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ENVIRONMENTAL JUSTICE AUSTRALIA

Supplementary Submission in response to

Yoorook Justice Commission Inquiry into Land, Sky and Waters

prepared by

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Introduction

1. Environmental Justice Australia (EJA) made a submission to the Yoorook Justice Commission inquiry into land, sky and waters on 30 November 2023.

2. By email, on 14 December, we were invited to provide a supplementary submission on certain questions referred to but not considered in detail in our original submissions. These questions concerned the significance of laws governing land-use planning, environmental protection (pollution and waste), and environmental assessment to truth-telling, justice and treaty-making in relation to lands, waters and natural resources.

3. In our original submissions we set aside dealing with these issues in detail largely because they are vast fields of law, policy and regulation in themselves, of often ubiquitous character and application in relation to lands and waters, and their relevance to justice and truth-telling deserves more rigorous and forensic consideration than we felt we could provide in the time and space available. For example, land-use planning intimately regulates all lands across the State of Victoria according to elaborate codes and countless decisions.

4. Respectfully it remains the case that we likely provide only summary insights into these issues here but nevertheless these supplementary submissions are intended to provide additional opinion and submissions on those issues. We thank the Commission for the invitation to make these additional submissions.

Land use planning

5. Land-use planning[1] primarily concerns regulation of the use and development of land.[2] 'Protection' of land also falls within the scheme. It emerged historically in order to respond to problems and conflicts the common law could not easily or efficiently govern such as location of noxious industries and overcrowding and squalor in the context of rapid urbanisation.

6. The 'mission' of planning has grown extensively, even incoherently,[3] as a regulatory platform for managing a key public good applying to land: development and use rights. Those rights and attendant duties are entirely a creature of statute. The current form of that statute is the *Planning and Environment Act 1987* (Vic).

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[1] The terms 'land-use planning' and 'planning' are generally used interchangeably in this section except where express otherwise.

[2] A strong focus of the planning system under the legislative scheme of the *Planning and Environment Act 1987* (Vic) is regulatory control and prescription combined with permissive authorities and to a lesser degree 'as-of-right' uses. Structurally these arrangements function under the scheme of the Act through planning schemes (effectively codes of use, development and protection of land) and planning permits. Land use planning is less concerned conceptually with compelling specific public good outcomes, such as environmental restoration of land, than controlling conduct notionally for the public benefit: see eg *Villawood Properties Pty Ltd v Greater Bendigo City Council* [2005] VCAT 2703, [4]-[10] and the 'net community benefit' principle at VPP, cl 71.02-3.

[3] See Rowley *The Victorian Planning System: Practice, Problems and Prospects* (Federation Press, 2017), 5-6

7. 'Land' here is very broadly understood. For example, planning applies to land with water over it, such as waterways, and to legal rights and interests in land as well as its physical incarnation. Biodiversity and habitat, emissions, aspect, natural resources, heritage and various other social and biophysical qualities are regulated under planning as incidents of land use and development.

8. Land-use planning is widely used to manage environmental issues as well as social ones, alongside ordinary urban development or infrastructure issues and other minutiae of everyday life.

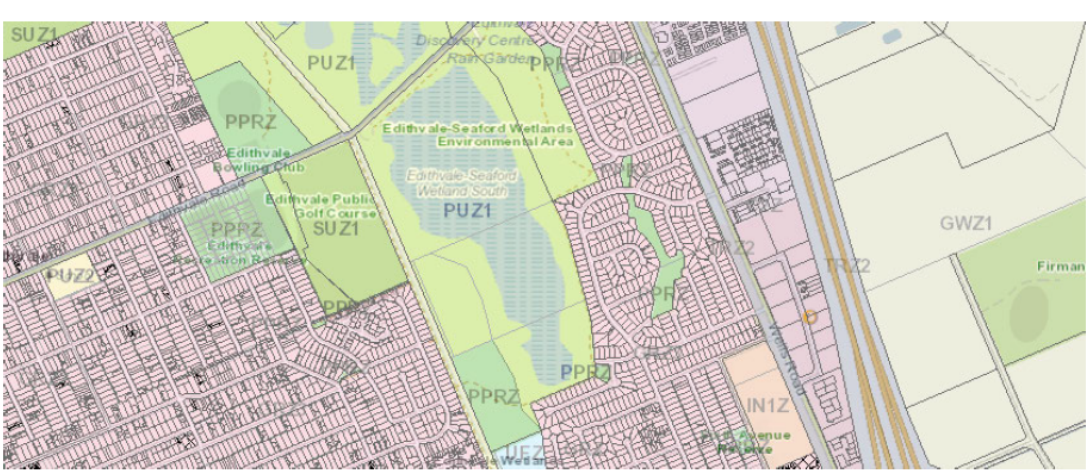
9. The institutional architecture of planning and its decision-making is vast, taking up a large component of the work of local government, various (mainly State) government departments, and statutory tribunals such as VCAT.

