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Australian Heritage Strategy  
Heritage Branch  
Department of the Environment  
GPO Box 787  
CANBERRA ACT 2601

To Whom It May Concern

#### THE DRAFT AUSTRALIAN HERITAGE STRATEGY

Thank you for providing the opportunity for input into 'A Strategy for Australia's Heritage' (**Strategy**). The Victorian Aboriginal Heritage Council (**Council**) is a statutory authority established under the *Aboriginal Heritage Act 2006 (the AHA)* to provide a "state wide voice for Aboriginal people on the management of cultural heritage."<sup>1</sup> It is made up of up to 11 Victorian Traditional Owners, all with extensive knowledge and experience in cultural heritage management.

One of Council's primary functions is to appoint Registered Aboriginal Parties (**RAPs**) to manage their cultural heritage over their appointed area. Where native title exists, native title holders must be appointed as RAPs, ensuring there is alignment between recognition of Traditional Owners' rights under native title and the Victorian cultural heritage management system. To date, Council has appointed 10 RAPs covering approximately 60% of the State to carry out management and protection of cultural heritage, as shown in the map at 'Attachment 1'.

Information including contact details regarding RAPs and RAP applicants is found here: <http://www.dpc.vic.gov.au/index.php/aboriginal-affairs/registered-aboriginal-parties>

Another Council function is to promote public awareness and understanding of Aboriginal cultural heritage in Victoria. In this capacity, Council provides these comments on the draft Australian Heritage Strategy.

Victoria is unique because of the AHA's provisions, in particular, regarding the roles set out therein for Traditional Owners on Council and through RAPs. Traditional Owners, through RAPs, continue to enjoy powers to protect and determine what happens to their cultural heritage. Council's priorities reflect a key objective of the AHA, namely to recognise Aboriginal people as primary guardians, keepers and knowledge holders of Aboriginal cultural heritage. Council's approach to its functions draws support from and is in keeping with national and international laws that recognise the distinct cultural rights and responsibilities of Traditional Owners.

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<sup>1</sup> Second Reading Speech, Aboriginal Heritage Bill, 6 April 2006 (Legislative Assembly).

Council's vision is of a community that respects Aboriginal cultural heritage and the cultural responsibilities of Traditional Owners. Council seeks a proactive approach to protecting Traditional Owners' cultural heritage for everyone.

Ancient and contemporary, extensive and often sensitive Aboriginal cultural heritage of great archaeological significance exists across Victoria. The AHA aligns approval processes relating to Aboriginal cultural heritage with planning approvals and native title, maximising efficiencies and certainty for all land users. Aboriginal cultural heritage is protected from harm under s.27-30 of the AHA and penalties may apply. Where Traditional Owners have been recognised as RAPs and through settlement of native title rights, a "one-stop shop" is available for land users with respect to the management and protection of Aboriginal cultural heritage.

The uniqueness of Aboriginal cultural heritage—places, objects, landscapes—cannot be overstated, and these precious and irreplaceable assets should be protected for all Australians. The Budj Bim National Heritage Landscapes of the Gunditjmara in south-west Victoria have been included on the National Heritage List. The values of these cultural places go beyond our national shores, as evidenced by the work being done to have these landscapes included on the World Heritage List.

## **GREATER HERITAGE POLICY AND PROCESS ALIGNMENT**

Council notes the Commonwealth Government's desire to pursue greater heritage policy and process alignment across all levels of government. The Commonwealth Government has previously proposed accrediting States and Territories to administer certain functions of the *Aboriginal and Torres Strait Heritage Protection Act 1984* (the **ATSHP Act**), provided that the States and Territories could demonstrate that their relevant legislation was at the standard of the ATSHP Act. In 2009, the Council met with representatives of the Commonwealth Department of Environment, Water, Heritage and Arts regarding these proposed reports and submitted a response to the discussion paper.

In our view, the ATSHP is the most relevant Commonwealth legislation under which States and Territories could be accredited to assess requests regarding Indigenous areas and objects under threat. As Council noted in its response in 2009, to the Indigenous Heritage Law Reform Process (see 'Attachment 2'), the *Environmental Protection and Biodiversity Conservation Act 1999* (the **EPBC Act**), primarily addressing environments of national significance, does not provide the strongest level of protection of Aboriginal cultural heritage.

Council would appreciate receiving clarification as to whether the Commonwealth Government intends to proceed with accreditation of state and territory legislation with functions undertaken as part of the ATSHP.

