

**Best practice recognition and engagement of
Aboriginal Traditional Owners
and other Indigenous people
in the use and management of
Victoria's marine protected areas**

**A Discussion Paper for
the Victorian Environment Assessment Council**

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Executive Summary

As a contribution to VEAC's Marine Investigation, this paper discusses the longstanding relationship between Aboriginal societies and Victoria's coastal and marine environments and best practice engagement of Indigenous people in the management of Marine National Parks and Marine Sanctuaries.

The discussion paper draws on existing published and unpublished material from Australia and internationally, including the author's experience from undertaking research and consultancy projects on matters relating to the recognition and engagement of Aboriginal and Torres Strait Islander peoples in protected area management, including marine protected areas, over the last 30 years.

Like other coastal Indigenous peoples in Australia and elsewhere, Aboriginal groups in Victoria had well-defined coastal clan estates in which they sustainably used and managed their terrestrial and marine resources. While this cultural and economic relationship was greatly impacted by British colonisation and subsequent settlement, many Traditional Owners groups have continued to access and use traditional coastal and marine resources to the present day.

IUCN guidelines, recommendations from the World Parks Congress and the World Conservation Congress, and practices elsewhere in Australia, such as the Great Barrier Reef Marine Park, provide guidance on developing best practice Indigenous engagement in Victoria's marine protected areas (MPAs).

Legislation and management planning in Victoria provide significant recognition of Aboriginal Traditional Owners' association with sea country included in MPAs, protection of native title rights, protection of Aboriginal cultural heritage and opportunities for engagement in planning and management. Although it is not part of this VEAC investigation to examine the establishment processes of MPAs (which in Victoria include whether or not fishing is permitted) it is noted that current arrangements do not meet international best practice with respect to Indigenous prior informed consent for the establishment of MPAs or opportunities to continue traditional fishing and gathering practices, other than through determination of native title.

The current review of Victoria's MPAs provides an opportunity for Traditional Owner groups, Victoria's Indigenous population more broadly and the government agencies responsible for managing MPAs and sea country resources to review how their respective interests and obligations can be addressed through the adoption of international best practices. Experience elsewhere in Australia and internationally indicates that the conservation and sustainability objectives of MPA managers can be achieved without unduly curtailing Indigenous customary rights to access, use and management marine areas and resources.

Conclusions 1

It is recommended that the following steps promote best practice recognition of Indigenous interests in Victoria's MPAs:

- 2 Traditional Owners groups consider developing and implementing sea country plans as an Indigenous-led mechanism to engage in the planning and management of Victoria's MPAs – including consideration of collaborative frameworks such as Traditional Use of Marine Resources Agreements (TUMRAs) and Indigenous Protected Areas (IPAs).
- 3 Parks Victoria and other relevant State and Commonwealth agencies support interested Traditional Owners groups to develop and implement sea country plans for their customary coastal and marine areas;
- 4 Traditional Owner groups, separately and together (e.g. through a facilitated workshop process), consider how Indigenous informed consent and co-governance arrangements can be achieved for the existing MPAs and any future MPAs.
- 5 Traditional Owner groups and Parks Victoria utilise the World Parks Congress to be held in Sydney in 2014 to showcase their collaboration, achievements and best practice approaches to MPA management.

1 Introduction

This discussion paper was commissioned by the Victorian Environmental Assessment Council (VEAC) as part of its Marine Investigation, which focuses on the outcomes of the establishment of Victoria's existing marine protected areas (MPAs)¹. The purpose of the discussion paper is to provide advice on pathways and approaches for best practice recognition and engagement of Aboriginal Traditional Owners and other Indigenous people in the use and management of Victoria's existing marine protected areas (MPAs). The project specifications for this discussion paper are provided in Appendix 1.

Engagement of Aboriginal Traditional Owners and other Indigenous people in MPAs is relevant to the scope of VEAC's Marine Investigation for a number of reasons. The most significant of these is the requirement, within the Victorian Environmental Assessment Act 2001 (section 18), that VEAC, in carrying out an investigation, should consider the need to conserve and protect any areas which have ecological, natural, landscape or **cultural interest or significance**, recreational value or geological or geomorphological significance. For the VEAC Marine Investigation, the scope of "cultural interest or significance" includes Aboriginal cultural interests in the environments, resources, areas and sites within the existing MPAs.

The discussion paper also seeks to meet VEAC's obligations under section 18 of the Victorian Environmental Assessment Act 2001 to take into account the following matters as they relate to Indigenous engagement in MPAs with respect to:

- *all relevant State Government policies and strategies, Ministerial statements and reports by the Victorian Auditor-General;*
- *all relevant national and international agreements, policies and strategies, including ecosystem-based management approaches; and*
- *relevant regional programs, strategies and plans.*

The discussion paper draws on existing relevant published and unpublished material from Australia and internationally, including author's experience from undertaking research and consultancy projects on matters relating to the recognition and engagement of Aboriginal and Torres Strait Islander peoples in protected area management, including marine protected areas, over the last 30 years².

The discussion paper was undertaken through a desktop review. It will be made available to the appropriate peak Aboriginal organisations in Victoria, and opportunities will be available for Aboriginal people and their representative organisations to contribute to the various consultative stages of the Marine Investigation.

¹ For the purposes of this project, Victoria's marine protected areas means the 13 marine national parks, 11 marine sanctuaries, and 6 marine parks, marine reserves or marine and coastal parks established under schedules seven, eight and four respectively of the National Parks Act 1975.

² For further information on the author's experience and publications refer to www.sbconsultants.com.au

2 Aboriginal people and Australia's marine environment

As in other coastal and island regions around Australia, Aboriginal groups in coastal Victoria have a complex cultural, social and economic relationship with the marine environment that pre-dates British colonisation and also pre-dates the stabilisation of current sea levels about 6,000 years ago. The following extract from *Australia's Oceans Policy Issues Paper No.6 Saltwater Country* (Smyth 1997)³ provides a general summary of relationships between Aboriginal groups and the sea before British colonisation. The use of the past tense does not imply that this relationship ceased at colonisation. On the contrary, as will be described later, much of the basis of Indigenous interests in coastal and ocean management today are based on continuing cultural traditions, rights and responsibilities.

Clans and Country

Although there was considerable diversity between the cultures of the hundreds of Aboriginal groups around Australia's coast, there were some common factors which reflected the relationship of Aboriginal people to the sea around Australia. The fundamental social unit around most of coastal Australia was the extended family or 'clan'. Clan membership was typically inherited from one's father, but in some parts of Australia clan membership was passed down through the maternal line. Intimately associated with each clan was their estate or 'country'.

For coastal clans their country always included the adjoining estuaries, beaches, coastal waters and ocean. Groups of clans speaking a common language formed a wider social group, sharing ceremonies, belief systems, technologies and subsistence strategies. The ocean, or saltwater country, was not additional to a clan estate on land, it was inseparable from it. As on land, saltwater country contained evidence of the Dreamtime events by which all geographic features, animals, plants and people were created. It contained sacred sites, often related to these creation events, and it contained tracks, or Songlines along which mythological beings travelled during the Dreamtime. The sea, like the land, was integral to the identity of each clan, and clan members had a kin relationship to the important marine animals, plants, tides and currents.

