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First Nations peoples' engagement with urban policy: A policy synthesis in support of AHURI Final Report No. 430

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The research team would like to acknowledge the Traditional Custodians of Country around Australia, and particularly those situated within urban contexts. It is easy to overlook the deep and enduring connection of Traditional Custodians to Country that has been built over with physical structures and imposed notions of Western planning. However, when we scratch the surface it reveals hidden and precious layers of knowledge and deep ancient wisdom that is ready to be reawakened.

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Abbreviations and Acronyms

AANSW	Aboriginal Affairs New South Wales
ACCO	Aboriginal Community Controlled Organisations
AHA	*Aboriginal Heritage Act 2006* (Vic)
AHRC	Australian Human Rights Commission
AHURI	Australian Housing and Urban Research Institute Limited
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRA	*Aboriginal Land Rights Act 1983* (NSW)
ALP	Australian Labor Party
ANTaR	Australians for Native Title and Reconciliation
ANU	The Australian National University
ASSA	Academy of the Social Sciences
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSIHP Act	*Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)
BGLC	Barengi Gadjin Land Council Aboriginal Corporation
CANZUS	Canada, Australia, New Zealand, United States of America
CAPO	Coalition of Aboriginal Peak Organisations
CAEPR	Centre for Aboriginal Economic Policy Research
CARE	Collective Benefit, Authority to Control, Responsibility and Ethics
CLM Act	*Crown Land Management Act 2016* (NSW)
COAG	Council of Australian Governments
CTG	Closing the Gap
Cth	Commonwealth
DA	Development Application
DDP	Development Delivery Plan
DDWCAC	Dja Dja Warrung Clans Aboriginal Corporation
DCCEEW	Department of Climate Change, Energy, the Environment and Water
DCP	Development Control Plan
DEECA	Department of Energy, Environment and Climate Action (Vic)
DELWP	Department of Environment, Land, Water and Planning (Vic)
DKCRC	Desert Knowledge Cooperative Research Centre
DPE	Department of Planning and the Environment
DPIE	Department of Planning, Industry and Environment (NSW)
DPHI	Department of Planning, Housing and Infrastructure (NSW)
DTP	Department of Transport and Planning (Vic)
EP&A Act	*Environmental Planning and Assessment Act 1979* (NSW)
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)
FAIR	Findable, Accessible, Interoperable, and Reusable
FCA	Federal Court of Australia
FNHPA	First Nations Heritage Protection Alliance
FPAV	First Peoples' Assembly of Victoria
FPIC	Free, prior and informed consent
FVTOC	Federation of Victorian Traditional Owner Corporations
GANSW	Government Architect New South Wales

GCC	Greater Cities Commission
GIDA	Global Indigenous Data Alliance
GR	Genetic resources
HCA	High Court of Australia
HCOANZ	Heritage Chairs of Australia and New Zealand
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICIP	Indigenous Cultural and Intellectual Property
IDS	Indigenous Data Sovereignty
IEK	Indigenous Ecological Knowledge
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IK	Indigenous Knowledge
ILO	International Labour Organization
ILUA	Indigenous land use agreement
ILSC	Indigenous Land and Sea Corporation (formerly the Indigenous Land Corporation (ILC))
IP Australia	Intellectual Property Australia
ITK	Indigenous Traditional Knowledge
Kartinyeri	*Kartinyeri v Commonwealth* [1998] HCA 22; 195 CLR 337
LALC	Local Aboriginal Land Council
LDM	Local Decision Making
LEP	Local Environmental Plan
LG Victoria	Local Government Victoria
LNP	Land Negotiation Program
LUAA	Land Use Activity Agreement
Mabo (No. 2)	*Mabo v the State of Queensland (No. 2) (1992)* 175 CLR1
MGPG	Ministerial Good Practice Guidelines
MNES	Matters of national environmental significance
NAC	National Aboriginal Conference
NACC	National Aboriginal Consultative Committee
NCAFP	National Congress of Australia's First Peoples
NHMRC	National Health and Medical Research Council
NIAA	National Indigenous Australians Agency
NIC	National Indigenous Council
NILSS	National Indigenous Land and Sea Strategy
NNTT	National Native Title Tribunal
NPW Act	*National Parks and Wildlife Act 1974* (NSW)
NRA	Natural Resource Agreement
NSW	New South Wales
NSWALC	New South Wales Aboriginal Land Council
NTA	*Native Title Act 1993* (Cth)
NZ	Aotearoa New Zealand
OCHRE	Opportunity, Choice, Healing, Responsibility and Empowerment
OPOC	Our Place On Country
PBC	Prescried Body Corporate

P&E Act	*Planning and Environment Act 1987* (Vic)
Qld	Queensland
RAP	Registered Aboriginal Party
RSA	Recognition and Settlement Agreement
SBC	Seal of British Columbia
SCfCPF	Statewide Caring for Country Partnership Forum
SDRF	Self-Determination Reform Framework
SEPP	State Environmental Planning Policy
SSD	State Significant Development
TLaWCAC	Taungurung Land and Waters Council Aboriginal Corporation
TCE	Traditional Cultural Expressions
TK	Traditional Knowledge
TO	Traditional Owner
TOC	Traditional Owner Corporation
TOLMA	Traditional Owner Land Management Agreement
UN	United Nations
UN-DESA	United Nations–Department of Economic and Social Affairs
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VAAF	Victorian Aboriginal Affairs Framework
VCAT	Victorian Civil and Administrative Tribunal
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
VGAAR	Victorian Government Aboriginal Affairs Reports
VGAIF	Victorian Government Aboriginal Inclusion Framework
Vic	Victoria
WIPO	World Intellectual Property Organization
WJJWJ	Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk People

1. Introduction

The aim of this synthesis is to provide an overview, as at June 2024, of the vast and complex array of law and policy documents that affect how First Nations peoples engage with urban policy and planning in Australia at the national level and in New South Wales and Victoria.

In total, over 1,500 documents were reviewed. At the international level, this included United Nations (UN) instruments, official UN General Assembly records, research reports and supporting documents. At the national level in Australia, it included statutes, Bills and Explanatory Memoranda, Parliamentary Committee reports, submissions to Parliamentary Committee inquiries, policy statements, research reports, discussion papers, Ministerial media releases and speeches. At the state level for both New South Wales and Victoria the initial review included state-level statutes, regulations, Ministerial directions, Parliamentary Committee Reports, Committee Inquiry submissions, planning policies, policy statements, plans, guidelines, research reports, discussion papers and supporting documents.

For New South Wales, the final list of documents was narrowed down to just over 100 documents, and for Victoria, the final list of documents was narrowed down to just over 150 documents, which were closely scrutinised and contextualised for their relevance to the purpose of this research. For New South Wales they span the period 2011–December 2023. For Victoria they span the period 2006–December 2023.

The law and policy documents that are the subject of this synthesis constitute a complex array of overlapping and interacting economic, social, environmental, cultural, civil, political, and statutory and strategic planning systems that frame the structural exclusion (and sometimes inclusion) of First Nations peoples' voices, knowledges, values, worldviews and cultural authority over their ancestral lands and waters[1] in urban policy and planning.

At the international level, the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (UN 2007) is regarded as the pinnacle of Indigenous peoples' human rights. UNDRIP was 30 years in the making, draws on existing rights from other international laws and conventions, such as the *Universal Declaration of Human Rights,* and explains how these apply to Indigenous peoples. UNDRIP therefore carries substantial normative weight and legitimacy, as it was produced in consultation with (and the support of) Indigenous peoples worldwide, and was finally adopted by the majority of the UN General Assembly (Daes 2008; Lino 2010; Wensing 2021b). The Declaration has been signed by 147 out of 192 nations around the world, many of which have incorporated UNDRIP into their domestic laws or policies in a variety of different ways (Hohmann and Weller 2018: 2).

At the national level, the *Uluru Statement from the Heart* is the culmination of several decades of debate over how the First Peoples of Australia can be more appropriately recognised in Australia's national affairs (Referendum Council 2017). The election of an ALP Government in May 2022 raised some hopes, as the incoming Prime Minister committed to implementing the Statement in full. However, following the loss of the Constitutional Referendum in October 2023, and at the time of writing, the Australian Government has not made any statements about its commitment to implementing the other two key elements: Treaty and Truth-telling.

1 Terrestrial freshwater and groundwater are mentioned here together with land, as First Nations peoples see the environment holistically and not segregated, unlike Western systems of government and governance. However, it should be noted that this paper focusses more on land planning matters and not freshwater and groundwater, as they are governed by very different regimes than land.

The synthesis of New South Wales and Victoria shows that some commendable progress has been made in terms of greater involvement of Aboriginal peoples in urban policy and planning in both jurisdictions, particularly over the past decade. In New South Wales however, it has tended to be more of a patchwork approach, whereas in Victoria, the focus has been on respecting Aboriginal Victorians' rights to self-determination and a commitment to treaty and truth-telling. As will be seen, the differences are stark.

2. International context

For several decades, and perhaps always, the Aboriginal peoples of Australia have been openly stating the need to sit down and negotiate issues of sovereignty, self-determination and land rights through a treaty or treaties in a civil and peaceful way (Australian Institute of Aboriginal and Torres Strait Islander Studies [AIATSIS] 1988, 2003; Mansell 2016; Morris 2017; Wensing 2019: 107; Williams and Hobbs 2020). They have also long argued that the international human rights framework applies to the recognition and protection of their rights and interests in Australia. This section discusses the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (UN 2007) and its applicability to First Nations rights and interests in urban contexts. UNDRIP is not a covenant that binds nation-states to international law. Instead, it is a declaration that sets out the minimum standards that nation-states need to adhere to and be measured against when dealing with Indigenous peoples.

International human rights standards

International human rights standards have come a long way since the *Universal Declaration of Human Rights* was adopted and proclaimed by the General Assembly of the United Nations (UN) on 10 December 1948 (UN 1948).

Membership of the UN is based on statehood. Statehood gives clear status under international law, which is not easily gained or granted. As nation-states are collectives of people, the term 'people' is defined very technically. In short, the prevailing view in the early years of the UN was that surviving Indigenous peoples[2] did not qualify as 'peoples' for the purposes of international law. This denied them statehood and limited their access to the international human rights system as non-state actors.

As Wensing (2021b: 100) notes, since World War II, Indigenous peoples have achieved extraordinary things, thanks to the rise of international human rights law and its work to moderate and regulate the conduct of states towards citizens. From the late 1940s to the present, a suite of human rights conventions and declarations has emerged from the UN. For historical reasons, human rights law is very interested in the treatment of marginalised minorities, including Indigenous minorities who are among the world's most marginalised peoples (UN-DESA 2017). Thus, Indigenous peoples are supported by the international human rights law movement and have used the human rights system to tackle discrimination and abuses of their rights. The UN has increasingly become a place for Indigenous peoples from around the world to voice their concerns, and over the past 30 years the international community has increasingly recognised that special attention needs to be paid to their individual and collective rights (Wensing 2021b: 100).

2 The term 'Indigenous peoples' has been the subject of considerable discussion and study and there is no universal, standard definition (WIPO 2019a). The term 'Indigenous' has evolved through international law and acknowledges a particular relationship of First Nations peoples to the territory from which they originate and refers to the diverse international community of Indigenous peoples, whose distinct identity and rights are recognised in international law—the *United Nations Declaration on the Rights of Indigenous Peoples* (UN 2007). For practical purposes, the understanding of the term commonly accepted is the one provided in the Martinez Cobo (1983) study, which as Castellino and Doyle (2018: 36) note is not without its weaknesses. In this paper, the term 'Indigenous peoples' is used to refer to the diverse international community of Indigenous peoples, unless otherwise specified. Where the term Indigenous is used by government agencies or other sources, their use of the term is reflected.

Two key instruments

Only two international human rights instruments focus explicitly on the rights and interests of Indigenous peoples. These instruments are the International Labour Organization (ILO) *Convention No. 169 Indigenous and Tribal Peoples Convention* (ILO 1989), and the *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP) (UN 2007). UNDRIP was adopted by an overwhelming majority of member states on 13 September 2007 (143 states adopted, 11 abstained, 4 opposed). Four states voted against UNDRIP, including Canada, Australia, New Zealand and the United States (CANZUS states). All four CANZUS countries have since reversed their positions and endorsed UNDRIP. Canada incorporated UNDRIP into its domestic law, and New Zealand, until the recent change in government, was also moving in that direction (Wensing 2021c). These developments are discussed in more detail later in this chapter.

The capacity of these two instruments to elevate Aboriginal and Torres Strait Islander people's human rights is curtailed for two reasons:

- Australia is not a signatory to the ILO Convention No. 169
- UNDRIP 'creates no binding legal obligations in domestic legal systems' (Lino 2010: 848).

UNDRIP may not be a direct source of law (UN 2013: 16), but it nevertheless carries considerable normative weight and legitimacy for several reasons: it was adopted by the UN General Assembly;[3] it was compiled in consultation with, and the support of, Indigenous peoples worldwide;[4] and it reflects *'an important level of consensus at the global level about the content of Indigenous peoples' rights*' (UN 2013: 16). It also *'reflects the needs and aspirations of Indigenous peoples'* (Eide 2006: 157), as well as the concerns of states. As the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya,[5] reiterates, there are political and moral imperatives for implementing UNDRIP in addition to the legal imperatives (UN 2013: 18).

Furthermore, UNDRIP is an extension of the standards found in many other human rights treaties that have been ratified by and are binding on Member States, including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Convention on the Elimination of All Forms of Racial Discrimination (*UN 2013: 17). Amnesty International Canada (2012) maintains that UN declarations, unlike treaties, covenants and conventions, do not need to be signed or ratified because they are adopted by the UN General Assembly—and are therefore considered to be universally applicable.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

UNDRIP recognises the urgent need to promote the inherent rights of Indigenous peoples, and enshrines minimum standards as they relate to survival, dignity and the wellbeing of Indigenous peoples around the world. UNDRIP draws on existing rights from other international laws and conventions, such as the *Universal Declaration of Human Rights,* and explains how these apply to Indigenous peoples. UNDRIP carries substantial weight and legitimacy as it was produced in consultation with, and with the support of, Indigenous peoples worldwide, and was adopted in 2007 by the majority of UN General Assembly after more than 30 years in development (Lino 2010; Wensing 2021b).

3 The UN General Assembly has a long history of adopting declarations on various human rights issues, dating back to the *Universal Declaration of Human Rights* in 1948. Such declarations are adopted under Article 13(1)(b) of the UN Charter and are generally reserved by the UN *'for standard-setting resolutions of profound significance' (UN 2013: 16).*

4 Erica-Irene Daes was Chairperson of the Working Group on Indigenous Populations and Special Rapporteur of the UN Sub-Commission on Human Rights 1984–2001 and was instrumental in the preparation of UNDRIP. Daes (2008: 24) maintains that *'no other UN instrument has been elaborated with such an active participation of all parties concerned'*

5 James S. Anaya was the UN Special Rapporteur on the Rights of Indigenous Peoples 2008–2014.

One of the most important principles in UNDRIP is the right of Indigenous peoples to self-determination. The principle of self-determination is enshrined in the UN Charter of 1945. It is a collective right that can only be asserted by groups who are identified as peoples (Weller 2018: 119). Since that time, the concept of self-determination has evolved into Common Article 1 in the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), both adopted in 1966 (UN 1966a, 1966b) with identical language: *'All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'*

UNDRIP declares an explicit right to self-determination (Articles 3, 4, 5, 18 and 23 include references of express provisions), and procedural rights, such as the right to *'free, prior and informed consent'* (Articles 10, 11, 19, 28 and 29). Lino (2010) highlights that some commentators argue that UNDRIP details what the right of self-determination means in practice, explaining how rights of self-determination do not only comprise notions of *'autonomy, self-governance, and political participation',* but also extend to *'rights in relation to lands, territories and resources, numerous economic, social and cultural rights'* (Lino 2010: 849). However, there are firm parameters on UNDRIP's ability to decolonise settler colonial contexts. Article 46 of UNDRIP preserves the territorial integrity of states, excluding the possibility of secession. As Engle puts it: *'the Declaration seals the deal: external forms of self-determination are off the table'* (Engle 2011: 147).

UNDRIP is pertinent to the recognition and protection of Aboriginal and Torres Strait Islander peoples' rights and interests in urban contexts throughout Australia. In becoming a signatory to UNDRIP, Australian governments (federal, state/territory, local) can no longer make decisions that affect Indigenous peoples' rights and interests by imposition. Rather, they have a duty to consult with Indigenous peoples on the basis of free, prior, and informed consent—especially when Indigenous peoples' rights and interests will be affected (Wensing 2021b).

Accountability for applying or Incorporating UNDRIP into domestic law

At the time of writing (2024), there are no domestic requirements on governments in Australia to be held accountable against the principles of UNDRIP for the way in which they engage with First Nations peoples on any matters, let alone on urban policy and planning matters. This is reflective of the broader picture, that human rights are not comprehensively protected in Australia at the national level (AHRC 2022) or in some states, including New South Wales. In stark contrast, Victoria, Queensland and the Australian Capital Territory (ACT) have human rights Acts[6] that include protections for the distinct cultural rights of Aboriginal and Torres Strait Islander peoples in their respective jurisdictions.

The ACT *Human Rights Act 2004* was reviewed and amended in 2016 to insert additional provisions to protect the distinct cultural rights of Aboriginal and Torres Strait Islander peoples. The amendments to the Act included a change to the Preamble to amend the reference to the special significance of rights from 'Indigenous people' to 'Aboriginal and Torres Strait Islander peoples'. This subtle amendment was important, as it recognised that Aboriginal and Torres Strait Islander peoples should not be represented as a homogenous group with a uniform cultural heritage and identity, but should be acknowledged and recognised as being a diverse group of peoples with differing histories, aspirations and relationships. Furthermore, the amendments to the *Human Rights Act 2004* (ACT) also includes specific reference to Articles 5 and 31 of the United Nations *Declaration on the Rights of Indigenous Peoples.*

6 *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic). *Human Rights Act 2019* (Qld). Human Rights Act 2004 (ACT). For a discussion of the relative merits, see Australian Human Rights Commission (AHRC) 2022.

Furthermore, all three sub-national statutes provide that international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision of the Human Rights Act, thereby giving weight to international human rights law, including UNDRIP, in Australia—albeit through sub-national statutes.

These statutes by sub-national jurisdictions show that international human rights norms and standards are well capable of being protected in line with Australia's particular democratic structure and can be fully incorporated into Australian human rights laws (Wensing 2023c). Without a Human Rights Act, Australia is increasingly isolated from the shared legal standards in countries with domestic human rights instruments, such as Canada, New Zealand and the United Kingdom. According to the Australian Human Rights Commission (2022), enacting a national Human Rights Act in Australia would not only bring us into line with these countries and help repair our credibility on the international stage, but also embed transparent, human-rights-based decisions into our democratic culture and work to prevent breaches of human rights from occurring.

An Australia Human Rights Act could do three important things:

- protect human rights
- prevent violations of human rights
- provide effective relief for breaches of human rights.

At a minimum, the legislation should include explicit references to the full suite of covenants, conventions and declarations that Australia has ratified or is a signatory to, including UNDRIP. The inclusion of specific references to UNDRIP would give Aboriginal and Torres Strait Islander peoples greater opportunities to exercise their rights to self-determination, and to free, prior and informed consent. A powerful tool—complementary to Voice, Treaty and Truth—in contributing to the structural change necessary to bring about a better future for the Aboriginal and Torres Strait Islander peoples of Australia, and for all Australians (Wensing and House 2023).

Many nations around the world have incorporated UNDRIP into their domestic laws or policies in a variety of different ways, in some instances by restating the language of its provisions, and in other instances the more aspirational provisions of UNDRIP have been an effective tool for Indigenous peoples in their dialogues with governments (Hohmann and Weller 2018: 2). Of the four CANZUS countries with similar colonial histories and common law backgrounds, only Canada has passed legislation enshrining UNDRIP into domestic legislation (as has the province of British Columbia within Canada).

In June 2021, the Canadian Parliament passed *'An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples 2021* (Canada)', the purposes of which are to affirm the Declaration as a universal international human rights instrument with application in Canadian law, and to provide a framework for the implementation of the Declaration by the Canadian Government. The Act includes specific measures for working with First Nations to set priorities, to identify laws that need to be changed, and to prepare an action plan that must be created in 'consultation and cooperation' with Indigenous peoples. The Act also requires regular reporting on the progress being made, including published reports to parliament (Assembly of First Nations, n.d.).

In 2019, the province of British Columbia passed its own statute to implement UNDRIP, the first sub-national jurisdiction in Canada to do so. The Act's objectives are to affirm the application of the Declaration to the laws of British Columbia, to contribute to the implementation of the Declaration, and to support the affirmation of, and develop relationships with, Indigenous governing bodies (British Columbia 2019). Under the Act, the provincial government must develop an action plan in consultation and cooperation with Indigenous peoples, which must group actions under the following four themes:

- self-determination and inherent right of self-government
- title and rights of Indigenous peoples
- ending Indigenous-specific racism and discrimination
- social, cultural and economic wellbeing (British Columbia 2021).

Unlike the Canadian statute, the British Columbia Act (The *Declaration on the Rights of Indigenous Peoples Act 2019* (SBC)) also includes provisions authorising the provincial government to enter into agreements with Indigenous governing bodies for joint decision-making or consent with respect to the use of statutory powers (Library of the Parliament of Canada 2021: 5). As in Australia, it is notable that a sub-national government is playing a leadership role—albeit within a much more supportive national framework (Wensing 2021c: 150).

In New Zealand in 2019, the Labour–NZ First Government under the former Prime Minister Jacinda Ardern commissioned the preparation of a report to provide a legislative roadmap to New Zealand's realisation of the rights of Māori, as articulated by UNDRIP, titled *He Puapua*[7] (Charters 2019). The report outlined a roadmap to achieve what was called 'Vision 2040'—a vision of realising UNDRIP by 2040—the 200th anniversary of the signing of the Treaty of Waitangi (Karunanidhi 2023). The report's recommendations included strengthening the legality of the Treaty of Waitangi by putting it into law, and that Māori co-design or co-govern all Māori services. The report caused significant controversy and allegations from opposition parties of racial 'separatism' and the creation of a two-tiered governance system. The Labour Government responded by stressing that He Puapua was merely a report and not government policy (Karunanidhi 2023). In the New Zealand national elections in December 2023, the new right-wing Luxon Government said that the New Zealand Government will no longer champion Indigenous rights, that it intends to review the principles of the Treaty of Waitangi (Hall and Grey 2023) and that it will not recognise UNDRIP (Karunanidhi 2023). Karunanidhi (2023) argues that New Zealand's refusal to recognise UNDRIP will be nothing more than symbolic, because if it were to withdraw from the Declaration, it would be the only country in the world to reject UNDRIP.

Karunanidhi (2023) also observes that the largely symbolic nature of either endorsing or rejecting UN declarations raises questions about their effectiveness in the international community. Karunanidhi states that while they *'often place moral and political obligations on states, their impact on shaping meaningful policy remains limited'* because *'the lack of binding enforcement mechanisms leaves it open for states to prioritise national interests over collective international commitments'.* Karunanidhi (2023) concludes that the international community *'continues to face the challenge of translating rhetorical support into tangible change'* and that *'there is a clear need for more robust mechanisms that extend beyond symbolic gestures'* for ensuring the recognition and protection of Indigenous peoples' rights and interests. O'Sullivan (2024: 234) maintains that both the Voice to Parliament referendum in Australia and the treaty debates in Aotearoa New Zealand *'raise questions about the rights of Indigenous people to be themselves in public life'* and *'whether liberal democracy and the state belong to all citizens, or just some of them.'*

7 He puapua' means 'a break', which usually refers to a break in the waves. Here, it refers to the breaking of the usual political and societal norms and approaches. We hope that the breaking of a wave will represent a breakthrough where Aotearoa's constitution is rooted in te Tiriti o Waitangi and the United Nations *Declaration on the Rights of Indigenous Peoples* (Charters 2019).

Indigenous data sovereignty (IDS) and governance

The topic of Indigenous data sovereignty (IDS) and governance is gaining traction at the international level. IDS is a prerequisite for effective delivery of the social, political and economic promises of UNDRIP (Rose, Langton et al. 2023). The issues are multifaceted and wide-ranging, from legal and ethical dimensions around data storage, ownership, access and consent to intellectual property rights and practical considerations around the use of data in research, policy and practice. IDS is also linked to Indigenous peoples' right to maintain, control, protect and develop their culture, heritage, traditional knowledge and traditional cultural expressions, and to their rights to maintain, control, protect and develop their intellectual property over these matters (Tauli-Corpuz 2016: xxii).

Indigenous peoples have expressed the need for better data collection, particularly in relation to Indigenous use and rights, non-commercial activities and other social and economic attributes. Concerns have been raised about how this information may be utilised without their prior knowledge and consent. This is a consistent theme across many environmental and climate science research concerns. The scope also includes data generated by Indigenous communities and organisations, governments, research institutions, non-government organisations and commercial entities (Kukutai and Taylor 2016: 2).

The Global Indigenous Data Alliance (GIDA) is a network of Indigenous researchers, data practitioners, and policy activists advocating for Indigenous Data Sovereignty within their nation-states and at an international level. The aim of GIDA is to progress International IDS and Indigenous Data Governance in order to advance Indigenous control of Indigenous data.

The impetus for the formation of GIDA began with a forum held in Canberra in July 2015, sponsored by the Academy of the Social Sciences (ASSA) and the Centre for Aboriginal Economic Policy Research (CAEPR) at ANU. The forum was attended by an international group of scholars, representatives of Indigenous organisations and government personnel from the CANZUS group of Anglo-settler democracies: Canada, Australia, New Zealand and the USA. The purpose of the forum was to identify and develop an Indigenous data sovereignty agenda, to stimulate new thinking, and to uncover emergent practices regarding the generation of demographic, wellbeing and community information and data on Indigenous peoples, and what this might mean for Indigenous peoples' sovereignty over data about their territories, resources and ways of life (Kukutai and Taylor 2016: 1–2).

In order to better protect Indigenous data sovereignty, GIDA has developed the CARE Principles for Indigenous Data Governance. The CARE principles are people and purpose-oriented, reflecting the crucial role of data in advancing Indigenous innovation and self-determination. CARE stands for Collective benefit, Authority to control, Responsibility and Ethics. These principles complement the existing FAIR principles encouraging open and other data movements to consider both people and purpose in their advocacy and pursuits. GIDA's motto is 'Be FAIR and CARE' (Figure 1) (GIDA, n.d. a). FAIR stands for Findable, Accessible, Interoperable and Reusable. CARE stands for Collective Benefit, Authority to Control, Responsibility and Ethics.

Figure 1: Global Indigenous Data Alliance (GIDA FAIR and CARE Principles)

Source: GIDA (n.d. a).

In July 2019, the International Institute for the Sociology of Law at Oñati in Spain hosted a workshop entitled 'International Law, the United Nations Declaration on the Rights of Indigenous Peoples and Indigenous Data Sovereignty' (GIDA 2019). The workshop provided a forum for international Indigenous data sovereignty scholars and practitioners to collaboratively advance the legal principles underlying collective and individual data rights in the context of UNDRIP. One of the significant outcomes of the workshop was the development of a set of rights in data for Indigenous peoples (see Figure 2).

Figure 2: Indigenous Peoples' rights in data

Data for governance	Governance of data
RIGHT TO SELF-DETERMINATION: The ability to organise and control data in relation to a collective identity.	**RIGHT TO GOVERN:** The right to lead and collaborate in the development and implementation of protocols and in decisions about access to data.
RIGHT TO POSSESS: The ability to exercise jurisdictional control over the ways that data flow/move/are queried.	**RIGHT TO DEFINE:** The right to define lifeways of knowing and being and the right to determine how lifeways of knowing and being are represented in data.
RIGHT TO USE: The ability of individuals to use data for their own purposes.	**RIGHT TO PRIVACY:** The protection of collective identities and interests from undue attention, also including the possibility of requesting omission and/or erasure.
RIGHT TO CONSENT: The expression of digital autonomy and the ability to assess risks and accept potential harms.	**RIGHT TO KNOW:** The ability to track the storage, use, and reuse of the data and who has had access to them.
RIGHT TO REFUSE: The right to say 'no' to certain uses of data.	**RIGHT TO ASSOCIATION:** The recognition of provenance and terms of attribution.
RIGHT TO RECLAIM: The right to reclaim, retain, and to preserve data, data labels, and data outputs that reflect Indigenous people's identities, cultures, and relationships.	**RIGHT TO BENEFIT:** The opportunity to benefit from the use of data and equitable benefit sharing from derivatives of data.

Source: Adapted into a table from a publicly available figure developed by Global Indigenous Data Alliance (n.d. b 2023).