Promoting understanding and awareness of Aboriginal cultural heritage in Victoria flows into high standards of protection for this irreplaceable asset. We can only work for better appreciation of our heritage if we can rely on a legislative framework that ensures its protection. Council's view is that the level of protection in the Victorian legislation must be seen as a minimum standard. Inter-government agreements between the Commonwealth, States and Territories should at least maintain the standards of both the EPBC Act and relevant State and Territory legislation. We understand that parties to the agreement will acknowledge the importance of working with stakeholders and communities in developing new arrangements. We expect that the importance of working with Traditional Owners will be underscored here.

We also understand the Commonwealth Government is proposing developing 'strategic assessments' to assess large areas proposed for a range of similar activities. Council draws your attention to the work done by the Metropolitan Planning Authority (MPA) in a Victorian context. The MPA approach in developing precinct structure plans can be improved but does demonstrate a commitment to working with Traditional Owners from the earliest point in the planning process. Council's view is that strategic assessments can be valuable tools in cultural heritage management when they offer options to be proactive and avoid harm. These are the standards that should be maintained in any new approaches to strategic assessments proposed.

## **SPECIFIC COMMENTS ON THE DRAFT STRATEGY**

1. The Strategy needs greater development and this would be best approached through further consultation, including with Traditional Owners. The Strategy's purpose is unclear; as a national framework for heritage management, it seems limited by Departmental objectives and influenced by the Department's environmental portfolio.
2. The meaning of 'Heritage' versus 'Indigenous cultural heritage' is not adequately explained and Aboriginal heritage commitments require further thought (detailed examples are given subsequently). In addition, references to Aboriginal cultural heritage overlook Victorian examples and appear to have a northern Australian bias.
3. It is not clear why certain identified projects have been committed to (eg. National Heritage listing of Queen Victoria Market; securing Matthew Flinders' original map on long-term loan; the restoration of Port Arthur). Has there been consultation regarding these projects? The Gunditjmara peoples are currently working towards securing a World Heritage Listing (WHL) for the Budj Bim (near Lake Condah) landscape in Victoria's south west, which could be highlighted and supported by the Strategy. Budj Bim is recognised as one of the world's largest and oldest aquaculture systems and was included in the National Heritage List in 2004. If Budj Bim were included on the WHL, it would be the first Australian World Heritage site to be inscribed exclusively for its Aboriginal cultural heritage values.
4. Generally speaking, the Strategy has broad proposed themes, commitments and actions that do not always align with one another and/or do not recognise and support the current environment. Examples include:
  - Theme 1C includes a commitment to encourage training and capacity building through the Green Army. This proposal ignores existing frameworks at local, state and federal levels that already support capacity building and training in cultural heritage management. Victoria has a successful Certificate IV programme in Aboriginal Cultural Heritage with national accreditation that provides a higher level of training, and subsequently better employment opportunities, for Aboriginal Victorians. Furthermore, the commitment also does not acknowledge that there are already qualified and experienced Aboriginal people seeking work in this area.
  - The Theme 2A action 'that Aboriginal Australians have a central role in decision making relating to their heritage' is undermined by proposals to deploy the Green Army to undertake Aboriginal cultural heritage works. Aboriginal cultural heritage management and protection work should be undertaken by Traditional Owners or at Traditional Owners' instigation.
5. The proposal to employ the Green Army to undertake heritage works requires more thought. Traditional Owners have rights and responsibilities for their cultural heritage that are recognised in Article 25 of the *United Nations Declaration on*

*Indigenous Rights*, to which Australia became a signatory in 2009.<sup>2</sup> Aboriginal cultural heritage management requires specific skills. Resourcing a volunteer program of unqualified/less qualified young persons at the expense of tried-and-tested programs with more skilled persons is a backwards step for Aboriginal cultural heritage management and may harm heritage. Green Army programme guidelines do not require projects to be supervised or guided by heritage professionals; a standard requirement for works to heritage places. These guidelines must be revised to consider heritage-related project requirements if they are applied to heritage projects. Green Army volunteers should work alongside appropriately trained heritage professionals/Traditional Owners rather than being a substitute for them.