Use and Management

Aboriginal peoples' relationship to their sea country brought with it a complexity of rights and responsibilities, including the right to access, use and distribute resources, and the responsibility to manage those resources through time, from generation to generation. Clan members were owners of their country, they belonged to their country, they were identified with their country and they were stewards or carers of their country. Marine environments were managed through a variety of strategies and cultural practices, including:

- Conduct of ceremonies (songs, dances, storytelling and other rituals) with the purpose of nurturing the welling being of particular places, species and habitats;*
- Control of entry into marine clan estates by outsiders - restricting resource use to clan members and others by agreement;*
- Seasonal exploitation of particular marine resources; the opening and closure of seasons were marked by ecological events, such as the flowering of particular plants or the arrival of a migratory bird;*
- Restriction on the harvesting of particular species based on age, gender, reproductive conditions, health, fat content etc of individual animals;*

³ <http://www.environment.gov.au/archive/coasts/oceans-policy/publications/issues6.html>

- *Restrictions on resource use and distribution by clan members and others based on age, gender, initiation status, marital status and other factors;*
- *Restrictions on the use of particular animals and plants of totemic significance to individual clans; each clan usually identified closely with at least one natural element (usually animal or plant), the use of which was often highly restricted or prohibited;*
- *Prohibition of entry to certain areas on land and sea, often associated with storms or other sources of danger; entry and/or hunting and fishing in the these areas was believed to cause severe storms or other forms of danger, not only to the intruders but also to other people in the region.*
- *Together these strategies and practices resulted in a system of marine exploitation which was conservative and which enabled the local population to live within the carrying capacity of the local environment.*

The Extent of Saltwater Country

The extent of pre-colonial use of Australia's oceans by coastal Aboriginal groups varied through time and between regions. Aboriginal occupation of Australia extends at least 60,000 years, and possibly considerable longer. During this time sea levels have risen over 100 metres, resulting in inundation of extensive areas of coastal lands, particularly around northern Australia with a low gradient shoreline and extensive continental shelf. Following stabilisation of the sea level at its present height, about 6,000 years ago, Aboriginal patterns of marine use observed at the time of British colonisation, began to be established.

Marine Technologies

Throughout coastal Australia and along major river systems, logs and bark were used as floating aids for people and their possessions. In some areas more complex rafts and canoes were used, depending on availability of materials and coastal environments. In southern coastal areas, canoes were made from single strips of curved bark, filled with mud or clay at the ends, or wrapped or tied at either end with fibre. In northern Australia canoes were made of several pieces of bark sewn together, sometimes with pole gunwales, stretchers and ties added to proved greater strength and seaworthiness.

Numerous government enquiries, reports and research projects⁴ over the last several decades have documented the strong connections between coastal indigenous peoples

⁴ *The Coastal Zone Inquiry Final Report* ,(Resource Assessment Commission 1993)

A Voice In All Places – Aboriginal and Torres Strait Islander Interests in Australia's Coastal Zone (Smyth 1993 – a consultancy report for the Coastal Zone Inquiry)

Ecologically Sustainable Working Group Final Report - Fisheries (Commonwealth Government 1991)

Managing Sea Country – Tenure and Sustainability of Aboriginal and Torres Strait Islander Marine Resources (Cordell 1991 – a consultancy report for the Ecologically Sustainable Development Fisheries Working Group)

Aboriginal Fishing and Ownership of the Sea (Lawson 1984 – Department of Primary Industry internal report).

Turning the Tide – papers presented at a conference on Indigenous people and sea rights in 1993

Pre-European Coastal Settlement and use of the Sea (Nicholson and Cane 1994)

Customary Marine Tenure in Australia – proceedings of a workshop convened by the Australian Anthropological Society in 1996

Sea Country – an Indigenous perspective – consultancy report commissioned by the National Oceans Office for the development of the Sea-east Regional Marine Plan.

and their marine environments. The following quotes address key findings from these enquiries and research reports:

A fundamental point is that Aborigines see the distinction between land and water as arbitrary. Seas and offshore islands are an integral part of the total environment of coastal Aborigines. Aborigines who own coastal land have rights and duties to the adjacent sea as well as the land. (Lawson 1984)

Aboriginal and Torres Strait Islander people in many parts of the coast view the coastal sea as an inseparable extension of coastal land, and subject to the characteristics of traditional ownership, custodianship, spirituality and origins in the Dreamtime and Indigenous law. To them the coastal sea is an owned domain in which members of the local clan or family group have primary and even exclusive use and management rights). (Smyth 1994)

Indigenous people still relate to land that was inundated by sea during the last ice age and regard it as their own. (National Oceans Office 2002)

These and many other similar statements convey three key themes:

1. Areas of sea are an integral part of coastal and island Indigenous customary estates;
2. Indigenous customary law, with respect to ownership, rights and responsibilities, applies to the sea as it does to the land; and
3. Indigenous customary rights to the sea include rights to harvest and trade in fish and other marine resources, and the right to control access to sea areas and resources.

Aboriginal people and marine environments in Victoria

Archaeological evidence from Victoria indicates that occupation of coastal areas is as old as the present coastline – about 6,000 years. Most coastal occupation sites in Victoria, however, are 4000 years old or younger. Populations and resource use have increased throughout the last couple of thousands years (Coutts 1970, 1981; Lourandos (1977), with the oldest occupation sites located on Wilson's Promontory. The following summary of pre-colonial maritime culture and resource use is adapted from a review of Aboriginal use of the sea in south-western and south-eastern Victoria undertaken by the Research Unit of the National Native Title Tribunal (Wright 2001).

In south-western Victoria, a striking feature of the Guditjmarra people's economy was the building of elaborate permanent systems for harvesting the short-finned eels during their migratory runs in fresh-water. The eels spend most of their lives in the rivers of southern Australia and migrate into the Coral Sea and Pacific Ocean to breed once before dying. The juvenile eels are carried by ocean currents back to the eastern and southern coasts of Australia where they enter the river systems once more.

The Guditjmarra constructed extensive and complex channel, embankment and trapping networks for the manipulation of the swamps around Toolondo and Mount William. Such sophisticated works and water management systems were used to guide migrating eels into nets or basket traps and spears were also used to harvest eels. Eel fishing seasons extended for one to two months a year, with individual family groups harvesting from their own weirs. Aboriginal people gathered in large

numbers for "eel-feasts", with attendances of up to 2500 people recorded (McKinnon 2001).

The fertile volcanic plains of south-western Victoria were among the most densely populated regions of pre-colonial Australia. The Aboriginal people practiced intensive gathering, harvesting, hunting and fishing economies that included the management and manipulation of plants, land animals and fish. They established semi-permanent base camps and ceremonial and political life involved large social networks (Lourandos 1987).

Early ethnographic reports for south-east Victoria (Howitt 1904 and Smyth 1878), combined with more recent archaeological research, have resulted in the following description of pre-colonial economy of the Gunai/Kurnai people of the Gippsland coast and lakes (Hotchkin and May 1984):

The Kurnai focused a great deal of their attention on the Gippsland Lakes and waterways. From spring to autumn, camps were located on the lakes, during the cooler months they moved to the hills. Fishing played a major part in the lake economy, men using spears, while both sexes used nets. Of great interest are the bone fishhooks apparently used exclusively by women. Hooks are not known west of the Kurnai area in Victoria. To the east they are made of shell. Kurnai fished from tied stringy-bark canoes whose raised bow and stern made them considerably more seaworthy than the simple craft to the north and west. A broad range of estuarine fish was taken from the lakes, and appears to have been a summer staple.