10. Land-use planning remains tightly tied to, and derivative of, the law of real property (the vesting of *in rem* rights and interest in land guaranteed by the state, a product of the English inheritance referred to in our original submissions), such as through the alignment of planning with land tenure (for example, private verses public land) and with cadastral boundaries integral to the system of land titles.

11. Land-use planning, as for the law of real property, deeply inscribes the land, its features, places and qualities, with functional and administrative rationality.

12. This condition can be seen for example in Figure 1, which includes the Ramsar-listed Edithvale-Seaford Wetlands, a small remnant of the large Carrum Carrum Swamp wetlands system that once dominated this sub-coastal region adjacent to Port Philip Bay. Land here is now dominated by residential uses and public uses (environmental and recreational). Uses of land here is reflected in zoning, a key mechanism for regulating that dimension of planning.

FIGURE 1: PLANNING ZONES EDITHVALE, MELBOURNE



13. In our view it is important to consider the regulatory domain of land-use planning as it intersects with issues of land and water justice first conceptually and then practically.

Conceptual considerations

14. As we understand them, Aboriginal concepts, discourses and ontologies of land are categorically distinct from those acquired and operating under land-use planning laws. This is to say, at the conceptual level there are profound differences and arguable tensions as between Aboriginal peoples' practices and institutions concerning land, land-use, development and protection and those inherent to planning.

15. Conventional land-use planning is premised essentially on the usufructuary and/or utilitarian character of land and its features, assuming a model of 'dominion' derived from the law of property. The utility of land and its features may be for building or works, agricultural or commercial purposes, the management of harms, the protection of its natural assets, or indeed protection of Aboriginal values such as tangible or intangible heritage. 'Development' is closely associated with physical construction or alteration of features on land, or in other words 'built form.' 'Protection' generally presumes restraint of harm or damage.

16. The terms and ideology of British appropriation of land in Australia are instructive to this model of the 'use and development' of land, namely that lands appropriated on 'discovery' or (more honestly) conquest were conceived as 'wastelands' or 'unused' lands typically brought into 'productive use'. Outside of those uses they commonly remained 'wastelands', such as where unproductive for European agriculture. Axiomatically, the land was empty until such time as it was 'settled' and/or 'developed.' A foundational tenet, or perhaps thread, of land-use planning is the colonial origins and model of land as a *tabula rasa*, un-inscribed with meaning, peoples and activities. As with other aspects of the colonial project, use and development of land commences with what Deborah Bird Rose calls 'Year Zero', a 'place where something is going to happen.'[4]

17. The thread of the mythic 'nullius' (emptiness) principle continues to run through land-use planning.

18. For non-Aboriginal peoples, including EJA, it is or should be now well-known that Aboriginal paradigms of land are profoundly different. Any notions of 'use', 'development' or 'protection' of land is incomprehensible outside of the *relation* to land, which may also be a relation *from* or *of* land.

19. The Uluru Statement from the Heart provides one expression of this relationship, terming it 'sovereignty': 'the ancestral tie between the land, or "mother nature", and the Aboriginal and Torres Strait Islander peoples, who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors'.

[4] Rose *Reports from a Wild Country: Ethics for Decolonisation* (UNSW Press), 64

20. Elsewhere this relation has been described one of 'caring for Country', where Country (to use Aboriginal English) is personified, known, and experienced as a 'living entity', manifestation of ancestors, kin or supernatural beings.[5]

21. Country may have qualities and properties of a body or bodies, of sentience as well as sacredness.[6]

22. How the land is inscribed is profoundly different than by way of statutory and regulatory schemes. Fundamentally, the land is and remains inscribed with other meanings and forms (since time immemorial or 'creation'), based on lore, law and cultural authority.[7] That inscription is inherent in the existence of Aboriginal society and jurisdiction. That jurisdiction has been recognised in Australian law since *Mabo (No 2)*. Reconciliation between law governing land-use planning and Aboriginal jurisdiction (lore, law and cultural authority) in respect of that domain remains formally nascent and very limited.

23. Notable recent attempts have been made to reconcile land-use planning laws with Aboriginal paradigms of land. In Victoria perhaps the most well-known is through the *Yarra River Protection (wilip-gin Birrarung murron) Act 2018* (Vic), a law that is essentially a land-use planning law attempting, primarily through strategic planning informing it, a form of reconciliation with Wurundjeri Woiwurrung law in particular.[8]

24. Similarly, Victorian planning policy now extends to a limited form of accommodation between planning law and 'Traditional Owner living cultural heritage values' on the waterways of the Barwon system and across the western suburbs of Melbourne.[9]

25. Increasingly, Aboriginal representative bodies engaged in management of Country, such as Traditional Owner Groups and RAPs, have reduced expressions of lore, law and cultural authority in land to documentary form, enabling a degree of collaboration with certain domains of planning. Presently, those exercises appear to benefit other domains of planning more than land-use planning. For example, Country plans, Aboriginal Waterway Assessments, and fire plans inform land and water management. Incursions into the space of land-use planning has occurred for example by way of 'cultural values' studies and precinct planning.[10]

