

# Australia

## Victorian Aboriginal Heritage Council

*Submission to the Expert Mechanism on the Rights of Indigenous Peoples on the Repatriation of ceremonial objects and human remains under the UN Declaration on the Rights of Indigenous peoples*



# I. Background

## A. The Victorian Aboriginal Heritage Council

1. The Victorian Aboriginal Heritage Council (“the **VAHC**”) is a statutory authority that oversees the management and protection of cultural heritage for the Indigenous peoples of the State of Victoria in Australia. It was created in May 2007 under the operation of the Victorian *Aboriginal Heritage Act 2006* (“the **Act**”). The VAHC is composed of up to eleven Aboriginal people who are Traditional Aboriginal Owners, who reside in Victoria, and who have relevant experience of knowledge of Aboriginal cultural heritage in Victoria.
2. The VAHC has a range of responsibilities in relation to Aboriginal cultural heritage under the Act. These responsibilities include overseeing the protection and repatriation of human remains of Indigenous Victorians, and the repatriation of ceremonial objects. Under the Victorian statutory regime, Indigenous Victorians are referred to as *Aboriginal persons*, human remains are referred to as *Aboriginal ancestral remains*, and ceremonial objects are referred to as *secret or sacred objects*.<sup>1</sup>

## B. Traditional Owners and Registered Aboriginal Parties

3. For the purposes of this submission, it is important to understand the terms *Traditional Owner* and *Registered Aboriginal Party*.
4. In the context of the Act, a Traditional Owner is an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with an area, and who has responsibility under Aboriginal tradition for significant Aboriginal places or objects related to the area.
5. A Registered Aboriginal Party (“**RAP**”) is a representative body for Traditional Owners of a certain area in the State of Victoria, that administers the Act for that specific area. Their responsibilities include providing advice to the Victorian government about places or objects from their registered area, advising the Victorian government about returning Aboriginal cultural heritage, and assessing development activities to ensure that they comply with cultural heritage guidelines under the Act. RAPs are appointed by the VAHC based on several criteria including traditional and familial links to an area, and on historical or contemporary interests in Aboriginal cultural heritage.

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<sup>1</sup> Secret or sacred objects include items associated with a traditional burial; items created for ceremonial religious or burial purposes; items only permitted to be used or seen by certain people; and items sourced from or containing materials that only certain members of an Aboriginal community can use or see. They do not include objects that are made for sale.

## C. The Context for Repatriation in Victoria

6. From the onset of colonisation in Victoria, Aboriginal ancestral remains were stolen from their graves in the name of science and research. These people, who had been buried with care and ceremony, became objects of research and curiosities for individuals and institutions. Frequently these violations occurred in the name the discredited racist pseudo-science of Eugenics. Our ancestors have often been stored in boxes or left on shelves for decades. Since strong community activism in the 1980s, some Ancestors have been returned to the lands from which they belong, however there are still many Ancestors whose remains are yet to be repatriated. Of these the remains of these Ancestors are held in overseas institutions
7. Similarly, the racism of colonisation has resulted in the expansive theft of secret or sacred objects from their rightful owners for several reasons, including trade and archaeological or anthropological “research”. Some people continue to sell and exhibit such objects, despite the fact that they hold special traditional significance for the Aboriginal communities from which they were taken. These objects are housed in institutions, art galleries, museums and even households around Australia and the world, far from the places and peoples to whom they belong. Often the institutions involved are portrayed as “prestigious” or “world renowned” and their display of sacred objects justified as “educating mankind”. These portrayals are nothing, but ongoing colonial propaganda designed to justify the theft and detention of our objects and Ancestors

## D. This Submission

8. This submission will focus on the extent to which the Victorian legislative scheme meets the State’s obligations under Article 12 of the United Nations Declaration on the Rights of Indigenous Peoples (“**UNDRIP**”). Specifically, it will examine the way that the Act provides Aboriginal Victorians the right to the use and control of their ceremonial objects and the right to the repatriation of their human remains. It will demonstrate that the Act is a fair, transparent and effective mechanism for enabling access and repatriation of ceremonial objects and human remains to Aboriginal Victorians. However, it is ultimately limited due to its restricted jurisdictional application.