Hunting parties added meat from the hinterland. There is little reference to collecting shellfish. From this there emerges a picture of a dense population whose annual round and material culture was tuned to coastal, particularly lake environments. Fishing was a mainstay of the economy, along with plant gathering and hunting.

Another key feature of pre-colonial Aboriginal life in coastal Victoria was the need to adapt local economies to changing environmental conditions such as rising sea levels and the development of freshwater and estuarine lake systems. Wright (2001) suggests, for example, that:

...there may have been a slow change in fishing and gathering over the last 1,000 years or so. The coastal people's interests moved from salt-water estuarine shellfish and fish, towards greater use of freshwater resources of the lakes (for example birds and eels) and to the ocean beach resources (including shellfish, rock platform species and sea mammals).

The diversity of Aboriginal coastal archaeological sites in Victoria is described in the Victorian Land Conservation Council's *Marine and Coastal Descriptive Report* (Land Conservation Council 1993). The report points out that nearly one fifth of all of Victoria's archaeological sites occur within one kilometre of the coast. By far the most common sites are the shell middens, which are often well preserved and easily recognised. Surface artefact scatters and isolated artefacts are the next most common site types, while rock shelters, scarred trees and quarries are relatively rare.

Aboriginal management of marine environments

Marine environmental and resource management in pre-colonial Australia involved the control of human access to marine areas and resources. Ceremonial activities aimed at maintaining the well-being of habitats, species or both were also part of

marine resource management. Pre-colonial marine management strategies were based on an understanding of social organisations and a well established system of customary marine tenure all around the Australian coast (Smyth 2001):

Impacts of British colonisation and settlement

Contemporary relationships between Aboriginal people and Victoria's marine environments are the product of customary maritime cultures described above and the impact of British colonisation, settlement and subsequent coastal developments.

Coastal Aboriginal people in Victoria had been in contact with European whalers and sealers for about 30 years before the first colonial settlements at Portland (1834) and Geelong (1835). Within the next thirty years, the Aboriginal population was reduced to about 2000 – less than one fifth of the most conservatively estimated pre-contact number (Under the Board for the Protection of Aborigines, a system of Aboriginal Stations was established across the State to provide refuge for the dispossessed people. However these stations were inadequately supported by either the Government or the general community.

In 1886 the Victorian Government passed the *Aborigines Protection Act* requiring all persons of mixed Aboriginal/European descent under the age of thirty-four to be removed from Aboriginal Stations. This Act resulted in a second wave of dispossession and breaking up of families. The resident populations at Aboriginal Stations declined rapidly and most were subsequently closed.

Aboriginal people resisted the Station closures and rejected attempts at forced assimilation. Over 100 years later three coastal former Aboriginal reserves, at Lake Tyers (near Lakes Entrance on the east coast), Framlingham (near Warrnambool) and Lake Condah (near Portland) on the east coast came under the control of their Aboriginal residents during the 1970s and 1980s.

Continuing Aboriginal use and significance of coastal and marine resources

The following extract from the 1993 *Coastal Zone Inquiry* consultancy report (Smyth 1993) summarises the continuing significance of coastal and marine environments to Indigenous communities, including in southern coastal regions, including Victoria:

Submissions to the Inquiry, supported by information conveyed during consultations, hearings and workshops, confirmed that the current utilization of the coastal zone by Aboriginal and Torres Strait Islander people involves some or all of the pre-contact uses, depending on local history, tenure and legislation. Most parts of coastal Australia are of continuing cultural and spiritual significance to Aboriginal people, who continue to engage in subsistence hunting, fishing and gathering.

Hunting and fishing for traditional foods provide a significant proportion of household nutrition requirement, thus forming an almost invisible non-cash part of the economy in both remote and urban coastal regions. These subsistence activities contribute to the health and cultural well-being of Aboriginal and Torres Strait Islander people and reduce their reliance on the cash economy.

It is important to emphasise that coastal zone land and sea resources continue to be of cultural and economic importance to Aboriginal and Torres Strait Islander people

wherever they are living in the coastal zone. Submissions and consultations in southern Australia have clearly established that these cultural and economic interests are not confined to northern communities where the extent of dispossession and loss of cultural knowledge has been less than in the south. Aboriginal people in Tasmania, New South Wales, Victoria, South Australia and southern Western Australia conveyed to the Inquiry a cultural and economic reliance on coastal environments and resources, which was no less significant than for northern Indigenous communities.

The continuing importance of coastal zone resources to Aboriginal people in southern Australia is summarised in the following extract from the Tasmanian Aboriginal Centre's submission to the Inquiry:

The coastline gives us sources of fish foods, plant foods, and cultural activities. It is as meaningful today in our lives as it was thousands of years ago although the same sources of food is not as easily attainable as it was a long time ago due to commercialized fishing and the impacts of tourism on settled areas along the coast.

The Coastal Zone Inquiry reported that Aboriginal people resident in the three former coastal Aboriginal reserves of Lake Tyers (on the eastern coast) and Framlingham and Lake Condah (on the west coast), as well as many other Aboriginal residents of Victorian coastal towns and cities have continuing cultural and subsistence interests in the coastal zone and its resources. These findings were supported by the 1996 Victorian Land Conservation Council Marine and Coastal Investigation report (Harding and Rawlinson 1996), which identified the following "traditional uses" of marine and coastal areas:

- Place-related subsistence (including barter, exchange within local Indigenous communities);
- Maintenance of Indigenous culture, including spiritual beliefs, ceremonial practices and traditional fishing and hunting skills.

The following quotations from Aboriginal people consulted in coastal areas of Victoria during the development of the South East Regional Marine Plan (National Ocean Office 2002, p18) indicate the extent of their continuing relationship with their customary coastal and marine environments:

"Species that are destroyed or over-exploited by non-Indigenous people have totemic and dreaming significance to Indigenous people. They are custodians of a wide range of species such as Pelican and Dolphins. The latter are a powerful totemic species yet they are still being shot by fishers in the Lakes. Black Bream (Tambo) are a species that demands protection. Black Swans belong to certain people who had the right to collect eggs but this is no longer possible."

"Indigenous people in the region have spiritual links to the land and the environment. The destruction of Aboriginal culture has accompanied the destruction of the environment."

"Coastal and marine resources remain very important to Indigenous people, particularly in relation to hunting and gathering. This is a holistic relationship, which remains frequently overlooked by non-Indigenous people who may emphasise particular sites disconnected from their environmental and cultural context. Indigenous people have a culture that relates to the land and sea in a holistic way that also included connections to powerful and significant places. However, the

emphasis that is now put on management of discrete sites can overlook and diminish Indigenous connections to the environment as a whole.”

“There are many examples of how basic food resources connected Indigenous people to the seas and oceans. These examples highlight the complex relationships between the ecology of the species and cultural practices. The Indigenous people of the region relied heavily on eels and established permanent communities based on both hunting and trapping eels in rock traps associated with their houses. There is still concern about eels, their use and abundance. This species shows the connections between people, the coastline and the open ocean as eels migrate. It provides an avenue for international treaties that involve Indigenous people.”

The continuing cultural and economic significance of marine resources to Victoria's Aboriginal people forms the basis for the development of the draft *Aboriginal Fishing Strategy* released by the Victorian Department of Primary Industries – Fisheries in 2010⁵. The three key outcomes of the Aboriginal Fishing Strategy are:

- Protection and recognition of Aboriginal customary fishing rights;
- Sustainable fisheries management in collaboration with Aboriginal communities; and
- Better economic opportunities for Aboriginal people in fishing and related industries.