26. In our view, it appears that more systematic progress has been made in domains of planning outside of land-use planning, such as regional catchment planning. Interventions in the latter we understand are relatively *ad hoc*, such as the rivers and waterways examples noted

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[5] See Rose *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996)
[6] See eg Bell *Ngarrindjeri Wurruwarrin: a World That Is, Was, and Will Be* (Spinifex Press, 2014), Ch 5 'A land alive: embodying and knowing the Country'
[7] As in our original submissions, we use reference to this concept variously in these supplementary submissions, as it derives from the *Treaty Negotiation Framework* (2022).
[8] Victoria *Burndap Birrarung Burndap Umarkoo: Yarra Strategic Plan 2022-2023*
[9] See VPP, cl 12.03-1R
[10] See eg Freedman *Bulleen Banyule Burrung Dalga Bik Ngarrgu Yiaga: Bulleen-Banyule Flats Cultural Values Study* (2020)

above. In each instance, we suspect the importance of the interpretative exercise (whether formally anthropological or otherwise), including translation from Aboriginal concepts and lore/law to land-use planning instruments, cannot be understated. As noted below, once reason for this may be the enduring influence of archaeological paradigms in land-use planning and decision-making. It may be that institutional atrophy, alluded to for example by Rowley,[11] should not be underestimated in the limited capacity for land-use planning to accommodate itself to Aboriginal models and paradigms concerning land.

Considerations of practice[12]

27. Cursory review of planning law and any planning scheme (including the VPPs) shows a general silence in respect of Aboriginal concepts, or, if preferred, lore, law and cultural authority. The principal exception to that rule is consideration of Aboriginal heritage matters in planning decision-making. Overwhelmingly that is a matter of consideration of 'tangible' heritage or rather archaeological considerations in planning decisions. The emergence of 'living entity' concepts and 'cultural values' considerations is a departure. We will return to that below.

28. Formally and practically, the land-use planning system relies extensively, if not almost exclusively, on Aboriginal heritage law to recognise and respond to Aboriginal considerations in land. The practical view of planning actors and institutions is far less about protection of Country, its attributes or Aboriginal peoples' relationships to it than management of tangible artefacts. Cultural heritage management plans, available under Part 4 of the *Aboriginal Heritage Act 2006* (Vic), are used as guidance for planning permission and the cornerstone of this interaction.

29. The interaction is commonly a limited archaeological procedure, extending to use of Aboriginal heritage permissions to facilitate development and related planning approvals. Avoidance of damage may ensue, or otherwise excavation and 'salvage' of tangible heritage proceeds. Intangible heritage[13] considerations are generally not considered, such as ancient and contemporary lore and connection. Practical consequences of more recent experiments in accommodating intangible heritage, such as by way of 'cultural values studies' informing planning instruments, appear uncertain.

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[11] Rowley *The Victorian Planning System: Practice, Problems and Prospects* (Federation Press, 2017), 279: '... urban planning is a discipline that has a well-entrenched crisis of confidence. This institutional timidity is a problem that extends far beyond Victoria...'

[12] EJA acknowledges the insights of Dr Suzanne Barker in the preparation of this subsection. The views and submissions expressed herein remain those of EJA.

[13] See *Aboriginal Heritage Act 2006* (Vic), s 79B:

(1) For the purposes of this Act, Aboriginal intangible heritage means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.

(2) Aboriginal intangible heritage also includes any intellectual creation or innovation based on or derived from anything referred to in subsection (1).

30. In our submission, it remains likely that mechanisms within land-use planning to identify and accommodate Aboriginal intangible heritage[14] are at best nascent, ad hoc and exceptional.

31. Further, in our view, treatment of Aboriginal paradigms of and interests in land are not systemic or strategic. The manner by which planning law and practice interacts with Aboriginal heritage law is illustrative. Overwhelmingly, Aboriginal heritage considerations are dealt with a the 'back end' of development projects or land use changes (subject to exemptions for this requirement in development applications), so that any actual engagement with Aboriginal matters, usually concerning tangible heritage, occurs well after projects or uses are well-advanced.

32. In effect, Aboriginal considerations in planning law and practice are incidental, where indeed they are considered at all. They are, in other words, narrow and late. The institutional effects of this approach for Aboriginal people and their organisations are no doubt wide and deep.

33. What are appropriate responses to these conditions? Again, it may be instructive to distinguish between conceptual/theoretical and practical dimensions, with practical concerns including law and policy reform.

34. Can cornerstone concepts of land-use planning account for and genuinely engage with Aboriginal paradigms in land? Are there or can there be distinctive and unique Aboriginal principles or paradigms of 'use', 'development' and 'protection' of land? Inherently, these are questions for Aboriginal peoples and their relevant representative institutions to answer. We only answer by way of certain limited reflections on our work with Aboriginal colleagues and clients, as well as on formal written interventions by Aboriginal organisations, such as through Country Plans or documents prepared for relevant purposes. Additionally, we suggest it is unlikely that mere incorporation of Aboriginal content into current concepts of 'use', 'development' or 'protection' will suffice.