To ensure governance of Indigenous data in health and research environments, GIDA also advocates for mechanisms that facilitate Indigenous data governance, including better publication practices and metadata tagging; provenance and disclosure statements detailing the origin of data; collective consent; and data availability (Wensing 2024).

Protecting Indigenous Knowledge, Indigenous Ecological Knowledge and Genetic Resources

The World Intellectual Property Organization (WIPO) has been working since 2001 to develop a global system to protect Indigenous Knowledge (IK) around the world.

WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has been undertaking text-based negotiations with the objective of reaching agreement on the texts of three international legal instruments that will ensure the effective protection of traditional knowledge, traditional cultural expressions and genetic resources. The IGC considered these three legal instruments at its 40th meeting in Geneva in June 2019 (WIPO 2019a, 2019b, 2019c, 2019d, 2022).

A Diplomatic Conference of the parties was held in Geneva on 24 May 2024, at which WIPO Member States adopted a historic new Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (WIPO 2024a). The new Treaty creates a new international standard about what information patent applicants must disclose when seeking protection for new inventions that use genetic resources and associated traditional knowledge. Australia is participating in these proceedings and upon conclusion, Australia will be expected to become a signatory to the instruments.

The Treaty, once it enters into force with 15 contracting parties, will establish in international law a new disclosure requirement for patent applicants whose inventions are based on genetic resources and/or associated traditional knowledge (WIPO 2024b).

For example, genetic resources are contained in medicinal plants, agricultural crops and animal breeds. While genetic resources themselves cannot be directly protected as intellectual property, inventions developed using them can—most often through a patent (WIPO 2024b).

Some genetic resources are also associated with traditional knowledge through their use and conservation by Indigenous Peoples, as well as local communities, often over generations. This knowledge is sometimes used in scientific research and, as such, may contribute to the development of a protected invention (WIPO 2024b).

Under the new Treaty, where a claimed invention in a patent application is based on genetic resources, each contracting party shall require applicants to disclose the country of origin or source of the genetic resources. Where the claimed invention in a patent application is based on traditional knowledge associated with genetic resources, each contracting party shall require applicants to disclose the Indigenous Peoples or local community, as applicable, who provided the traditional knowledge (WIPO 2024b). Compliance with the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge is mandatory once it comes into force. Australia indicated at the Diplomatic Conference in Geneva that it will sign this Treaty.

Conclusion

This discussion highlights the fact that the international human rights norms and standards are applicable to Australia's treatment of its Indigenous peoples, the Aboriginal and Torres Strait Islander peoples, in all contexts. While they may not be binding in the strict legal sense, they do have a role to play in relation to urban policy and planning by all levels of government in Australia: the federal, sub-national and local levels.

3. National context

Introduction

At the national level in Australia, the law and policy landscape relating to Aboriginal rights and interests is divergent and dynamic. There is a plethora of statutes, policies, plans and frameworks that govern the relations between Australia's First Nations peoples and the Commonwealth, through its various government departments and agencies. For the purposes of this research, the focus is on the key statutes and policies relating to the recognition and protection of Aboriginal and Torres Strait Islander peoples' land-related rights and interests.

Since the High Court of Australia's groundbreaking decision in *Mabo (No. 2)* in 1992 and the enactment of the *Native Title Act 1993* (Cth), there have been considerable policy and legislative gains for Aboriginal and Torres Strait Islander peoples and communities in terms of legal recognition of their land rights and interests—albeit with some fundamental weaknesses or limitations.

There are also continuing challenges on other fronts, including:

- a largely ineffective Closing the Gap policy framework (Productivity Commission 2023, 2024)
- the continuing destruction of Aboriginal and Torres Strait Islander cultural heritage sites of significance such as Juukan Gorge (Wensing 2021a)
- the ongoing search for mutually agreeable mechanisms for recognition and representation of Aboriginal and Torres Strait Islander peoples in Australia's national legislative and public policy domains (Davis and Williams 2021; Mayor 2019).

The election of a federal Labor Government in May 2022 heralded a brighter future for First Nations peoples' rights and interests, with its support for fully implementing the three key elements of the Uluru Statement from the Heart: Voice, Treaty, Truth. This analysis therefore provides a snapshot of progress and failure on the recognition and protection of Aboriginal and Torres Strait Islander peoples' rights and interests at the national level in the four key policy areas: Native title, Closing the Gap, cultural heritage protection, and the *Uluru Statement from the Heart*.

The *Native Title Act 1993* (Cth)

In *Mabo v the State of Queensland (No. 2) (Mabo (No. 2))* the High Court of Australia recognised the pre-existing land rights and interests of the Aboriginal and Torres Strait Islander peoples of Australia under their system of law and custom, and which the High Court termed as native title. This was the first time in Australia's colonial history—since 1788—that the legal rights of Aboriginal and Torres Strait Islander peoples were recognised. To manage the fallout from the High Court's decision, the federal government negotiated and enacted the *Native Title Act 1993* (Cth) to provide a system for working with Native Title rights and interests. The Native Title system is incredibly complex, as it attempts to deal with 230 years of neglecting Native Title rights and interests, as well as creating a system for working with Native Title rights and interests into the future.

The *Native Title Act 1993* (Cth) (NTA) provides recognition in Australian law that the Aboriginal and Torres Strait Islander peoples had, and may still have, a system of law and custom relating to land that existed prior to the colonisation of Australia by the British, identified as native title. The NTA provides for the recognition and protection of common law Native Title. Native title rights are inalienable—that is, they cannot be transferred to new ownership—and typically include the right to access land, hunt, gather, take resources for bush medicine and other traditional uses. While the law recognises that Native Title can exist, the requirements for proof are significant, and land that is claimable under the Act is limited—particularly in urban localities where privately owned land is the predominant tenure. Land tenure composition, coupled with the early and intensive colonial impacts in major urban centres such as Sydney, makes the NTA largely ineffective for First Nations peoples seeking recognition of their rights and interests (Wensing and Porter 2016).

The statistics arising from the Native Title system tell a very interesting story about the recognition of Aboriginal and Torres Strait Islander peoples land rights and interests across the nation.

At February 2024 (Smith 2024):

- 612 Native Title determinations have been made by the Federal Court of Australia;
- 486 of those have been by consent between the parties;
- 55 of those have been by litigation; and
- 77 of those were unopposed determinations.

In relation to outcomes, at 24 February 2024 there are:

- 260 determinations of exclusive possession Native Title;
- 422 determinations of non-exclusive possession Native Title;
- 272 determinations where Native Title does not exist; and
- 99 applications where Native Title has been extinguished, but not within a determination area.

In relation to Indigenous land use agreements (ILUAs), at 24 February 2024, there are:

- 1,467 registered ILUAs; and
- 8 ILUAs being considered for registration.

In relation to the entity that Native Title holders are required to establish following a positive Native Title determination, at 24 February 2024, there are:

- 274 registered prescribed bodies corporate (PBCs) relating to 499 determinations.

And, at 24 February 2024, there are:

- 138 claimant applications awaiting determination.

In relation to compensation for the loss, diminution, impairment or extinguishment of Native Title rights and interests, there are:

- 5 compensation determinations; and
- 7 compensation applications awaiting determination.

The latest available map of the Indigenous Estate across Australia is dated July 2023 (Figure 3)[8] which is a composite of all the positive Native Title determinations plus the various statutory Aboriginal and Torres Strait Islander land rights grants/transfer schemes around the country.

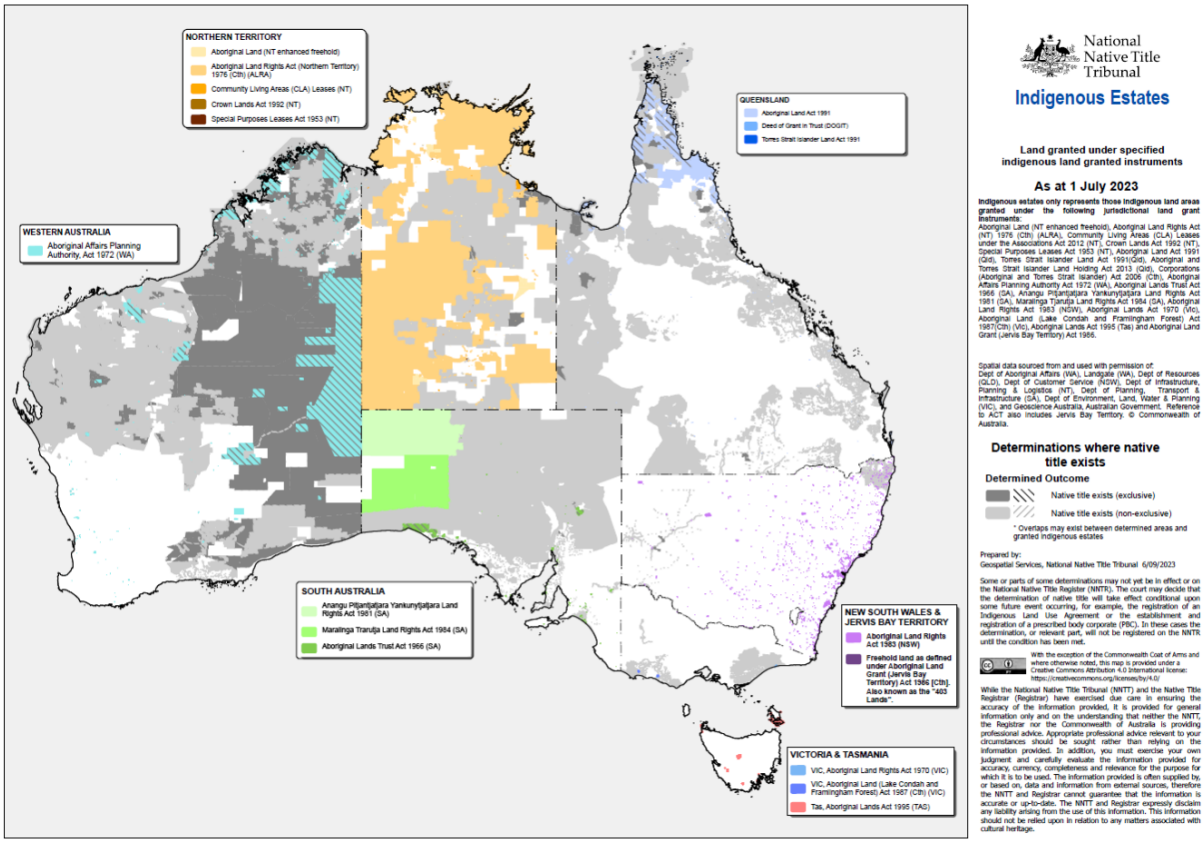
What these data show is that Aboriginal and Torres Strait Islander people have ownership, management or control over approximately 60–65 per cent of Australia through a variety of means.

In a presentation to an ACT Land Rights Symposium hosted by the ANU College of Law in Canberra in March 2024, the President of the National Native Title Tribunal (NNTT), Kevin Smith, said that there is an evolving jurisprudence in relation to native title rights and interests (Smith 2024). The native title system has now been in place for over 30 years. The early phases were very much focussed on jurisprudential clarity and agreement-making, with most of the claims being settled by consent rather than litigation. The current phase is focussing on the complex areas relating to residual claimant applications, variation applications, compensation applications, project agreement-making, the implementation of native title agreements, PBC governance, applications to replace PBCs, and Interrelationships with cultural heritage and the statutory land rights schemes and the land use and environmental planning systems.

Smith (2024) also stated that the next phase of the native title system will become even more sharply focussed on the implementation of the determined native title rights and interests. This phase has already commenced with managing Future Acts (actions which affect native title rights and interests); developing and implementing the terms of ILUAs; and the interactions between native title rights and interests, cultural heritage rights and interests, the statutory land rights schemes and the wider land administration and land use planning and environmental management systems.

8 Later versions of this map are no longer available, because NSW is withholding its land data from the NNTT.

Figure 3: The Indigenous Estate, at 1 July 2023



Source: NNTT Website, 1 July 2023.

There are also a range of critical views on native title law, as outlined below.

- Aboriginal and Torres Strait Islander peoples face very significant hurdles in preparing and pursuing native title claims over urban areas. The record of claims over our major capital cities and regional centres shows that the *'recognition of traditional rights in country is often hard won, euphoric and highly symbolic'* (Bauman, Strelein et al. 2013), especially in terms of positive outcomes (Wensing and Porter 2016).
- The complex legality of the NTA inhibits the decolonisation of Australian land law. The ability of Aboriginal and Torres Strait Islander peoples to prove their native title is testament to the survival of their socio-legal structures and the need to create a space for their authority and autonomy to 'breathe' (Strelein and Tran 2013: 47).
- The NTA is an act of misrecognition: the *'requirement that a native title claim can be made only over territory with which there is an unbroken connection is a profound Act of misrecognition'* as the test belies the *'state aggression in alienating land in the first instance'* (O'Sullivan 2021: 40).
- The Crown monopoly power over the extinguishment of native title rights and interests and the inalienability of native title means that native title holders are unable to use their property rights in ways that are available to holders of other forms of land title (Wensing 2019: 79, 85, 110, 249), and which continue to deny First Nations peoples the equality they have repeatedly declared they want (Wensing 2019: 100).

With these constraints in the native title system, it is extremely difficult for First Nations to reassert their voices and presence inside the cadastral grid of dispossession (Byrne 2003: 177) that came with the development of cities and regional centres (Wensing and Porter 2016: 95). The question of the formal recognition of Aboriginal and Torres Strait Islander peoples' ongoing connections to and responsibilities for Country in urban areas is therefore a vexed question:

> *At one level, planning professionals must be cognisant of the complexities of native title and other regimes of recognition that Aboriginal and Torres Strait Islander people are pursuing. Yet at a much deeper level, planning must begin to take very seriously its own responsibilities beyond the limitations and shallowness of the current regimes of recognition and extinguishment.* (Wensing and Porter 2016: 98)

The challenge for urban policy and planning:

> *is to look at the presence of the peoples, laws and cultures that co-exist in the very places of our practice, look carefully at the concomitant failure of the formal systems of recognition and think about how to respond in a meaningful, imaginative way.* (Wensing and Porter 2016: 98)

Indigenous Land and Sea Corporation

The Indigenous Land and Sea Corporation (ILSC) is a corporate Commonwealth entity established under the *Aboriginal and Torres Strait Islander Act 2005* (Cth) (ATSI Act), and as a Commonwealth Corporation it is subject to the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act).

Sitting within the portfolio of the Department of the Prime Minister and Cabinet (PM&C), the ILSC contributes to the achievement of the Australian Government's priorities in Indigenous Affairs and is accountable to the Parliament through the Minister for Indigenous Australians. It has a Board consisting of seven directors; five of whom, including the Chairperson, must be Indigenous Australians.

The ILSC began as the Indigenous Land Corporation (ILC) on 1 June 1995, to provide for the contemporary and future land needs of Indigenous Australians, particularly those unlikely to benefit from Native Title under the *Native Title Act 1993* (Cth) or the statutory land rights schemes run by the states. It was established in response to the High Court of Australia's judgment in *Mabo (No. 2)* in 1992 and, as such, complements the *Native Title Act 1993* (Cth) in the recognition of common law native title rights to land.

The ILSC's legislative remit was extended in 2019 to include saltwater and freshwater-related interests. Only since then have water acquisitions become a focus of the ILSC's work. The extended remit has given the ILSC much greater scope to acquire water interests—particularly for Indigenous people who are unlikely to benefit from the Native Title or Land Rights systems.

Each year the ILSC receives funding from the Aboriginal and Torres Strait Islander Land and Sea Future Fund (the Fund) to run its operations and provide funding to Indigenous peoples. The Fund was initially established through a government endowment of more than $1 billion and, through investment and management, is now worth over $2 billion. The Fund enables the ILSC to be financially self-sufficient. This money is thought of as Indigenous people's money, so it is very important that the way the ILSC spends it is aligned with the aspirations and priorities of Indigenous people for Country (ILSC 2023a: 30).

As the custodian of funds held in trust for Aboriginal and Torres Strait Islander people, the ILSC assists Indigenous Australians to acquire and manage land- and water-related rights so they can enjoy the rightful entitlements, opportunities and benefits that the return and management of Country brings.

In redressing dispossession, the ILSC's acquisition and management functions assist Indigenous Australians to maintain and grow the value and productivity of Country, own and manage Country sustainably, influence policy and opportunity for Country, and strengthen culture through reconnection to Country.

The ILSC's key purposes are to:

- purchase and return land- and water-related rights and assets to Indigenous Australians
- support Indigenous Australians to preserve and protect cultural and environmental sites and traditional knowledge through reconnection with Country
- assist Indigenous Australians to build their capacity and capability to sustainably manage and protect Country
- partner with Indigenous Australians to drive and influence opportunities for their Country.

In 2022, the ILSC embarked on engaging with and listening to Aboriginal and Torres Strait Islander peoples' aspirations for Country, and their thoughts on the current and future role of the ILSC. Across 44 locations in Australia and eight online sessions, an online survey, submissions, and a dedicated phone line, over 400 people generously shared their thoughts (ILSC 2022a).

The consultations for the Strategy produced some interesting responses for the ILSC. In particular, that the ILSC steps back and lets Indigenous people lead the way, while stepping up to demonstrate what it means to be a culturally capable leader; that the ILSC acts as a facilitator, collaborator, advocate, influencer, enabler, broker, and interpreter, in the interests of supporting self-determination; that the ILSC supports capability building by providing access to specialist advice and partners and champions Indigenous interests and voices into government and industry (ILSC 2022a: 5).

In June 2023, the ILSC launched its latest *National Indigenous Land and Sea Strategy 2023–2028* (NILSS) (ILSC 2023). The NILSS is the ILSC's leading five-year policy document and priority for how it spends the money it receives from the trust referred to earlier. The NILSS is underpinned by three guiding principles: Caring for Country, self-determination and partnership. These principles reflect Indigenous culture and the aspirations heard through the national consultation, and reinforce one another. In so doing, the NILSS provides a roadmap for the ILSC to deliver a foundational contribution to a self-determined Indigenous economy (ILSC 2023a).

The ILSC's national funding program, *'Our Country. Our Future'* has five broad focus areas to support opportunities for Indigenous Australians to enjoy the rightful entitlements, opportunities and benefits that the return and management of Country brings (ILSC, n.d.):

- *Conservation and Healthy Country*—supporting cultural and environmental protection and the development of enterprises based on the preservation of Country
- *Urban Investment*—pursuing strategic land purchases in urban areas, or providing management support to enhance commercial, social and cultural uses for Indigenous urban assets
- *Niche Indigenous Products*—assisting to build industries based on Australian native food and agriculture and leveraging traditional practices and cultural knowledge to grow consumer interest
- *Tourism*—supporting the development of land, saltwater and freshwater-Country-based eco-tourism operations
- *Agribusiness*—supporting enterprises in key sectors including aquaculture, horticulture and livestock industries.

The ILSC assists eligible projects in four key ways:

- Providing funding for the return, development or management of Country
- Providing advice and capability support for Indigenous owners of land or water-related Country through information, training and systems
- Connecting Indigenous Australians with opportunities through advocacy, networking and facilitating market access
- Supporting success by facilitating capability, operating and investment partnerships.

To date across Australia, the ILSC has supported the return of over 6.3 million hectares of Country to Indigenous people: 280 properties and four water-based interests.

Under the Urban Investment element of its *'Our Country. Our Future'* program, the ILSC continues to prioritise strategic acquisitions in urban and regional centres, as well as providing management support to enhance commercial, cultural or social uses for existing Indigenous urban assets. This focus brings geographical balance to the ILSC's investments and acknowledges that most Indigenous people live in urban centres or large regional centres. Activities supported under this focus area seek to expand the Indigenous physical and cultural footprint in urban and regional areas, providing meeting places, supporting culturally appropriate service provision, and raising the profile of Indigenous culture in the surrounding community (ILSC 2022b: 15; 2023b: 16).

In 2021–22, five projects received funding under the urban investment focus, including:

- the construction of the first stage of a cultural and language centre in the Albany area, WA (Kairli Cultural and Language Centre)
- construction of an expanded store in Goodooga, New South Wales, that will provide training and employment to local Indigenous people, as well as improving food security for families in the community (Goodooga Store)
- refurbishment of three adjoining houses, and installation of solar panels to create accommodation in Newman, WA, for 12 students from remote communities (Martu Student Hostel)
- preparation of a business case on the relocation of existing culturally appropriate health and wellbeing services from multiple sites to new central premises in Moorundi, SA (Moorundi New Premises Planning)
- planning activities to inform future sustainable economic development on Indigenous-held land at Hope Vale, Qld (Hope Vale Congress Aboriginal Corporation).

The Moorundi New Planning Premises project involves the acquisition of property in Adelaide. It aligns with three focus areas—niche Indigenous products, tourism, and urban investment. It will provide a secure, permanent base for the APY Art Centre Collective's art gallery, studio and office in Adelaide, enabling it to explore and develop new markets, increase its income from art and associated business activities, and support innovative and collaborative regional artistic projects (ILSC 2022b: 15).

In 2022–23, there were 12 new projects in the Urban Investment focus. They included:

- Three projects in WA: ABC Foundation HQ, Aboriginal Family Law Services HQ, and Wilinggin Head Office. These involved the acquisition and grant of a property to serve as a permanent base for operations and head office for the delivery of cultural programs and culturally appropriate services.

- Two planning projects, also in Western Australia—KALACC Cultural Centre Planning and Ebenezer Office Facility Planning—both projects involved the development of business plans for new administration buildings for the delivery of a range of existing programs, including health and wellbeing, family support and counselling, employment, crime prevention, and cultural programs. A third planning project—Centre for Appropriate Technology Planning—involved the preparation of a business and feasibility plan to support the expansion of an existing satellite ground station in Alice Springs, Northern Territory.
- Six projects focussed on the construction or refurbishment of community service centres: Mparntwe Health Hub in Northern Territory; St George Community Wellbeing Centre in Queensland; Dalki Ghuli Community Hub in Victoria; Wilcannia Health and Wellbeing Centre in New South Wales; Lake Tyers Children's Services Expansion in Victoria; and the Balgo Dialysis Building in Western Australia. These will variously deliver high quality education, health, wellbeing, and family and community services to Indigenous clients in the surrounding areas; instil a sense of pride and achievement in staff, clients and community; and contribute to Indigenous self-determination. The new Balgo dialysis building will enable Elders to stay on Country in WA while being treated at a culturally appropriate dialysis service. The new building at Lake Tyers, Victoria, will facilitate the delivery of culturally appropriate kindergarten and early learning programs.
- Finally, through the Normanton Foodworks project, a new supermarket has been constructed for Normanton, Queensland. This will be the largest supermarket of its kind in the region and represents a significant economic development that is expected to generate ongoing regional employment and training opportunities.

An examination of the ILSC's activities in the Urban Investment element of its *'Our Country. Our Future'* program shows that they are focussed principally in regional centres, rather than major capital cities. The land purchases and other management support activities are strategically aimed at facilitating or enhancing the ability of Aboriginal and Torres Strait Islander organisations to acquire land in urban areas, which then enables them to achieve other worthy objectives and outcomes for their people and communities. As small and sometimes remote as these projects are, they are nevertheless important actions for restoring First Nations presence in our small and remote urban centres.

Closing the Gap on Indigenous Disadvantage

The original *National Agreement on Closing the Gap* (2008) (CTG) was a social justice campaign launched by the Rudd Government in 2007 with the aim of improving life outcomes for Aboriginal and Torres Strait Islander peoples. The primary focus of the campaign was on closing the gap between Indigenous and non-Indigenous Australians in life expectancy, health outcomes, educational achievement and employment opportunities.

The CTG campaign was prompted by the Social Justice Commissioner's 2005 *Social Justice Report* that compelled Australian governments to achieve health and life expectancy equality for Indigenous Australians within 25 years (Aboriginal and Torres Strait Islander Social Justice Commissioner 2005). In response, the Council of Australian Governments (COAG) agreed to a partnership between all levels of government to work with Indigenous communities to achieve the target of 'closing the gap'. As the then Social Justice Commissioner Tom Calma highlights, this agreement was historic, as it was the first time Australian governments had agreed to being accountable to a goal within a timeframe (Aboriginal and Torres Strait Islander Social Justice Commissioner 2008: 199).

The original CTG framework was not able to deliver on the hopes and expectations it had created, largely because it was not developed or implemented in partnership with Aboriginal and Torres Strait Islander peoples and organisations, nor did it adequately resource Aboriginal communities as the drivers of change. Despite the intent of the CTG framework, annual assessment reports produced since 2007 have demonstrated mixed improvements in terms of the life outcomes for Aboriginal and Torres Strait Islander peoples (Productivity Commission 2022). Furthermore, Lino (2010: 840) and O'Sullivan (2021: 139) argue that the CTG Agreement displaced Indigenous self-determination as the primary goal, and perpetuated disadvantage by focussing on service provision rather than structural reform that would give Indigenous Australians greater authority over decisions made about them.

In response to the ineffectiveness of the 2008 CTG framework, COAG decided in 2018 that a new Agreement was required.

In July 2020, all Australian governments and the Coalition of Aboriginal and Torres Strait Islander Peaks (Coalition of Peaks) endorsed the *National Agreement on Closing the Gap* (Australian Government and CAPO 2020). The objective of the National Agreement is to overcome the entrenched inequality faced by too many Aboriginal and Torres Strait Islander people so that their life outcomes are equal to all Australians.

The *2020 National Agreement on Closing the Gap* (the National Agreement) was developed in partnership between the Coalition of Peaks and all Australian governments and the Australian Local Government Association as the peak body for local governments across Australia. The Coalition of Peaks, or CAPO, is a coalition of up to 80 Aboriginal and Torres Strait Islander community-controlled peak and member organisations across Australia.

The National Agreement reflects the needs and expectations of the Aboriginal and Torres Strait islander people from across Australia. It was developed following extensive engagements with Aboriginal and Torres Strait Islander people carried out by the Coalition of Peaks. The National Agreement is built around four agreed priority reform targets, 17 socioeconomic outcomes, and targets in areas including education, employment, health and wellbeing, justice and safety. The four priority reform targets are:

- formal partnerships and shared decision-making
- building the community-controlled sector
- transforming government organisations
- shared access to data and information at a regional level (Commonwealth of Australia 2021a).

The National Agreement also commits each of the parties to preparing Implementation Plans that respond to the differing needs, priorities and circumstances of Aboriginal and Torres Strait Islander people across Australia. The Implementation Plans must be fully aligned with the Agreement and be committed to implementing the Agreement (Commonwealth of Australia. 2021a).

In contrast to previous agreements, and informed by comprehensive engagement, the 2020 National Agreement reflects what Aboriginal and Torres Strait Islander people have identified as their needs and priorities. It responds to what had not been working on Closing the Gap over the 10 years prior to 2020, and incorporates what could be strengthened and needed to be changed.

The *Close the Gap Campaign Report 2022* prepared by the Lowitja Institute finds that *'a paradigm shift in health and wellbeing policy and planning is needed'* (Lowitja Institute 2022: 6). Thus, while the 2020 National Agreement on Closing the Gap provides progression on the previous campaign, it still fails to deliver the necessary structural reforms to support Aboriginal and Torres Strait Islander peoples' self-determination and self-governance over matters affecting them. Thus*, 'closing of the inequality gaps'* between Indigenous and non-Indigenous peoples remains an improbability until structural reform is achieved.

Part 9C of the *2020 National Agreement on Closing the Gap* requires the Productivity Commission to undertake a comprehensive review of progress, implementing the targets in the Agreement every three years to complement the Aboriginal and Torres Strait Islander-led review to be carried out within 12 months of each independent review by the Productivity Commission. These review processes are intended to capture the lived experiences of Aboriginal and Torres Strait Islander people and communities of the implementation of the National Agreement (Commonwealth of Australia 2020: 41).

In 2023, the Productivity Commission commenced its first review of implementing the 2020 National Agreement, and in February 2024, released its Final Report. The Productivity Commission pulled no punches in making its most recent assessment very clear. In its foreword, the Productivity Commission states:

> *The genesis of the Agreement was governments recognising that their efforts were not changing outcomes, and indeed the gap was widening in some areas. A new approach was required. The four Priority Reforms in the Agreement rely on a bedrock of trust, but trust is lacking and will only grow when decisions about Aboriginal and Torres Strait Islander communities are shared with communities.*
>
> *The gap is not a natural phenomenon. It is a direct result of the ways in which governments have used their power over many decades. In particular, it stems from a disregard for Aboriginal and Torres Strait Islander people's knowledges and solutions.*
>
> *Over the course of this review, it has become clear that in order to see change, business-as-usual must be a thing of the past. Across the country, we have observed small tweaks or additional initiatives, or even layers of initiatives, as attempts to give effect to the Agreement. However, real change does not mean multiplying or renaming business-as-usual actions. It means looking deeply to get to the heart of the way systems, departments and public servants work. Most critically, the Agreement requires government decision-makers to accept that they do not know what is best for Aboriginal and Torres Strait Islander people.*
>
> *Change can be confronting and difficult. But without fundamental change, the Agreement will fail and the gap will remain. We cannot afford to waste the opportunity that this Agreement presents* (Productivity Commission 2024: iii).