3 Best practice Indigenous engagement in MPAs

MPAs are “protected areas” as defined by the IUCN – the international conservation organisation to which all Commonwealth, State and Territory government conservation agencies in Australia belong. In 2008 the IUCN adopted a revised protected area definition and revised guidelines for applying IUCN protected area categories (Dudley 2008). The revised definition states:

A protected area is a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.

This carefully negotiated definition, adopted by all IUCN members (including the Australian Government and all Australian state and territory conservation agencies), contains important opportunities for Indigenous engagement in protected area governance and management. In particular:

- The definition does not specify that protected areas must only be dedicated and managed by government agencies;
- The definition's reference to management “through legal and other effective means” recognises the contribution that both legislative and non-legislative means can make to effective protected area outcomes;
- With respect to Indigenous engagement in MPA governance and management, legislative means could include:
 - Recognition of native title in marine areas;

⁵ http://www.dpi.vic.gov.au/__data/assets/pdf_file/0006/43944/Aboriginal-Fishing-Strategy.pdf

- Indigenous Land Use Agreements (ILUAs) in marine areas;
- Other legal agreements, such as Traditional Use of Marine Resource Agreements (TUMRAs) which are accredited under the *Great Barrier Reef Marine Park Act 1975* (Cth) and the *Queensland Marine Park Act 2004* (Qld);
- Indigenous people's rights to access marine resources in fisheries legislation or other legislation;
- With respect to Indigenous engagement in MPA governance and management, non-legislative means could include:
 - Indigenous customary practices;
 - Indigenous traditional knowledge;
 - Indigenous ranger patrols;
 - Indigenous research and monitoring activities and partnerships;
 - Indigenous membership of advisory committees.
- The reference to cultural values recognises the need to manage protected areas for their full spectrum values, including Indigenous cultural values.

The IUCN has established six protected area categories⁶ to guide the management of all terrestrial and marine protected areas. These are:

- Ia Strict Nature Reserve
- Ib Wilderness Area
- II National Park
- III Natural Monument or Feature
- IV Habitat/Species Management Area
- V Protected Landscape/Seascape
- VI Protected area with sustainable use of natural resources

The IUCN protected area guidelines specify that there is a spectrum of governance and management arrangements that can apply to any protected area category. As indicated in the table below, protected areas can be managed solely by government agencies, or through co-management arrangements (with Indigenous or other partners), or solely by Indigenous groups, local communities or others. In practice, most protected areas involve some degree of collaboration between multiple stakeholders, even when management is nominally solely by a government agency or solely by an Indigenous or community group. Throughout the IUCN guidelines there is a focus on achieving protected area outcomes rather than promoting particular governance and management models.

The IUCN protected area definition and management categories are “neutral” about which type of ownership or management authority is appropriate for particular protected area categories. With respect to who holds decision-making and management authority and responsibility about protected areas, IUCN distinguishes four broad protected area governance types (see table below).

⁶ The IUCN protected area categories are described in more detail in Appendix 2.

IUCN classification system for protected area management category and governance type
(source: Dudley 2008)

Protected area categories	A. Governance by government			B. Shared governance			C. Private governance			D. Governance by indigenous peoples & local communities	
	Federal or national ministry or agency in charge	Sub-national ministry or agency in charge	Government-delegated management (e.g., to an NGO)	Transboundary management	Collaborative management (various forms of pluralist influence)	Joint management (pluralist management board)	Declared and run by individual land-owner	...by non-profit organizations (e.g., NGOs, universities, co-operatives)	...by for profit organizations (e.g., individual or corporate land-owners)	Indigenous peoples' conserved areas and territories – established and run by indigenous peoples	Community conserved areas -- declared and run by local communities
I a. Strict Nature Reserve											
Ib. Wilderness Area											
II. National Park											
III. Natural Monument											
IV. Habitat/Species Management											
V. Protected Landscape/Seascape											
VI. Protected Area with Sustainable Use of Natural Resources											

Indigenous and community conserved areas (ICCAs)

Indigenous and Community Conserved Areas (ICCA) are defined by IUCN as: “natural and/or modified ecosystems containing significant biodiversity values, ecological functions and benefits, and cultural values voluntarily conserved by indigenous peoples and local communities both sedentary and mobile – through customary laws or other effective means”.

The 2008 IUCN Guidelines note that many ICCAs are also protected areas. In some countries, long established “traditional” or new ICCAs have been formally recognised as protected areas. In Australia, terrestrial Indigenous Protected Areas (IPAs) are a form of ICCA that are formally recognised as part of the National Reserve System (NRS); the potential for IPAs to contribute to the National Reserve System for Marine Protected Areas (NRSMPA) is currently subject to debate (Smyth 2009).

In 2010 the IUCN released draft *Supplementary Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas* which are currently being finalised through a consultative process among IUCN members and other stakeholders. While these draft *Supplementary Guidelines* have no policy authority, they provide the most recent indication of international best practice for Indigenous engagement in MPA governance and management. The Draft *Supplementary Guidelines* provide examples of how Indigenous interests in MPAs could be addressed within each IUCN category, as summarised in the table on the following page.

Addressing Indigenous interests/engagement in IUCN MPA categories

Protected Area Category	MPA Purpose	Indigenous interest/engagement
Ia Strict Nature Reserve	MPAs in which biodiversity is preserved and where human visitation, use and impacts are strictly controlled	No reference to Indigenous people.
Ib Wilderness Area	Sites of relatively undisturbed seascape, significantly free of human disturbance, works or facilities and capable of remaining so through effective management.	To enable indigenous communities to maintain their traditional wilderness-based lifestyle and customs. To protect the relevant cultural and spiritual values and non-material benefits to indigenous or non-indigenous populations.
II National Park	Large natural or near natural areas set aside to protect large-scale ecological processes, along with the complement of species and ecosystems characteristic of the area, which also provide a foundation for environmentally and culturally compatible spiritual, scientific, educational, recreational and visitor opportunities.	To take into account the needs of Indigenous people and local communities, including subsistence resource use, in so far as these will not adversely affect the primary management objective.
III Natural Monument or Feature	To protect a specific natural monument, which can be a landform, sea mount, submarine cavern, geological feature such as a cave or even a living component such as a specific coralline feature.	To protect specific natural sites with spiritual and/or cultural values where these also have biodiversity values. To conserve traditional spiritual and cultural values of the site.
IV Habitat/Species Management Area	To protect particular species or habitats and management reflects this priority.	To protect vegetation patterns or other biological features through traditional management approaches.
Category V Protected Landscape/ Seascape	To protect and sustain important landscapes/seascapes and the associated nature conservation and other values created by interactions with humans through traditional management practices.	To maintain a balanced interaction of nature and culture through the protection of landscape and/or seascape and associated traditional management approaches, societies, cultures and spiritual values. To contribute to broad-scale conservation by maintaining species associated with cultural landscapes and/or by providing conservation opportunities in heavily used landscapes.
Category VI Protected area with sustainable use of natural resources	Conserve ecosystems and habitats, together with associated cultural values and traditional natural resource management systems.	To facilitate inter-generational security for local communities' livelihoods – therefore ensuring that such livelihoods are sustainable.

The Draft IUCN MPA Guidelines also sets out recommendations on the suitability of fishing and collecting activities in each of the MPA categories, as summarised in the table below.