## II. Repatriation of Aboriginal Ancestral Remains

9. The Act creates a number of obligations that are aimed at restoring custody of all Aboriginal ancestral remains to their rightful custodians. These obligations endeavour to empower Traditional Owners as protectors of their cultural heritage on behalf of Aboriginal people and restore familial links that have been harmed by the ongoing impact of colonial

dispossession in Australia. Some of the following obligations have been in place since the Act was first passed in 2006, and others have been in place since the *Aboriginal Heritage Amendment Act 2016* (“the **Amending Act**”) was passed in 2016.

## A. Persons

10. Any person in Victoria, be that person an individual or a corporation, who is in possession of Aboriginal ancestral remains and is aware of that fact, must take all reasonable steps to transfer the remains into the custody of the VAHC as soon as practicable. Further, all persons who discover the existence of what are likely to be Aboriginal ancestral remains must report their existence to the VAHC, giving details about their nature and location. If the VAHC is satisfied that they are Aboriginal ancestral remains, then they must take steps to consult with the relevant Aboriginal person or body that may have an interest in the remains and determine the appropriate course of action to be taken. The penalties for an offence against these laws vary from \$9,000 to \$99,000 AUD.

## B. Public Entities and Universities

11. After the Amending Act came into effect in 2016, all public entities and universities were given two years to notify the VAHC of any Aboriginal ancestral remains in their possession at that time, subject to a fine of up to \$495,000 AUD. In turn, the VAHC was obliged to notify any relevant Traditional Owner and RAP who may have been entitled to custody of the remains. The public entity or university was then obliged to take all reasonable steps to transfer the remains into the custody of the VAHC as soon as practicable.

## C. Coroners

12. Coroners have specific obligations under the *Coroners Act 2008* to report to the VAHC if, in investigating a death, they believe that the body is or is likely to be Aboriginal ancestral remains, or if a preliminary examination by a medical investigator determines as such. After making such a report, they must transfer the remains into the custody of the VAHC as soon as practicable.

## D. Transfer to the VAHC

13. If any of the above situations result in the VAHC being transferred Aboriginal ancestral remains, they have several options. They must transfer the remains to any relevant Traditional Owner or RAP that they are satisfied is *entitled and willing* to take possession, custody and control of the remains; or they must transfer them to the Museums Board of Victoria for safekeeping; or they must otherwise deal with them as appropriate.

### III. Repatriation of Secret or Sacred Objects

14. The Act creates obligations regarding ownership, possession and transfer of secret or sacred objects that are aimed at restoring the custody of such objects to their rightful owners. These obligations endeavour to empower Traditional Owners as the protectors of their cultural heritage on behalf of Aboriginal people, and to strengthen their ongoing right to maintain the distinctive cultural relationship to items with which they have a connection under traditional laws and customs.

#### A. Ownership

15. After the Act commenced in 2006, the ownership of all secret or sacred objects in the custody of a State entity was deemed to sit with Aboriginal people who have a traditional or familial link with the object. Upon the commencement of the Amending Act in 2016, this right was extended. Under the current regime, the Traditional Owners of an area in which any secret or sacred object is reasonably believed to have originated are deemed to become the owners of that object.

#### B. Restoring Custody

16. From 2016, any person who comes into the custody of a secret or sacred object but is not an owner of that object must take all steps to transfer the object into the custody of the VAHC as soon as practicable, subject to a fine of up to \$99,000 AUD. Like with Aboriginal ancestral remains, the VAHC will then transfer the object to an Aboriginal person or RAP that they are satisfied is *entitled to and willing* to take possession, custody or control the object; or transfer the object to the Museums Board of Victoria; or otherwise deal with it as appropriate.

17. It should be noted that this rule does not apply retrospectively to people who had pre-existing custody of the objects, and only applies if the custody of the object *changes*. This is to limit any interference with previous rights that a possessor of a secret or sacred object may have held over that object.