35. Plainly, Aboriginal peoples having been 'using' lands and resources across what is now Victoria since time immemorial. In some ways talking of the novelty of distinctive Aboriginal land uses is absurd as those uses have always been here. Colonization irreparably changed those uses. Our understanding is that certain themes permeate contemporary approaches to land use:

    a. It emphasizes 'healing' of and 'care' for land, in recognition that land has frequently been damaged and has always required active management

    b. In this sense it is protective and restorative

    c. It emphasizes the importance of Aboriginal peoples taking an active role in those tasks

[14] Aboriginal intangible heritage might be used here as a rather imperfect analogue for Aboriginal lore, law and cultural authority.

d. It emphasizes that uses of land should be sympathetic to cultural, spiritual, and key biophysical considerations

e. It emphasizes connection to ancestral lands

f. It emphasizes social, community, educational (including intergenerational transmission of knowledge) and health uses of land

g. It emphasizes agency over and authority in respect of lands.

36. Similarly, 'development' may adopt, but be a more expansive concept than, associations with built forms, insofar as 'development' within the domain of land-use planning includes but is not limited to buildings, works or adjustment of title. Those considerations do appear entirely relevant to Aboriginal economic models associated with their land base, such as for agribusiness, tourism, accommodation, or community services purposes. In this respect alternative, additional and dedicated forms of planning instruments (such overlays or particular provisions within planning schemes) may be effective and appropriately adapted planning tools.

37. Potentially, however, 'development' of land requires incorporation of Aboriginal practices and models of land management and their revitalization beyond of the current statutory concept. For example, 'development' on land may arguably include its spiritual or ecological repair, reinstatement of natural features or processes historically degraded or destroyed or lost through the effects of colonization, or physical alteration of land or features directed to social or community development. Cultural burning programs as a device to alter ecological structure, wetland and waterway restoration, reconstruction of ancient built forms, may effectively be considered examples of 'development' arising out of and/or re-establishing continuity with ancient practices, knowledge or connections. Generally, these actions are familiar to other institutional domains, such as catchment and land management, but foreign to land-use planning. Existing concept of 'works' seem poorly designed to accommodate these approaches or at best ambiguous.[15]

Law and policy reform

38. In our view, reform of the Act and subordinate planning instruments (such as planning schemes and VPPs) is preferable to align planning law with Aboriginal models and practices of land management clearly and expressly.

39. Directions for law and policy reform may include (non-exhaustively):

a. Amendment to definitions of 'use' and 'development' under the Act.

[15] *Planning and Environment Act 1987* (Vic), s 3: '"works" includes any change to the natural or existing condition or topography of land including the removal, destruction or lopping of trees and the removal of vegetation or topsoil.'

Purposes of amendment include expressly expanding those terms to accord with key Aboriginal principles and concepts in respect of land, such as care, healing, protection or recovery of intangible heritage, and promotion of cultural, spiritual, economic and social relationships with Country.

In our view, such reforms would likely need to be preceded by development of policy and legal positions on the issue by Aboriginal peoples and their representative organisations.

Additionally, principles of Aboriginal peoples' connection to, care for, or management of Country should be reflected in decision-making principles under clause 71.02 of the Victorian Planning Provisions.

b. Amendment of section 4 of the Act in order to provide expressly for the objective of recognising and promoting Aboriginal peoples'

    i. enduring relationships to land and Country

    ii. identified uses and values in land.

    These amendments would introduce directly Aboriginal peoples' interests in regulation of use and development of land and do so in broad terms.

    In this form, the amendments to the Act's objectives reflect the issue of relationship to land (used elsewhere in legislative form) and in terms ('uses and values') contained in other laws.

c. Amendment of the Act to include express reference to Aboriginal peoples and their representative organisations, such as Traditional Owner Group Entities or Registered Aboriginal Parties.

d. Amendment of section 19 of the Act to provide scope for notice to and involvement of relevant Aboriginal organisations in amendment of planning schemes.

e. Amendment of Victorian Planning Provisions to include express policy requirements to recognise and promote Aboriginal peoples' enduring connections to Country as noted above and regulatory provisions designed to give effect and expression to those interests (such as through discrete zoning, overlay or particular provision frameworks).

f. Further to the paragraph above, amendment of Victorian Planning Provisions to require consideration and promotion of Aboriginal values and uses in land as set out in relevant statements or studies on those uses and values.

    Design and development of these provisions would need to be accompanied by a program of preparation of those statements or studies by Aboriginal organisations and communities. They could be implemented through the planning system as they

are completed (whether as incorporated documents or otherwise). They should be matters of mandatory consideration under clause 65 of the Victorian Planning Provisions.

g. Amendment of the *Victorian Planning Authority Act 2017* (Vic) to require recognition and promotion of Aboriginal peoples' connection to and care for Country in accordance with Aboriginal laws and customs.