Suitability of fishing/collecting activities in different management categories

IUCN category	Commercial fishing/collecting	Recreational fishing/collecting	Traditional fishing/collecting
Ia	No	No	No**
Ib	No	No	Yes
II	No	No	Yes
III	No	No	Yes
IV	Variable*	Variable*	Yes
V	Yes	Yes	Yes
VI	Yes	Yes	Yes

Key: * whether fishing is or is not permitted will depend on the specific objectives of the habitat or species management area;

** any extractive use of Category Ia reserves would generally be prohibited with possible exceptions for scientific research which cannot be done anywhere else or where indigenous sea rights provide for sustainable resource harvesting

Best practice Indigenous engagement in MPAs is also informed by deliberations and recommendations at key international protected area and conservation forums, such as the World Parks Congress and the World Conservation Congress, as well as commitments contained in the international instruments, such as the Convention on Biological Diversity and the United Nations Declaration on the Rights of Indigenous People. Selected recommendations and commitments from these sources relevant to Indigenous engagement in MPAs are summarised below.

World Parks Congress

The World Parks Congress (WPC) is held approximately every 10 years. The last WPC was held in Durban, South Africa in 2003; the next WPC will be held in Sydney, Australia in 2014 (during which there will be a focus on protected area governance and management of protected areas in Australia, including Indigenous engagement in MPAs).

Participants in the Cross-Cutting Theme on Communities and Equity and in the Stream on Governance at the 2003 WPC made the following recommendations regarding Indigenous rights, interests and engagement in protected areas, stressing that the recommendations should be conducted in full partnership with the freely chosen representatives of indigenous peoples:

Indigenous Engagement in Protected Area

Recommendations to governments, inter-governmental organizations, NGOs, local communities and civil societies:

- a. ENSURE that existing and future protected areas respect the rights of indigenous peoples;
- b. CEASE all involuntary resettlement and expulsions of indigenous peoples from their lands in connection with protected areas, as well as involuntary sedentarization of mobile indigenous peoples;
- c. ENSURE the establishment of protected areas is based on the free, prior informed consent of indigenous peoples, and of prior social, economic, cultural and environmental impact assessment, undertaken with the full participation of indigenous peoples;
- d. Further ELABORATE and APPLY, in coordination with indigenous peoples, the IUCN-WWF Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas (available at http://www.iucn.org/themes/wcpa/pubs/pdfs/Indig_people.pdf), as well as principles that build on IUCN Resolution WCC 1.53 and which fully respect the rights, interests, and aspirations of indigenous peoples;
- e. RECOGNISE the value and importance of protected areas designated by indigenous peoples as a sound basis for securing and extending the protected areas network;
- f. ESTABLISH and ENFORCE appropriate laws and policies to protect the intellectual property of indigenous peoples with regards to their traditional knowledge, innovation systems and cultural and biological resources and penalise all biopiracy activities;
- g. ENACT laws and policies that recognise and guarantee indigenous peoples' rights over their ancestral lands and waters;
- h. ESTABLISH and implement mechanisms to address any historical injustices caused through the establishment of protected areas, with special attention given to land and water tenure rights and historical/traditional rights to access natural resources and sacred sites within protected areas;
- i. ESTABLISH participatory mechanisms for the restitution of indigenous peoples' lands, territories and resources that have been taken over by protected areas without their free, prior informed consent, and for providing prompt and fair compensation, agreed upon in a fully transparent and culturally appropriate manner;
- j. ESTABLISH a high level, independent Commission on Truth and Reconciliation on Indigenous Peoples and Protected Areas;
- k. ENSURE respect for indigenous peoples' decision-making authority and SUPPORT their local, sustainable management and conservation of natural resources in protected areas, recognising the central role of traditional authorities, wherever appropriate, and institutions and representative organizations;
- l. REQUIRE protected area managers to actively support indigenous peoples' initiatives aimed at the revitalization and application, where appropriate, of traditional knowledge and practices in land, water, and resource management within protected areas;
- m. UNDERTAKE a review of all existing biodiversity conservation laws and policies that impact on indigenous peoples and ensure that all parties work in a coordinated manner to ensure effective involvement and participation of indigenous peoples;

- n. DEVELOP and promote incentives to support indigenous peoples' self-declared and self-managed protected areas and other conservation initiatives to protect the lands, waters, territories and resources from external threats and exploitation;
- o. ENSURE open and transparent processes for genuine negotiation with indigenous peoples in relation to any plans to establish or expand protected area systems, so that their lands, waters, territories and natural resources are preserved and decisions affecting them are taken in mutually agreed terms;
- p. INTEGRATE indigenous knowledge and education systems in interpretation of and education about natural, cultural and spiritual values of protected areas; and
- q. ENSURE that protected areas are geared towards poverty alleviation and improve the living standards of the communities around and within the parks through effective and agreeable benefit sharing mechanisms;

2. Recommendations to IUCN and World Commission on Protected Areas:

- a. FORMULATE and CARRY OUT a programme of work, with the full participation of indigenous peoples, to support their initiatives and interests regarding protected areas, and to actively involve indigenous peoples' representative authorities, institutions and organizations in its development and implementation;
- b. PROVIDE support and funding to indigenous peoples for community conserved, co-managed and indigenous owned and managed protected areas;
- c. ENCOURAGE international conservation agencies and organizations to adopt clear policies on indigenous peoples and conservation and establish mechanisms for the redress of grievances; and
- d. CONDUCT an implementation review of the World Conservation Congress Resolution 1.53 Indigenous Peoples and Protected Areas and the IUCN-WWF Principles and Guidelines on Indigenous and Traditional Peoples and Protected Areas; and

3. Recommendations to IUCN Members:

- a. Consider the establishment of an IUCN Commission on Indigenous Peoples and Protected Areas at its next World Conservation Congress.

Co-management of Protected Areas

Recommend international conventions, governments, protected area agencies, donor agencies, conservation NGOs, communities, and the private sector, and in particular IUCN – The World Conservation Union as potential inspirer and leader of well coordinated and synergistic efforts, to:

- 1. SUPPORT the review, consolidation, strengthening and expansion of existing experiences of co-management of protected areas;
- 2. PROMOTE the participation of stakeholders in decision-making concerning protected area management, with particular regards to indigenous, mobile and local communities, and disadvantaged groups via a range of mechanisms including information generation and sharing; joint visioning and participatory assessment exercises; support to stakeholder organizing and capacity building; negotiated management agreements and benefit sharing; and full empowerment and accountability for conservation in effectively co-managed and community-managed areas;
- 3. CREATE or strengthen enabling legal and policy frameworks for co-management in protected areas;

4. UNDERTAKE programmes to develop and strengthen institutional and human capacities for co-management of protected areas as part of efforts towards good governance and more effective management, including setting up basic training and refresher courses for natural resource managers, national and international exchange visits and joint learning initiatives among PA institutions and sites engaged in co-management efforts;
5. PROMOTE participatory action-research in co-managed protected areas with emphasis on stakeholder identification, social communication initiatives, negotiation processes, consensus-based decision making, co-management outcomes and impacts, and legislation and policies for a supporting environment;
6. EXPAND the sharing of experience and lessons learned on co-management of protected areas at national, regional and international levels including by strengthening the work of the Co-management Working Group (CMWG) of the IUCN Commission on Environmental, Economics and Social Policy (CEESP) and of the joint World Commission on Protected Areas/CEESP Theme on Indigenous and Local Communities, Equity and Protected Areas (TILCEPA); and
7. CALL upon the Conference of the Parties to the Convention on Biological Diversity to address co-management issues in their programme of work for protected areas, in particular with regard to enabling legal and policy framework, capacity building, participatory action-research and exchanges of experiences and lessons learned.