The Productivity Commission only made three recommendations, the first of which states that:

> *For meaningful progress to be made towards Closing the Gap, governments must share power, recognising that the right of Aboriginal and Torres Strait Islander people to have control over decisions that affect their lives is central to self-determination. This right is set out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), of which Australia is a signatory. The Agreement's Priority Reforms contain many of the principles of self-determination, but governments are not adequately putting them into practice* (Productivity Commission 2024).

The Productivity Commission also made pertinent comments about five essential actions for sharing power:

- amending the Agreement to clarify the purpose and broaden the scope of Priority Reform 1
- governments treating ACCOs as essential partners in program and service design and delivery, not simply as funding recipients
- regular meetings between Ministers and Aboriginal and Torres Strait Islander peak bodies
- governments adequately resourcing the implementation of the Agreement

- governments writing implementation plans more strategically, in collaboration with Aboriginal and Torres Strait Islander people (Productivity Commission 2024).

As Dillon (2024) observes, the Commonwealth needs to *'step up and take seriously its role as the national government'* and ensure that the national level reforms it has committed to are coordinated and thus coherently applied, and it must ensure the states and territories apply much greater rigour to the formulation of their Implementation Plans and are fully committed to achieving the outcomes they agreed to in the National Agreement. Dillon (2024) also believes that the Commonwealth should commission an independent strategic review of the Indigenous policy domain '*aimed at bringing a much greater degree of discipline, rigour and, most importantly, urgency to a worsening crisis blighting the life opportunities of many tens of thousands of First Nations citizens'.*

Blackwell (2024), a member of the Uluru Dialogue team at UNSW, also argues that:

> *Governments need to prioritise Indigenous peoples and communities in decision-making. That means meaningful transformation, capacity-building, and genuine co-design, not half-hearted 'consultation' on policies for which the government merely wants consent. It likely means the implementation of the UNDRIP and all that that provides.*

While the *2020 National Agreement on Closing the Gap* opens opportunities for Indigenous organisations to play a greater role in their own affairs, Dillon (2020) argues that the federal government is stepping back from its post-1967 responsibilities, and that the annual Closing the Gap reports at the beginning of each year's parliamentary sittings have become an increasingly controversial symbol of Australia's collective failure to tackle Indigenous disadvantage.

First Nations cultural heritage protection reform

The protection of First Nations cultural heritage in Australia is primarily the responsibility of state and territory governments (Section 51, Australian Constitution), with the Commonwealth providing a limited role of last resort.

All states and territories have statutes, regulations, codes of practice and management prescriptions that govern the management of Aboriginal and Torres Strait Islander heritage sites, places and objects. These instruments provide a level of protection for Aboriginal and Torres Strait Islander heritage sites by:

- minimising damage or disturbance to the sites
- imposing penalties for significant impacts
- requiring prior consultation with the relevant Aboriginal or Torres Strait Islander Heritage body or council regarding actions that might affect the site.

The Commonwealth's role in protecting First Nations cultural heritage only occurs through the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

The ATSIHP Act is legislation of last resort, available where state or territory laws have failed to provide adequate protections. It is in practice only activated when an application is made by an Aboriginal or Torres Strait Islander person, placing the onus on First Nations peoples to take action against a known threat, rather than creating protection from the outset and without application.

The EPBC Act is designed as a means of protecting a defined set of *'matters of national environmental significance'* (MNES) (Part 3, EPBC Act), including heritage values that are of world, national or Commonwealth heritage significance, through assessment and approvals processes. Decision-making power sits with the Minister for the Environment (or the Minister's delegate). The EPBC Act's threshold test of *'national environmental significance'* is benchmarked against the Western notion of there being one Australian nation, rather than against the multiple, diverse First Nations groups contained within the Australian continent.

All jurisdictions around Australia, including New South Wales, have attempted legislative reforms to their Indigenous heritage statutes over the last decade or so—but the processes have been *'drawn out, controversial and, for the most part, unsuccessful'* (McGrath and Lee 2016; ANTaR 2022).

In June 2020, the Australian Senate referred the Parliamentary Joint Standing Committee on Northern Australia the terms of reference for an inquiry into the destruction of Juukan Gorge. The Committee produced two reports, *Never Again* (Joint Standing Committee on Northern Australia 2020) tabled in December 2020, (Interim Report), and *A Way Forward* (Joint Standing Committee on Northern Australia 2021) (Final Report), tabled in October 2021.

The Committee's final report emphasises that what happened at Juukan Gorge is not unique. It is an extreme example of the destruction of Aboriginal and Torres Strait Islander cultural heritage that continues to happen in this country. The Committee made eight recommendations, including that a new framework for cultural heritage protection be developed at the national level through a process of co-design with Aboriginal and Torres Strait Islander peoples consistent with the UN *Declaration on the Rights of Indigenous Peoples*.

In June 2020, Aboriginal leaders from across Australia met to express their outrage at the destruction of the 47,000 year-old heritage site at Juukan Gorge and vowed to pursue national reforms to prevent this from ever happening again. Sadly, the cultural richness of what has been lost at Juukan Gorge has only very recently come to light (Slack et al. 2024). Using multiple lines of evidence, including lithic, faunal, pollen, ancient DNA, radiocarbon dating, optically stimulated luminescence, and Bayesian chronological modelling, the research shows that Aboriginal people occupied the western Hamersley Plateau as early as 47,000 years ago (47 ka) (Slack et al. 2024).

Following the Aboriginal leaders' expression of outrage at what had just happened in 2020, they took the opportunity to form the First Nations Heritage Protection Alliance as a coalition of member organisations including major Native Title, Land Rights, Traditional Owner and community-controlled organisations nationally, and gave the Alliance a mandate to strengthen and modernise cultural heritage laws and to create industry reforms that ensure Indigenous Cultural Heritage is valued and protected for the future.

The First Nations Heritage Protection Alliance (FNHPA) was formed to enhance the capacity of First Nations peoples to fully manage and control their Cultural Heritage, fostering self-determination to benefit culturally, spiritually and economically, and to strengthen the laws, policies and procedures around the recognition, respect, protection and celebration of First Nations cultural heritage in Australia.

Coincidentally, over the 12 months to September 2020, the Chairs of Australia's national, state and territory Indigenous heritage bodies, with support from peak organisations representing every major land council and native title representative bodies, developed the *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* (HCOANZ 2020). *Dhawura Ngilan* provides a roadmap for improving approaches to Aboriginal and Torres Strait Islander heritage management in Australia, and was produced after extensive consultation with Indigenous stakeholders and relevant peak advisory bodies. On 16 September 2020, it was welcomed and supported by the Heritage Chairs of Australia and New Zealand (DCCEEW 2020a) and on 21 September 2020, the Chair of the Australian Heritage Council, the Hon Dr David Kemp AC, and Ms Rachel Perkins, an Indigenous heritage expert member of the Council, presented the Vision and Best Practice Standards to Ministers on behalf of the Indigenous Chairs (DCCEEW 2020b).

On 29 November 2021, the Australian Government and the First Nations Heritage Protection Alliance entered into a partnership agreement to co-design options to reform First Nations heritage protections. The Partnership Agreement was renewed in November 2022 (FNHPA 2022). It is a unique partnership agreement informed by the principles set out in the *2020 National Agreement on Closing the Gap*. Following the change in government in the May 2022 federal elections, the partnership agreement was renegotiated in November 2022, and will continue until 30 June 2024.

In the partnership agreement, the Australian Government committed to strengthening First Nations cultural heritage protections under the following three principles:

- First Nations peoples will be supported to participate in decision-making about their own Cultural Heritage
- There will be clear national standards for Heritage protections consistent with international law, UNDRIP and Dhawura Ngilan
- States and territories will remain responsible for managing heritage within their jurisdictions.

The object of this process is to see Commonwealth legislation that implements the *(Dhawura Ngilan)* Best Practice Standards in Indigenous Cultural Heritage Management and Legislation (Standards). The Standards articulate the requirements of UNDRIP in the context of Cultural Heritage and have taken on particular significance with the focus on Traditional Owner rights.

Under the partnership agreement, the parties embarked on a national engagement process to co-design options for modernising cultural heritage protections. This engagement was undertaken in two stages. The aim was to finalise a recommendation on the option(s) for legislative reform to the Minister by 30 May 2023 and to conduct further consultation on policy and implementation detail from April to December 2023.

The Stage 1 consultations have shown that across First Nations peoples and their organisations, state and territory governments, statutory authorities, industry and industry peak bodies, academics and specialised professionals, there is a shared understanding around many of the changes that are necessary to address the need for better protections of First Nations cultural heritage.

The overwhelming message from the Stage 1 consultations was that reform of First Nations cultural heritage protections is urgent and necessary in the context of ongoing destruction of important cultural heritage—and that doing nothing is not a viable option.

The Options Paper prepared for the Stage 2 consultations outlined three options for legislative reform that emerged from the first stage of national engagements. The three options have the potential to meet the principles of UNDRIP and self-determination, and the design principles mentioned earlier in an efficient and effective manner. Broadly, the three options are:

1. Overarching federal standalone legislation and repeal of the ATSIHP Act. This option would introduce a new national regime for cultural heritage protection, replacing all current federal legislation, and state and territory regimes.
2. Federal accreditation of state and territory legislation where mandatory national standards are met, and repeal of the ATSIHP Act. This option would establish 'national standards'. The cultural heritage regime in each state and territory would have to comply with these standards, and if not, the Australian Government would step in.
3. 'Model' legislation, and exemption from the operation of the ATSIHP Act once enacted. This option would see the Australian Government develop 'model' best practice legislation, and then negotiate with each state and territory to have it implemented (Wensing 2023a).

The second stage of national engagements was aimed at determining how the options could apply and operate, and which model may be preferred.

The Alliance has stated that for Cultural Heritage legislation to be effective, the principle of free, prior and informed consent (FPIC) must be included in the legislation. The inclusion of FPIC in the legislation will ensure that Traditional Owner organisations are the vehicle of FPIC, and the decision-makers allow Traditional Owners to determine which areas and values are significant and worthy of protection. The Alliance is also seeking the establishment of a 'First Nations Cultural Heritage Council' comprised of First Nations peoples, with its independence guaranteed in law. The Council would consider and approve declaration applications and identify relevant Traditional Owners where there is no recognised Traditional Owner organisation. This would provide a recognised basis for governments and proponents to engage with Traditional Owners across a range of issues (FNHPA 2024).

At the time of writing, the outcomes of the process are yet to be announced. However, one thing is clear: any new cultural heritage protection regime must permeate all of our systems of governance, not just at the national and state and territory levels, but also at the local level.

Past proposals for recognition and representation of Aboriginal and Torres Strait Islander peoples

Australia has seen almost a century of debate over how to best recognise prior occupation of Australia by Aboriginal and Torres Strait Islander people, and how they should be represented to decision-makers (Haughton and Kohen 2022). In the 1920s and 1930s, there were many calls for Aboriginal and Torres Strait Islander representatives in Canberra. For example, in 1937 Yorta Yorta man William Cooper gathered 1,814 signatures for a petition to King George V, calling for Aboriginal representation in the Australian Parliament, but the government of the day led by the then Prime Minister, Joseph Lyons, never forwarded William Cooper's petition to King George V (Attwood 2021: 169).

By the 1960s, the Aboriginal people of Australia were frustrated at discriminatory and paternalistic state laws. They sought protection from the Commonwealth (of Australia) and, after many years of campaigning, were successful (Hobbs and Wensing 2023). The 1967 Constitutional referendum removed the exception to the Commonwealth's race power in Section 51(xxvi) of the Constitution. This provision had given the Australian Parliament the power to make laws for *'the people of any race, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws'.* The amendment removed the words *'other than the Aboriginal race in any State'*, thus giving the Australian Parliament the power to make laws with respect to Aboriginal and Torres Strait Islander peoples. The referendum also saw the repeal of Section 127 of the Constitution which precluded 'aboriginal natives' from being included in *'reckoning the numbers of people of the Commonwealth'* (Lino 2018: 133).

From 1972, following the change in government at the federal level to Labor after 23 years of Coalition Government, there have been several government-supported representative bodies to advise government—all of which have been abolished or abandoned at the whims of government (see Table 1).

Table 1: Historic timeline of national-level Indigenous advisory bodies 1970s to 2020s

National-level advisory body	Representative or appointed by government	Year established	Year abolished	Years active
National Aboriginal Consultative Committee (NACC)	Representative	1973	1977	5
National Aboriginal Conference (NAC)	Representative	1977	1985	8
Aboriginal and Torres Strait Islander Commission (ATSIC)	Representative	1989	2005	16
National Indigenous Council (NIC)	Appointed	2004	2007	3
National Congress of Australia's First Peoples (NCAFP)	Representative	2010	2019	9
Prime Minister's Indigenous Advisory Council	Appointed	2013	2017	4
Prime Minister's Indigenous Advisory Council	Appointed	2017	2021	4

Source: NIAA (2020: 119) and Department of Prime Minister and Cabinet website.

In its final report in 2000, the Council for Aboriginal Reconciliation recommended that the Australian Constitution be amended to recognise the Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia, and to enshrine a constitutional protection against racial discrimination. This report kickstarted a public debate about constitutional recognition. In more recent years, the Aboriginal and Torres Strait Islander peoples have emphasised the need for more substantive change, rather than symbolic change.

The abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 2005 looms large in the debate about recognition and representation at the national level. Since that time, the Aboriginal and Torres Strait Islander peoples of Australia have felt isolated from the forums where decisions about them are made. They want a relationship with the Australian state based on parity, mutual respect and trust (Hobbs 2021: 155; Wensing 2019: 270).

The debate now taking place has its origins in a 1998 decision by the High Court of Australia: *Kartinyeri v Commonwealth* [1998] (HCA 22; 195 CLR 337 [Australia]) (also known as the Hindmarsh Island Bridge case). In *Kartinyeri,* the outcome was that the Australian Parliament can pass laws to discriminate against Aboriginal people. It has done so at least four times in the last 30 years.[9]

For many Aboriginal and Torres Strait Islander people, the promise of the 1967 referendum was broken by the High Court's decision in *Kartinyeri.* They therefore sought structural reform to better recognise and respect their rights and interests. However, it was not until 2010 that the idea of constitutional recognition firmly re-emerged on the national agenda, when Prime Minister Julia Gillard set up an expert panel to consider whether and how this could be achieved (Lino 2018: 44–45). Since 2010, there have been several public processes, including two parliamentary committee inquiries, a Referendum Council, and more than 10 public reports on the topic of recognition (Davis 2023: 2), oversighted by no less than five prime ministers and five leaders of the opposition. They include the following:

- *Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012), which proposed recognition, reform of the constitutional 'race' power (subsection 51(xxvi)), a constitutional prohibition on racial discrimination and constitutional recognition of Aboriginal and Torres Strait Islander languages (Expert Panel 2012)

9 The relevant statutes are the *Native Title Act 1994* (Cth), *Hindmarsh Island Bridge Act 1997* (Cth), *Native Title Amendment Act 1998* (Cth) and Northern Territory *National Emergency Response Act 2007* (Cth).

- *Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (2013–15), which recommended similar proposals to the 2012 Expert Panel (Joint Select Committee on Constitutional Recognition 2015)
- *Kirribilli Statement (*2015), which warned that 'minimalist' recognition was unacceptable and called for a national process to inform and consult Aboriginal and Torres Strait Islander people (Statement presented by Aboriginal and Torres Strait Islander attendees at Kirribilli 2015)
- *Uluru Statement from the Heart* (2017, reaffirmed in 2022 by the Yarrabah Affirmation), which called for an enshrined First Nations Voice to Parliament in Australia's Constitution and a Makarrata Commission (Referendum Council 2017a)
- *Referendum Council* (2017), which endorsed the *Uluru Statement from the Heart,* and suggested that the Voice should specifically monitor the Commonwealth's use of the 'race' and 'territories' constitutional heads of power (Referendum Council 2017b)
- *Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples* (2018), which called for a detailed design process to encompass both a national Voice and local and regional 'voices' (Joint Select Committee relating to Constitutional Recognition 2018)
- *Indigenous Voice Co-Design Process* (2019–2021), the Terms of Reference for which stated that recommendations on Constitutional recognition were out of scope, produced a Final Report suggesting designs and implementation plans for local and regional voices feeding up to a national Voice, and that the Voice should particularly be consulted on laws specific to, or which significantly or distinctly impact on, Aboriginal and Torres Strait Islander people (NIAA 2021: 160).

All of these reports gave momentum to the push for better recognition of Australia's First Peoples at the national level, which culminated in a national referendum in October 2023 for an Aboriginal and Torres Strait Islander Voice to Parliament to be inserted into the Constitution with only an advisory role, as a way of overcoming the rolling abolition of national advisory bodies that have been abolished at the whim of governments over the last 50 years.

The *Uluru Statement from the Heart*

The Uluru Statement from the Heart (Uluru Statement) is a powerful and historic consensus document on Constitutional recognition, developed by Aboriginal and Torres Strait Islander peoples and released to the Australian public on 26 May 2017. The Uluru Statement is the culmination of a long, drawn-out debate about the need for Constitutional reform to recognise the Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia. The Uluru Statement is significant for three reasons:

- it sets out the grievances of Aboriginal and Torres Strait Islander peoples
- it sets out the mechanisms for addressing those grievances
- it is addressed to the Australian people, not the Australian Government—as it is the Australian people who vote to change the Constitution.

Similar to UNDRIP in the international arena, the Uluru Statement challenges colonial conventions and provides a blueprint to rectify injustices and introduce structural reforms to change the way legislative and policy decisions affecting First Nations peoples are made—including in relation to urban policy.

The Uluru Statement is an invitation and challenge to every Australian citizen to reflect deeply on the history of the nation, the injustice and inequality that colonialism has wrought on the First Peoples of Australia, and to instigate structural reforms that extend beyond the tokenism of most previous initiatives to effect change in the ways that will enable First Nations peoples to have inputs into legislation and policy that affects them. The three key elements in the Uluru Statement include Voice, Treaty, and Truth. They reflect the outcomes of the Regional Dialogues that were held in the lead-up to the National Indigenous Constitutional Convention that was held at Uluru in May 2017. The implementation of each of these elements in this order is pertinent to self-determination by First Nations peoples of Australia (Davis and Williams 2021c: 151).

The Uluru Statement also:

- challenges the untenable assumptions about European imperialism
- asserts a declaration of sovereignty
- sets out the way toward finding a settlement of past grievances for a better future together.

The three reforms have the potential to counter the misshapen understanding of self-determination. Self-determination as currently understood by bureaucracies is about *'doing things with communities, not doing things to Indigenous communities'* (Davis 2018), and allowing Aboriginal and Torres Strait Islander communities to *'freely determine their political status and freely pursue their economic, social and cultural development',* consistent with Article 3 in UNDRIP.

The three elements in the Uluru Statement include:

1. **A constitutionally enshrined First Nations' Voice to Parliament.** This is identified as the principal constitutional reform (Davis and Williams 2021: 150–1). The aspiration for the Voice to Parliament was intended to secure an enhanced role in policy and legislative decision-making affecting First Nations peoples at the national level. The reason for wanting such an advisory body enshrined in the Constitution was to make a real structural change to the way policy and legislation affecting First Nations peoples is enacted. There are numerous justifications, but two stand out for mention. First, since the passing of the Australian Constitution in 1901, Aboriginal and Torres Strait Islander peoples remain unrecognised—an unusual condition compared to other liberal democracies with significant Indigenous populations. Second, by placing the First Nations' Voice in the Constitution, the Australian Government will not be able to arbitrarily abandon or dissolve the Voice at whim if governments of whatever political persuasion don't like the advice they are receiving from the Voice. The aspiration of having a Constitutionally enshrined Voice to Parliament was seen by many Aboriginal and Torres Strait Islander leaders as being central to the implementation of the principle of self-determination in UNDRIP.
2. **A treaty** is the second element in the *Uluru Statement from the Heart*. A treaty or treaties have been a primary aspiration of Aboriginal and Torres Strait Islander peoples for at least the past eight decades (Wensing 2019: 104–106). A treaty does not require constitutional amendment (Davis and Williams 2021: 152). Treaties are agreements made between two or more states, aimed at resolving past and continuing grievances, and for establishing frameworks to govern future engagement and conflict resolution. The treaty component is described as *Makarrata*, a Yolngu word from north-eastern Arnhem Land, which can be translated to *'things are alright again after a conflict'* or *'coming together after a struggle'* (Hiatt 1987). It is worth noting that since late 2016, five sub-national jurisdictions in Australia have taken positive steps toward treaty negotiations. These jurisdictions include Victoria, South Australia, the Northern Territory, Queensland and Tasmania. In the lead-up to the New South Wales state election in March 2023, the Australian Labor Party committed to '*treaty consultations with Indigenous community'* if elected to government (Hayman 2023). The ALP did win the election and, shortly after the defeat of the Constitutional Referendum in October 2023, the premier stated that he *'remained committed to kickstarting treaty discussions with Indigenous people in the state'* (Gerathy 2023). Western Australia remains the only state that has not indicated any support for treaty developments (Hobbs 2024).

3. **The final element is truth-telling.** The Uluru Statement calls for the establishment of a legislated Makarrata Commission that will enable localised truth-telling on a First Nations basis and oversight the development of treaties. The importance of truth-telling was repeatedly raised in the 13 regional dialogues held across Australia on the question of Constitutional recognition for Aboriginal and Torres Strait Islander peoples. Its significance is inextricably linked to the Voice and to treaty because *'you cannot recognise what you do not know'* (Davis and Williams 2021: 166).

In his victory speech on election night in May 2022, the new Labor Prime Minister, Anthony Albanese, committed to implementing the *Uluru Statement from the Heart* in full. With the loss of the referendum in 2023 to enshrine a First Nations Voice to Parliament in the Constitution (discussed below), the Albanese Government has not made any public statements about its future intentions to implement the other key elements of the *Uluru Statement from the Heart*. While Prime Minister Albanese's initial support for the implementation of the Uluru Statement was markedly different from that of the previous Coalition Governments led by Malcolm Turnbull and Scott Morrison, the failure of the referendum has dealt a significant blow to any real progress towards structural reform.

Arguably, the implementation of the Uluru Statement is pertinent to positing First Nations voices in urban policy in Australia, provided local and regional Voice arrangements are also geared toward providing input to state, territory and local governments, in addition to any First Nations Voice arrangement at the national level. All three key elements of the Uluru Statement remain pertinent to providing opportunities for embedding First Peoples' voices into contemporary urban policy processes and planning systems.

An Aboriginal and Torres Strait Islander Voice to Parliament

Indeed, the previous Coalition Government (2013-2022) had initiated a study of what the Voice arrangement could look like at the national, regional and local scales. In October 2019, the then Minister for Indigenous Australians, the Hon Ken Wyatt AM MP, initiated a two-stage Indigenous Voice co-design process.

Stage 1 comprised of three groups:

- two Indigenous Voice co-design groups
- a Local and Regional Co-Design Group
- a National Co-Design Group, along with a Senior Advisory Group.

The role of the Local and Regional Co-design Group was to articulate effective regional mechanisms for improved local and regional decision-making by Aboriginal and Torres Strait Islander people in partnership with governments, including building on what is already working well in regions across Australia. The National Co-Design Group's role was to develop models for a National Voice, including how it should link to local and regional voices. The Senior Advisory Group's role was to guide the process, including the public consultation process, and to provide advice to the co-design groups as they developed the proposals.

Collectively, the three groups comprised 52 members from around the country, working together to develop the detail of what an Indigenous Voice could look like and how it could operate. The Group was co-chaired by Professor Dr Marcia Langton AM, with Professor Tom Calma AO appointed to assist, guide and oversee the co-design process. The *Indigenous Voice Co-Design Process Interim Report* was submitted to the Australian Government in October 2020 and released for comment in January 2021 (Langton and Calma 2021a).

Stage 2 comprised a series of extensive consultations and engagements around Australia, with over 9,400 people and organisations participating in a consultation process led by co-design members. The consultation marks one of the most significant engagements with the Australian community on Aboriginal and Torres Strait Islander affairs in recent history. The final report was released in October 2021 (Langton and Calma 2021b).

The Co-Design Process's Final Report built on the proposals in the *Indigenous Voice Co-Design Process Interim Report*. The preliminary sections include the foreword, executive summary, and visual guides to the key elements of the final proposals.

- Chapters 1 and 2 detail the proposals for a principles-based framework for Local & Regional Voices and a National Voice, respectively. These chapters explore how Stage 2 feedback influenced the final proposals, and explain the intersections the National Voice and Local & Regional Voices would have with each other and with a range of stakeholders and existing arrangements.
- Chapter 3 details the Stage 2 consultation and engagement process, including detailed statistical information and broad insights. This chapter also explains the process undertaken by the co-design groups to consider feedback, and addresses additional themes that emerged from consultation and engagement.
- Chapter 4 details a range of transition and implementation considerations, including the potential pathways to new arrangements. It also includes the Senior Advisory Group's reflections on the co-design process and describes the recommendations.

It should be noted that the *Indigenous Voice Co-Design Process Final Report* to the Australian Government was the culmination of a robust and contested process to design the details of an Indigenous Voice, as recommended by the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples (2018) in their final report to the Parliament.

Constitutional Referendum October 2023

Following the 2022 election of the Albanese Government, the Parliament passed two important pieces of legislation for the Constitutional Referendum to proceed.

The first was the *Referendum (Machinery Provisions) Amendment Bill 2022* (Cth) to update the contemporary federal election voting processes, and extend transparency and integrity measures in the Electoral Act to support voter confidence in referendum. This Bill was passed by the Parliament in March 2023.

Also in March 2023, the Prime Minister announced the Government's preferred wording for the Constitutional amendment to be put to the Australian people, as agreed by the Referendum Working Group. This was contained in the second Bill, the *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) Bill 2023* which was passed by the Parliament without amendment in June 2023.

The Bill was intended to introduce a new section into the Constitution, which would be located in a new Chapter IX, to be named 'Recognition of Aboriginal and Torres Strait Islander Peoples', at the end of the existing chapters of the Constitution. The new Chapter would contain four key components. The purposes of these components would be to:

- recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia
- provide for the establishment of a new constitutional entity called the Aboriginal and Torres Strait Islander Voice
- set out the core representation-making function of the Voice
- confer upon the Parliament legislative power to make laws with respect to matters relating to the Voice, including its composition, functions, powers and procedures.

For a Constitutional referendum to pass, Chapter VIII of the Australian Constitution requires that the proposed alteration must be approved by:

- a national majority of voters, and
- a majority of voters in a majority of the states (at least four out of the six states).

On 14 October 2023, Australians voted in a referendum about whether to change the Constitution to recognise the First Peoples of Australia by establishing a body called the Aboriginal and Torres Strait Islander Voice.

The referendum did not pass. Only 39.9 per cent of legal votes were in favour of this change, and there was not a majority or close to a majority in any of the six Australian states (however, there was a majority in the Australian Capital Territory). For an analysis of the results, see Baum and Mitchell (2024) and Biddle, Gray et al. (2023).

The fact that most of the nation rejected the proposal for the insertion of an Aboriginal and Torres Strait Islander Voice to Parliament should not be seen as meaning that Voice, Treaty and Truth do not have a role to play in urban policy and planning. As Wensing and Kelly (2024: 303) have stated:

> *Quite the contrary, it reinforces the need for Voice, Treaty and Truth-telling, especially at the local or regional scales. A stronger system of implicit recognition of the prior and continuing ownership of all land and waters in Australia by Aboriginal and Torres Strait Islander peoples under traditional law and custom is required to embed their consideration in conventional and contemporary land use and environmental planning systems. Otherwise, we remain a nation built on the stolen lands of the Aboriginal and Torres Strait Islander peoples who owned and occupied these lands for thousands of years before colonisation.*

Protecting Indigenous Cultural and Intellectual Property (ICIP)

The use of Indigenous Cultural and Intellectual Property (ICIP), which includes Indigenous Knowledge (IK), Indigenous Ecological Knowledge (IEK) or Indigenous Traditional Knowledge (ITK), is coming under closer scrutiny, not only in relation to arts, craft and music, but also in relation to the use of ICIP in other contexts—including environmental management and in relation to urban policy and planning, as we have found in both the New South Wales and Victorian planning systems.

There are two broad approaches to protecting Indigenous Cultural and Intellectual Property (ICIP) and Indigenous Data Sovereignty (IDS):

- legally enforceable instruments
- voluntary arrangements.