40. A systemic and strategic approach to education and training of the key workforces engaged in land-use planning would be important to effective operation of any such law and policy reform program. Such a project and program of education and professional development would need to apply to the planning profession itself (in government and in consulting industries), other built environment professionals (engineers, ecologists, surveyors, landscape architects, etc), legal professionals working in planning, and decision-makers within local government and at VCAT.

41. Aboriginal Traditional Owner corporations and RAPs, in effect, perform a quasi-public function presently, albeit largely confined to Aboriginal tangible cultural heritage considerations in planning decisions. Any significant expansion in the role and function of Aboriginal bodies and persons in land-use planning, as would be necessary in our view to achieve justice outcomes referred to above, requires appropriate expansion of those organisations' resource and funding base. As is consistent with the tenor of our submissions above, that approach aligns with recognition of Aboriginal *jurisdiction* (inherent rights and obligations) in respect of land-use planning and other functions affecting land and waters.

Pollution and waste

42. The *Environment Protection Act 2017* (Vic) (**EP Act 2017**) is the principal Victorian statute concerning the regulation of pollution and waste. It is silent on Aboriginal peoples' rights, interests and relationship to their Country.

43. In our view, the EP Act 2017 may be interpreted to include risks of harm to the health and environment of Aboriginal peoples arising from pollution and waste. However, the EP Act 2017 does not directly recognise or account for Aboriginal peoples' rights and interests, law/lore, and relationships to their Country.

44. Some of the statutory instruments (discussed below) recognise the unique relationship that Aboriginal peoples have to Country and to the environment, but in practice it appears that the Regulator has done little more than recite broad platitudes.

<u>The EP Act 2017</u>

45. The main purposes of the EP Act 2017 include to:

a. Specify a new objective of the Environment Protection Authority (**EPA**)[16]

[16] EP Act 2017, ss 1(b).

b. Provide for a new governance structure of the EPA, including a Governing Board[17]

c. Set out the legislative framework for the protection of human health and the environment from pollution and waste, the cornerstone of which is the 'general environmental duty'.[18]

46. The EPA's new objective is to protect human health and the environment by reducing the harmful effects of pollution and waste.[19] The concepts of 'human health' and 'environment' are defined broadly, as follows:

a. ***human health*** includes psychological health;

b. ***environment*** means—

i. the physical factors of the surroundings of human beings including the land, waters, atmosphere, climate, sound, odours and tastes; and

ii. the biological factors of animals and plants; and

iii. the social factor of aesthetics;

47. In our view, these concepts may be of particular relevance to Aboriginal peoples contending with, for example, contamination of land or pollution of waters. However, they could be strengthened by directly recognising or promoting Aboriginal peoples' rights and interests.

48. For example, 'environment' could inclusively refer to Country as specific form of relationship held by Aboriginal peoples and inhering in biophysical 'factors'.

49. 'Human health' could be expanded to include reference to Aboriginal cultural or spiritual health: see also reference to 'cultural loss' below.

50. The EPA's new governance structure is centred around a Governing Board. The Governing Board of 5-9 members is now responsible for the governance, strategic planning and risk management of the EPA. It is also responsible for pursuing the objective of the EPA.[20]

51. The EP Act 2017 specifies that collectively, persons recommended for appointment to the Governing Board have skills, knowledge or experience in relation to environment protection or regulation, regulation of industry, local government, public administration or governance, finance or accounting, and legal practice. There is no requirement for any person appointed

[17] EP Act 2017, ss 1(c) and (d).
[18] EP Act 2017, ss 1(f) and (g).
[19] EP Act 2017, s 357(1).
[20] EP Act 2017, ss 361 - 362.

to the Governing Board to have knowledge or experience in relation to the rights and interests of Aboriginal peoples and Traditional Owners.

52. The new legislative framework for the protection of human health and the environment from pollution and waste is multifaceted, comprising various duties for waste, contaminated land and incident notification and management, along with a 'permissions' scheme of licences, permits and registrations for higher risk activities, and a range of legal tools setting legal requirements through to advisory guidance. The cornerstone of the of the legislative framework is the 'general environmental duty' (**GED**).

53. The GED applies to all Victorians engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste. The GED is a duty to minimise those risks of harm so far as reasonably practicable. As noted above, the concepts of 'human health' and 'environment' are defined broadly.[21]

54. In our view, the scope of the GED can be interpreted to include harm to Aboriginal peoples distinctively as arising from their unique connection to lands, waters, and environment, being psychological harm associated with harms to Country, harms to connections to Country, or harms sourced in cultural damage or loss.[22] This view is in addition to our submissions above on expanded key definition under the Act.