Indigenous engagement in Marine Protected Areas

While all WPC recommendations regarding protected areas apply to MPAs, a recommendation regarding the establishment of a global system of MPAs (Recommendation 22) included the following sub-recommendation:

Engage stakeholders including local and traditional communities through participatory processes in the design, planning and management and sharing of benefits of marine protected areas.

World Conservation Congress

Recommendation 4.127 of the World Conservation Congress at its 4th Session in Barcelona, Spain, 5–14 October 2008 urges states to:

- (a) Within a framework of cooperation and taking into account national and regional characteristics, make available the means necessary for the full exercise and effective implementation of the rights recognized in the United Nations *Declaration on the Rights of Indigenous Peoples*; and
- (b) In the designated protected areas fully or partially within the territories of indigenous peoples:
 - (i) respect the rights of these peoples, ensuring the full and effective participation of their representative organizations in making decisions on the management and protection of these areas; and
 - (ii) apply Article 28.1 of the United Nations *Declaration on the Rights of Indigenous Peoples* which states:

“Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has now been endorsed by all members of the United Nations, including Australia. UNDRIP contains non-binding commitments that together provide a global best practice guide to the recognition of Indigenous peoples' rights and interests with respect to traditional land and sea, culture, language, education, housing, political rights and freedom from discrimination etc. The following articles relate to recognition of Indigenous peoples' rights and interests particularly relevant to MPAs.

Article 20

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

4 Recognition of Indigenous rights and interests in Victoria's MPAs

Native Title

The establishment, planning and management of MPAs in Victoria do not affect native title rights and interests. The *National Parks (Marine National Parks and Marine Sanctuaries) Act 2002* (Vic) amends the *National Parks Act 1975* to ensure that native title is not affected by the establishment of Marine Parks or Marine Sanctuaries:

Section 19. *Insertion of new section 48A* After section 48 of the National Parks Act 1975 insert—

'48A. *Native title not affected by amendments*

(1) The amendments made to this Act by the National Parks (Marine National Parks and Marine Sanctuaries) Act 2002 are not intended to affect native title rights and interests.

(2) Sub-section (1) does not apply in any case where native title rights and interests are affected or are authorised to be affected by or under the Native Title Act 1993 of the Commonwealth.

(3) In this section—

"affect" has the same meaning as in the Native Title Act 1993 of the Commonwealth;

"native title rights and interests" has the same meaning as in the Native Title Act 1993 of the Commonwealth.¹

Joint management or co-management of protected areas in Victoria

The *Traditional Owners Settlement Act 2010* (Vic) establishes a framework for recognition of native title in Victoria that can include joint management of protected areas as part of a native title settlement. The Act allows for parks and reserves to be returned to Aboriginal ownership under a form of land title called Aboriginal Title, under which these areas continue to be managed as national parks or other forms of public parks through the establishment of Traditional Owner Land Management Boards (TOLMBs). TOLMBs comprise Traditional Owners (majority), government representatives and members of the broader Victorian community.

Co-management is another form of partnership with Traditional Owners operating in Victoria. Co-management is an outcome of the recognition of native title which provides for Traditional Owner membership of park councils to guide park management, but not the transfer of ownership of the park under which title to parks and reserves is not transferred to the Traditional Owners.

To date no joint management or co-management arrangements in Victoria include either Marine Parks or Marine Sanctuaries. However, section 17D of the *National Parks Act 1975* does indicate the possibility of management of a marine Park or a Marine Sanctuary MPAs by a TOLMB:

17D (4) *National Park Act 1975*: In the case of any appointed land of a Traditional Owner Land Management Board that constitutes the whole or a part of a marine national park or a marine sanctuary, a management plan prepared under subsection (3)(c)⁷ does not have effect in so far as a joint management plan is in effect for that land.

MPA Management Plans

The following extracts from the *Discovery Bay Marine National Park Management Plan* (2007)⁸ give an indication of the extent of recognition, opportunities and constraints for Aboriginal engagement in Marine National Parks and Marine Sanctuaries in Victoria. Management Plans for all Victorian MPAs are available at <http://www.dse.vic.gov.au/coasts-and-marine/marine/marine-national-parks-and-sanctuaries>

Acknowledgement

- *Acknowledgement of Country: In their rich culture, Indigenous Australians are intrinsically connected to the continent – including the area now known as Victoria. Parks Victoria recognises that the park is part of Country of the Traditional Owners.*

⁷ 17D(3) refers to the requirement to prepare plans of management of Marine Parks and Marine Sanctuaries

⁸ http://parkweb.vic.gov.au/__data/assets/pdf_file/0016/313270/discovery-bay-mnp-mp.pdf

Forward

- *The area included in the park is significant to the Traditional Owners and other people with traditional attachments to these areas.*
- *Sea Country is central to the culture of Indigenous communities in south-west Victoria, particularly the Gournditch-Mara.*
- *The park is an integral part of this sea Country and the Traditional Owners are connected to the area by tradition.*
- *Discovery Bay Marine National Park and the surrounding landscape have particular spiritual significance and have provided resources for thousands of years.*

Evidence of past use

- *The park and adjacent coastline is a part of Gournditch-Mara Country. Archaeological research of middens, lithic scatters, cooking ovens and other sites along the coast adjacent to the park have revealed an extensive and complex record of past use. Analysis of middens indicates the importance of marine resources to the Gournditch-Mara and identifies ecological trends over time.*
- *Open middens dated at up to 11 000BP have survived along the cliff tops at Cape Duquesne. Post-glacial sea rise to 6500B inundated low-lying middens so that most middens in the region are less than 4000 years old (Richards, T. pers. comm. 2006). Although there are no known cultural sites within the park, submerged sites are likely to be present. The park and surrounding areas are of major cultural significance to the Gournditch-Mara.*

Legislation

- *All forms of extraction, including recreational and commercial fishing and shellfish extraction and the taking or damaging of animals, plants or objects, are prohibited within the park under the National Parks Act and regulations.*
- *The Native Title Act 1993 (Cwlth) applies to the management of the park. An application for a native title determination, which covers Discovery Bay Marine National Park, among other areas, was lodged with the Native Title Tribunal on 30 August 1996. It was later amended to exclude areas at sea beyond 100 metres of the mean low water mark from the claim.*

Park Vision

- *Gournditch-Mara concepts of sea Country are understood, respected and are central to the management of the park. The Traditional Owners are closely involved in management.*

Indigenous Cultural Heritage

Discovery Bay Marine National Park is a part of Gournditch-Mara Country. Gournditch-Mara belong to the Dhauwurd wurrung language group which is known to have consisted of at least 59 clans. The clans were separated into two moieties, the Krokitch/Grgidj (white cockatoo) and Kappatch/Gabadj (black cockatoo). The Cupponenet gundidj clan belonged to the area around Bridgewater Bay, east of Cape Bridgewater. Dhauwurd wurrung is one of seven language groups within the Maar Nation which extends across south west Victoria. (Clark 1998a).