In Australia, legally enforceable instruments include:

- recognition of IK as intellectual property (IP), including certification and collective trademarks and geographic indications (GIs)
- *sui generis* (unique) laws for particular contexts
- enforceable private agreements
- actions against the misuse of IK under the Australian Consumer Law in tort or in equity (Stratton, Blackwell et al. 2019).

Stratton, Blackwell et al. (2019: 17) have found that legally enforceable instruments grant holders of IK rights to use or control that knowledge or to undertake action against inappropriate use of that knowledge.

Voluntary arrangements include voluntary protocols, codes of conduct and certification schemes which *'encourage, but typically do not mandate, appropriate treatment of and compensation for the use of IK'* (Stratton, Blackwell et al. 2019: 27). These include the AIATSIS *Code of Conduct for Aboriginal and Torres Strait Islander Research* (AIATSIS 2020), the NHMRC *Australian Code for the Responsible Conduct of Research* (NHMRC, ARC et al. 2023) and the Desert Knowledge CRC's *Protocol for Aboriginal Knowledge and Intellectual Property* (DKCRC 2007).

In 2017, IP Australia and the Department of Industry, Innovation and Science commissioned a discussion paper, *Indigenous Knowledge: Issues for protection and management*, from Terri Janke and Company (Janke and Sentina 2018). The Discussion Paper was aimed at building a nationally coordinated approach by focussing on six key areas to identify clear gaps and suggest strategies for addressing them. The Discussion Paper provided a comprehensive examination of the issues affecting protection and management of ICIP, and noted there is no single solution to address the issues raised. The Discussion Paper suggested a package of options to realise IK rights, including many measures that can be practically achieved with ease, as well as others that require deeper consultation and legislative change (Janke and Sentina 2018: 117).

In 2022, IP Australia commissioned a study into the scope and feasibility of new standalone legislation protecting Indigenous Cultural Intellectual Property, including Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE). The objective of the study was to identify models that could aid Indigenous Australians to protect and commercialise their knowledge and cultural expressions (IP Australia 2022). IP Australia identified four potential elements that could be a part of developing new purpose-built legislation:

- A new legal right that recognises communal ownership of TK and TCEs, to fill the gaps where existing intellectual property protections don't apply
- Measures to deter trade and import of inauthentic product and a labelling system to promote authentic products
- A national IK authority that has power to help people to protect and use their IK
- Measures to support and build the capacity of Indigenous businesses to manage and commercialise their IK (IP Australia 2022).

The final report of the study (Ninti One Limited 2023) identified a need for increased IK protections and standalone legislation. The report captures the key concerns of stakeholders:

- The importance of IK being accessed or used with proper free, prior, and informed consent, and recognition of the appropriate custodians
- Current remedies in legislation don't go far enough or are not fit for the purpose for fully protecting Aboriginal and Torres Strait Islander peoples' Indigenous Knowledge
- Aboriginal and Torres Strait Islander peoples should receive benefits or remuneration when their IK or ICIP is used.

In its National Cultural Policy *'Revive: a place for every story, a story for every place'* (Commonwealth of Australia 2023), the Australian Government committed to work with First Nations peoples to develop standalone legislation to recognise and protect First Nations traditional knowledge and cultural expressions. This includes addressing the harm caused by fake art, merchandise and souvenirs. IP Australia is currently working with the National Indigenous Australians Agency (NIAA), the Office for the Arts and the Attorney General's Department to establish a partnership between the Government and First Nations peoples to help develop the legislation, in line with Closing the Gap Priority Reforms 1 and 3.

Conclusion

This discussion has outlined the current state of play with respect to a selection of national legislative and policy initiatives that are pertinent to First Nations voices in the urban policy and planning space. While the election of an ALP Government at the federal level has changed the public discourse about Aboriginal and Torres Strait Islander affairs, the defeat of the Constitutional Referendum has had a negative impact on the federal government's commitment to implementing the other two elements of the *Uluru Statement from the Heart:* Treaty and Truth-telling.

Following the release of the Productivity Commission's (2024) review of the implementation of the *National Agreement on Closing the Gap* and the Commonwealth's 2023 Annual Report on Closing the Gap and its third Implementation Plan (Commonwealth of Australia 2024), the Australian Government made several funding announcements about a range of specific initiatives,[10] but it has remained silent on making any further announcements about treaty and truth-telling at the national level (NIAA 2024).

This discussion has also shown that ongoing developments in several key areas at the national level continue to have significant relevance to urban policy and planning at the sub-national and local levels. These developments cannot be ignored by state/territory and local governments.

10 None of those funding announcements are relevant to the focus of this study.

4. New South Wales state context

Introduction

The urban policy environment in New South Wales comprises a complex array of statutes, policies, plans and frameworks. They are difficult to navigate, and present several challenges for the Aboriginal peoples of New South Wales to gain traction for the better recognition of their inherent rights and responsibilities for Country under their law and custom. This chapter explores three key components that govern the interactions between urban policy and planning and Aboriginal peoples land rights and interests in New South Wales:

- the statutory framework
- the key policies on Aboriginal Affairs
- key urban policy and planning documents.

The statutory framework governing land and Aboriginal peoples' rights and interests in New South Wales include the following statutes (listed in chronological order of first enactment):

- *National Parks and Wildlife Act 1974* (NSW)
- *Environmental Planning and Assessment Act 1979* (NSW)
- *Aboriginal Land Rights Act 1983* (NSW)
- *Native Title Act 1993* (Cth)
- *Crown Land Management Act 2016* (NSW).

There are numerous other statutes that also impact this space, but the statutes listed above are the primary statutes that govern the interactions between Aboriginal peoples' land rights and interests in New South Wales and the NSW Government's interests in land use planning and management.

It is acknowledged that several factors impact on Aboriginal peoples' health and wellbeing, but for the purposes of this research, the key policy frameworks in Aboriginal Affairs in New South Wales that are pertinent to Aboriginal peoples' interactions with urban policy and planning are:

- *OCHRE: Opportunity, Choice, Healing, Responsibility and Empowerment plan*
- *Closing the Gap Implementation Plans,* 2021 and 2022.

There are several urban policy and planning documents in New South Wales. But for the purposes of this research, the most pertinent urban policy documents impacting on Aboriginal peoples' involvement or engagement in urban policy and planning are the following:

- *Our Place on Country,* 2020, NSW DPIE
- *Designing with Country,* 2020, GANSW
- *Draft Connecting with Country,* 2020, GANSW
- *Recognise Country Guidelines for Development in the Aerotropolis,* 2021, DPIE
- *Recognise Country,* 2021, NSW Government
- *Six Cities Region Discussion Paper,* 2022, and *What We Heard*, 2023, GCC
- *Indigenous Cultural and Intellectual Property Protocol,* 2023, DPIE
- *Connecting with Country Framework,* 2023, GANSW.

What is evident from this analysis is that New South Wales has not grasped the significance of the recent debates about recognition of Aboriginal and Torres Strait Islander peoples' rights at the national level, and the need to address the grievances arising from colonisation and its ongoing impacts in a comprehensive manner through treaty and truth-telling.

The Statutory Framework

The *National Parks and Wildlife Act 1974* (NSW) (NPW)

The principal statute for protecting and managing Aboriginal cultural heritage in New South Wales is the *National Parks and Wildlife Act 1974* (NSW) (NPW Act). New South Wales was the second government in Australia to legislate to protect Aboriginal heritage when amendments were made to the *National Parks and Wildlife Act 1967* (NSW) in 1969.

Division 2 of Part 6 of the NPW Act enables the Secretary of the Department of Premier and Cabinet to issue Aboriginal heritage impact permits on applications for development that have been submitted to the Minister. Permits granted by the Minister may be subject to conditions or unconditionally. The onus for making such applications rests on the proponent of a development or land use change if the proposed development or land use change will damage or destroy Aboriginal objects.[11] The power to declare a place to be a place of special significance with respect to Aboriginal culture rests with the Minister under Division 1 of Part 6 of the NPW Act. The NPW Act therefore empowers the state to determine how Aboriginal cultural heritage is to be interpreted and protected, or destroyed, with very little input by the Aboriginal people whose cultural heritage it is.

The dominant academic discourse about the NPW Act asserts that it is outdated, provides weak protections, and allows for *'regulated destruction'* (Hunt 2020; Hunt and Ellsmore 2016). This critical view of the NPW Act is shared by the Australian Parliament's Joint Standing Committee on Northern Australia in its 2021 inquiry into the destruction of Juukan Gorge, titled *A Way Forward* (2021). It is important to highlight that Aboriginal people have been trying to strengthen the law since the 1970s, but legislative reform to improve the protection of Aboriginal cultural heritage in New South Wales remains elusive.

11 S.5 of the NPW Act: *Aboriginal object* means any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.

Empirical evidence suggests that more Aboriginal cultural heritage is being destroyed than protected under heritage legislation in New South Wales (Hunt 2020; Hunt and Ellsmore 2016; Joint Standing Committee on Northern Australia 2021). The demonstrated failures of the NPW Act to 'protect' Aboriginal cultural heritage places are attributed to issues such as:

- the narrow definition of Aboriginal cultural heritage—that is, derived from non-Aboriginal notions of value and significance
- 'ownership' of Aboriginal cultural heritage residing with the Minister
- the small financial penalties for entities found to harm Aboriginal cultural heritage
- a disproportionate amount of power resting with the entity causing impact to Aboriginal cultural heritage (Hunt 2020; Hunt and Ellsmore 2016).

Aboriginal-led efforts to strengthen the protection of Aboriginal cultural heritage over the last 50 years have yielded no substantive changes: a Ministerial Inquiry in 1978, a Ministerial Task Force in 1989, a Green Paper in 1996, a review of existing legislation in 2012-13, a draft *Aboriginal Cultural Heritage Bill* in 2018. While the 2018 draft Bill was intended to produce substantive changes, concerns were raised about the limitations of proposed amendments and the delays in creating a new piece of legislation (Lingard, Stoianoff et al. 2021; ANTaR 2022):

> *In 2021, eleven years after the bipartisan commitment to Aboriginal Cultural Heritage Reform, there has been no further progress and in the meantime, the destruction of Aboriginal sites continues. (National Trust 2021).*

Thus, the capacity for First Nations voices to protect Aboriginal cultural heritage in New South Wales remains heavily constrained, with Aboriginal cultural heritage places very poorly protected and managed.

New South Wales remains the only state jurisdiction in Australia without a stand-alone Aboriginal cultural heritage statute.[12]

The *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act)

Environmental planning and development assessment in New South Wales are governed by the *Environmental Planning Act 1979* (NSW) (EP&A Act) and *Environmental Planning and Assessment Regulation 2000* (NSW). The EP&A Act is the primary land use planning statute in New South Wales. It governs matters such as planning administration, planning instruments, development assessments, building certification, infrastructure finance, appeals and enforcement.

The objects of the EP&A Act are to:

- promote the social and economic welfare of the community and a better environment via the proper management, development and conservation of the state's natural and other resources
- facilitate ecologically sustainable development by considering economic, environmental and social factors in planning decisions
- promote the orderly and economic use and development of land—'development' includes the use of land, the subdivision of land, and the erection or demolition of a building
- promote the delivery and maintenance of affordable housing

12 The Australian Capital Territory also does not have a stand-alone Aboriginal cultural heritage statute. At the time of writing, the ACT Government was actively undertaking a review of its heritage legislation and was considering a report recommending the creation of an Aboriginal Cultural Heritage Body with decision-making powers (Stenning Associates et al. 2023).

- protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats
- promote the sustainable management of built and cultural heritage—including Aboriginal cultural heritage
- promote the good design and amenity of the built environment
- promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants
- promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the state
- provide increased opportunity for community participation in environmental planning and assessment.

The EP&A Act establishes a tiered system of planning instruments, including:

- State Environmental Planning Policies (SEPPs), which deal with issues that are of importance to the whole state
- Local Environmental Plans (LEPs), which set planning rules for each local government area
- Development Control Plans (DCPs), which provide more detailed design and planning requirements.

Local government councils are also required to prepare Local Strategic Planning Statements (LSPSs). LSPSs must identify the planning priorities for an area, explain how these are to be delivered, and show how the council will monitor and report on putting the priorities into action. LSPSs allow community members to contribute to and understand the future direction of land use in their area. Councils may choose to develop their LSPS as a single approach for the whole council area, and may choose to address matters on a theme or ward basis.

The EP&A Act was created in advance of both the *Aboriginal Land Rights Act* 1983 (NSW) (ALRA) and the *Native Title Act 1993* (Cth) (NTA). No significant structural changes to the EP&A Act have been made to make it accommodate or integrate the rights and interests of Aboriginal peoples enshrined in these two statutes. In recent years, concerns have surfaced about how the EP&A Act affects Local Aboriginal Land Council's (LALCs) ability to make economic use of their land granted under the ALRA. Challenges arise from a combination of factors, including:

- adversarial local governments and communities
- the restrictive qualities of Crown land parcels that have been granted
- the limited resources of LALCs to engage with the planning system (Miers 2018).

The need for special planning measures to support the economic self-determination of Aboriginal communities has its origins in the 1980 Keane Report (Keane 1980). It has been the subject of two NSW Parliamentary Inquiries—the *Inquiry into Economic Development in Aboriginal Communities* (Standing Committee on State Development 2016), the *Inquiry into Regional Planning Processes* (Standing Committee on State Development 2015)—and remains an ongoing pursuit of LALCs since the enactment of the ALRA in 1983. Responding to the findings of the 2015 and 2016 enquiries, the Department of Planning and Environment (DPE) initiated a statewide training program for LALCs on the NSW planning system. This training coincided with a Henry Halloran Trust–funded research project (Miers 2018) that detailed the extent of the problems faced by LALCs in realising the economic opportunities of their land grants under the ALRA.

Emerging from these inquiries, programs and research are a suite of measures designed to better align the NSW planning system with the statutory land rights system under the ALRA and to secure suitable uses for LALC landholdings to address the contemporary needs of their communities. These measures are included as part of the Aboriginal Land Planning Framework and comprise the Aboriginal Land SEPP of 2019 (now Chapter 3 in *State Environmental Planning Policy (*Planning Systems) 2021 (NSW) (Planning Systems SEPP)), Ministerial Direction (Development of Aboriginal Land Council Land) and Planning Circular PS19-003. Catalysts for the development of the SEPP, supporting instruments and guidelines were the acute challenges faced by Darkinjung in seeking the rezoning and development of their land in the Central Coast region of New South Wales. While the SEPP theoretically applies to all LALCs, it does not take effect until a Development Delivery Plan (DDP) is prepared. Research undertaken by Hather (2021) finds that *'through the SEPP, the State fails to concede power and recognise Aboriginal people as a coexisting planning authority, thus empowering only a limited and compromised form of self-determination'.*

The impact of these measures that constitute the Aboriginal Planning Framework will be observed in the short to medium term, following the State Government's approval of the Darkinjung Development Delivery Plan (DDP) on 16 December 2022. The DDP applies to 31 sites in the Darkinjung Local Aboriginal Land Council area. The DDP does not approve development on the sites, but it examines the constraints and opportunities associated with future development via planning proposals or development applications. Under the provisions of the Planning Systems SEPP, a DDP must be considered by a consent authority for development applications and when planning proposals are being prepared. In addition to DDPs, provisions under the SEPP contain a lower threshold requirement for regionally significant development. Under the SEPP, LALC development is declared regionally significant if it has a capital investment value of $5 million (typically over $30 million for private development), has received more than 50 submissions during public exhibition, and has not been determined within 60 days of lodgement. The consent authority for regionally significant development is the relevant independent Sydney District or Regional Planning Panel—not the local council. This has the potential to circumvent some council-related issues, which have been set out in the Parliamentary Committee reports cited above, and also in a study funded by the Henry Halloran Trust in 2018 (Miers 2018; Standing Committee on State Development 2015; Standing Committee on State Development 2016).

While these changes to the SEPPs are welcome, they fall well short of ensuring Aboriginal peoples' inherent rights and interests in relation to their ongoing connections to, and responsibilities for, Country under their law and custom are better integrated and appropriately recognised and reflected in urban policy and planning outcomes. Far more fundamental changes to the EP&A Act are necessary if this is going to have any chance of becoming a reality.

The *Queensland Planning Act* 2016 provides a good example of how statutory and strategic land use planning systems can be modified to better recognise Aboriginal and Torres Strait Islander land rights and interests. The *Planning Act 2016* (Qld) includes a provision whereby all entities performing functions under the Act are required to perform them in a way that advances the purpose of the Act, which includes '*valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition'* (s.5(2)(d) of the Act) and *'conserving places of cultural heritage significance'* (s.5(2)(e) of the Act) (Wensing 2018: 172). This is substantially different to the only Object in the EP&A Act that references Aboriginal people, which states that the Objects of the Act are to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage) (s1.3 (f)). The authors are unaware of any empirical study of the impact of the provisions in s.5(2)(d) and (e) of the *Planning Act 2016* (Qld). Despite this, there is scope for the NSW Government to consider enacting similar enabling provisions in the EP&A Act, as section in s.5(2)(d) and (e) of the *Planning Act 2016* (Qld).

The *Aboriginal Land Rights Act 1983* (NSW) (ALRA)

The *Aboriginal Land Rights Act 1983* (NSW) (ALRA) was the then NSW Government's response to the street marches and protests by Aboriginal people and their supporters during the 1960s, 1970s and 1980s over land justice and other issues (Norman 2015).

The *Aboriginal Land Rights Act 1983* (NSW) establishes a mechanism for compensating the Aboriginal peoples of New South Wales for the loss of their land through colonisation since 1788, and for promoting social and economic development—particularly through the ability to claim, use and deal with land. It is important to reiterate that this statute provides a mechanism to compensate, rather than a mechanism to recognise. It also establishes a statewide Aboriginal Land Council (NSWALC) and a network of 120 Local Aboriginal Land Councils (LALCs) across most of New South Wales that are elected every four years. Membership of LALCs is available to all adult Aboriginal peoples who reside in the LALC's jurisdictional area, or is an Aboriginal Owner in relation to land in the LALC area. Establishing traditional connection to any particular area is not required to become a member of a LALC in New South Wales. Membership of LALCs in some parts of New South Wales is skewed towards residence, while in other areas it may be skewed towards Traditional Ownership. Aboriginal people in New South Wales can be members of multiple LALCs, but can only exercise their voting rights in one LALC.

The ALRA established a scheme for land claims over limited areas of *'claimable crown lands'* (c.36 ALRA) by LALCs or by NSWALC, which if granted, is transferred as freehold title, or as perpetual lease if granted in the Western Division of New South Wales. In addition to claiming land, land can also be purchased by a LALC subject to certain pre-conditions (s.38). In exceptional circumstances, the Minister may purchase land for the purpose of satisfying the objectives of the ALRA (s.39). LALCs can only make claims to Crown land that is not required for an essential public purpose, and that is not subject to a native title determination application (see also s.22I to s.22L of the *Native Title Act 1993* (Cth)). Thus, the efficacy of the ALRA statute in delivering land justice is constrained by the high proportion of privately owned land, especially in urban areas in New South Wales, the potentially arbitrary determination of what land is 'claimable', and the characteristics of 'claimable' Crown land.

Some important observations can be made in relation to the land claims process (Wensing 2024b):

- Since the commencement of the *Aboriginal Land Rights Act 1983* (ALRA), a total of 4,530 land claims have been granted or part granted by Crown lands, and 173,594 hectares of land has been returned to Aboriginal Land Councils (as of September 2023). Twenty-three per cent of all land granted in the 40 years since the ALRA came into effect, has been granted in the last two years.
- Although the ALRA has been in place for 40 years, the proportion of land granted to Aboriginal people under the ALRA is less than 1 per cent of the land mass of New South Wales.
- Since enactment, the processing of land claims under the ALRA has been ineffective—with over 39,000 outstanding land claims yet to be determined (Ronalds 2020).
- Pursuant to s.42 of ALRA, an Aboriginal Land Council must not deal with land vested in it subject to native title rights and interests under section 36(9) or (9A) unless the land is the subject of an approved determination of native title. Therefore, in order for a LALC to deal in land granted on or after 28 November 1994, a non-claimant application must be made to the Federal Court of Australia (FCA) seeking a determination that native title does not exist in the area covered by the application. Since the enactment of the *Native Title Act 1993* (Cth), 85 per cent of all non-claimant applications are in New South Wales. The FCA is concerned about the interaction between the two land rights systems because the non-claimant application process is potentially setting Aboriginal people into serious conflict over their own land. For example, Traditional Owners asserting native title rights versus LALCs seeking to deal in the land—even when membership of the LALC may comprise a small number of Traditional Owners.

The following observations are pertinent to the research about the recognition and integration of Aboriginal peoples' land rights into New South Wales urban policy and planning:

- The ALRA provides a mechanism for the restitution of land as a form of compensation, rather than recognition of ownership/sovereignty.
- Compared with the statutory land rights grants/transfer scheme in the Northern Territory, land grants or transfers under the ALRA in New South Wales are not reliant on traditional or customary connection to land, and the land is not inalienable. In other words, subject to meeting certain criteria and following certain processes, it may be sold on the open market and thereby lost to Aboriginal ownership.
- The ALRA does not provide for self-determination as set out in UNDRIP, for a number of reasons, including: (1) the determination of 'claimable' Crown land by the State is potentially arbitrary, (2) LALC's require approval from NSWALC to deal in granted land, and (3) LALCs must navigate and negotiate their way through the NSW statutory planning system to develop their land. As set out earlier, navigating the NSW statutory planning system is a complex, expensive and potentially adversarial process. Results come slowly, if at all, after long and arduous negotiations.

The *Crown Land Management Act 2016* (NSW) (CLM Act)

The *Crown Land Management Act 2016* (NSW) (CLM Act) signified a new approach to Crown land management in New South Wales. The Act began in 2018, consolidating into one statute the provisions for dealing with the ownership, use and management of Crown land in New South Wales, and repealing the *Crown Lands Act 1989* (NSW) and the *Crown Land (Continued Tenures)* Act 1989 (NSW) and several other statutes.

While the principles have remained unchanged from the previous regime, the objects of the CLM Act certainly contemplate greater consideration of environmental factors, as well as cultural, spiritual, social and economic recognition of the importance of Crown land to the Aboriginal peoples of New South Wales, along with recognition of the need for co-management (Lyster et al. 2021: 553). The CLM Act is the first Crown land statute in New South Wales to recognise the operation of both the ALRA 1983 (NSW) and the NTA 1993 (Cth). For native title, the CLM Act includes express requirements for land being vested in local government to be subject to native title rights and interests and for local councils to employ or engage a certified native title manager.

In addition, the Land Negotiation Program (LNP), designed to enable voluntary transfers of locally significant land between the state, local councils and Aboriginal Land Councils, is currently being redesigned to resolve transactional and adversarial aspects of the program, and to improve outcomes to Aboriginal communities. This is in response to a detailed assessment prepared by Senior Counsel Chris Ronalds (2020) that found the LNP to be unnecessarily complex and time-consuming. The LNP was originally established in 2016 as a four-year, voluntary pilot program to facilitate the divestment of Crown land to local councils under the *Crown Land Management Act 2016* (NSW) and the comprehensive settlement of land claims with LALCs under the ALRA.

In September 2023, the NSW Government decided that is did not support vesting of land to Local Government Councils and would not progress such land transfers, as it wished to retain state-owned land currently being used for community purposes. While some in-principal agreements had been reached for the vesting of Crown land in a Local Government Council, these would not proceed, and the relevant parties were notified of the Government's decision (Crown Lands 2023). The NSW Government also advised that it is in the process of refreshing the way Aboriginal Land Agreements (ALA) are utilised, and that they will be seen as a complementary tool to the Aboriginal Land Claim process to deliver site-specific outcomes for LALCs on a repeatable basis (Wensing 2024).

The Ronalds (2020: 51) review of the LNP noted that there is no statewide framework for negotiating native title claims in New South Wales, resulting in contradictory and ad hoc decisions throughout the state, and a lack of cohesion in the response. Ronalds (2020: 51) also noted that the land claim assessment process under the ALRA needs to include an assessment of Native Title claims as a matter of course, and that this step should not be used as an impediment to fruitful LNP negotiations.

Key Policies: the Aboriginal Affairs policy framework

Two Aboriginal Policy initiatives stand out for particular attention: the NSW Government's OCHRE Plan, and its commitment to the *2020 National Agreement on Closing the Gap* in Indigenous disadvantage.

NSW Government's OCHRE Plan

Since 2011, the OCHRE Plan has been the driving force behind Aboriginal Affairs NSW's policy for addressing Aboriginal disadvantage in New South Wales. OCHRE stands for *opportunity, choice, healing, responsibility* and *empowerment,* and is symbolic of Aboriginal communities' deep connection with Country. The OCHRE Plan is the outcome of consultations with Aboriginal communities, industry and stakeholders by the Ministerial Taskforce on Aboriginal Affairs in 2011. The report of the consultations claims that the views of 2,700 people were captured. The NSW Ombudsman (2019: 18) has described the OCHRE initiative as: *'an umbrella plan housing a number of discrete initiatives that have mostly operated separately from one another'.*

The OCHRE Plan (Aboriginal Affairs 2013) responds to shortcomings of Aboriginal Affairs NSW's (AANSW's) *Two Ways Together Plan* (in place between 2003 and 2012) (Aboriginal Affairs NSW 2012), and the findings of two key reports into the administration of Aboriginal affairs in New South Wales (NSW Ombudsman 2011; Audit Office of NSW 2011).

The stated aim of the OCHRE Plan is *'to support strong Aboriginal communities in which Aboriginal people actively influence and participate fully in social, economic and cultural life'* (Aboriginal Affairs NSW 2013: 5). This Plan is implemented through major initiatives that include Linking Education and Employment; Language and Culture; Local Decision Making; and Accountability (Aboriginal Affairs NSW 2013). Spatially, the foci of the OCHRE initiatives are in the regional and rural areas of New South Wales rather than in the larger urban centres of New South Wales. The four major initiatives are outlined below:

1. *Linking Education and Employment:* This initiative focusses on strengthening school communities to facilitate further education and training and to support economic participation, which are identified as essential for strong and sustainable communities. This major initiative is being implemented by two sub-initiatives, identified as Connected Communities and Opportunity Hubs. The Connected Communities sub-initiative allows school principals—in collaboration with parents, local governance groups and school communities—to align resources to meet the needs of their students, with the aim or breaking down barriers to student learning. The Opportunity Hub sub-initiative aims to better coordinate and utilise existing resources to improve the opportunities for Aboriginal young people transitioning from school into tertiary education, training or employment.
2. *Language and Culture:* This initiative responds to the fundamental right Aboriginal people have to revitalise and maintain traditional languages and how the teaching of Aboriginal languages and culture can help increase school participation, retention and improve interactions between Aboriginal and non-Aboriginal students. Five Aboriginal language and culture nests and two satellite nests are currently in operation, with the aim of facilitating the learning of local Aboriginal languages and cultural practices in seven different geographical locations.

3. *Local Decision Making:* Local Decision Making (LDM) is an Aboriginal community governance initiative. LDM is central to the delivery of the OCHRE Plan, and is underpinned by the principle of self-determination. The Plan aims to ensure that Aboriginal communities have a genuine voice in determining what and how services are delivered to their communities. The stated aim of LDM *'is to ensure Aboriginal communities have a genuine voice in determining what and how services are delivered to their communities'* and is enabled by the Premiers Memorandum M2015-01-Local Decision Making. The memorandum requires NSW Government agencies to work *'respectfully, constructively and cooperatively with Aboriginal community-based regional decision-making groups (regional alliances), to develop Accords (agreements)'* (Aboriginal Affairs NSW 2017a: 4). The OCHRE Local Decision Making Policy and Operational Framework (2017) outlines principles, objectives, outcomes of local decision-making and a toolkit for implementation. The aim of LDM is that Aboriginal people are placed at the centre of service design, planning and delivery, *'enabling the staged devolution of decision-making and accountability to the local level'* (Aboriginal Affairs NSW 2017a). The NSW Ombudsman's OCHRE Review Report (2019) finds that LDM has resulted in some positive development. However, the pace of implementation has been slower than anticipated, reflecting both the larger than expected number of communities involved in the initiative, and the practical changes required to share decision-making authority with Aboriginal Communities. Similar findings to the NSW Ombudsman's 2019 report are found in the evaluation of Murdi Paaki Regional Assembly (MPRA) Accord II Negotiation (part of the LDM program since 2013) by the Centre for Aboriginal Economic Policy Research (O'Bryan, Markham et al. 2022). The evaluation points to limitations, but also provides direction on improvements. Underlying a number of structural issues identified was a power imbalance between Lead Agency Negotiators (Government) and the MPRA delegates (Aboriginal representatives).
4. *Accountability:* The importance of providing transparency and accountability in the design and delivery of programs and services delivered to Aboriginal people were asserted by the Auditor-General (Audit Office of NSW 2011) and NSW Ombudsman (NSW Ombudsman 2011) in their 2011 reports. A Deputy Ombudsman (Aboriginal Programs) role was created to provide independent monitoring and assessment of OCHRE and respond to recommendations by Aboriginal community leaders. Following consultation with Aboriginal community leaders, the Deputy Ombudsman (Aboriginal Programs) roles is in lieu of a Coordinator General of Aboriginal Affairs and a new Independent Aboriginal Council.