## C. Return of Objects by a State Entity or Other Entity

18. If an Aboriginal person who owns a secret or sacred object that remains in the custody of a State entity wants that object to be returned to them, and the entity is satisfied that they are indeed the owner of that object, then the entity must comply with the request to the greatest extent practicable.
19. A Traditional Owner of a secret or sacred object held by a university, museum or other institution may negotiate directly with the entity for the return of that object, or they may request the Victorian government to do so on their behalf.

## IV. Strengths of the Regime

20. Victoria's repatriation scheme maximises the interests and autonomy of Traditional Owners and all Aboriginal Victorians, whilst imposing strict measures that ensure compliance.

### A. The Role of the VAHC

21. The Act mandates various obligations and procedures that must be followed by persons and institutions to ensure the transfer of Aboriginal ancestral remains or secret or sacred objects to the VAHC. It is this body, a statutory authority that is composed solely of Traditional Owners, that must then decide where they are to be transferred. A body representing Aboriginal Victorians is therefore the primary decision-making organ on the repatriation of Aboriginal ancestral remains in the State. This empowers Aboriginal people who have extensive knowledge in cultural heritage with the ability to oversee the process of repatriation. Vesting Traditional Owners with the management of the repatriation process is in keeping with Articles 3 and 4 of UNDRIP, which state that Indigenous peoples have the right to self-determination, and the right to autonomy in matters relating to their international and local affairs.

### B. Restoring Custody to the Rightful Owners

22. The Act also outlines the relevant obligations and procedures that must be followed by the VAHC in transferring Aboriginal ancestral remains or secret or sacred objects to any relevant Traditional Owner or RAP who is entitled and willing to take possession of those remains. Or, alternatively, to ensure their safekeeping in other hands. This demonstrates an emphasis on ensuring that ancestral remains and secret or sacred objects are returned to the rightful land and people to which they belong. It means that ownership can be restored to the proper custodians in accordance with their relevant traditions and customs, so that a process of healing can begin. This effort to ensure rightful ownership sits at the heart of the Victorian repatriation regime, and accords with Article 12 of UNDRIP, which states that Indigenous

peoples have the right to use and control of their ceremonial objects, and the right to the repatriation of their human remains.

## C. Strong Penalties to Ensure Compliance

23. By imposing penalties of up to \$495,000 AUD for non-compliance with procedures under the Act, the Victorian regime affirms that the illegal possession or trade of ancestral remains and secret or sacred object is a serious offence. These strong penalties aim to reflect the substantial harm that damage to Aboriginal cultural heritage can have on Aboriginal communities.

## V. Limitations of the Regime

### A. Applicability Interstate

24. Although the Act applies in Victoria, it has no application in Australia's other States or Territories. Each other jurisdiction has its own legislative regime pertaining to Aboriginal cultural heritage protection, with varying efficacy in regards to repatriation of Aboriginal ancestral remains and secret or sacred objects.
25. This lack of applicability has obstructive practical implications. The most significant is that remains and objects from interstate cannot be repatriated into Victoria. This means that, for example, if ancestral remains are discovered in Western Australia and their rightful custodians are located within Victoria, they are not obliged to be repatriated to Victoria under the Act. Due to the extensive theft, removal and trade of remains and objects in Australia since the beginning of colonial dispossession, both Aboriginal ancestral remains and secret or sacred objects are spread out over the continent. Many are situated in areas that are far from the land from which they originate. Therefore, although the Act creates a comprehensive regime for repatriation within Victoria itself, it has little effect nationally until all States and Territories have a uniform repatriation system.

### B. Applicability Internationally

26. The Act also has no application to Aboriginal ancestral remains and secret or sacred objects that have been taken overseas. For example, the Victorian Act has no applicability to a sacred object that is in the custody of a museum in the United Kingdom, regardless of the fact that that object's rightful owner is an Aboriginal community in Victoria.
27. Until there is a uniform international consensus that outlines the specific obligations and procedures to be followed by nations when dealing with the repatriation of human remains and ceremonial objects, the legislative regime in Victoria cannot have the full, practical effect that is desired.