The Maar creation story explains the spiritual connection of the Gournditch-Mara with the sea. This story also demonstrates the spiritual connection with nearby Deen Maar Island, the sea and the afterlife. Archaeological investigation of shell middens,

occupation sites, and ovens (Godfrey 1984; Richards & Jordan 1996; Godfrey 2000; Schell 2000) and early descriptions (Dawson 1981) illustrate the importance of the sea to the Cupponet gundidj and other clans. Unique for Australia, open middens dated at up to 11000BP have survived along the cliff tops at Cape Duquesne. Post glacial sea rise to 6500BP inundated low-lying middens so that most middens in the region are less than 4000 years old. (Richards, T. pers. comm. 2006).

Gournditch-Mara languages were well documented in the late 1880s and have been more recently collated (Dawson 1981). Language demonstrates a close association between the sea and the Gournditch-Mara. Many aspects of the sea and whales in particular hold spiritual, totemic significance. Stories of a tsunami which extended inland as far as Heywood have also been recorded (D. Lovett, pers. comm. 2006).

Sir William Grant was the first European to chart this coastline in 1800. He noted the presence of numerous campfires near Portland which were most likely those of the Gournditch-Mara (Learmonth 1934). In the 1830s and 1840s organised groups of Gournditch-Mara fought a guerrilla war (Clark 1995) that became known as the Eumeralla war. Within this language group there were 28 recorded massacres and killings of Gournditch- Mara people, including a massacre at the Convincing Ground near Portland which was thought to be related to a dispute over a whale washed up on the beach. By 1846 the Portland Guardian and Normandy Advertiser reported that stock had been killed by Indigenous people near Bridgewater Lakes but that Indigenous people were rarely seen in this area (Portland Guardian and Normandy Advertiser 1846).

Following the progressive displacement of clans from Country, survivors found refuge at local pastoral stations and many were eventually taken to Lake Condah mission. After disease, violence, displacement and institutionalisation, the Gournditch-Mara believed that spirits were no longer plentiful (Dawson 1981). Many aspects of culture are now shared between language and clan groups throughout south-western Victoria. Despite this history, Indigenous people are committed to maintaining their strong cultural identity (Critchett 1980; Clark 1998b).

Sea Country is a central theme of Indigenous cultural heritage in south-western Victoria which the Gournditch-Mara aspire to maintain and build in partnership with Parks Victoria. Marine National Parks and Marine Sanctuaries provide a unique opportunity to maintain, build and enhance these cultural connections. Lake Condah, Discovery Bay Marine National Park and many other parks and reserves are an integral part of the vibrant Gournditch-Mara culture. Many older cultural sites are likely to have been destroyed with rising sea levels and dune erosion. There are no registered cultural sites in Discovery Bay Marine National Park.

However there are many sites in the adjacent Discovery Bay Coastal Park, and cultural material could still be present beneath the waters of the park. All Indigenous places and objects are protected under the Archaeological and Aboriginal Relics Preservation Act and the Aboriginal and Torres Strait Islander Heritage Protection Act. It is an offence to damage, interfere with or endanger an Aboriginal site, place or object without obtaining prior written consent from the scheduled Aboriginal community. Issues relating to the protection of such cultural heritage and the involvement of the scheduled Aboriginal community are approached in accordance with these Acts. Under the Commonwealth Act, the Kerrup-Jmara Elders Corporation, c/- Winda Mara Aboriginal Corporation is the scheduled Aboriginal community.

Indigenous people are concerned about the state of Country and their role in its protection. The Kooyang Sea Country Plan highlights the aspirations of Framlingham Aboriginal Trust and Winda Mara Aboriginal Corporation members regarding sea Country, which includes the park, and identifies a framework for partnership with government in sea Country management (FAT & WMAC 2004).

Local Indigenous communities have been involved in the development of cultural interpretation and other projects in Discovery Bay Coastal Park and other nearby protected areas. They aspire to build and extend this partnership to sea Country.

The Gournditch-Mara Native Title Group is the relevant group for Native Title in the area. Issues relating to Native Title are dealt with according to the Native Title Act. Parks Victoria respects the views of the Traditional Owners, and seeks to reflect their knowledge, interests and rights in the land, and aspirations for Country in planning and management of the park (Parks Victoria 2005b).

Aims

- *Protect Indigenous places and objects from interference or damage.*
- *Support the views of the Traditional Owners in managing the park.*

Management strategies

- *Protect Indigenous places and objects from disturbance and damage in partnership with the Traditional Owners and in cooperation with the scheduled Aboriginal community and AAV (section 8.3), and in accordance with:*
 - *the provisions of relevant legislation, including the Archaeological and Aboriginal Relics Preservation Act and Aboriginal and Torres Strait Islander Heritage Protection Act*
 - *Parks Victoria's Guidelines for Working with Aboriginal Communities and Protection of Cultural Sites (Parks Victoria 2002).*
- *Respect the views of the Traditional Owners and the cultural obligations of Indigenous communities.*
- *Reflect the Traditional Owners' knowledge, interests, rights and aspirations for Country in all planning and management of the park in consultation the Traditional Owners and the scheduled Aboriginal community, and in accordance with Parks Victoria's operational policies.*
- *Respond accordingly to any Native Title determinations for the park.*
- *Develop a Memorandum of Understanding (MOU) with relevant Indigenous communities. Ensure this MOU does not impact on native title determinations. The MOU should address;*
 - *appropriate use of language, stories and other culture by Parks Victoria;*
 - *arrangements for ongoing liaison, cooperation and sharing of knowledge*
 - *processes for the identification and development of training, capacity building or commercial opportunities.*
- *Work with the Traditional Owners to integrate Discovery Bay Marine National Park into a cultural heritage strategy for Discovery Bay Coastal Park (Parks Victoria 2004b). The strategy will identify:*
 - *priorities for cultural mapping, research and survey*
 - *themes for interpretation, promotion of Indigenous culture, including places, objects, archaeological relics, and tradition and practices*

- *arrangements for partnerships with Gournditch-Mara, other community groups and relevant agencies.*
- *Assess annual park programs to integrate relevant Indigenous practices and minimise the potential for impact of park management activities on Indigenous cultural heritage, in consultation with the Traditional Owners and the scheduled Aboriginal community.*
- *Maintain confidentiality in respect of Indigenous cultural obligations, knowledge, places, objects and aspirations, in accordance with the views of the Traditional Owners.*
- *Ensure that all management actions are in accordance with the Native Title Act.*
- *Contribute to the implementation of the Kooyang Sea Country Plan (FAT & WMAC 2004), and the Indigenous Partnership Strategy (Parks Victoria 2005b).*

Indigenous Partnerships Framework

Planning and management of Victoria's MPAs is also governed by commitments contained with the Department of Sustainability and Environment's Indigenous Partnership Framework, which provides direction for all departmental Indigenous partnering initiatives:

The framework establishes the base on which the department's business areas and activities align with the department's commitment to:

- *work inclusively with Victoria's Native Title Holders, Traditional Owners and Indigenous people in Victoria*
- *ensure Traditional Owners and Indigenous people in Victoria have a real say in the future management of Victoria's biodiversity, water and land.*

It is also a practical document providing guiding principles for staff in the implementation and delivery of DSE's natural resource management activities.

The guiding principles are:

Principle 1 Respect and Recognition

Principle 2 Caring for Country

Principle 3 Partnership and Capacity Building

Charter of Human Rights and Responsibilities Act 2006

The Victorian *Charter of Human Rights and Responsibilities Act 2006* provides a further guide to the recognition of Aboriginal rights and interests in MPAs. The *Charter* states that the distinct cultural rights of Aboriginal people and their communities "must not be denied", 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(2)).