There appears to be limited synchronicity between Aboriginal affairs policy and urban planning policy in New South Wales, with only minor references made to the OCHRE Plan in two elements of planning policy:

- the NSW Government Architect's 2020 Draft *Connecting with Country* Framework
- the NSW Department of Planning and Environment's Aboriginal Outcomes Strategy 2020–23 *Our Place on Country.*

In addition to the current incongruity between Aboriginal affairs policy and urban planning policy is the misguided use of the term 'self-determination' to describe a core tenet of the OCHRE Plan, being Local Decision Making. Despite the NSW Government divesting some power over service delivery functions, decision-making is constrained to discrete or limited services—for example, education services, housing provision. This is a far cry from the practical intent of the principle of self-determination in Article 3 of UNDRIP.

NSW Closing the Gap Implementation Plans 2021 and 2022

New South Wales is party to the *2020 National Agreement on Closing the Gap* which commits the parties to developing their own Implementation Plans to support the achievement of the National Agreement's objectives and outcomes in their respective jurisdictions.

The NSW Government and the NSW Coalition of Aboriginal Peak Organisations (NSW CAPO) developed their first Closing the Gap Implementation Plan in 2021 and renewed it in 2022 (NSW Government and NSW CAPO 2021; 2022). The Implementation Plans should be read in in conjunction with the *National Agreement on Closing the Gap 2020–2030* and *Partnership Agreement on Closing the Gap 2019–2029.*

The 2021 Implementation Plan is a whole-of-government plan that details the structural and systemic reforms to the relationship between the NSW Government and Aboriginal peoples and organisations and existing actions underway across government. It outlines NSW-specific actions to achieve the priority reforms, the socioeconomic targets, and the accountability measures for meeting its commitments under the National Agreement. The partnership between the NSW Government and NSW CAPO has adopted an iterative approach to the Implementation Plan requirements in the National Agreement, with its 2021 Implementation Plan setting out preliminary actions and work already underway on the Priority Reforms and baselines on the 17 socioeconomic targets. The 2021 Implementation Plan commits the parties to working in partnership to renew the plan and develop further forward-looking action plans to achieve the reforms and targets through working groups led in partnership by government and NSW CAPO. The 2021 Implementation Plan will be regularly reviewed and updated to provide direction on how all government agencies—in partnership with NSW CAPO and other partners—will work together to enhance economic, social and cultural outcomes for Aboriginal peoples, their families and communities to benefit the entire NSW community.

The 2022 Implementation Plan outlines the vision, purpose and methods to the Plan, including the approach to partnership between NSW CAPO and the NSW Government; the commitment to accountability to Aboriginal communities through the Plan's implementation; and details the new funding, programs, policies and services the parties will implement over the next two years to achieve the Priority Reforms and 17 Socioeconomic Outcomes in New South Wales. The Plan states that:

> *Underscoring all our work are commitments to transforming how government organisations work to be more responsive to the needs and aspirations of Aboriginal people, and to implement all activities in a way that takes full account of, promotes, and does not diminish in any way, the cultures of Aboriginal peoples* (NSW Government and NSW CAPO 2022: 4).

The specific socioeconomic target dealing with Aboriginal peoples' connections to land and waters is Socioeconomic Outcome 15: Aboriginal people maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters.

In relation to Socioeconomic Outcome 15, the Plan articulates the following key actions:

> ***Key Action Area 1: The land dealings system and interaction between Aboriginal Land Rights and Native Title are improved.*** *This Key Action Area is about establishing a simplified, less expensive and clearer interaction between the various systems that provide rights over land to achieve better social, cultural and economic outcomes for Aboriginal people. Improving this will increase ownership and legal rights over land for Aboriginal people* (NSW Government and NSW CAPO 2022: 115).
>
> ***Key Action Area 2: Aboriginal people's ownership of, legal interest over and access to sea, Country and inland water is increased/improved upon.*** *This Key Action Area is about increasing Aboriginal ownership of, legal interest in and access to water—including sea and inland water—to support Aboriginal people's vital cultural, spiritual, physical and economic relationships with water. This includes ensuring water management systems are sustainable, and support Aboriginal communities' cultural rights and ecosystem health* (NSW Government and NSW CAPO 2022: 116).
>
> ***Key Action Area 3: There is enhanced and streamlined support for Aboriginal people to realise their legal rights and interests over land, sea and water, including at pre-, during and post-transfer and return stages.*** *This Key Action Area is about supporting Aboriginal communities to unlock or 'activate' the full economic, social and cultural potential of land and water that has been or will be transferred back to Aboriginal ownership or management. This includes supporting Aboriginal communities' long-term goals for the land, sea and water that they own or have legal rights and interests over, such as caring for Country, development that provides social or economic community benefits, and improving community access* (NSW Government and NSW CAPO 2022: 117).

In relation to Key Action Area 1, the NSW Government acknowledges that it has been told about the need for *'a more effective system for managing the interaction between Native Title and Land Rights in NSW'* because the current state of affairs is *'not productive or sustainable and community strongly want to see a more effective system'* (NSW Government and NSW CAPO 2022: 115). In response, the NSW Government has committed to establishing a taskforce to negotiate a redesign of the Native Title and Land Rights systems. The taskforce will partner in designing an overarching comprehensive and holistic reform policy that supports a negotiated redesign of the Native Title and Land Rights systems at a local or regional level. The objective of the redesign is to reform the complex operational relationship between the *Native Title Act 1993* (Cth) and the *Aboriginal Land Rights Act 1983* (NSW) to be approved and implemented by 2025 (NSW Government and NSW CAPO 2022: 115).

The 2022 Implementation Plan also includes a commitment to increasing the return of land to Aboriginal communities in New South Wales, based on comprehensive research, economic analysis and the development of options and models that take account of the economic considerations in supporting significant and ongoing increases in land ownership by Aboriginal communities. And commitments for greater support for Aboriginal landowners including prior to, during, and after transfer (NSW Government and NSW CAPO 2022: 115–117).

The Implementation Plan also includes details of specific actions against the full range of the socioeconomic targets in the 2020 National Agreement, and who is responsible for their implementation by Minister and agency. Progress with the actions in relation to Socioeconomic Outcome 15 are keenly awaited.

The Urban Policy Planning Framework

Over the past two decades in New South Wales, there has been a gradual rise in the production of built environment policies, strategies, frameworks, and guidelines that relate to the rights and interests of the Aboriginal peoples of New South Wales. While not providing substantive rights, the cumulative impact of this material diverges from conventional practice and may progressively modify the actions of built environment professionals. The probable outcomes include augmenting the awareness of Aboriginal rights and interests, needs and aspirations to land and waters in land use, design and development activities. Possible outcomes include an incremental increase in the recognition of Aboriginal peoples' rights and interests in some tangible way, rather than tokenistically. The degree to which this growing public policy discourse can contribute to Aboriginal self-determination can only be judged over time. What these documents do show is some kind of material progress toward better tangible outcomes for the Aboriginal peoples of NSW.

There are several notable policies, strategies, frameworks and guidelines with a particular focus on urban policy and planning, and these are discussed below.

Our Place on Country—Aboriginal Outcomes Strategy (OPOC Strategy)

The Our Place on Country—Aboriginal Outcomes Strategy (DPIE 2020) (the OPOC Strategy) was prepared by the NSW Department of Planning, Industry and the Environment (DPIE). The OPOC Strategy aims to contribute to the NSW Government's OCHRE objectives by making sure DPIE includes the OCHRE approaches in its work. The OPOC Strategy outlines the Department's aspirations to grow the cultural understanding of the Department, facilitate the Department becoming an employer of choice for Aboriginal people and to deliver better services in partnership with Aboriginal communities. The OPOC Strategy aims to strengthen the links between the management of Country and issues such as education, health, employment and law and justice. The Strategy also aims to contribute to the OCHRE objectives by embedding them in the work of the Department. The claimed principles of the Strategy are self-determination and co-design. However, it is notable that there are no explicit references to UNDRIP or to the *Uluru Statement from the Heart* in the OPC Strategy.

Designing with Country Discussion Paper

The *Designing with Country Discussion* Paper (GANSW 2020) prepared by the NSW Government Architect (GANSW) presents a series of questions and issues regarding embedding Country and Aboriginal culture in the design and planning of the built environment. Developed in conjunction with recognised Aboriginal knowledge holders, the discussion paper defines Country, discusses the merit of designing with Country, presents three elements of Country (nature, people, design), some examples of design with Country in practice, and a call to action to contribute to the development of cultural design principles. There are no references to UNDRIP or the *Uluru Statement from the Heart*.

Connecting with Country Framework

The *Draft Connecting with Country Framework* (GANSW 2020) is a *'set of pathways, commitments, and principles for action intended to help form, design, and deliver government infrastructure'* (GANSW 2020: 9) that protects the health and wellbeing of Country and sets out how Aboriginal knowledge can be embedded in a way that ensures that Aboriginal communities retain intellectual property rights. The framework comprises strategic long-term goals and principles for action that incorporate a fundamental repositioning from human-centred to Country-centred design. The draft framework has been informed by engagement with an Advisory Panel of Traditional Custodians, Aboriginal consultants, and advisory organisations, and is written by and with Aboriginal experts in spatial design in collaboration with GANSW staff. The mandating of this draft Framework into the statute was suddenly abandoned in April 2022, when the draft *State Environmental Planning Policy (Design & Place 2021)* (NSW) was discarded by the NSW Government. Arguably, this action by the NSW Government asserts the continuation and remaking of colonial impacts in New South Wales (Jackson, Porter et al. 2019). There are no references to UNDRIP or the *Uluru Statement from the Heart* in the Draft Framework.

A final version of *Connecting with Country Framework* was released in 2023 (GANSW 2023). It states that the United Nations Sustainable Development Goals and *Declaration on the Rights of Indigenous Peoples* have helped to create a momentum for projects such as this Framework, to give voice to Aboriginal and other First Nations peoples in the development of policy. The final Framework also acknowledges that:

- ICIP is recognised in international law, including the UN *Declaration on the Rights of Indigenous Peoples*, to which Australia is a signatory
- ICIP is underpinned by the self-determination of Aboriginal peoples and is an important part of the cultural heritage and identity of Aboriginal communities (GANSW 2023).

Interestingly, the Framework makes reference to the Victorian Department of Environment, Land, Water and Planning's Cultural Safety Framework (DELWP 2019d).

The Framework is an evolving document, reflecting an increasing body of knowledge and practice. Feedback on what is working well and how the framework can be improved is encouraged and will be recorded and incorporated into a review of the framework by the end of 2027.

Recognise Country—Guidelines for Development in the Aerotropolis

The *Recognise Country—Guidelines for Development in the Aerotropolis* (DPIE 2021) (the Guidelines) prepared by the NSW Department of Planning and Environment, developed alongside the Western Sydney Aboriginal community and authored by Elle Davidson and Jahni Glasby with Tanya Koeneman as the main editors, and Dillon Kombumerri, Michael Mossman and Daniele Hromek as advisors. The Guidelines contain requirements intended to direct landowners, developers and consent authorities to support Country-centred planning and design principles in alignment with the *Connecting with Country Framework.* The Guidelines aim to provide practical information and tools to facilitate culturally safe practices in the design, planning, and delivery of major development, while elevating the voices of Traditional Custodians.

The following development types must follow the planning Guidelines:

- State Significant Development (SSD)
- State Significant Infrastructure (SSI)
- Master Plans as per the Aerotropolis State Environmental Planning Policy (SEPP)
- Development Applications (including concept applications) on sites 20 hectares or more in size, or with a capital investment of $20 million or more.

If development does not satisfy this criterion, there is the option to opt in to the process, which is highly encouraged, given the benefits associated with supporting the recognition of Country. There are no references to UNDRIP or the *Uluru Statement from the Heart*.

The Six Cities Region Discussion Paper and What We Heard Report

The *Six Cities Region Discussion Paper* (GCC 2022) prepared by the Greater Cities Commission (GCC) contains reference to a First Nations Voice to be embedded into the strategic planning for the Six Cities Region. The notion of a Voice parallels the *Uluru Statement from the Heart*, which calls for the establishment of a First Nations Voice to the Australian Parliament in Australia's Constitution. The first mechanism proposed by the GCC that aims to parallel the *Uluru Statement from the Heart* is the establishment of a First Nations Advisory Panel to advise on regional strategic planning, operating as a voice to the Greater Sydney Commission (the Commission). Furthermore, the Commission aims to engage First Nations peoples in accordance with the *National Agreement on Closing the Gap*. While making reference to the UN *Sustainable Development Goals*, the report does not include any references to UNDRIP. In contrast to the planning frameworks and guidelines set out above, the report does include reference to the *Uluru Statement from the Heart* as a source for taking specific actions to make the involvement of First Nations peoples more tangible.

In the GCC's *What We Heard Report* (GCC 2023) about consultations on the Discussion paper, the GCC stated there was strong support for embedding the voice of First Nations peoples in planning. Community members expressed support for how First Nations people care for their land, waters and seas and for embedding First Nations wisdom into planning processes, and that doing so represents respect and progress towards reconciliation. Industry stakeholders and local government also expressed support for establishing a First Nations Advisory Panel and sought further detail on how to progress these ideas and complement existing initiatives (GCC 2023).

While the GCC committed to recognising and embedding First Nations voices in the future of the multi-city region, the Commission was abolished on 1 January 2024 and its functions were absorbed into the Department of Planning, Housing and Infrastructure (DPHI).

Indigenous Cultural and Intellectual Property Protocol

In July 2020, DPIE released the OPOC Strategy, with the aim of providing strategic direction for achieving Aboriginal outcomes across the Department's work, in line with the NSW Government's OCHRE Plan. The OPOC Strategy sought to embed the principles of self-determination and co-design into the Department's core practice and contribute to wider positive benefits for Country and for Aboriginal communities.

In April 2023, DPIE released the *Indigenous Cultural and Intellectual Property Protocol* (DPIE 2023) (the ICIP Protocol). The purpose of the Protocol is to guide staff in implementing these principles into practice and to offer practical guidance to the Department's staff on protecting ICIP. The Protocol is guided by the True Tracks® Principles for ethical engagement with First Nations people, developed by Dr Terri Janke of Terri Janke & Company, Lawyers and Consultants, and the principle of free, prior, and informed consent (FPIC) as provided for in the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (UN 2007).

A great deal of the Department of Planning's work impacts on Country and on Aboriginal peoples and communities in New South Wales. Through this work, the Department may be entrusted with Aboriginal knowledge and culture, also known as Indigenous Cultural and Intellectual Property (ICIP). An obligation is attached to that trust to ensure adequate protection is provided for the ICIP the Department is entrusted with, through agreed protocols and agreements. In upholding that obligation, the Department is acknowledging its responsibility to introduce practical measures to uphold the principles of self-determination and co-design. The Department's ICIP Protocol is intended to guide staff in implementing these principles into practice. In adopting this ICIP Protocol, the department is strengthening its commitment to the OPOC Strategy, and the National Agreement on Closing the Gap on ensuring best practice around ICIP rights.

Connecting with Country Framework

The *Connecting with Country Framework* (GANSW 2023) prepared by the Government Architect New South Wales (GANSW) and published in July 2023, is identified as an *'evolving framework'* that provides *'good practice guidance on how to respond to Country in planning, design and delivery of built environment projects in NSW'* (GANSW 2023: 3). There are several variations to the original draft, the most substantive being Section 1.5, which sets out the context for the framework. This section acknowledges that the framework is informed by a wider context of international, national-level, and state-level First Nations peoples' rights, which includes the *United Nations Sustainable Development Goals* and the *Declaration on the Rights of Indigenous Peoples* (UNDRIP), the *Uluru Statement from the Heart*, the *Native Title Act 1993* (Cth), and the National Agreement on Closing the Gap, objects of the EP&A Act 1979, the ALRA 1983, and the OCHRE policy. Furthermore, in contrast to the 2020 draft, the final *Connecting to Country Framework* (the Framework) is now informed by a rights-based international and national context, where calls for self-determination, truth-telling, and recognition are echoed. The Framework describes practical ways for responding to 'new directions in planning policy'—particularly those related to Aboriginal culture and heritage. The final section of the framework, Section 5, outlines 19 case studies that have been designed to successfully connect with Country. Feedback from government, industry, and Aboriginal community is encouraged to improve the framework, and will be incorporated into a review by the end of 2027.

Conclusion

This chapter examined the complex array of statutes, policies and frameworks governing the interactions between Aboriginal people's land rights and interests and urban policy and planning in New South Wales. This research involved reviewing over 100 documents spanning the period 2011–2023. The scope of the analysis included a review of several documents in three key areas that govern the interactions between Aboriginal peoples' land rights and interests and urban policy and planning in New South Wales:

- the statutory framework
- key policies in Aboriginal Affairs
- key urban policy and planning documents.

As is the case in any examination of the statutory environment, it is important to note that statutes are made at different points in time and generally reflect the issues and prevailing circumstances at the time at which they were introduced. It rarely happens that an overall assessment is undertaken as to how well different statutes interact with each other over time. That is not the job of the legal officers charged with the responsibility of drafting new statutes—although they do consider whether a new statute might give rise to consequential amendments to other existing statutes. But it is the role of governments and the Parliament of the day to ensure that various statutes do not create unnecessary tensions or conflicts between different systems, which lead to irreconcilable differences. When these circumstances occur, governments are expected to show some leadership, rather than continue to wash their hands of the problem and say it is not their business to fix.

In New South Wales, the state's statutory Aboriginal land rights system operates alongside the Commonwealth's native title system. Both systems were created at different points in time and reflect the issues and the circumstances of the era when they emerged and were developed and implemented. But in recent years, the tensions between these two systems have reached boiling point and, in some localities, circumstances are becoming irreconcilable.

The ALRA was devised a decade before Eddie Koiki Mabo's land rights claim was finalised by the High Court in 1992 in *Mabo (No. 2)* and the Commonwealth enacted the *Native Title Act 1993*. The ALRA was conceived in the context of the government of the day having to grapple with the fact that previous colonial and state governments had failed to recognise the intrinsic and deeply embedded spiritual and cultural connections to, and responsibilities for, Country in Aboriginal law and custom. While the ALRA has been modified along the way, it remains predicated on the idea of compensation for historic losses and a very loose form of restitution for having dispossessed the Aboriginal people of their lands without their consent and without proper compensation in the first place (Reynolds 2021: 135).

In complete contrast, native title rights and interests are not something that governments create and grant to Aboriginal people—they already exist under Aboriginal law and custom. Where native title has been determined to exist (wholly or partly), native title holders are prevented from leveraging or encumbering their native title rights and interests as collateral for economic development.[13] They can only surrender their native title rights and interests to the Crown, or the Crown can compulsorily acquire them, subject to compensation on just terms (Valuer General NSW 2022).[14] And the native title system cannot be scrapped or changed by the NSW Government because it does not have the power to do so (Wensing 2024a).

The tensions between the two systems occasionally come to the surface in New South Wales, but are rarely addressed constructively because they give rise to some particularly difficult questions, including:

- How can Aboriginal people's cultural and traditional connections to Country be better recognised and respected so that they may prosper well into the future?
- How can the cultural and traditional connections to Country and statutory land rights be justly accommodated without unfairly displacing anyone's existing rights and interests?
- How can Crown land that may be subject to land rights claim and native title rights and interests be used for the benefit of Aboriginal peoples in New South Wales without having to extinguish the latter (Wensing 2024a)?

The risk for other parties—for example, local government and sporting or community organisations—with interests in accessing and using Crown land is that they may find themselves caught between these conflicting systems, and the paths to amicable resolution in everyone's interests are difficult to traverse. Yet removing barriers to access to land is of great importance to Aboriginal peoples and to the wider community (Wensing 2024a).

13 Under s.56(5) of the NTA, the native title rights and interests held by a body corporate are not able to be assigned, restrained, garnisheed, seized or sold or made subject to any charge or interest as a result of the incurring, creation or enforcement of any debt or other liability of the body corporate, including any act done by the body corporate (Wensing and Taylor 2012: 25; Wensing 2019: 252).

14 S.51 NTA and para 51(xxxi) of the Australian Constitution.

As Wensing (2019: 57) and Wensing and Porter (2016: 4) have observed, the statutory land rights system in New South Wales is *'an act of grace or favour'* by the state because it was grasping for a solution to a complex problem of not having recognised the pre-existing rights and interests of the Aboriginal peoples of New South Wales since colonisation began in 1788. The ALRA is based on a complex claim system without any reference to the claimants' traditional connections to Country; land can only be granted if the state has no other purpose for the land; and the ALRA will never be able to adequately compensate the Aboriginal people of New South Wales for the land they have lost due to colonisation. Given the limitations on what land can be claimed, the slow processing of claims (Hunt and Elsmore 2016: 87), the very low proportion of land that has been transferred under the ALRA over the 40 years of its operation, the huge backlog of claims awaiting consideration (Ronalds 2020: 66) and the ALRA's failure to recognise Aboriginal peoples' intrinsic and inherent connections to and responsibilities for Country under their law and custom, the ALRA appears to be no longer 'fit for purpose' in its current form.

The native title system is also complex. It has to deal with over 230 years of failing to recognise Aboriginal and Torres Strait Islander law and custom (particularly in New South Wales), as well as create a system for working with native title rights and interests into the future. In many respects, the NTA is an act of *'statecraft'* (Scott 1998: 77) because Aboriginal (and Torres Strait Islander) peoples *'don't belong anywhere unless they can prove their title according to criteria established by the state'* (Moreton-Robinson 2015: 16). Furthermore, their rights and interests are always subject to extinguishment by the state (O'Sullivan 2021: 36, 40) and are vulnerable to the state's powers of compulsory acquisition (Wensing 2019: 70, 173).

Aboriginal peoples' persistent desire is that the two systems of law and custom relating to land be accorded an equal and non-discriminatory status (Dodson 1997). This is not mere historical or symbolic posturing. They want to use their property rights to engage in the economy *'on their terms'* (Cornell and Kant 1992: 13) and at their choosing (Wensing 2019: 6).[15] Their position is supported by various international human rights instruments (Wensing 2019: 2),[16] and Aboriginal and Torres Strait Islander people and communities throughout Australia will always retain their special relationship with and responsibility for land and sea Country (Dodson 1998: 209; Rose 1996).

In examining the Aboriginal Affairs policy domain, it was found that the OCHRE Plan has been at the heart of the NSW Government's approach to addressing Aboriginal disadvantage in New South Wales since 2011. While some elements of the OCHRE Plan are consistent with the principle of self-determination and have crept into other policy areas, the NSW Government has not shown any inclination that the principle of self-determination has relevance across the breadth of NSW Government legislative and policy actions. There appears to be a quiet denial and staunch resistance to extending its application into other policy areas in New South Wales, other than within the Closing the Gap agenda.

The first stage evaluations of OCHRE Plan were undertaken at the five-year mark. Now that the OCHRE Plan has been in place for more than 10 years, the second stage evaluations are underway, and a series of reports are being produced that evaluate the various components of the OCHRE Plan. The evaluations are being undertaken by academics from the Centre for Aboriginal Economic Policy Research at ANU (Howard-Wagner and Markham 2023; O'Bryan and Markham 2023; O'Bryan, Markham, and Harrington 2022).[17]

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15 By this turn of phrase, I mean that native title holders have *'genuine decision-making control over the running of tribal affairs and the use of tribal resources'* (Cornell and Kant 1992: 13), including the discretion to make decisions about land tenure and land use without outside interference and on the basis of free, prior and informed consent, consistent with Articles 18 and 19 of the UN *Declaration on the Rights of Indigenous People* (UN 2007).

16 Including, but not limited to, the *Universal Declaration of Human Rights* (UN 1948), the *International Covenant on Civil and Political Rights* (ICCPR) (UN 1966a), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (UN 1966b), the *Declaration on the Right to Development* (UN 1986) and the *Declaration on the Rights of Indigenous Peoples* (UN DRIP) (UN 2007).

17 Disclosure: Dr Ed Wensing is a Visiting Research Fellow at the Centre for Indigenous Policy Research (formerly the Centre for Aboriginal Economic Policy Research) at ANU. Dr Wensing has not had any involvement in the OCHRE evaluation studies.

The preliminary evaluation of the Local Decision Making (LDM) component of OCHRE has found that while there have been some successes, progress in relation to LDM has been ad hoc, and that it is not being implemented well across the board. There have not been systematic transformations of relationships between Aboriginal communities and the NSW Government under LDM, and the report's authors identify areas where the design and implementation of LDM are falling short. The authors also provide evidence and recommendations that may be used to improve outcomes under LDM in the future (Howard-Wagner and Markham 2023).

A review of the other evaluation reports shows that most of the activity under the OCHRE Plan is in regional and rural New South Wales, and not in the urban areas of Greater Sydney or around Newcastle or Wollongong.

The 2022 Closing the Gap Implementation Plan signals, for the first time, a plan of action for addressing the tensions between the ALRA and the NTA in New South Wales in the context of the Socioeconomic Outcome 15 in the 2020 National Agreement on Closing the Gap, which commits all governments to ensuing Aboriginal and Torres Strait Islander people can maintain a distinctive cultural, spiritual, physical and economic relationship with their land and waters by increasing the extent of Australia's landmass that is subject to Aboriginal and Torres Strait Islander peoples' legal rights or interests by 15 per cent by 2030.

For the first time, the NSW Government acknowledges it is aware of the tensions between the ALRA and the NTA, because it has been told the current state of affairs is *'not productive or sustainable and [the Aboriginal] community strongly want to see a more effective system'* (NSW Government and NSW CAPO 2022: 115). While the NSW Government has committed through the Closing the Gap Implementation Plan to addressing the problem, it has set a very ambitious target of finding a resolution to these matters by 2025. The NSW Government has also committed to increasing the return of land to Aboriginal communities.

These are ambitious but necessary targets for New South Wales. However, the extent to which the land-related targets can be achieved in urban areas around Greater Sydney remain problematic due largely to the restrictive applicability of the statutory land rights scheme and the national native title system in urban areas where there is very little claimable Crown land under either scheme.

In New South Wales, the latest urban policy documents show a slow progress toward some tangible mechanisms for incorporating Aboriginal peoples' rights and interests in urban policy and planning. The principles embedded in the UN *Declaration on the Rights of Indigenous Peoples* and Indigenous rights flowing from Indigenous Cultural and Intellectual Property (ICIP) rights are gradually making their way into the urban policy domain. While these are small steps, they nevertheless set the groundwork for further progress toward greater recognition of Aboriginal peoples' inherent rights and interests and self-determination in urban policy and planning in New South Wales. In the main, progress in this space in New South Wales is slow when compared to what is happening in Victoria. To date, developments in New South Wales have been a patchwork approach with still very limited forms of involvement and no devolution of power from the settler-state, rather than a more concerted effort toward finding long-term solutions to addressing past grievances arising from the impacts of colonisation and dispossession through settlement and urbanisation. There is considerable room for improvement in New South Wales, when compared to what is happening in Victoria.

5. Victoria state context

Introduction

Similar to New South Wales, the urban policy environment in Victoria also comprises a complex array of statutes, policies, plans and frameworks that are difficult to navigate, and present several challenges for Aboriginal Victorians to gain traction for the better recognition of their inherent rights and responsibilities for Country under their law and custom. This chapter explores three key components that govern the interactions between urban policy and planning and Aboriginal peoples' land rights and interests in Victoria:

- the statutory framework
- the key policies on Aboriginal Affairs
- key urban policy and planning documents.

There are several statutes relating to land in Victoria that Aboriginal people have to navigate in relation to their land rights and interests. This chapter provides an overview of each statute and their complex interplay (including with the *Native Title Act 1993* (Cth)). This chapter also provides an overview of the proliferation of land-based policies, frameworks and guidelines the Victorian Government has produced in recent history relating to Aboriginal affairs and urban policy and planning.

The statutory framework governing land and Aboriginal peoples' rights and interests in Victoria include the following statutes (listed in chronological order of first enactment):

- *National Parks Act 1975 (Vic)* and *Parks Victoria Act 2018* (Vic)
- *Aboriginal Heritage Act 2006 (Vic)* and *Aboriginal Heritage Amendment Act 2016* (Vic)
- *Planning and Environment Act 1987* (Vic)
- *Local Government Act 1989 (Vic) and Local Government Act 2020* (Vic)
- *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- *Traditional Owner Settlement Act 2010* (Vic)
- *Yarra River (Wlip-gin Birraraung murron) Act 2017* (Vic)
- *Advancing the Treaty Process with Aboriginal Victorians 2018* (Vic) and *Treaty Authority and Other Treaty Elements Act 2022* (Vic).

