Park Authority
- Department of Infrastructure, Transport, Regional Development and Communications; Office for the Arts.

Welcomed and supported by:

- Australian Heritage Council
- Heritage Council of NSW
- Aboriginal Cultural Heritage Advisory Committee (NSW)
- ACT Heritage Council
- Victorian Heritage Council
- Victorian Aboriginal Heritage Council
- Queensland Heritage Council
- Department of Aboriginal and Torres Strait Islander Partnerships (Queensland) (responsible for administering Indigenous cultural heritage Acts)
- Tasmanian Heritage Council
- Aboriginal Heritage Council (Tasmania)
- SA Heritage Council
- State Aboriginal Heritage Committee (SA)
- National Museum of Australia
- Heritage Council of Western Australia
- Aboriginal Cultural Material Committee of Western Australia

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