Statutory instruments

55. Our review of the statutory instruments made under the EP Act 2017 reveal a similarly limited consideration of specific harms to Aboriginal peoples and Aboriginal Country arising from pollution, waste and land contamination (historically or contemporaneously). Our review uncovered two references.

56. First, the EPA's *Charter for Consultation* states:[23]

> ***Consultation with Aboriginal Victorians***
>
> *EPA recognises the unique relationship that Traditional Owners and custodians have to Country and to the environment. We commit to building and strengthening our relationships with Traditional Owners and custodians by:*
>
> - *developing relationships with Traditional Owner corporations and Recognised Aboriginal Parties*
> - *working towards a shared understanding of the aspirations and priorities of Traditional Owners for Country, and EPA's work and role*
> - *exploring opportunities for collaboration and working together*
> - *understanding the ways that Traditional Owners and Recognised Aboriginal Parties want to participate in consultation processes.*

[21] EP Act 2017, s 3.
[22] See: *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 [187] (***Timber Creek***).
[23] Environment Protection Authority Victoria, *Charter of Consultation* (Publication 1928, June 2021) <https://www.epa.vic.gov.au/about-epa/publications/1928> 13.

Proponents, applicants, and duty holders also have a responsibility to ensure that impacts to Country and cultural values are identified and can be considered through an assessment process.

a. Our understanding is that the implementation of the EPA's statement on 'Consultation with Aboriginal Victorians' is not supported in practice by any formal consultation requirements/procedures. For example, the consultation processes documented in the Charter itself are silent on when proponents, applicants and or duty holders are to consult with Aboriginal peoples (to identify impacts to Country and cultural values).

57. The second statutory instrument which takes account of Aboriginal peoples in the context of risks of harm from pollution and waste is the Environmental Reference Standard (**ERS**).

a. The primary function of the ERS is to provide an environmental assessment and reporting benchmark. It is not a compliance standard, although the Minister, the Victorian Civil and Administrative Tribunal, the EPA, and local councils are required to consider the ERS when making a range of decisions.

b. The ERS sets out the 'environmental values' which are the uses, attributes and functions of the environment that Victorians value. For example, water that is safe to drink or land that is suitable for production of food. Standards for the environmental values are comprised of 'objectives' for supporting different uses of the environment and 'indicators' that can be measured to determine whether those objectives are being met.

c. It is acknowledged in the preamble to the ERS that all places in Victoria exist on the Traditional Country of Aboriginal Victorians. However, the ERS recognizes only one 'environmental value' as having any relevance to Aboriginal people: water.[24]

d. Specifically:

Cl 1 Preamble

...

All places in Victoria exist on the traditional country of Aboriginal Victorians. As recognised in the Constitution Act 1975, Aboriginal people have a unique status as the descendants of Australia's first peoples and a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria. This ERS should be understood in this context.

Cl 13 Environmental values for waters

Table 5.1

Environmental value	Description of environmental value

[24] Environmental Reference Standard (Victorian Government Gazette No. S245 Wednesday 26 May 2021) <https://www.epa.vic.gov.au/about-epa/laws/compliance-and-directions/environment-reference-standard>.

Traditional Owner cultural values	Water quality that protects the cultural values of Traditional Owners, having recognized primary responsibility for protecting the values of water for cultural needs, to ensure that Traditional Owner cultural practices can continue. Values may include traditional aquaculture, fishing, harvesting, cultivation of freshwater and marine foods, fish, grasses, medicines and filtration of water holes.

Cl 19 Indicators and objectives [surface waters]

Table 5.7

Environmental value	Indicators	Objectives
Traditional Owner cultural values	Indicators must be developed in consultation with Traditional Owners and may be informed by the process identified in the ANZG for determining cultural and spiritual values.	Objectives must be developed in consultation with Traditional Owners and may be informed by the process identified in the ANZG for determining cultural and spiritual values.

e. This means that that the State's environmental assessment and reporting benchmark fails to recognize in any tangible way lands, territories or places within Victoria – other than waters – as Country or as inherently vested with ancestral and continuing connections for Aboriginal peoples.

<u>Addressing ongoing systemic injustice</u>

68. In our view, there has been little – if any – consideration of Aboriginal peoples in the drafting of the EP Act 2017 and the statutory instruments made under the Act do little more than recite broad platitudes.[25] The ongoing silence with respect to the manner and nature of harms specific to Aboriginal peoples and Country arising from pollution, waste and land contamination (historically or contemporaneously) represents a source of ongoing systemic injustice.