6. The Ask First Indigenous Consultation Guidelines referred to in the Strategy are outdated. More thought is needed regarding engagement with Indigenous and Traditional Owner communities and we would be open to working alongside other Traditional Owner groups to develop up to date guidelines. Of relevance to this is the joint project we are currently undertaking with the Heritage Council of Victoria. The project will develop case studies for assessing the significance of places that have both Aboriginal and non-Aboriginal values associated with them.
7. There is a focus on heritage as ‘places’ rather than landscapes. Understanding heritage as landscape is more in keeping with Traditional Owners’ understandings of their cultural heritage.
8. The statement that ‘Australia Day has become an important focus for reflection of our growing national identity’ requires further exploration to consider various perspectives, including within Aboriginal communities. Council is aware of work being undertaken by Reconciliation Victoria with the Australia Day Committee that may provide a basis for further discussions.
9. The document does not specify the timeframe of the Strategy.
10. A National Strategy should ideally incorporate ‘best practice’ approaches being undertaken by the States and Territories in heritage management, along with looking into international best practice in heritage management.
11. Finally, Council notes the potential for further development of Aboriginal heritage tourism. Heritage tourism is an exciting opportunity for Traditional Owners to plan for the benefit of future generations. Opportunities exist for responsible promotion of Aboriginal cultural heritage assets that do not compromise the significant values of these assets. Council recently made a submission to the Victorian Government’s Parliamentary Inquiry into Eco- and Heritage Tourism, available here:  
[http://www.parliament.vic.gov.au/images/stories/Ecotourism/FINAL\\_TRANSCRIPT\\_S/76\\_Victorian\\_Aboriginal\\_Heritage\\_Council\\_VAHC.pdf](http://www.parliament.vic.gov.au/images/stories/Ecotourism/FINAL_TRANSCRIPT_S/76_Victorian_Aboriginal_Heritage_Council_VAHC.pdf)

## PREVIOUS ENGAGEMENT REGARDING A NATIONAL STRATEGY

In 2011, Council was invited by the Australian Heritage Council to participate in the development of the Strategy. Council’s engagement with the development of the Strategy was driven by Council’s chair at the time, Ms Denise Lovett, who was

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<sup>2</sup> The Declaration states that “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.” See Article 25, UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994). This declaration was adopted by the Human Rights Council of the United Nations on 29 June 2006. The wording in the final Declaration is substantially the same. Australia along with Canada, New Zealand and the United States, originally voted against the Declaration when it was adopted by the General Assembly in September 2007, but signed the Declaration in April 2009

involved in several workshops in Canberra. We note your confirmation that work undertaken through previous workshops submissions would be considered in the development of the Strategy. It is important that this work is not lost.

Council also previously acted as a conduit to distribute information about the development of the Strategy to RAPs and other Traditional Owners in Victoria. This is a role Council would be happy to play again as it is critical that Traditional Owners are included in these conversations. Council believes that the Traditional Owner community in Victoria should be consulted directly about the content and development of the Strategy. This includes ensuring the language and format of the Strategy are relevant to and readily understood by Victorian Traditional Owners.

[REDACTED]

Yours sincerely



**Rodney Carter**  
**Chair**  
**Victorian Aboriginal Heritage Council**

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### ATTACHMENT 3: BACKGROUND TO THE INTRODUCTION OF THE *ABORIGINAL HERITAGE ACT 2006* AND THE MANAGEMENT OF PROTECTION OF ABORIGINAL CULTURAL HERITAGE IN VICTORIA

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The *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) (the Relics Act) was the first legislation of its kind in Australia. The Relics Act established a register of Aboriginal cultural heritage and a permit system, but did not recognise or give legislative power to Aboriginal people. Despite this, Council member Jim Berg was an Inspector under the Relics Act as a result of being appointed as Deputy Chairperson of the Advisory Committee established under this Act.<sup>3</sup> This is only one example of an Aboriginal person taking action to protect Aboriginal cultural heritage, another important example being the telegram sent by Auntie Marge Tucker to the Premier in the early 1970s about the need for Inspectors to protect Aboriginal cultural heritage.

From 1987, the management of Victorian Aboriginal cultural heritage was subject to State and Commonwealth legislation. The Relics Act continued to apply in some matters, and as well, Part IIA of the Federal *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the ATSIHP Act) was enacted. In 1987, the Part IIA amendment to the ATSIHP Act was made at the request of the Victorian Government when it could not pass a Bill to strengthen the legitimate, traditional interests of the Aboriginal peoples of Victoria. The amendments set up mechanisms under which Victorian Aboriginal people could apply to the Minister for an emergency/temporary/other declaration if they considered that Aboriginal objects or places were under threat. The Minister was empowered to compulsorily acquire any Aboriginal cultural property if s/he was satisfied that it was of such significance to be irreplaceable, and no other arrangements could be made for its preservation. Part IIA of the Amendment Act prevented Victoria from passing its own Indigenous heritage protection laws and made it the only jurisdiction not to have its own laws in this area. The introduction of the AHA repealed Part IIA to enable the Victorian Government to administer Aboriginal heritage protection laws directly.