There are numerous other statutes that also impact in this space, but these are the primary statutes that govern the interactions between Aboriginal people's land and native title rights and interests in Victoria and the Victorian Government's interests in urban policy and planning.

There are also numerous policy documents in the wider Aboriginal affairs policy domain impacting on Aboriginal peoples' overall health and wellbeing. The principal Aboriginal Affairs policy initiatives in Victoria pertinent to the scope of this research, include:

- The Victorian Government's *Aboriginal Affairs Annual Reports* (since 2013) and *Aboriginal Affairs Framework*
- *The Closing the Gap Implementation Plan 2021*
- The Pathway to Treaty in Victoria
- Recognition and engagement with Traditional Owner voices across Victoria.

The most pertinent urban policy documents impacting Aboriginal peoples' involvement or engagement in urban policy and planning in Victoria include:

- DELWP's *Munganin–Gadhaba 'Achieve Together' DELWP Aboriginal Inclusion Plan 2016–2020* (2016)
- DELWP's *Pupangarli Marnmarnepu 'Owning Our Future' Aboriginal Self-Determination Reform Strategy 2020–2025* (2019)
- DELWP's *Traditional Owner and Aboriginal Community Engagement Framework* (2019)
- DELWP's *Aboriginal Cultural Safety Framework* (2019).

What is evident from this analysis is that since the ALP came to government in Victoria in 2014, the first meeting between then Premier, Daniel Andrews, and Aboriginal Victorians was pivotal in terms of steering Victoria toward a Treaty (or Treaties), with the state government placing the principle of self-determination at the heart of Aboriginal Affairs in Victoria—and at the heart of all its dealings with Aboriginal Victorians on all matters.

The Statutory Framework

The *National Parks Act 1975* (Vic) and the *Parks Victoria Act 2018* (Vic)

The *National Parks Act 1975* (Vic) is the principal statute for the creation and management of national parks in Victoria. The Act established a network of national parks and other protected areas that are representative of Victoria's diverse natural environments, and sets out the legal framework for their protection, enjoyment and management. The objects of the Act set out the key objectives for park managers to deliver for the Victorian public.

Parks Victoria, established under the *Parks Victoria Act 2018* (Vic), is responsible for the management of parks in Victoria. The agency currently manages a system of more than 100 parks and other areas under the *National Parks Act 1975* (Vic), totalling approximately 4 million hectares, including 3,000 land and marine parks and reserves making up 18 per cent of Victoria's landmass, 75 per cent of Victoria's wetlands and 70 per cent of Victoria's coastline on behalf of the Victorian Government.

One of the objects of the *Parks Victoria Act 2018* (Vic) is to recognise and support Traditional Owner knowledge of and interests in Parks Victoria–managed land. Under the *Parks Victoria Act 2018* (Vic), Parks Victoria is required to prepare a Land Management Strategy that *'sets out the general long-term directions, strategies and priorities for the protection, management and use'* of land managed by Parks Victoria.

Parks Victoria's Land Management Strategy, approved by the Minister in September 2022, was prepared with input from Traditional Owner partners and consultations with other stakeholders. Consistent with the Victorian Government's priority of placing self-determination at the heart of Aboriginal Affairs policy in Victoria, the Parks Land Management Strategy *'seeks to support a self-determination approach for Traditional Owners'* and commits to working in partnership with Traditional Owners to restore and care for healthy cultural landscapes in all aspects of park management. Many parks are already managed in a partnership between Traditional Owners and the Victorian Government—and the Victorian Government's intention is that more parks will be managed this way in the future.

The one factor that distinguishes the management of national parks in Victoria is that the protection and management of Aboriginal cultural heritage is dealt with under separate legislation, and is not embedded within the legislation governing National or State Parks and conservation reserves, as is the case in New South Wales.

The *Aboriginal Heritage Act 2006* (Vic) and the *Aboriginal Heritage Amendment Act 2016* (Vic)

The *Aboriginal Heritage Act 2006* (Vic) (AHA) provides for the protection and management of Victoria's Aboriginal cultural heritage, with processes linked to the Victorian planning system.

The AHA introduced measures designed to improve Aboriginal peoples' input into Cultural Heritage management. The objectives of the AHA are to empower Traditional Owners as protectors of their Cultural Heritage on behalf of Aboriginal peoples, and all other peoples. The AHA operates to establish Registered Aboriginal Parties (RAPs), who may approve or reject Cultural Heritage Management Plans (CHMPs) in relation to their Country. The AHA 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 AHA. These include:

- advising the Minister in relation to the protection of Aboriginal Cultural Heritage in Victoria
- receiving and determining applications for registration of Aboriginal parties
- promoting public awareness and understanding of Cultural Heritage in Victoria
- being the central coordinating body responsible for the oversight, monitoring, managing, reporting and returning of Aboriginal Ancestral Remains and Secret and/or Sacred Objects in Victoria.

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

The AHA also has processes for handling dispute resolution. This includes the review of certain decisions through the Victorian Civil and Administrative Tribunal (VCAT).

The *Aboriginal Heritage Amendment Act 2016* (Vic) made several amendments to the *Aboriginal Heritage Act 2006* (Vic), with five broad aims:

- to increase Aboriginal self-determination
- to make improvements for history
- to improve Aboriginal cultural heritage management and protection
- to improve enforcement and compliance
- to increase focus on Aboriginal intangible heritage.

The amendments also improved reporting requirements, introduced provisions regarding Aboriginal intangible heritage, and established an Aboriginal Cultural Heritage Fund.

The model established under the AHA 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 AHA 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 disassociate and disconnect Aboriginal Culture from Country and impose a Western perspective that cultural objects and practice exist separately from Country.

In 2020 and 2021, the VAHC undertook a rigorous consultation and review process through a Discussion Paper (VAHC 2020) and a Proposal Paper (VAHC 2021a). In the VAHC's report of the process (VAHC 2021b), it found that *'the overwhelming considerations were that Aboriginal Peoples cannot responsibly undertake the function of the Act'* because the responsibility for administering the Act *'are often in the hands of bureaucrats, non-Traditional Owners and other entities, whose Culture it isn't.'* (VAHC 2021b: 4). The VAHC also noted that:

> *It is essential that, as a society, we truly understand that Traditional Owners are the only comprehensive knowledge holders of their Cultural Heritage. Once we understand that single, fundamental truth, then the recommendation for Traditional Owners to manage their own Cultural Heritage becomes clear and purposeful. Such understandings are in step with the international benchmark set by the United Nations Declaration on the Rights of Indigenous Peoples.* (VAHC 2021b: 4)

The VAHC maintains that there is still room for improvement, particularly in how the *Aboriginal Heritage Act 2006* (Vic) interacts with the *Native Title Act 1993* (Cth) and the *Traditional Owner Settlement Act 2010* (Vic). 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. The VAHC concluded that *'The time has come for Traditional Owners to do more than play a part, they must realise their rights to control their Cultural Heritage through the law that governs the protection and management of that Cultural Heritage'* (VAHC 2021b: 4).

To date, there has been no response from the Victorian Government to the VAHC's 2021 report for further amendments to the *Aboriginal Heritage Act 2006* (Vic).

The *Planning and Environment Act 1987* (Vic)

The purpose of the *Planning and Environment Act 1987* (Vic) (P&E Act) is to establish a framework for planning the use, development and protection of land in Victoria. The Act sets out procedures for preparing and amending the Victoria Planning Provisions (VPPs) and planning schemes. It also sets out the process for obtaining permits under schemes, settling disputes, enforcing compliance with planning schemes and permits, and other administrative procedures.

The main functions of the Act are to:

- set the broad objectives for planning in Victoria
- set the main rules and principles for how the Victorian planning system works
- set up the key planning procedures and legal instruments in the Victorian planning system
- define the roles and responsibilities of the Minister, councils, government departments, the community and other stakeholders in the planning system.

The P&E Act is 'enabling' legislation. This means that it does not precisely define the scope of planning, how it should be done or the detailed rules that should apply to land use and development. These and other more detailed matters are dealt with by 'subordinate' instruments under the P&E Act, meaning these instruments get their legal weight from the P&E Act. These instruments include the Victoria Planning Provisions, planning schemes, regulations and Ministerial directions.

The main parts of the planning system established by the P&E Act include the following:

- The system of planning schemes that sets out how land may be used and developed
- The Victoria Planning Provisions that set out the template for the construction and layout of planning schemes
- The procedures for preparing and amending the Victoria Planning Provisions and planning schemes
- The procedures for settling disputes, enforcing compliance with planning schemes, and other administrative procedures.

Like almost all other planning statutes around Australia, the P&E Act is relatively silent on direct engagement with Aboriginal rights and interests in land. The only direct trigger in the P&E Act is if the Crown land is subject to a Traditional Owner Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic), which is the State's alternative to the *Native Title Act 1993* (Cth) in Victoria. That trigger exists because the definition of 'owner' in the planning statute had to be amended to include the Traditional Owner group entity within the meaning of the *Traditional Owner Settlement Act 2010* (Vic).

While the change to the definition of 'owner' was a consequential necessity, the implication in the planning context is that where the State has struck an agreement with the relevant Traditional Owner group entity under the *Traditional Owner Settlement Act 2010* (Vic), their rights and interests in the agreement with the State will be triggered under the planning statute if they will be affected by a Development Application (DA) under the planning statute. But in all other contexts, the P&E Act is silent on the recognition and protection of Aboriginal peoples' rights and interests (Wensing 2023b).

There are, however, specific measures in the Victorian Planning Provisions under the P&E Act that provide a relatively robust framework for ensuring Aboriginal heritage is considered in the planning assessment process. The Victorian Planning Provisions bring Aboriginal cultural heritage to the forefront of the planning process—before decisions are made and before works can begin, thereby:

- ensuring all stakeholders with flexibility to negotiate the requirements for managing and protecting Aboriginal cultural heritage
- mitigating the risk of incurring penalties for harming Aboriginal cultural heritage
- avoiding unforeseen delays to construction and development projects (Pfeffer and Boulet 2019).

The *Local Government Act 2020* (Vic)

The new *Local Government Act 2020* (Vic) was proclaimed in four stages, and progressively replaced the *Local Government Act 1989* (Vic). The new Act was aimed at improving financial management, greater community engagement, clearer standards of behaviour for elected representatives, increased accountability for both council and councillors, changes to election processes and candidate requirements, and increased transparency of council decisions.

The most significant feature of the 2020 Act, compared to its predecessor, is that its provisions move from a prescriptive basis to a principle-based approach to the regulation of local government. Over time, it became apparent that the level of prescription was unnecessary for modern councils and the *Local Government Act 2020* (Vic) removes these restrictions and enables councils to govern based on the following five principles: Community Engagement; Strategic Planning; Financial Management; Public Transparency; Service Performance.

Also significant about the new Act is that under section 87, the Minister for Local Government can issue Ministerial Good Practice Guidelines (MGPGs). While MGPGs are not mandatory for councils (unlike regulations), in the spirit of having a principles-based Act, it is intended that MGPGs be developed where there is a clear need to support councils. Compliance by a council with a relevant good practice guideline can be used as evidence that the Council has complied with the corresponding requirement under the Act or the regulations. The Ministerial Good Practice Guidelines have been issued in relation to Virtual Meetings and to Engaging with Aboriginal Victorians.

The *Ministerial Good Practice Guideline for Engaging with Aboriginal Victorians* draws upon the *Victorian Aboriginal Affairs Framework 2018–2023* (VAAF) as a foundation to guide councils in engaging with Traditional Owners, ACCOs and Aboriginal Victorians. It is intended that councils endeavour to understand which type of organisation leads pillars, and where appropriate collaboration will maximise outcomes for local communities. It provides a step-by-step guide for councils on how to identify, engage and build connections and develop mutually beneficial relationships. The Guideline requires councils to take reasonable steps to give effect to the engagement principles contained within the Guideline when seeking advice and guidance from Traditional Owners when developing and maintaining their community engagement policy under the *Local Government Act 2020*. A General Guidance note has also been issued as an explanatory document, providing background information to councils on the different Traditional Owner groups and Aboriginal Community Controlled Organisations (ACCOs) in the community.

At the same time as the *Ministerial Good Practice Guideline for Engaging with Aboriginal Victorians* was being released, the Victorian Government also released the *Victorian Aboriginal and Local Government Strategy 2021–2026* (Victoria State Government 2020). The Strategy was informed by a strong consultation process of 20 months, with guidance from a Steering Committee consisting of stakeholder organisations, local government representatives and members of the Aboriginal community in addition to consultation with Traditional Owner groups, local governments and peak bodies.

The Strategy includes a clear framework for shared decision-making processes and actions for Aboriginal Victorians working together with local government based on mutual control, shared power and decision-making, fairness, respect and trust. The Strategy serves as a practical guide for councils across Victoria and will help embed the voices and priorities of Aboriginal communities at a local government level. It is centred on seven strategic pillars:

- Culture, respect and trust
- Awareness and engagement
- Accountability and direction
- Governance and participation
- Economic participation
- Health and wellbeing
- Resourcing and funding.

The Strategy recommends actions for local governments, the Victorian Government and Aboriginal communities that progress Aboriginal self-determination and reconciliation. It was developed to support alignment of the Local Government sector with the Victorian Aboriginal Affairs Framework 2018–2023, the Victorian Treaty process, the Victorian Closing the Gap Implementation Plan and the work of the Yoo-rrook Justice Commission (Victoria State Government 2020).

The *Charter of Human Rights and Responsibilities Act 2006* (Vic)

Victoria is one of three jurisdictions within Australia to have a comprehensive Human Rights Act. The other two jurisdictions being Queensland and the Australian Capital Territory.

The *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) is a statute that sets out the basic rights, freedoms and responsibilities of all people in Victoria. The law aims to build a fairer, more inclusive community. While all of us have a role to play in respecting the rights of others, promoting and protecting fundamental human rights is primarily about the relationship between government and the people it serves.

The Charter places obligations and responsibilities on all three arms of government to uphold human rights:

- the executive—public authorities, such as state government departments and local councils)
- the legislature—the Parliament of Victoria
- the judiciary—courts and tribunals.

The Charter lets the Victorian community know about which rights the Victorian Government will protect, how it intends to do this, and what the consequences are for failing to do so. It gives public authorities rules and a framework within which to operate, and the community a language and principles with which to engage public authorities.

The Charter protects 20 fundamental human rights, and it requires public authorities—such as Victorian state and local government departments and agencies, and people delivering services on behalf of government—to act consistently with the human rights in the Charter. Interestingly, the Victorian Equal Opportunity and Human Rights Commission maintains that some rights may be limited, but there must be clear and reasonable grounds for doing so (VEOHRC: n.d. a).

The Charter creates a 'dialogue model' of rights—a constructive and continuous conversation about human rights between these arms of government and within the Victorian community. The model is designed to ensure human rights are considered in the development of laws and policies, in the delivery of public services, and in government decision-making. It encourages each part of our democratic system to play a role in protecting and promoting human rights. While each arm of government is subject to checks and balances, ultimate sovereignty rests with Parliament.

One of the key principles upon which the Act is based is that the human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

Section 19 of the Charter is based on Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) (UN 1966a), a treaty to which Australia became a party in 1980. However, unlike Article 27, section 19 is not limited to minority groups. Section 19 also specifically highlights Indigenous cultural rights which have been recognised as distinct in more recent human rights instruments and cases. Under the Charter, all rights may be subject to reasonable limits (section 7(2)). The nature of the right is relevant when considering what is reasonable.

S.19(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides a right to protection of cultural rights:

> *(1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.*

The right to culture therefore provides for people to practise and maintain shared traditions and activities and allows for those belonging to minority groups to enjoy their own culture, to profess and practise their own religion and to use their own language (in private and in public), as well as to participate effectively in cultural life (VEOHRC: n.d. b).

Section 19(2) focusses on the rights of Aboriginal persons regarding their cultural institutions, ancestral lands, natural resources and traditional knowledge:

> *(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—*
>
> *(a) to enjoy their identity and culture; and*
>
> *(b) to maintain and use their language; and*
>
> *(c) to maintain their kinship ties; and*
>
> *(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.*

According to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), this right puts an onus on public authorities to adopt measures for the protection and promotion of cultural diversity, enabling people from diverse communities to engage freely and without discrimination in their own cultural practices, and take appropriate measures or develop programs to support minorities or other communities, including Aboriginal and Torres Strait Islander communities, in their efforts to preserve their culture. For example, the cultural rights of Aboriginal Victorians were taken into account in the development of the *Traditional Owner Settlement Act 2010* (Vic) and agreement-making between the state and traditional owner groups (VEOHRC: n.d. b).

The Charter requires public authorities, including local councils, to consider the Charter in the way they go about their work, deliver services, apply laws and make decisions—including planning decisions because human rights are a key consideration when addressing the social and economic impacts of planning applications. The Charter also requires public authorities, including councils, to consider human rights when making a decision, and to not act incompatibly with human rights, and provides a framework for considering when human rights may be lawfully limited (VEOHRC: n.d. (c)).

The Victorian Equal Opportunity and Human Rights Commission's website contains an example of how the application of s.19 played out in relation to a planning application for the development of a mosque next to a church of another religious denomination in an industrial zone in the matter of *Rutherford & Ors v Hume City Council* [2014] VCAT 786. (VEOHRC: n.d. (c)).

It should be noted, however, that s.7(2) provides that a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Therefore, it remains to be seen how the Charter may be applied in relation to Aboriginal peoples' rights with respect to maintaining their distinctive spiritual, material and economic relationship with land and waters and other resources with which they have a connection under traditional laws and customs. This applies especially in locations where it may be difficult to establish the continuing existence of native title rights and interests under the *Native Title Act 1993* (Cth), or to reach an out-of-court settlement under the *Traditional Owner Settlement Act 2010* (Vic), or circumstances are not sufficient to meet the requirements for protection under the *Aboriginal Heritage Amendment Act 2016* (Vic).

It should also be noted that the Charter provides that International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision of the Charter (s.32)—including, for example, UNDRIP.

The *Traditional Owner Settlement Act 2010* (Vic)

Ever since the High Court of Australia's decision in *Members of the Yorta Yorta Aboriginal Community v Victoria (2002)* that the Yorta Yorta people's native title rights and interests did not exist, Victorian Traditional Owners had been advocating for an alternative approach to resolving native title claims in Victoria. In 2008, a steering committee consisting of Victorian Traditional Owners and representatives of the Victorian Government, was formed to undertake the 'Development of a Victorian Native Title Settlement Framework'. The Victorian Traditional Owner Land Justice Group was an active participant on the Steering Committee.

The Steering Committee's report set out the parameters of a Victorian Native Title Settlement Framework for out-of-court settlement packages that allow Traditional Owner groups to settle native title claims directly with the State outside the Federal Court process (Steering Committee 2008). A key objective in developing the Framework was to ensure a streamlined and expedited approach to settling native title claims through interest-based negotiations, which are equitable in outcomes and meet the aspirations of both Traditional Owners and the State. The Framework proposed that the State would have its own formal recognition of Victorian Traditional Owner groups alongside a raft of benefits to Traditional Owners in return for their agreement to withdraw their native title claim and/or agree not to lodge a claim into the future. Benefits for Traditional Owner groups would be tailored to local circumstances and range from access to land and natural resources through to measures for the recognition and strengthening of culture.

In February 2009, members of the Victorian Traditional Owner Land Justice Group unanimously endorsed the recommendations in the Steering Committee's report, and the *Traditional Owner Settlement Act (2010)* (Vic) was developed in close consultation with the Group.

The Victorian *Traditional Owner Settlement Act 2010* (the Act) provides for an out-of-court settlement of native title. The Act allows the Victorian Government to recognise Traditional Owners and certain rights in Crown land. In return for entering into a settlement, Traditional Owners must agree to withdraw any native title claim, pursuant to the *Native Title Act 1993* (Cth) and not to make any future native title claims.

Under the Act, a settlement package can include:

- a Recognition and Settlement Agreement (RSA) to recognise a Traditional Owner group and certain Traditional Owner rights over Crown land
- a Land Agreement, which provides for grants of land in freehold title for cultural or economic purposes, or as Aboriginal title to be jointly managed in partnership with the state
- a Land Use Activity Agreement (LUAA), which allows Traditional Owners to comment on or consent to certain activities on public land
- a Funding Agreement to enable Traditional Owner Corporations to manage their obligations and undertake economic development activities
- a Natural Resource Agreement (NRA) to recognise Traditional Owners' rights to take and use specific natural resources and provide input into the management of land and natural resources.

Under the Act, the State Government decides whether to enter into a settlement with a particular group. The group must meet the definition of 'Traditional Owner group' under the Act.

Designed 'to advance reconciliation and promote good relations' between the state and Indigenous Australians, the *Traditional Owner Settlement Act 2010* (Vic) enables Victorian Traditional Owners to pursue a negotiated agreement directly with the state government outside the native title determination process.

To date the following Recognition and Settlement Agreements have been reached, or are under negotiation:

Gunaikurnai Recognition and Settlement Agreement. On 22 October 2010, the Federal Court recognised that the Gunaikurnai people hold native title over much of Gippsland. On the same day, the State entered into a Recognition and Settlement Agreement (RSA) with the Gunaikurnai people under the *Traditional Owner Settlement Act 2010* (Vic). This agreement between the State and the Gunaikurnai people was the first to be made under the *Traditional Owner Settlement Act 2010* (Vic).

Dja Dja Wurrung Recognition and Settlement Agreement (28 March 2013). This was the first comprehensive settlement under the *Traditional Owner Settlement Act 2010* (Vic) and the agreement settled four native title claims in the Federal Court of Australia dating back to 1998.

Taungurung Recognition and Settlement Agreement. On 26 October 2018, the Victorian Government, the Taungurung Land and Waters Council Aboriginal Corporation (TLaWCAC), and the Taungurung Traditional Owner group signed a suite of agreements under the *Traditional Owner Settlement Act 2010* (Vic), and related legislation. The Recognition and Settlement Agreement (RSA) commenced on 11 August 2020.

The Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk People of the Wotjobaluk Nations Recognition and Settlement Agreement. In August 2017, the Victorian Government and the WJJWJ People formally commenced negotiations towards a Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic). The Agreement between the Victorian Government and Barengi Gadin Land Council Aboriginal Corporation (BGLC) was signed on 25 October 2022 and came into effect on 13 December 2022.

Proposed Eastern Maar Recognition and Settlement Agreement. On 2 November 2017, the former Attorney-General, the Hon Martin Pakula MP, announced that the Victorian Government and the Eastern Maar Traditional Owner group had agreed to commence negotiations to enter into a Recognition and Settlement Agreement (RSA) under the *Traditional Owner Settlement Act 2010* (Vic).

The *Yarra River (Wlip-gin Birraraung murron) Act 2017* (Vic)

The *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) is the first legislation in Australia to be co-titled in a Traditional Owner language. *'Wilip-gin Birrarung murron'* translates as 'keep the Birrarung alive' in Woi-wurrung, the traditional language of the Wurundjeri Woi-wurrung people. Woi-wurrung was used in recognition of the Traditional Owners' custodianship of the river and their unique connection to the lands through which the river flows. It is also a Victorian and 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 gives effect to a long-term Community Vision and a Yarra Strategic Plan to give effect to the vision.

The Yarra Strategic Plan sets the direction for coordinated future protection and management of the Yarra River, for collaborative implementation across a range of stakeholders. It also includes the visions, frameworks for future land use and decision-making, and a list of priority projects for the Yarra River.

The Community Vision forms the cornerstone of the Yarra Strategic Plan, providing overarching direction for the river, focussing on issues relating to its long-term health and amenity, and outlining guidelines for land use and development.

The Act also prescribes the establishment of a new statutory body, the Birrarung Council, as the first independent voice of the Yarra River, recognising the River as a living entity. The Birrarung Council speaks for the Yarra as *'one integrated natural entity'* and provides independent advice to the Victorian Government on, and advocates for, protecting and improving the Yarra River.

O'Donnell (2019: 183) notes that while this legislation is the first in Australia to use bilingual language in its title, and that some of its content centres on the values of Aboriginal peoples and their relationship to the river, in a manner comparable to the *Whanganui River Claims Settlement (Te Awa Tupua) Act 2017* in Aotearoa New Zealand, it falls short of giving the river legal rights. O'Donnell (2019: 183–4) warns that constructing the aquatic environment as a legal subject can lead to unexpected and significant paradoxes between water rights and water markets which may *'undermine the cultural narrative that considers the environment worthy of protection at all'.*

The *Advancing the Treaty Process with Aboriginal Victorians 2018* (Vic)

In August 2018, the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) (Treaty Act) became law, having passed through both houses of the Victorian Parliament in June 2018. This Act is considered to be the first ever government legislation in Australia to attempt to legislate a treaty process with Aboriginal Australians.

The Treaty Act sets out a roadmap towards Treaty negotiations. The Treaty Act reflects the intent to work in genuine partnership with Traditional Owners and Aboriginal Victorians to give meaningful and practical effect to the right of self-determination.

The purpose of the Act is as follows:

1. To advance the treaty process between Aboriginal Victorians and the State
2. To establish that the Aboriginal Representative Body will be the sole representative of Aboriginal Victorians, as recognised by the State, for the purpose of establishing the framework necessary to support future treaty negotiations
3. To enshrine principles of the treaty process
4. To require that the Aboriginal Representative Body and the State work together to establish elements necessary to support future treaty negotiations.

The purposes of the Act do not concern the eventual parties to a treaty or treaties. In the context of the preamble this is important, as the preamble refers to Traditional Owners who maintain their sovereignty was never ceded. This means that the Act allows for a future in which entities other than the Aboriginal Representative Body can negotiate a treaty or treaties. The role of the Aboriginal Representative Body at this stage is confined to developing the framework by which the process will progress. The Aboriginal Representative Body is not concerned with the eventual content or character of a treaty or treaties.

The preamble to the Act states that Aboriginal Victorians maintain their sovereignty was never ceded, that they have long called for treaty, that these calls have gone unanswered, and that the time has now come for Aboriginal Victorians and the State to talk treaty. The Act established a Treaty Advancement Commission charged with creating an Aboriginal representative body and developing a Treaty Negotiation Framework.

The *Treaty Authority and Other Treaty Elements Act 2022* (Vic)

On 23 August 2022, the *Treaty Authority and Other Treaty Elements Act 2022* (Vic) was enacted by the Victorian Parliament following a historic agreement reached between the Government and the First Peoples' Assembly of Victoria.

The Act establishes the Treaty Authority under the Treaty Authority Agreement and facilitates its operations by giving legal force to its activities. And it amends the *Advancing the Treaty Process* with *Aboriginal Victorians Act 2018* (Vic) in relation to the Treaty Negotiation Framework and self-determination fund to support the establishment of those elements by agreement between the State and the Aboriginal Representative Body.

The Treaty Authority will act as the 'independent umpire' for the Treaty process and is a required element under Victoria's *Advancing the Treaty Process* with *Aboriginal Victorians Act 2018* (Vic). The Treaty Authority is a nation-leading institution, drawing on international best practice but adapted for Victoria to ensure Aboriginal lore, law and cultural authority are observed and upheld.

Agreement on the Treaty Authority was marked on 10 June 2022 with a ceremonial signing at a First Peoples' Assembly of Victoria chamber meeting on Gadubanud Country of the Eastern Maar, attended by Premier, Daniel Andrews MP, and the Minister for Treaty and First Peoples, Gabrielle Williams MP. To acknowledge the significance of this milestone, the First Peoples' Assembly of Victoria made a historic address to the Victorian Parliament on the importance of Treaty.

In July 2024, the First Peoples' Assembly of Victoria notified the Treaty Authority that the First Peoples' Assembly of Victoria seek to be the First Peoples' Representative Body to negotiate a Statewide Treaty in Victoria (FPAV 2024).

Key policies: the Aboriginal Affairs Policy Framework

Several Aboriginal Policy initiatives stand out for particular attention, and they are:

- the Pathway to Treaty in Victoria
- recognition of Aboriginal voices and Traditional Owners
- the Victorian Aboriginal Affairs Framework (VAAF) and Victorian Government Aboriginal Affairs Reports (VGAAR)
- Victoria's contributions to the National Agreement on Closing the Gap and Victoria's Closing the Gap Implementation Plan
- the Victorian Aboriginal and Local Government Strategy and Ministerial Guidance on Engaging with Aboriginal Victorians.

The Victorian Government's Pathway to Treaty

In February 2016 Aboriginal people in Victoria called on the Victorian Government to negotiate a Treaty. Following this call, the Victorian Government entered into discussions with the Aboriginal peoples of Victoria about a treaty. More than 400 people attended a statewide forum and hundreds more attended smaller forums across regional Victoria. At the conclusion of these forums, the Victorian Government committed to advancing self-determination for Aboriginal Victorians by establishing a Treaty Interim Working Group.