69. In these circumstances, we propose the following amendments:

    a. Amend the definition of 'environment' under the EP Act 2017 to include Country.

    b. Amend the definition of 'harm' under the EP Act 2017 to align with concepts of cultural loss and damage arising from pollution or waste or land contamination. We note that spiritual connection with land is not to be equated with loss of enjoyment

[25] **Note** the exception re: recognizing Traditional Owner cultural values with respect to water.

of life or other notions and expressions found in the law relating to compensation for personal injury. As explained by the High Court of Australia:[26]

> Spiritual connection identifies and refers to a defining element in a view of life and living. It is not to be equated with loss of enjoyment of life or other notions and expressions found in the law relating to compensation for personal injury. Those expressions do not go near to capturing the breadth and depth of what is spiritual connection with land.

c. Amend the EP Act 2017, or supporting instruments, to ensure that public officials at the EPA actively implement, promote and support human rights, and specifically the cultural rights contained in section 19 of the *Charter of Human Rights and Responsibilities*.[27]

We note that the *Public Administration Act 2004* applies to the EPA,[28] which in turn requires public officials at the EPA to respect and promote all human rights contained in the *Charter.* In circumstances where their authorizing Act and supporting instruments are largely silent on the issue, it is our view that section 19 requires extra attention from the EPA.

Environmental assessment

70. Environmental assessment is the process by which information is relevantly assembled and used in decision- or policy-making on environmental matters. It is an expansive field and discipline, not simply confined to consideration of impacts of specific harmful projects on the environment but, in various guises, traverses environmental effects considered cumulatively, across multiple environmental domains, associated with policy or programs as well as individual projects, and so forth.

71. Assessment of impacts deriving from projects, policies, programs or actions can and do extend to consideration of Aboriginal interests, such as impacts on lands, waters, cultural and spiritual values, and tangible and intangible heritage. Commonly, environmental assessment schemes are adapted, varied, extended or modified expressly to account for and include these considerations. At the international level, a well-known example is the *Ake:Kon Guidelines*,[29] which emerged out of work implementing the Convention on Biological Diversity (Biodiversity Convention), in order to include Indigenous cultural values in assessment impacts of projects and actions on biodiversity.

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[26] *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 [187] (***Timber Creek***).
[27] *Public Administration Act 2004,* s 7(g); *Charter of Human Rights and Responsibilities 2006,* s 19.
[28] EP Act 2017, s 375.
[29] Secretariat of the Convention on Biological Diversity *Akwe:Kon: Voluntary Guidelines for the Conduct of Cultural, Environmental, and Social Impact Assessments Regarding Developments Proposed to Take Place on, or Which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* (2004), akwe-brochure-en.pdf (cbd.int)

72. In essence, consideration of Aboriginal interests in land, waters and Country by way of environmental assessment regimes has functioned by incremental, if structured, annexure to those regimes.

73. In Victoria, stand-alone legislation governs environmental assessment to some degree. This scheme is the *Environment Effects Act 1978* (Vic). The threshold for its use is the (Planning) Minister's opinion as to 'significant effect on the environment' of designated works. In practice, this threshold is low but subject to exercise of very broad Ministerial discretion. Ministerial guidance[30] prepared under the Act provides some additional non-binding direction. Assessment under this Act typically occurs in relation to major projects or projects of some sensitivity or controversy. It provides a 'fall back' scheme where other assessment processes are insufficient or where more complex or integrated assessment is required.

74. Assessment under the scheme is project-based, or responsive to referral of individual projects. It may be that a wider set of 'effects' are considered in an assessment, such as indirect or cumulative effects.

75. Aboriginal interests are reflected in guidance under the Environment Effects Act mainly to the extent of consideration of Aboriginal cultural heritage in a manner analogous to planning law, to intended inclusion of Registered Aboriginal Parties on technical reference groups, and otherwise general and indicative guidance to proponents to engage with Traditional Owners.[31]

76. 'Environment' is not defined under the Act. Ministerial guidance constructs 'environment' broadly to include 'all physical, biological, social, spiritual and economic systems, processes and attributes.' Conceptually, the scheme accommodates Aboriginal interests. Little more is provided in guidance beyond this level.

77. Assessment of impacts of development, projects, works or other activities can and do proceed under other legislation. For example:

    a. Assessment of development applications under the *Planning and Environment Act 1987* (Vic) is the routine task of local government and occasionally the State. In relation to removal or destruction of native vegetation, detailed assessment standards apply.[32] Only native vegetation to which provisions of the Aboriginal Heritage Act apply fall within the scope of this assessment regime. Our comments and submission above broadly apply.

[30] Victorian Government *Ministerial Guidelines for Assessment of Environmental Effects under the Environment Effects Act 1978* (8th ed, 2023)
[31] Victorian Government *Ministerial Guidelines for Assessment of Environmental Effects under the Environment Effects Act 1978* (8th ed, 2023), 15, 23-24, 26, 46,
[32] DELWP *Guidelines for the Removal, Destruction or Lopping of Native Vegetation* (2017)

b. Assessment of licence or permission applications, enabling polluting or waste activities, under the *Environment Protection Act 2017* (Vic) is the ordinary task of the EPA. Our views and comments above apply.

c. Assessment of applications to take and use water, to construct works on waterway, to obtain allocations or entitlements to water resources, or transfer rights in water resources are tasks vested in water authorities or the Water Minister. In certain circumstances considerations of Aboriginal cultural values and uses are now mandatory in assessment and decision-making on these applications. What weight is given to those considerations remains at the discretion of the decision-maker.