Victorian Traditional Owners used the mechanisms available under the ATSIHP Act to act strongly to protect cultural heritage, as they had under the Relics Act. One example was action that Council member Rodney Carter took to issue an emergency declaration as an inspector appointed under the ATSIHP Act to protect objects believed to be under threat and at risk of desecration. This action was necessary and continued despite being challenged through litigation, ultimately resulting in the objects' protection as well as strengthened mechanisms to ensure Traditional Owners were more respectfully involved in decisions about cultural heritage.

At a Federal level, the High Court's 1992 *Mabo*<sup>4</sup> decision and the resulting *Native Title Act 1993* (Cth) caused a fundamental change to the way all governments and Aboriginal and Torres Strait Islander people interact across Australia. The Court recognised the existence of native title as part of Australian common law. This decision has increasingly resulted in recognition of traditional and familial links and Aboriginal nations over the notion of pan-Aboriginality. Native title rights are specific to each case but generally involve the right to protect cultural heritage. As a result of native title legislation, Traditional Owners in Victoria can also protect their heritage through registered Indigenous Land Use Agreements (ILUAs). In addition to native title law, Aboriginal Victorians may utilise the heritage provisions of Federal legislation including the *Environment Protection and Biodiversity*

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<sup>3</sup> S. Faulkhead & J. Berg, *The Power and the Passion: our ancestors return home*, Koorie Heritage Trust, Melbourne, 2010, p.8.

<sup>4</sup> *Mabo v State of Queensland* (No 2) 1992 175 CLR 1.

*Conservation Act 1999*, the *ATSIHP Act* and the *Protection of Movable Cultural Heritage Act 1986*.

Aboriginal cultural heritage is not simply a matter of archaeological importance. The bulk of Aboriginal cultural heritage in Victoria is a living culture based on the laws and customs of Traditional Owners. This is why giving Traditional Owners, through RAPs, the central role in protecting Aboriginal cultural heritage is so vital. This is the meaning in practice of the human rights recognised internationally, nationally and by the Victorian Charter of Human Rights.

This shift towards recognising Traditional Owners' unique cultural responsibilities is reflected in a range of legislative and policy developments. Milestones along the way include the:

- Enactment of s.1A *Constitution Act 1975* in 2004
- Wimmera People's native title consent determination in 2005
- Enactment of the AHA (and repeal of the *Archaeological and Aboriginal Relics Preservation Act 1972* pursuant to s.195 of the Act)
- Recognition of the distinct cultural rights of Aboriginal people in the *Victorian Charter of Human Rights and Responsibilities Act 2006* (the Charter), including the right 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 (s.19)
- Establishment of the Council in 2006 and the registration of the first RAP in 2007<sup>5</sup>
- Gunditjmara People's native title consent determination in 2007
- Enactment of the *Traditional Owner Settlement Act 2010* (the TOS Act)
- Recognition and Settlement Agreement between the State of Victoria and the Gunai Kurnai peoples in 2010
- Gunditj Mirring and Eastern Maar People's native title consent determination in 2011
- Recognition and Settlement Agreement between the State of Victoria and the Dja Dja Wurrung peoples in 2013

In November 2004, the *Constitution (Recognition Of Aboriginal People) Act 2004* was passed to amend the *Constitution Act 1975* (Vic) to "acknowledge that the events described in the preamble to [the Constitution Act] occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria" and to "give recognition within that Act to Victoria's Aboriginal people and their contribution to the State of Victoria." This amendment gave recognition to the unique status of Victoria's Aboriginal people as descendants of the original custodians of the land who have spiritual, social and cultural connections to land and their "unique and irreplaceable contribution to the identity and well-being of Victoria."<sup>6</sup> Fundamentally, it recognised the importance of proper consultation with, and the involvement of, Traditional Owners in decision making, particularly regarding Aboriginal cultural heritage.<sup>7</sup>

In 2006, the implementation of the AHA broadened this shift towards recognition of and consultation with Traditional Owners in Victoria.<sup>8</sup> Following a two year

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<sup>5</sup> The significance of the formation of the VAHC and the registration of the first RAP was mentioned in paragraph 303 of the SARC Inquiry into the *Charter of Human Rights and Responsibilities Act 2006*.