In July 2016, the Minister for Aboriginal Affairs announced that the Working Group would comprise both Aboriginal and non-Aboriginal people, and that it will provide advice on the process and timing for treaty, guidance on community engagement and examining options for a permanent Victorian Aboriginal representative body. The Minister also stated that:

> *For the first time in over 20 years work is underway to build on the existing relationship between government and the Aboriginal community to empower that community to achieve long-term generational change. We understand that it's not for us to decide what treaty or self-determination should look like. We know that action needs to come from the Victorian Aboriginal community* (Hutchins 2016).

The Victorian Government has taken several steps toward Treaty, including the following:

- In 2018, the Victorian Government enacted Australia's first Treaty legislation, The *Advancing the Treaty Process* with *Aboriginal Victorians Act 2018* (Vic).
- In 2019, the first statewide election was held to establish the First Peoples' Assembly of Victoria to represent the voice of First Peoples in the Treaty process.
- In 2021, the Yoorrook Justice Commission was established to inquire into historic and contemporary injustices experienced by First Peoples across all areas of social, political and economic life, and the relationship between historical injustices and ongoing systemic injustices experienced today.
- In 2022, the Victorian Government enacted the *Treaty Authority and Other Treaty Elements Act 2022* (Vic) to establish an independent 'Treaty Umpire'. The Act supports the establishment and ongoing operation of the Treaty Authority as an independent entity from Government, which will consist of five to seven members who will oversee and facilitate Treaty negotiations. The objects of the Treaty Authority are to facilitate the journey towards reconciliation, mutual respect and tolerance between the First Peoples and other people of the State, and to maintain, promote and advance the self-determination and empowerment, culture and human rights of First Peoples. The central tenets for the Agreement include the following:
  - A set of guiding principles under the Treaty Act
  - Observe and uphold self-determination and empowerment of First Peoples
  - Independence and impartiality
  - Accountability
  - Relationships and facilitating Treaty-making
  - Integrity of the Treaty process for all (FPAV and Victoria State Government 2022: 5–6).

  The Treaty Authority, once operational, will support First Peoples groups to register for Treaty negotiations and will invite the State to join Treaty negotiations.
- In 2022, the Treaty Negotiation Framework and the processes for treaty-making were agreed between the parties. The Treaty Negotiation Framework sets out the process and rules for negotiating a Statewide Treaty and Traditional Owner Treaties between the State and First Peoples. The Framework establishes a Treaty process in Victoria that is inclusive and open to all First Peoples, as well as ensuring the protection of Traditional Owners with existing legal rights such as Native Title.
- In 2022, a Self-determination Fund was also established. The Self-determination Fund provides First Peoples, including Traditional Owners, with a financial resource, independent from the State, to achieve 'equal standing' in Treaty negotiations. The Self-determination Fund will also build capacity, wealth and prosperity for the First Peoples of Victoria.
- In 2023, the second election of the First Peoples' Assembly was held.

With these elements and institutions in place, Treaty negotiations are able to commence.

One of the key factors in the Treaty Negotiation Framework is Clause 25. The clause has four sub-clauses listing various matters which may be brought to the table for negotiation as General matters and other matters for negotiation at the State or Traditional Owner levels. However, Clause 25.1 states that *'There are no matters that cannot be or must not be agreed in the course of Treaty negotiations'* (FPAV and Victoria State Government 2022b: 40). This provision means that there are no restrictions on what can be brought to the table for negotiation (Wensing and Kelly 2023: 29).

Recognition and Engagement with Traditional Owner Voices across Victoria

In Victoria, there are currently three different processes for Aboriginal groups to become formally recognised as Traditional Owners of Country. Traditional Owners seeking formal recognition can pursue any or all of these processes. The three processes are:

- Registered Aboriginal Party (RAP) under the *Aboriginal Heritage Act 2006* (Vic)
- Native title determination under the *Native Title Act 1993* (Cth)
- Recognition and Settlement Agreement (RSA) under the *Traditional Owner Settlement Act 2010* (Vic) (Figure 4).

Formally recognised groups under any of these three schemes have rights and responsibilities as recognised Traditional Owners of Country. This means that they are entitled to certain procedural rights when their rights and responsibilities may be affected by the actions of third parties, including state and local governments, businesses, community organisations and private individuals (Aboriginal Victoria 2019a).

Registered Aboriginal Parties (RAPs) have cultural heritage responsibilities under the *Aboriginal Heritage Act 2006* (Vic). These include the evaluation of cultural heritage management plans and decisions about cultural heritage permit applications. RAPs also:

- provide advice to government and to the Victorian Aboriginal Heritage Council about Aboriginal places and objects
- negotiate the return of Aboriginal cultural heritage and Ancestral Remains
- participate in cultural heritage agreements, protection declarations and intangible heritage processes
- consult with sponsors and heritage advisors
- undertake cultural heritage assessments and engage in compliance and enforcement activities.

Figure 4: Three processes for formal Traditional Owner recognition in Victoria

Source: Aboriginal Victoria 2019a, 2019b.

There are currently 11 Registered Aboriginal Parties (RAPs), covering approximately 75 per cent of Victoria.[18]

18 The list of RAPs, including an online map to find a RAP for an area of Victoria, can be accessed here: https://www.aboriginalheritagecouncil.vic.gov.au/victorias-current-registered-aboriginal-parties

A positive native title determination involves recognition by the Federal or High Court of Australia that a groups' rights continue from before European colonisation to the present day. It also lists the native title rights determined—for example, to camp, hunt, fish, gather food, and teach law and custom on Country. Native title holders and registered native title claimants have rights under the Future Acts regime (such as the right to comment on or negotiate agreements) in relation to activities on Country that affect native title rights and interests. Five agreements between the State and Traditional Owner groups have arisen out of, or complemented, native title determinations. The five agreements are:

- Gunaikurnai Settlement Agreement
- Yorta Yorta Co-operative Management Agreement
- Wimmera Settlement Agreement
- Gunditjmara Settlement Agreement
- Dja Dja Warrung Recognition and Settlement Agreement.[19]

The *Traditional Owner Settlement Act 2010* (Vic) allows the government and Traditional Owner groups to make agreements that recognise Traditional Owners' relationship to land and provide them with certain rights on Crown land. The *Traditional Owner Settlement Act 2010* (Vic) provides a framework for the State and a Traditional Owner group to agree to a comprehensive settlement package in lieu of progressing with a native title claim under the *Native Title Act 1993* (Cth). The settlement package can include the following:

- A Recognition and Settlement Agreement (RSA) recognising the named Traditional Owner group and their traditional rights over Country.
- A joint Recognition Statement that acknowledges the depth of the Traditional Owner group's relationships to Country and their survival, as well as the disruptions and harms of European colonisation, and that also commits the State and the group to a mutual partnership going forward.
- A binding Indigenous Land Use Agreement that 'settles' all native title claims and opts into the *Traditional Owner Settlement Act 2010* (Vic). A Settlement Agreement does not extinguish native title rights and interests but involves an agreement to exercise similar rights and interests under this agreement, and not under the native title regime.
- A Land Agreement providing land transfers and grants of Aboriginal title.
- A Land Use Activity Agreement (LUAA) providing rights for Traditional Owner groups to be consulted on, compensated for and to consent to certain activities on public land within their Country.
- A Natural Resource Agreement (NRA) providing rights to use certain natural resources, including for commercial purposes, and participate in natural resource management.
- A Funding Agreement, providing payments into the Victorian Traditional Owners Trust and/or payments to the Traditional Owner Group Entity.
- A Traditional Owner Land Management Agreement (TOLMA), regarding joint management of parks and reserves granted as Aboriginal title.
- Compensation that may be owed by the State for extinguishment.

19 https://www.forestsandreserves.vic.gov.au/land-management/what-we-do/agreements-with-traditional-owners

There are currently three Recognition and Settlement Agreements under the *Traditional Owner Settlement Act 2010* (Vic) in place in Victoria, and one still under negotiation. They are:

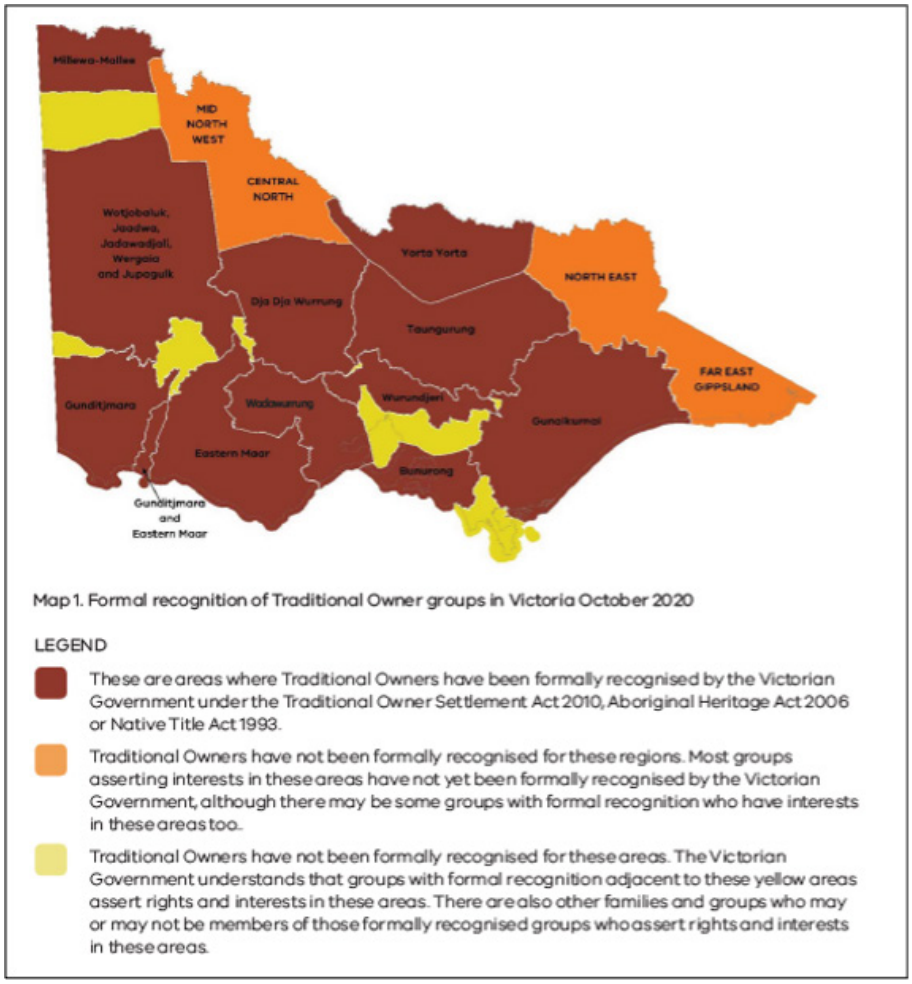
- Dja Dja Warrung Clans Aboriginal Corporation (DDWCAC), which commenced on 24 October 2013
- Taungurung Land and Waters Council Aboriginal Corporation (TLaWCAC), which commenced on 26 October 2018
- The Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples (WJJWJ People), which commenced on 13 December 2022
- The Eastern Maar Traditional Owner group is still under negotiation.

As part of its commitment to enabling self-determination, in 2018–19 the Victorian Government undertook an ambitious project of consultation with Victorian Traditional Owner groups that are not recognised under the three arrangements described above. The four key regions of the State were: Mid North West, Central North, North East and Far East Gippsland regions.[20]

The project also invited feedback from the 11 Traditional Owner groups with formal recognition across Victoria (shown in brown and described in Figure 5), acknowledging that some of these groups may have interests in the four regions and other areas without formal recognition (shown in yellow and described in Figure 5).

20 Disclosure: Dr Ed Wensing worked on the first stage of this project with Bhiamie Williamson, a Euahlayi man from north-west New South Wales with family ties to north-west Queensland. Bhiamie Williamson and Dr Ed Wensing were engaged to undertake research and community consultations on this project through the Australian Indigenous Governance Institute in 2019–20.

Figure 5: Formal recognition of Traditional Owner groups in Victoria, August 2019

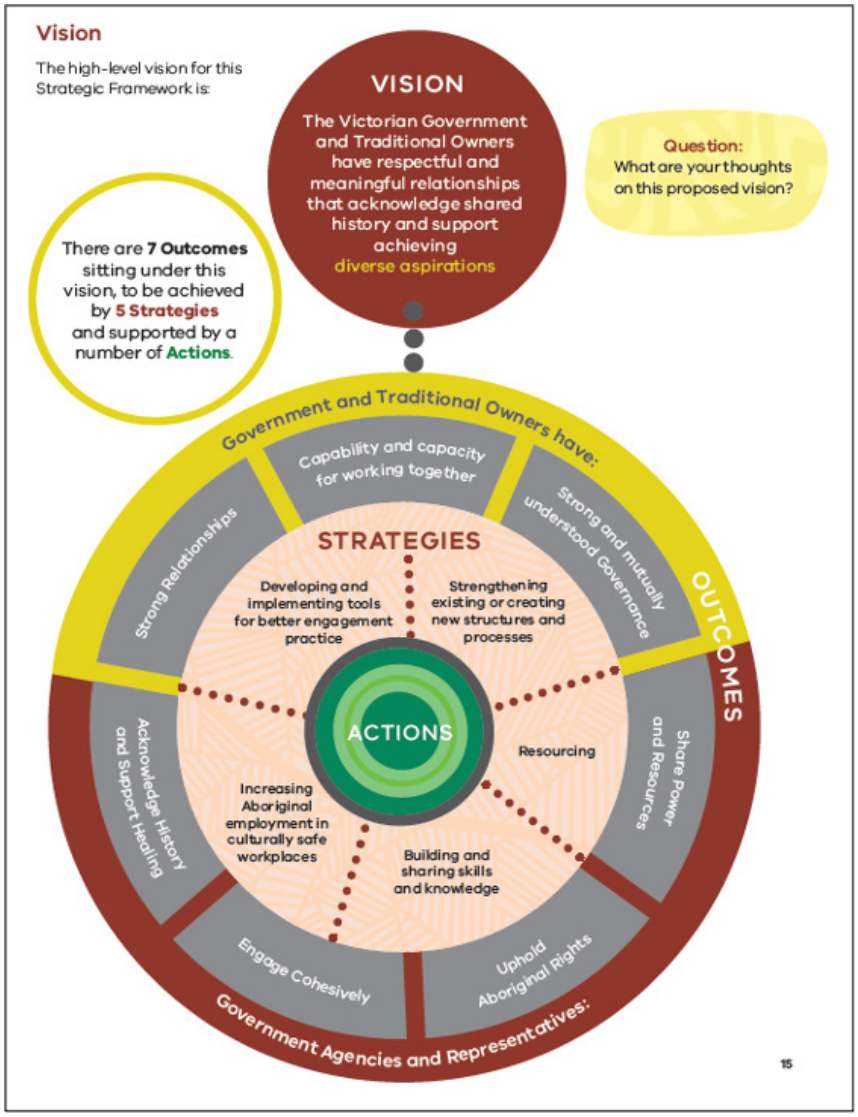


Source: Aboriginal Victoria, Consultation Draft Strategic Framework for strong relationships and engagement between the Victorian Government and Traditional Owners of areas without formal recognition (2020: 10).

Feedback from over 120 Traditional Owners of regions without formal recognition was published in 2019 (Aboriginal Victoria 2019b), following which a draft framework for stronger relationships between the Victorian Government and Traditional Owners of areas without formal recognition was developed (Aboriginal Victoria 2020a). The draft Framework (Figure 6) envisaged a whole-of-government approach to improve the way in which government engages with Traditional Owners of these areas, to better enable self-determination. While the primary focus of the draft Framework was on engagement regarding Country, it also had relevance to government activities across domains including health, education, justice, social spheres and land use planning and land and natural resource management.

The Traditional Owner Voices Report and the draft Framework identified a need to improve engagement in the areas identified in yellow in Figure 5, as well as in the regions. The consultation process sought to develop a better understanding of this need through an open approach and willingness to hear from all families and groups asserting interests in these areas.

Figure 6: Strategic framework for stronger relationships and engagement between the Victorian Government and Traditional Owners without formal recognition



Source: Aboriginal Victoria, *Consultation Draft Strategic Framework for strong relationships and engagement between the Victorian Government and Traditional Owners of areas without formal recognition* 2020: 15).

A final report on the consultations was also produced (Aboriginal Victoria 2020b). Feedback from the Consultations indicated that while there were some clear areas for improvement, there was also general support for the development and finalisation of the Framework among Traditional Owners, government agencies, staff, other bodies and stakeholders. The Traditional Owner groups in the areas without formal recognition expressed some cautious optimism around the direction in which things were heading. The Consultation Report concluded the challenges and opportunities ahead lie not only in revising the framework to account for the feedback from the process, but also in 'walking together' to successfully implement the Framework (Aboriginal Victoria 2020b).

The Victorian Aboriginal Affairs Framework (VAAF) and Victorian Government Aboriginal Affairs Reports (VGAAR)

Since 2006, Victoria has implemented whole-of-government frameworks to address the gaps between Aboriginal and non-Aboriginal Victorians. This has included the national Closing the Gap agenda since its commencement in 2008. These frameworks have reflected the Victorian context, including the unique voices, strength, resilience and cultural knowledge of Aboriginal people in Victoria.

While past government reporting in Aboriginal affairs focussed on 'how Aboriginal people are faring' (Victoria State Government 2019a: 10), it was decided in 2018 for the renewal of the Victorian Aboriginal Affairs Framework (VAAF) to shift the focus from measuring improvements in people's lives to a new approach that enables the community to hold the Victorian Government to account by recognising that to achieve positive outcomes, governments must fundamentally change the way they work with Aboriginal people.

The 2018–2023 Victorian Aboriginal Affairs Framework's vision is that *'all Aboriginal Victorian people, families and communities are healthy, safe, resilient, thriving and living culturally rich lives'.* The Framework provides an ambitious and forward-looking agenda for Aboriginal affairs. The VAAF's two key purposes are to:

1. Provide an overarching framework for working with Aboriginal Victorians, organisations and the wider community to drive action and improve outcomes
2. Set out the whole-of-government self-determination enablers and principles, and commit government to significant structural and systemic transformation (Victoria State Government 2018: 10).

The framework sets a clear direction for how government will 'Plan', 'Act', 'Measure' and 'Evaluate' to progress change across government, address inequity and deliver stronger outcomes for and with Aboriginal Victorians.

In the context of refreshing the VAAF 2018–2023, the Victorian Government also committed to advancing Aboriginal self-determination. In doing so, the VAAF builds on and goes beyond previous government approaches by recognising that to improve outcomes for Aboriginal Victorians, government must enable self-determination through systemic and structural transformation (Victoria State Government 2019a: 4).

The VAAF and the Self-Determination Reform Framework (SDRF) outlines the Victorian Government's commitment to advancing Aboriginal self-determination in Victoria. The SDRF guides public service action to enable self-determination in line with the Victorian Government's commitments in the VAAF. Specifically, to:

- build on and update the 2011 Victorian Government Aboriginal Inclusion Framework (VGAIF)
- provide a consistent understanding of how government should enable self-determination
- provide guidance for whole-of-government and departmental transformation to enable self-determination
- provide a consistent approach to reporting on government's efforts to enable self-determination (Victoria State Government 2019a: 5).

The SDRF is focussed primarily on government departments to reform internal processes, practices and policies to better enable Aboriginal self-determination. The SDRF was not intended to restrict further action or limit areas where self-determination work had already extended beyond those agencies. The SDRF was also not intended to limit what may come out of the treaty processes currently underway in Victoria. In the SDRF, the Victorian Government stated that a:

> *treaty will provide the foundation for a new, positive relationship between the State and Aboriginal Victorians by determining how each party's priorities, interests and responsibilities can be realised together into the future (Victoria State Government 2019a: 4).*

The VAAF also requires that government report on its efforts to enable self-determination in the annual Victorian Government Aboriginal Affairs Report (VGAAR). These annual reports outline progress towards achieving the vision of the VAAF. The purpose of the annual reports is for the Victorian Government to report on progress against the VAAF, the Self-Determination Reform Framework (SDRF) and the Victorian Closing the Gap Implementation Plan 2021–2023. The Report is intended to be an outcomes measurement and accountability tool that provides valuable information about progress and challenges that still need to be addressed (Victoria State Government 2022).

The 2022 VGAAR (Victoria State Government 2023) is the fourth annual Report against the VAAF since its release in 2018, although these reports have been prepared annually since at least 2013. For the second year, the Report embeds dedicated reporting on progress in Victoria to implement the National Agreement on Closing the Gap through Victoria's 2021–2023 Closing the Gap Implementation Plan. The Report showcases the most up-to-date available data for the years 2021 and 2022 across the 111 measures in the VAAF. As detailed in the 'About Data' section of the Report, the latest year of available data varies due to the inconsistent frequency of data collection across a range of data sources. Victoria is pursuing more ambitious and comprehensive outcome-focussed goals under the VAAF and Victoria's Implementation Plan, over and above the targets set under the National Agreement.

The 2023 Report was the last against the current VAAF, SDRF and Victoria's Closing the Gap Implementation Plan, as they all expired in 2023. At the time of this research, the Government was consulting with the First Peoples' Assembly of Victoria (FPAV) in relation to the next VAAF and SDRF, and the FPAV and the Koorie Caucus of the Partnership Forum in relation to the next Victorian Closing the Gap Implementation Plan, including in relation to strong engagement and accountability processes.

The original VAAF ran from 2018 to 2023, but it has been extended until June 2025 to allow time for ongoing consultation with First Peoples stakeholders to self-determine the next steps in the development of a new framework.

Victoria Closing the Gap Implementation Plan

Victoria is party to 2020 National Agreement on Closing the Gap which commits the parties to developing their own Implementation Plans to support the achievement of the National Agreement's objectives and outcomes in their respective jurisdictions.

Victoria's Closing the Gap Implementation Plan outlines the actions Victoria will undertake to achieve the objective of the new National Agreement on Closing the Gap: equity for Aboriginal and Torres Strait Islander Peoples (Victoria State Government 2021: 8).

The Implementation Plan was developed in close partnership with sector implementation partners, including Aboriginal Community Controlled Organisations and key Aboriginal partnership forums to develop the Victorian Implementation Plan.

The Implementation Plan is for an initial three-year period and focusses on advancing Aboriginal self-determination through transferring power and resources to the Aboriginal community-controlled sector, promoting accountability of government departments and mainstream service providers, and breaking down systemic barriers faced by Aboriginal people throughout life. The Implementation Plan will drive the four Closing the Gap Priority Reforms areas that hold the key to achieving and exceeding the socioeconomic targets and outcomes within the National Agreement. Through the Implementation Plan, the Victorian Government has committed to transforming the way in which it engages with the Aboriginal community-controlled sector to ensure Aboriginal people are respected to make decisions about their own lives (Victoria State Government 2021: 13).

The Victorian Government also committed to partnering with the Aboriginal Community Controlled Organisation (ACCO) sector, formally recognised Traditional Owner groups and existing Aboriginal governance forums to implement the National Agreement on Closing the Gap in Victoria.

In May 2022, in alignment with the National Agreement, the Victorian Government established a Partnership Forum on Closing the Gap. Membership of the Partnership Forum comprises Ngaweeyan Maar-oo (representing the 13 elected ACCO-sector representatives and Aboriginal Governance Forums) and senior executives of the Victorian Government.

Together, Ngaweeyan Maar-oo and the Victorian Government have committed to partnership actions under the National Agreement, including policy partnerships, sector-strengthening, place-based partnerships and data projects. The Partnership Agreement states that:

> *All parties to this Agreement acknowledge that ensuring Aboriginal voices and leadership are heard, respected, and acknowledged appropriately is key to achieving self-determination, as are transparent negotiation and data sharing, and tangible activities to ensure mainstream accountability (Victoria State Government, n.d.).*

Acknowledging local government's critical and potential role in contributing to Closing the Gap and driving positive change in Victoria, the Victorian Government appointed a State Ambassador for Closing the Gap (State Ambassador), to actively engage and advocate with local councils to strengthen shared decision-making at the local level with Aboriginal communities. The Implementation Plan includes a commitment to providing guidance to local councils and Aboriginal organisations on inclusion of Aboriginal voices in council strategic planning processes.

Victorian Aboriginal and Local Government Strategy and Ministerial Guidance on Engaging with Aboriginal Victorians

The Victorian Aboriginal and Local Government Strategy was launched in March 2021 to replace the Victorian Aboriginal and Local Government Action Plan that had been developed in 2016.

The 2016 Action Plan was a practical resource for communities to achieve economic, equity and liveability outcomes for all Victorians through improving relationships with Aboriginal communities and councils, promoting reconciliation, and engaging Aboriginal people in planning, decision-making, employment, programs and services. The 2016 Action Plan was reviewed through an Aboriginal self-determination approach to enable strong voice and engagement with Aboriginal communities and councils, so that the rights, culture, heritage, needs and aspirations of Aboriginal Victorians are embedded into the critical work and functioning of local government. That review led to the creation of the broader Victorian Aboriginal and Local Government Strategy.

The Victorian Aboriginal and Local Government Strategy 2021–2026 was developed as a resource for local government and as a practical guide for councils across Victoria to help embed the voices and priorities of Aboriginal communities at a local government level. The Strategy is centred on seven strategic pillars:

- Culture, respect and trust
- Awareness and engagement
- Accountability and direction
- Governance and participation
- Economic participation
- Health and wellbeing
- Resourcing and funding.

The Strategy recommends actions for local governments, the Victorian Government and Aboriginal communities that progress Aboriginal self-determination and reconciliation. It was developed to support alignment of the local government sector with the Victorian Aboriginal Affairs Framework 2018–2023, the Victorian Treaty process, the Victorian Closing the Gap Implementation Plan and the work of the Yoo-rrook Justice Commission.

The Strategy includes a clear framework for shared decision-making processes and actions for Aboriginal Victorians working together with local government based on mutual control, shared power and decision-making, fairness, respect, and trust. The development of the Strategy was informed by a strong 20-month consultation process, with guidance from a Steering Committee consisting of stakeholder organisations, local government representatives and members of the Aboriginal community, as well as consultation with Traditional Owner groups, local governments and peak bodies.

To support the release of the Strategy, the Minister for Local Government issued a *Ministerial Good Practice Guideline and General Guidance for Councils Engaging with Aboriginal Victorians* under the *Local Government Act 2020* (Vic). These resources were issued to assist Councils when engaging with Traditional Owners, Aboriginal Organisations and Community by providing a step-by-step guide on how to identify, engage and build connections and develop mutually beneficial relationships.

The Guideline requires councils to take reasonable steps to give effect to the engagement principles contained within the Guideline when seeking advice and guidance from Traditional Owners when councils are developing and maintaining their community engagement policy under the *Local Government Act 2020* (Vic). The general Guidance is a covering explanatory document for the Guideline and provides background information for local government on the different Traditional Owner groups and ACCOs in the community.

The Strategy reflects VAAF's 11 guiding principles for self-determination which set the minimum standards for all existing and future work with Aboriginal Victorians and guide the Victorian Government's work towards self-determination.

The Victorian Aboriginal and Local Government Strategy and the *Ministerial Good Practice Guideline* are supported by the Maggolee Online Resource. Maggolee means 'here in this place' in Woi wurrung, the language of the Wurundjeri people of the Kulin Nation.

The Maggolee website was launched in 2015. It was developed with input from the Municipal Association of Victoria, the Victorian Local Governance Association, local government professionals and the Koori Youth Council, with funding support from the Victorian Government. The Maggolee website was developed as a 'one-stop shop' to promote cultural awareness, and includes information on policies, programs and protocols, latest news and events. The aim of the website is to assist Councils in working more closely with Aboriginal communities, and to promote reconciliation.

The Maggolee website (https://www.maggolee.org.au/) includes interactive maps and information about Victoria, detailing Aboriginal languages, Registered Aboriginal Parties, and local government areas. It is a useful tool for students, educators and those wanting to expand their knowledge of Aboriginal Victoria. It also includes case studies on how councils can better partner with Aboriginal communities on service delivery, the arts, reconciliation, land use, planning and cultural heritage, and provides support for Aboriginal employment and economic participation.

The Urban Policy Planning Framework

Victoria's urban policy framework is largely the responsibility of the Department of Environment, Land, Water and Planning (DELWP). However, in 2023 a change of state premier prompted changes in the Departmental portfolios, and planning and environment responsibilities were spilt between two portfolios:

- the Department of Energy, Environment and Climate Action (DEECA)
- the Department of Transport and Planning (DTP).