78. Environmental assessment undertaken by public authorities subject to the provisions of the *Charter of Human Rights and Responsibilities Act*, requiring *inter alia* proper consideration and compatible actions with Aboriginal cultural rights, requires conformity to that human rights standard. That includes Aboriginal peoples' rights not to be denied traditional connections to land, waters and natural resources. Further to our submissions in the original submissions, our view is that it is unlikely that construction of models, standards and methods of environmental assessment, where undertaken in Victoria by public authorities, in practice conforms to those standards.

79. Development of bicultural approaches to environmental assessment has been led by scholars and practitioners in certain discrete domains, such as water management and planning[33] and land management (such as use of cultural fire[34]). Typically, assessment methods have evolved in support of Aboriginal-led programs and initiatives directed to protection and health of Country. Important general guidance on use and authority in Aboriginal and Torres Strait Islander knowledge, on its nature and relationships and rules embedded within in, can be found in documents such as the *Our Knowledge, Our Way in Caring for Country* guidelines.[35]

80. Much of this work on bicultural approaches to assessment operates in the context of land, water and natural resources *planning*, not in the context of impact assessment or in a manner responsive to specific projects, works or programs. As noted elsewhere, the

[33] See eg Moggridge et al 'Integrating Aboriginal cultural values into water planning: a case study from New South Wales, Australia' (2019) *Australasian Journal of Environmental Management*, https://doi.org/10.1080/14486563.2019.1650837; Finn and Jackson 'Protecting indigenous values in water management: a challenge to conventional environmental flow assessments' (2011) 14 Ecosystems 1232; Mooney and Cullen 'Implementing the Aboriginal Waterways Assessment tool: collaborations to engage and empower First Nations in waterway management' (2019) 3 *Australasian Journal of Environmental Management*, https://doi.org/10.1080/14486563.2019.1645752; Mackenzie *Cultural Flows: Aboriginal Water Interests for Establishing Cultural Flows: Preliminary Findings* (MLDRIN, NBAN and NAILSMA, 2016), National Cultural Flows - Research Reports

[34] See eg Atkinson and Montiel-Molina 'Reconnecting fire cultural with Aboriginal communities with contemporary wildlife risk management' (2023) 6 *Fire* 296, https://doi.org/10.3390/fire6080296

[35] Woodward et al (eds) *Our Knowledge, Our Way in Caring for Country: Indigenous-led Approaches to Strengthening and Sharing Our Knowledge for Land and Sea Management – Best Practice Guidelines from Australian Experiences* (NAILSMA, CSIRO, 2020), OKOW Guidelines_FULL (1).pdf

conventional approach of environmental impact assessment to Aboriginal interests is to confine them to Aboriginal heritage, typically tangible heritage values.

81. Whether through development and adaptation of national or international guidance, and/or through coalescing bicultural assessment practices from other domains, we submit that there is considerable scope and need for reform of environmental impact and strategic assessment. That should occur through legislative and other (for example, policy) pathways.

82. Starting points may be:

    a. Reform of the *Environment Effects Act 1978* (Vic) to require assessment of and inquiry into Aboriginal uses and values in respect of any lands and waters potentially affected by works (project). 'Uses and values' should be broadly conceived as they presently are under water legislation and be taken to accommodate intangible and tangible heritage or, alternatively or additionally, lore/law and cultural authority. Any such approach is to reflect the fact and values of Aboriginal jurisdiction in respect of land, waters and connections to them.

    b. Reform of the *Environment Effects Act* or accompanying guidance should reflect the 'benchmark' legal standard as to the adequacy of assessment,[36] modifying it in order to accommodate the consequences of a project or works on Aboriginal peoples' distinctive spiritual, material and economic relationships with Country in any particular set of circumstances.

    c. To the extent relevant assessments are undertaken under other laws, such as planning law or environmental protection law, they should reflect a comparable standard, with any further modifications appropriate to that subject-matter (for example, considerations of cultural loss or harm arising from pollution or waste).

    d. As with other submissions made here, any further extension or expansion of the quasi-public functions of Aboriginal organisations or institutions must be accompanied by sufficient resources and funding to ensure they may be carried satisfactorily and sustainably. There is, in our view, a clear public interest in the safeguarding, extension and consolidation of those functions (emanating from inherent jurisdiction of Aboriginal connections to Country) in management of lands, waters and resources across Victoria.

[36] Compare Cripps J dictum in *Prineas v Forestry Commission of NSW* (1984) 49 LGRA 402, 417: '... the environmental impact assessment must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of the carrying out or not carrying out of that activity. It should be written in understandable language and should contain material which would alert lay person and specialists to problems inherent in the carrying out of the activity...' Cited in Bates *Environmental Law in Australia* (10th ed, LexisNexis, 2019), [5.180]