<sup>6</sup> See Explanatory Memorandum to the Constitution (Recognition of Aboriginal People) Bill 2004.

<sup>7</sup> S.1A, *Constitution Act 1975* (Vic).

<sup>8</sup> Report of the Right People for Country Project Committee, p.1.

consultation process, the Second Reading Speech for the AHA acknowledged the importance of Traditional Owners in the protection of Aboriginal cultural heritage, and stated that the creation of a comprehensive register of Aboriginal parties to eventually cover the whole of Victoria would “*for the first time provide recognition of Aboriginal nations within a Victorian legislative framework.*”<sup>9</sup> The speech also noted that “one of the strongest messages taken from consultation with indigenous communities was the need to recognise the role of Traditional Owners in managing their heritage.”

The AHA addressed this concern by establishing an Aboriginal Heritage Council—the Council—comprised solely of Victorian Traditional Owners.<sup>10</sup> While the initial Exposure Draft had not proposed that membership of the Council be limited to those with traditional and familial links to Victoria, consultation with the Victorian Aboriginal community led to this requirement being added.<sup>11</sup>

The AHA reflects a positive legal measure of protection and allows for the effective participation of Traditional Owners in decisions that affect them. Council understands the AHA as giving priority to RAP applications made by groups representing Traditional Owners.<sup>12</sup> Council believes that this approach is consistent with the objectives of the Act, the Second Reading Speech and the broader operation of the AHA. The objectives of the AHA recognise:

- Aboriginal cultural heritage must be protected and conserved ‘in ways that are based on respect of Aboriginal knowledge and cultural and traditional practices’;
- appropriate status should be accorded ‘to Aboriginal people with traditional and familial links with Aboriginal cultural heritage’; and
- the importance of protecting this heritage.<sup>13</sup>

Victoria’s Traditional Owners are recognised and authorised by Federal and State legislation to manage their heritage. The recognition of Traditional Owners by the Victorian Government in the AHA is in keeping with, and draws support from, national and international laws which recognise that Indigenous people hold distinct cultural rights and must not be denied the right to maintain their distinctive spiritual, material and economic relationship to the land, waters and other resources with which they have a connection under traditional laws and customs. These rights are recognised in Article 25 of the United Nations’ *Declaration on Indigenous Rights*,<sup>14</sup> to which Australia became a signatory in 2009.

The Australian Parliament is currently working on amendments to Australia’s Constitution towards constitutional recognition for Aboriginal and Torres Strait Islander communities that should be finalised by 2014.

Council’s view is that Traditional Owners in Victoria are a knowledgeable, capable and highly skilled group of people who will always speak strongly for Country. We have

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<sup>9</sup> Second Reading Speech, Aboriginal Heritage Bill, 6 April 2006 (Legislative Assembly). [Emphasis added].

<sup>10</sup> Ibid.

<sup>11</sup> See Aboriginal Heritage Bill Exposure Draft.

<sup>12</sup> See VAHC ‘General Principles - RAP Decision Making’:

[http://www.dpcd.vic.gov.au/\\_\\_data/assets/pdf\\_file/0003/35499/General\\_principles\\_of\\_RAP\\_decision\\_making\\_8.07.pdf](http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0003/35499/General_principles_of_RAP_decision_making_8.07.pdf)

<sup>13</sup> S.3 of the AHA.

<sup>14</sup> Article 25, UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994). This declaration was adopted by the Human Rights Council of the United Nations on 29 June 2006. The wording in the final Declaration is substantially the same. Australia along with Canada, New Zealand and the United States, originally voted against the Declaration when it was adopted by the General Assembly in September 2007, but signed the Declaration in April 2009.



long fought for recognition of our distinctive spiritual, material and economic relationship with the land, waters and other resources with which they have a connection under traditional law and customs. Stories told by Victorian Traditional Owners convey our strength and resilience in the long and arduous struggle for appropriate recognition of our obligations to protect land and culture and to “for Country”. Our continued presence challenges the now disproven history of *terra nullius* and recognises Aboriginal people’s agency in history, documenting the continuing connection that Traditional Owners have maintained to our lands and celebrating our successes in having these connections recognised. Traditional Owners in Victoria will work hard to safeguard the successes and recognition that we have gained.