Prior to these machinery-of-government changes, DELWP took up the Victorian Government's Self-Determination Reform Strategy and produced four significant documents aimed at ensuring the DELWP better integrates the voices of Aboriginal Victorians into its policy, planning and program activities in meaningful ways. These are discussed below.

DELWP's Munganin–Gadhaba 'Achieve Together' DELWP Aboriginal Inclusion Plan 2016–2020

Munganin–Gadhaba means 'Achieve Together' (DELWP 2015), and is intended to bring to life the intention and purpose of the plan.

This Plan builds on the former Department of Environment and Primary Industries' Aboriginal Inclusion Plan—Meerreeng Wanga, meaning 'Understand Country'—with greater emphasis on relationships and collaboration. It also builds on and brings forward the work undertaken by the former Department of Transport, Planning and Local Infrastructure within the areas of the built environment and local government.

DELWP's vision for Aboriginal inclusion is: *'Working in partnership with Aboriginal Victorians across landscapes, communities and natural resources, growing liveable, sustainable and inclusive communities, and sustainable natural environments.'* The Plan is underpinned by four guiding principles:

- Respect and acknowledge Aboriginal culture
- Reject all forms of racism and intolerance
- Recognise Aboriginal peoples' right to access and role in Caring for Country
- Work together to improve Aboriginal participation.

The plan was developed in alignment with other state-level strategies, including the:

- Victorian Aboriginal Affairs Framework 2013–18 (VAAF), originally released in November 2012
- Victorian Aboriginal Economic Strategy 2013–20 (Department of Economic Development, Jobs, Transport and Resources)
- Victorian Aboriginal Inclusion Framework (Department of Premier and Cabinet)
- Karreeta Yirramboi-Aboriginal Public Sector Employment and Career Development Action Plan 2010–15 (Victorian Public Sector Commission)
- Victorian *Charter of Human Rights and Responsibilities Act 2006* (Equal Opportunity and Human Rights Commission)
- The 2008 National Indigenous Reform Agreement (Closing the Gap on Indigenous Disadvantage).

The *Munganin–Gadhaba 'Achieve Together' Aboriginal Inclusion Plan* (DELWP 2015) was developed to increase understanding and recognition of Aboriginal culture, and to respect and celebrate how the Department cares for Country. The Plan was aimed at:

- developing a better understanding of the needs and aspirations of Aboriginal communities, and how their land is of spiritual, cultural and economic importance
- identifying opportunities for partnership in all aspects of DELWP's work from land use, water, planning and policy-making to service delivery, governance and representation on boards and committees, and its work with external providers and partner agencies
- increasing opportunities for Aboriginal employment, cultural wellbeing and economic prosperity, while bringing deep knowledge of Country to the management of land, water, the natural landscape and Victoria's built environments.

DELWP's *Pupangarli Marnmarnepu 'Owning Our Future' Aboriginal Self-Determination Reform Strategy 2020–2025* (2019)

'Pupangarli Marnmarnepu' means 'Owning Our Future', and embodies what it means for Traditional Owners to be self-determining.

Pupangarli Marnmarnepu responds to the whole-of-government commitments set out in the Victorian Aboriginal Affairs Framework 2018–2023 (VAAF) (DELWP 2019a), and supports transformation guided by the Self-Determination Reform Framework (SDRF) (Victoria State Government 2019a). The Strategy was also developed to complement the work being done to advance Treaty in Victoria (DELWP 2019a).

Pupangarli Marnmarnepu is DELWP's five-year Aboriginal Self-Determination Reform Strategy. It is founded on cultural authority and sets the strategic direction, outcomes and priorities for DELWP to respond to Aboriginal self-determination. The development of Pupangarli Marnmarnepu was guided by the many conversations and engagements that DELWP undertook with Traditional Owners across Victoria (DELWP 2019a).

The Pupangarli Marnmarnepu Strategy incorporates and builds upon the SDRF, focussing on the domains of:

- **People**—DELWP is culturally capable and safe; recognising, supporting, valuing and embracing Aboriginal decision-making
- **Systems**—DELWP has transformational systems that respect Aboriginal decision-making, leadership and self-governance
- **Country**—DELWP supports Traditional Owners' rights on Country so that their aspirations for land, water and culture are realised
- **Accountability**—DELWP is accountable and transparent in its efforts to transfer relevant decision-making powers and resources to Traditional Owners and Aboriginal Victorians (DELWP 2019a: 13).

The Pupangarli Marnmarnepu Strategy committed the Department to adopting an outcomes-focussed approach that values and supports Aboriginal leadership and expertise. And that self-determination is embedded in DELWP's plans, processes, actions and outcomes in the management of land, water and the built environment (DELWP 2019a).

At that time, DELWP was also establishing a Caring for Country Partnership Forum, comprising representatives from Traditional Owner groups (formally and non-formally recognised) and the DELWP Senior Executive Team. The aim of the Forum was to support systemic change and to monitor DELWP's progress on the Strategy and oversee the changes in systems and processes to remove barriers. DELWP also committed to regional partnership forums, where required, to enhance partnership arrangements between Traditional Owners, Regional Directors and their senior staff. The Forum was to be co-chaired and co-governing, acting as a supervisory body until an Aboriginal-led mechanism was developed. Following recent machinery-of-government changes, it is not clear at the time of writing if this Forum still exists.

DELWP's *Traditional Owner and Aboriginal Community Engagement Framework* (2019)

DELWP developed its Traditional Owner and Aboriginal Engagement Framework to achieve best practice engagement with Traditional Owners and Aboriginal Victorians. The Framework is based on principles of empowerment and self-determination, and *'about listening and taking the time to find out how people want to be treated, instead of assuming you know'* (Victoria State Government 2019b: 5; DELWP 2019b).

The Framework was designed to ensure DELWP's engagement activities with Traditional Owners and the Aboriginal Community are better coordinated, informed and guided by the best available information and resources, and are carried out in a culturally safe and competent manner. The Framework enables meaningful engagement between DELWP staff and Traditional Owners by creating the necessary mechanisms, opportunities and protocols for participation and collaboration (DELWP 2019b).

The Framework centres on Aboriginal empowerment and self-determination, highlighting the importance of listening to and acting in the best interest of Traditional Owners and Aboriginal communities. The Framework also acknowledges the deep spiritual connection Traditional Owners have to their Country, and the significant responsibility DELWP has in partnering with Traditional Owners to care for Country. At the core of the framework are eight principles of engagement, which are critical to successfully engaging with Traditional Owners and Aboriginal communities:

1. Self-determination
2. Traditional Owners as partners
3. Place-based or whole-of-Country approach
4. Respect for decision-making processes
5. Aboriginal people set their own priorities
6. Free, prior and informed consent
7. Acknowledge past injustices and structural inequality
8. Aboriginal Cultural safety and competency.

The purpose of the Framework is to strengthen the capacity of Traditional Owners and Aboriginal communities by enabling better coordination while engaging in a meaningful and culturally appropriate manner (DELP 2019b; Victoria State Government 2019b: 6).

DELWP's *Aboriginal Cultural Safety Framework* (2019)

The Department of Environment, Land, Water and Planning's (DELWP) *Aboriginal Cultural Safety Framework* (DELWP 2019c) acknowledges the significant role that cultural safety plays in the social, emotional, physical and mental health of Aboriginal peoples and communities. It puts cultural safety at the forefront of all interactions with Aboriginal communities, centring cultural awareness, cultural respect, sensitivity, and self-determination to ensure meaningful and genuine relationships and partnerships are experienced.

The Framework defines 'Cultural safety' as:

> *an environment that is safe for people: where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning, living and working together with dignity and truly listening* (Eckermann, Dowd et al. 1994).

The Framework also states that:

> *In the context of Aboriginal people working at DELWP, and our partnerships with Traditional Owners, cultural safety refers to the environment, relationships and systems that enable individuals to feel safe, valued and able to participate in and enable their culture, spiritual and beliefs systems, free from racism and discrimination* (DELWP 2019c: 3).

The Aboriginal Cultural Safety Framework is an Aboriginal-led and evaluated initiative that aims to embed Aboriginal self-determination into the Department's practices, policies, procedures and daily administration. The Victorian Government's commitment to self-determination is embedded in the Framework to drive change throughout DELWP by transforming and creating culturally safe places for Aboriginal staff members, stakeholders and visitors.

DELWP's commitment to Aboriginal cultural safety is guided by three domains:

- leadership and governance
- Aboriginal workforce, support and development
- social and emotional wellbeing.

A close examination of the *Cultural Safety Framework Implementation Action Plan* (DELWP 2019d) shows that the actions are internally focussed toward DELWP's workplace environment, and not particularly toward DELP's urban policies and programs.

Conclusion

This chapter examined the complex array of statutes, policies and frameworks governing the interactions between Aboriginal peoples' land rights and interests and urban policy and planning in Victoria. This research involved reviewing over 150 documents spanning the period 2006–2023. The scope of the analysis included a review of several documents in three key areas that govern the interactions between Aboriginal peoples' land rights and interests and urban policy and planning in Victoria: the statutory framework, key policies in Aboriginal Affairs, and key urban policy and planning documents.

The statutory landscape in Victoria is far more numerous—and arguably more advanced in relation to better recognition of First Nations land rights and interests—when compared to New South Wales. In the statutory context, Victoria has broken new ground in several areas, compared to New South Wales. For example, Victoria is the first government in Australia to legislate for the following:

- An Aboriginal cultural heritage regime that prioritises Aboriginal led decision-making in recognition of Traditional Owner group's rights and responsibilities for Country and cultural heritage (VAHC 2020; 2021).
- The recognition and protection from discrimination of Indigenous peoples' distinct cultural rights in the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The ACT's Human Rights Act preceded Victoria's by two years, but the ACT's Human Rights Act did not include the recognition and protection of Indigenous peoples' distinct cultural rights until it was amended in 2016. And Australia does not have a comprehensive human rights act or a charter of human rights (AHRC 2022).
- An alternative process for the resolution of native title claims in the *Traditional Owner Settlement Act 2010 (*Vic) which embodies a more flexible approach to recognition and connection to Country than the Commonwealth's *Native Title Act 1993*. While it has not resulted in a more efficient system for claim resolution, the Act was nevertheless forward thinking at its inception (FVTOC 2021: 22).
- Extending legal personhood to a river and co-titling a statute using bilingual language in the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic). The Preamble states that the legislation *'recognises the intrinsic connections of the Traditional Owners to the Yarra River and its Country and recognises them as custodians of the land and waterway they call Birrarung'.*
- Entering into a treaty process with Aboriginal Victorians in the Advancing the *Treaty Process with Aboriginal Victorians Act 2018* (Vic) and the *Treaty Authority and Other Treaty Elements Act 2022* (Vic) which amends the previous Act and establishes further institutions to progress the Pathway to Treaty. In terms of new institutions, these statutes establish the First Peoples' Assembly of Victoria (FPAV) as the Aboriginal Representative Body for the State of Victoria, and the Treaty Authority as an independent entity that has the role of facilitating fair, effective and efficient dealings between the negotiating parties.

These are remarkable pieces of legislation, each groundbreaking. They all have their plusses and minuses, but they collectively demonstrate that where there is a will, there is a way of advancing the recognition of Indigenous peoples' land rights and interests.

While statutes also reflect the social norms and mores of society at particular points in time, and have a tendency to be static and not always easy to remedy along the way—as we have seen with the several failed attempts at improving the various cultural heritage statutes across Australia—they nevertheless provide important 'hooks' upon which important social advances can be made. The value of these statutes in Victoria is that they provide greater opportunities for prompting action by governments and other parties or matters for which they can be held to account for performing (or not performing).

In 2016, following a meeting with over 400 Aboriginal Victorians, the Andrews Labor Government made an ambitious and audacious commitment to not only advancing self-determination for Aboriginal Victorians, but also to committing to a Treaty process through the formation of the Treaty Interim Working Group. 'Ambitious' in the sense that a treaty between First Nations and governments in Australia has been discussed as a way of resolving the grievances arising from the colonisation for decades, but no government in Australia has been brave enough to put any work into making it happen. 'Audacious' in the sense that the Victorian Government was showing a willingness to take a surprisingly bold risk by agreeing to apply the principle of self-determination as a whole-of-government approach to working with Aboriginal Victorians.

Aboriginal and Torres Strait Islander peoples across Australia have long been asserting that the full suite of international human rights norms and standards are applicable to their affairs and to dealings with them, including the UN Declaration on the *Rights of Indigenous Peoples* (UNDRIP) (Wensing 2021b). UNDRIP enshrines the critically important and inextricably intertwined human rights principles of self-determination and free, prior and informed consent (FPIC) for Indigenous peoples as peoples (Nosek 2017: 125). As Anaya (2009: 186) notes, self-determination *'is a right that inheres in human beings themselves'* and which *'derives from common conceptions about the essential nature of human beings … individually and as groups'.*

The Victorian Government's commitment to embark on a Pathway to Treaty in 2016 was remarkably bold in the context of a decade of discussion and debate about the lack of recognition of Australia's First Nations peoples in the Australian Constitution. The Premier also made this commitment prior to the release of the *Uluru Statement from the Heart,* which emerged from the Referendum Council's Regional Dialogues and the National Constitutional Convention at Uluru in May 2017.

The Pathway to Treaty that Victoria has embarked on has involved the passage of legislation to give key elements of the process the authority and legitimacy of the Victorian Parliament to establish significant institutions to progress the process toward Treaty negotiations, including the First Peoples' Assembly of Victoria, the Yoorrook Commission, the Treaty Authority, and a legal basis for a Treaty Negotiation Framework.

Furthermore, the Victorian Government's placing of self-determination at the heart of its policy and legislative dealings with Aboriginal Victorians and the establishment of significant institutions are a clear demonstration of its commitments to treaty and truth-telling. They are also very brave steps because no other governments in Australia have taken the same steps toward reconciling past grievances with the present for a better future for everyone.

In addition to the Pathway to Treaty processes, the Victorian Government also:

- developed formal mechanisms for the recognition of Traditional Owners and their connections to and responsibilities for Country
- partnered with elected ACCO-sector representatives and Aboriginal Governance Forums to progress the implementation of the Closing the Gap agenda
- collaborated with local government to develop a strategy with a framework for shared decision-making processes and actions for Aboriginal Victorians working together with local government based on mutual control, shared power and decision-making, fairness, respect and trust.

The Victorian Government's VAFF and VGAAR actions have provided a firm basis for monitoring and reporting on its commitments to self-determination and for ensuring that progress was made, even in an incremental way, as well as through significant legislative and policy reforms. The Victorian Government's partnership approaches to Closing the Gap have also included local government and the development of resources to provide guidance on engagement with Aboriginal Victorians in constructive ways.

The change of Premier in Victoria in October 2023 precipitated new Administrative Orders for Victoria,[21] which saw the former Department of Planning, Environment, Land, Water and Planning (DELWP) being dismantled and its former responsibilities being given to several new Departments, including the Department of Energy, Environment and Climate Action (DEECA); the Department of Transport and Planning (DTP); and Local Government Victoria (LG Victoria).

DEECA's Corporate Plan for 2023–27 states that the Department is committed to Aboriginal self-determination through genuinely partnerships and meaningfully engagement with Victoria's Traditional Owners and Aboriginal communities to support the protection of Country, the maintenance of spiritual and cultural practices and their broader expectations and aspirations in the 21st century and beyond (DEECA 2023: 8).

Guided by the Victorian Government's Self-Determination Reform Framework (SDRF), DEECA has retained the *Pupangarli Marnmarnepu 'Owning Our Future' – Aboriginal Self-Determination Reform Strategy 2020–2025* and the *Pupangarli Marnmarnepu Implementation Action Plan*. DEECA has also continued with the Statewide Caring for Country Partnership Forum (SCfCPF) in partnership with Parks Victoria and the 11 formally recognised Traditional Owner Corporations (TOCs) under the TOC Caucus as a Traditional Owner-led mechanism to hold DEECA accountable for the implementation of Pupangarli Marnmarnepu. The SCfCPF was initially established under the DELWP portfolio in 2020, and continues to meet and develop strategies that enable the transfer of relevant decision-making powers and resources to Traditional Owners, and enables decision-making, leadership and self-governance on statewide matters across DEECA's portfolios as determined by TOC Caucus (DEECA 2023: 8).

The Department of Transport and Planning (DTP) Strategic Plan brings together the Department's vision, purpose and mission across six focus areas, consistent with government objectives, priorities and budget decisions (DTP 2023). DTP's Strategic Plan states that it is committed to self-determination and working closely with First Nations people to drive reform and improve the impact of outcomes and that the DOT has an *Aboriginal Self-Determination Plan 2020–2023*. However, at the time of writing, this document could not be located on the Department's website.

What is clear from the suite of documents discussed above is that DELWP took a very broad and inclusive approach to its commitment to working with Traditional Owners and Aboriginal communities. Collectively, the four documents demonstrate that DELWP wanted to keep building on previous work, have a strategy based on Aboriginal cultural authority to steer the Department's directions, priorities and outcomes, and ensure that its engagement with Traditional Owners and Aboriginal Victorians was carried out in a culturally safe and competent manner. DELWP's cultural safety strategy was centred on cultural awareness, cultural respect, sensitivity and self-determination. It required the Department to put cultural safety at the forefront of all its interactions with Traditional Owners and Aboriginal communities to ensure meaningful and genuine relationships and partnerships were experienced.

Unfortunately, it appears that some of these documents have not been adopted and carried forward into the new Departmental structures following the reshuffle of portfolio responsibilities in October 2023.

Nevertheless, a Treaty Negotiation Framework has been agreed between the First Peoples' Assembly of Victoria, a Treaty Authority has been established and Treaty negotiations are about to get underway in Victoria. There is no doubt that land-related matters will be brought to the Treaty negotiation table at the state level and at Traditional Owner group level. What emerges from the negotiations is up to the parties and what they can reach agreement on.

21 https://www.vic.gov.au/general-order-dated-2-october-2023

6. Conclusions

At the international level, human rights standards have come a long way since the *Universal Declaration of Human Rights* was adopted and proclaimed by the General Assembly of the United Nations (UN) on 10 December 1948 (UN 1948). Since then, a suite of human rights conventions and declarations have emerged from the UN and human rights law has become very interested in the treatment of marginalised minorities—including Indigenous minorities. Consequently, the UN has increasingly become a place for Indigenous peoples from around the world to voice their concerns, and over the past 30 years the international community has increasingly recognised that special attention needs to be paid to their individual and collective rights. Thus, Indigenous peoples are supported by the international human rights law movement and have used the human rights system to tackle discrimination and abuses of their rights (Wensing 2021b: 100).

Only two international human rights instruments focus explicitly on the rights and interests of Indigenous peoples:

- the International Labour Organization (ILO) *Convention No. 169 Indigenous and Tribal Peoples Convention* (ILO 1989)
- the United Nations *Declaration of the Rights of Indigenous Peoples* (UNDRIP) (United Nations 2007).

The capacity of these two instruments to elevate Aboriginal and Torres Strait Islander Peoples' human rights is curtailed, because Australia is not a signatory to the ILO Convention No. 169, and UNDRIP is not legally binding.

However, UNDRIP carries substantial normative weight and legitimacy, as it was produced in consultation with, and the support of, Indigenous peoples worldwide, and was adopted by the majority of UN General Assembly (Lino 2010; Wensing 2021b). UNDRIP draws on existing rights from other international laws and conventions, such as the *Universal Declaration of Human Rights*, and explains how these apply to Indigenous peoples. Indeed, UNDRIP is an extension of the standards found in many other human rights treaties that have been ratified by and are binding on Member States, including the ICCPR, the ICESCR, and the *International Convention on the Elimination of All Forms of Racial Discrimination* (UN 2013: 17).

One of the most important principles in UNDRIP is the right of Indigenous peoples to self-determination. The principle of self-determination is enshrined in the UN Charter of 1945. It is a collective right that can only be asserted by groups who are identified as peoples (Weller 2018: 119). As Dodson (1994) asserts:

> *By any reasonable definition, Indigenous peoples are unambiguously "peoples". We are united by common territories, cultures, traditions, histories, languages, institutions and beliefs. We share a kinship and identity, a consciousness as distinct peoples and a political will to exist as distinct peoples.*

Aboriginal and Torres Strait Islander peoples across Australia have long been asserting that the full suite of international human rights norms and standards are applicable to their affairs and to dealings with them, including the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (Wensing 2021b).

On the positive side, some Australian governments are slowly beginning to take notice that the Indigenous peoples of Australia have the support of the international human rights law norms and standards to protect their human rights and to tackle discrimination and abuses of their rights. On the negative side, some governments are still being recalcitrant and are not embracing the need for human-rights-based approaches to the recognition and protection of Indigenous peoples' rights and interests.

Since the High Court of Australia's groundbreaking decision in *Mabo (No. 2)* in 1992 and the enactment of the *Native Title Act 1993* (Cth), there have been considerable policy and legislative gains for Aboriginal and Torres Strait Islander peoples and communities in terms of legal recognition of their land rights and interests—albeit with some fundamental flaws and limitations. There are also continuing challenges on other fronts, including:

- a largely ineffective Closing the Gap policy framework (Productivity Commission 2023; 2024)
- the continuing destruction of Aboriginal and Torres Strait Islander cultural heritage sites of significance, such as Juukan Gorge (Wensing 2021a)
- the ongoing search for mutually agreeable mechanisms for recognition and representation of Aboriginal and Torres Strait Islander peoples in Australia's national legislative and public policy domains (Davis and Williams 2021; Mayor 2019).

The election of a federal Labor Government in May 2022 heralded a more positive note for First Nations peoples' rights and interests in Australia. It changed the public discourse about Aboriginal and Torres Strait Islander affairs, however the defeat of the Constitutional Referendum in October 2023 has had a negative impact on the federal government's commitment to implementing the Treaty and Truth-telling elements of the *Uluru Statement from the Heart.* This paper focuses on the following four key policy areas: Native title, Closing the Gap, Cultural heritage protection and the Uluru Statement.

Following the release of the Productivity Commission (2024) review of the implementation of the National Agreement on Closing the Gap, and the Commonwealth's 2023 Annual Report on Closing the Gap and its third Implementation Plan (Commonwealth of Australia 2024), the Australian Government made several funding announcements about a range of specific initiatives. However, the Government has remained silent on making any further announcements about Treaty and Truth-telling at the national level (NIAA 2024). Some welcome progress is being made into better legislative protections for ICIP at the national level through the partnership agreement between the Commonwealth and the First Nations Heritage Protection Alliance. However, at the time of writing, the outcomes of that process are yet to emerge.

While some commendable progress has been made in New South Wales in relation to greater recognition of Aboriginal peoples' land rights and interests in urban policy and planning through various policy initiatives and guidance documents, the approach in New South Wales is still characterised by limited forms of authority and power divested from the settler-state. There remains a stubborn unwillingness to address the impacts of dispossession and alienation arising from colonisation through recognition of Aboriginal peoples' human rights as reflected in UNDRIP, and a lingering failure by the State to respond meaningfully to the three key elements in the *Uluru Statement from the Heart.*

A key finding arising from this synthesis of key documents in New South Wales is the misalignment between the goals and aims of each element. For example, the statutes, plans and policy related to Aboriginal affairs and planning are not necessarily working towards the same unified goal—nor are they aligned with each other. It is more of a patchwork approach. References to self-determination are not in keeping with the principle as articulated in UNDRIP, with rather weak or limited forms of decision-making power delegated to Aboriginal organisations with very inadequate or tightly controlled decision-making powers. Despite the NSW Government divesting some power through LDM, decision-making is constrained to discrete or limited services—such as education and housing—and is a far cry from the principles of self-determination in UNDRIP. New South Wales is still doing things to communities, rather than with communities. While there has been a marginal shift in conventional bureaucratic policy or practice in New South Wales, it falls well short of the principle of self-determination as defined in UNDRIP or as expressed in the *Uluru Statement from the Heart*.

However, more recently, there is some recognition of the relevance of UNDRIP and better protection of ICIP in key planning documents. These developments are slowly setting the groundwork for further innovation and progress toward greater recognition of Aboriginal peoples' inherent rights and interests and self-determination in urban policy and planning. However, progress toward a deeper recognition of Aboriginal peoples' rights and interests in urban policy and planning in New South Wales is still slow, with limited forms of involvement and little or no devolution of power from the settler-state.

In contrast, Victoria has made great strides in moving toward a treaty or treaties to improve the recognition of Aboriginal Victorians' land rights and interests. Since 2016, there has been steady progress towards a treaty between the First Peoples of Victoria and the State of Victoria (Hobbs 2024). In early 2016, the Victorian Government entered into discussions with the Aboriginal peoples of Victoria; more than 400 people attended a statewide forum and hundreds more attended forums across regional Victoria. At the conclusion of these forums, the Victorian Government committed to advancing self-determination for Aboriginal Victorians by establishing a Treaty Interim Working Group.

Since that time, several steps have been taken, including:

- establishment of a Treaty Working Group (2016)
- establishment of the Victorian Treaty Advancement Commission (2018)
- establishment of the First Peoples Assembly of Victoria (2019)
- establishment of a truth and justice commission: the Yoorrook Justice Commission (2021)
- development of a Treaty Negotiation Framework between the State of Victoria and the First Peoples Assembly of Victoria
- establishment of a Treaty Authority.

The Treaty Authority is an 'independent umpire' to oversee negotiations between the Government and Aboriginal Victorians, and it has the necessary legal powers to facilitate treaty negotiations and resolve any disputes between the parties.

The Yoorrook Justice Commission is the first formal truth-telling process into past and ongoing injustices experienced by First Peoples in Victoria because of colonisation. It was established by agreement between the First Peoples' Assembly of Victoria and the Victorian Government, but is independent of the Assembly and of Government. The Commission has already delivered its first report and has had its term extended to at least mid-2025, when it is expected to bring down its final report. The Victorian Government has also established a Self-determination Fund to provide First Peoples, including Traditional Owners, with a financial resource independent from the State to achieve 'equal standing' in Treaty negotiations and to build capacity, wealth and prosperity for the First Peoples of Victoria. With all of these elements and institutions in place, treaty negotiations are about to get underway. What eventuates from this process will depend on what the parties can agree on.

Victoria also placed the important principle of self-determination at the heart of its Aboriginal policy framework, thereby committing to its application across all portfolios and state departments. This was a strategic move to ensure that the State of Victoria's dealings with Aboriginal peoples and communities are on the same footing, regardless of portfolio or area of responsibility. This is evident in the key elements of Aboriginal Affairs policy, and also in relation to urban policy and planning with a suite of documents aimed at ensuring the DELWP better integrates Aboriginal Victorians' voices into its policy, planning and program activities in meaningful ways. Strategies, guidelines and other resources have also been developed for local government in Victoria to help embed the voices and priorities of Aboriginal communities at a local government level. Unfortunately, a recent restructure of portfolio responsibilities in Victoria appears to have resulted in the loss of some key documents from the former DELWP portfolio.

The fact that the Victorian Government has placed the principle of self-determination at the heart of Aboriginal policy in Victoria is very promising. The test will be whether this momentum can be maintained and that treaty negotiations will deliver devolution or sharing of power between the settler-state and Aboriginal Victorians on matters that mean the most to the future prosperity and wellbeing of Aboriginal Victorians. The hard work of negotiations is about to get underway in Victoria, as the First Peoples' Assembly of Victoria has presented the Victorian Government and the people of Victoria with a Declaration that they are ready to begin the negotiations (FPAV 2024).

What does all this mean for the future of Aboriginal peoples' (land) rights and urban policy and planning? It is evident that international and national policy and legislative settings are having some influence; Australia's Aboriginal and Torres Strait Islander peoples have been asserting for some time that international human rights norms and standards are applicable to the recognition of their status as the Indigenous peoples of Australia. In the course of the First Nations Regional Dialogues hosted by the Referendum Council, the participants referred to the importance of the right to self-determination as enshrined in Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UN 2007). This was also reflected in the *Uluru Statement from the Heart*, which was issued to the people of Australia at the conclusion of the National Constitutional Convention at Uluru in May 2017. The *Native Title Act 1993* (Cth), though imperfect, is generating an evolving jurisprudence, with consent determinations and agreement-making driving the resolution of native title matters in most jurisdictions.

Both New South Wales and Victoria are responding to the wider international and national developments in relation to Indigenous peoples' rights; both states have indicated this in some of their recent documents—albeit the former state is acting slower than the latter.

The analysis of the array of statutes and policy documents across the two jurisdictions shows that there has been a steady increase in focus on Aboriginal peoples' land rights in urban policy and planning, especially in Victoria. This is aimed at improving the recognition and incorporation of their knowledge and connections to Country in urban policy and planning outcomes. There is more fertile ground in Victoria for greater recognition of Aboriginal peoples' ongoing connections to and responsibilities for Country because of Victoria's focus on self-determination and Pathway to Treaty. In New South Wales the policy focus is much more on urban design and localised place-based outcomes.

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