The reference to "*economic relationship with the land and waters and other resources*" could indicate protection of Aboriginal people's right to use traditional resources, including within MPAs that lie within their traditional country – a similar recognition of native title holders' rights to access traditional resources under section 211 of the *Native Title Act 1993* (Cth).

5 Opportunities and constraints

Based on an understanding of Aboriginal cultural rights and responsibilities to sea country and the extent of recognition of these rights and interests in legislation and management plans, Victoria's marine national parks and marine sanctuaries provide range of opportunities and constraints for Aboriginal people of the state, as summarised below.

Opportunities

Opportunities for Aboriginal people in the planning and management of Victoria's MPAs include:

- Native title rights and interests are protected;
- The cultural connection of particular Aboriginal groups to particular coastal and marine areas are recognised in MPA management plans;
- Aboriginal cultural heritage values and places are respected and protected in the planning and management of MPAs;
- Parks Victoria is committed to:
 - engage with Aboriginal groups associated with particular coastal and marine areas in the planning and management of MPAs;
 - collaborate with Aboriginal groups to implement their own plans for sea country that include MPAs (e.g. *Kooyang Sea Country Plan*);
 - Collaborate with Traditional Owners in the development of cultural heritage strategies, including cultural mapping and interpretation of Indigenous culture;
 - Apply Aboriginal traditional knowledge and language in the management of MPAs;
 - Formalise engagement mechanisms and commitments, e.g. through the negotiation of Memoranda of Understanding;
- Though not specified in legislation and management plans, there are opportunities for suitably qualified Aboriginal people to be employed by Parks Victoria and involved in the management of MPAs.

Constraints

Constraints on Aboriginal people in the planning and management of Victoria's MPAs include:

- No mechanism for prior informed consent to the establishment of an MPA on their sea country;
- No opportunities to continue traditional hunting and gathering practices in sea country within MPAs, unless these practices are recognised as native title rights and interests;
- No current pathway to joint management of MPAs – though this is a potential outcome of a native title settlement.

These opportunities and constraints are summarised in the context of international best practice governance and management of MPAs in the table below.

Comparing recognition of Indigenous rights & interests in MPAs with international best practice

Issue	Best Practice	Victorian MPAs
Decision to establish MPA	Prior informed consent by Indigenous people	No consent process
Governance	Opportunity for co-management or Indigenous sole management	No current pathway to co-management
Community engagement	Engagement throughout the planning/management cycle	Engagement throughout the planning/management cycle
Customary rights and interests	Recognised and protected	Native title rights protected
Cultural heritage	Protected, promoted and interpreted	Protected, promoted and interpreted

In practical terms, the most significant constraint on Aboriginal people is the ban on fishing and gathering in MPAs. While native title rights and interests are protected, this is arguably a much narrower recognition of Indigenous cultural interests than envisaged in international instruments, best practice guidelines or the Victorian *Charter of Human Rights and Responsibilities Act*. Due to the social and cultural changes that occurred during and after the colonial period, determination of native title is a very challenging legal threshold to achieve for many Aboriginal groups in Victoria – even for coastal Aboriginal groups whose traditional use of sea country resources has continued since before British colonisation to the present day.

These constraints in Victorian MPAs contrast with arrangements in the Great Barrier Reef Marine Park (GBRMP) where amendments to the *Great Barrier Reef Marine Park 1975* (Cth) provide for the accreditation of Traditional Use of Marine Resource Agreements (TUMRAs)⁹, without the requirement for a native title determination. TUMRAs are agreements negotiated among and between Traditional Owners groups about how they intend to manage and sustainably use traditional marine resources (e.g. dugong, turtles, fish and shellfish) within their traditional sea country inside the GBRMP. TUMRAs may include a commitment to limit the harvesting of a particular species to an agreed number per year, or may include a moratorium on harvesting a species for a specified time. Once a TUMRA is accredited by the Great Barrier Reef Marine Park Authority (GBRMPA), the TUMRA provisions are enforceable under the GBRMP Act – though native title rights are not affected. TUMRAs are being used effectively to ensure sustainability of traditional resource use by local Traditional Owner groups, and a way to manage use of these resources by other Indigenous groups who may wish to access resources in the specified TUMRA area. TUMRAs are also recognised under the *Queensland Marine Parks Act 2004* (Qld).

Sea Country Planning

Sea country planning is a process whereby Indigenous groups develop their own plan for their own coastal land and sea country. For some Aboriginal groups sea country

⁹ <http://www.gbrmpa.gov.au/our-partners/traditional-owners/traditional-use-of-marine-resources-agreements>

plans are an effective mechanism to maximise opportunities and to some extent overcome constraints imposed by legislation, policies and the activities of other stakeholders, such as recreational and commercial fishers.

A sea country plan is a maritime example of what could more broadly be called a country-based plan, which is simply a strategic plan for the traditional country of a particular Indigenous group as defined and selected by that group. The scope and intent of a country-based plan are matters for each Traditional Owner group to determine. The potential scope and intent of country-based plans include assisting Traditional Owners to:

- Consider the cultural, natural, social and economic values of country that are important to them and to others;
- Gather new information to clarify values of country, utilising cultural knowledge and traditions as well as contemporary scientific information and practices;
- Decide which information should be made available publicly through the country-based plan and which information should remain confidential;
- Summarise local historical events that have contributed to current circumstances of Traditional Owners and country;
- Consider the implications of legal, tenure and native title issues that may impact on the protection and management of cultural and natural values;
- Consider the impacts and benefits of existing or proposed developments or management actions on identified values of country;
- Consider the impacts and benefits of other planning schemes or proposals, including (e.g. MPA management plans);
- Develop strategies and actions to protect and manage values of country;
- Identify potential partnerships with other Indigenous groups, government agencies, research institutions, non-government conservation organisations, commercial enterprises, philanthropic organisations and others to implement proposed strategies and action;
- Communicate the values, history, concerns, aspirations, capacity etc. of the Traditional Owner group; the target audience could include the Traditional Owner group itself, the broader Indigenous community, government agencies, other stakeholders with an interest in country and the general public.

In short, a country-based plan provides an opportunity to tell the story of a Traditional Owner group and its country, and to be a catalyst for supporting culture, addressing concerns and achieving aspirations.

The *Kooyang Sea Country Plan*, which won an award in the Victorian Coastal Awards for Excellence 2006, was prepared by Framlingham Aboriginal Trust and Winda Mara Aboriginal Corporation for coastal and marine areas in Maar sea country in south-west Victoria. As noted above, the Discovery Bay Marine National Park Management Plan includes a commitment to collaborate with Gournditch-Mara people in the implementation of the *Kooyang Sea Country Plan*. Copies of the

Kooyang Sea Country Plan and other sea country plans can be downloaded from an Australian Government website¹⁰.

Sea country plans are non-statutory plans for which implementation depends very much on the capacity of the local Aboriginal group to deliver the leadership and build the partnerships to gather the resources, expertise and other support to achieve the aims of the plan. A good planning process will address these issues during the development of the plan, so that ideally implementation becomes a seamless outcome of planning. Enough country-based plans have now been developed and implemented to show that this expression of Indigenous self-determination can achieve results, subject to local capacity constraints. Sea country planning is an effective option for Indigenous-led engagement in MPA planning and management and may, in time, open up new pathways to co-management of MPAs. Further information about country-based planning is available in Smyth (2011) and Smyth (2007).

Indigenous Protected Areas

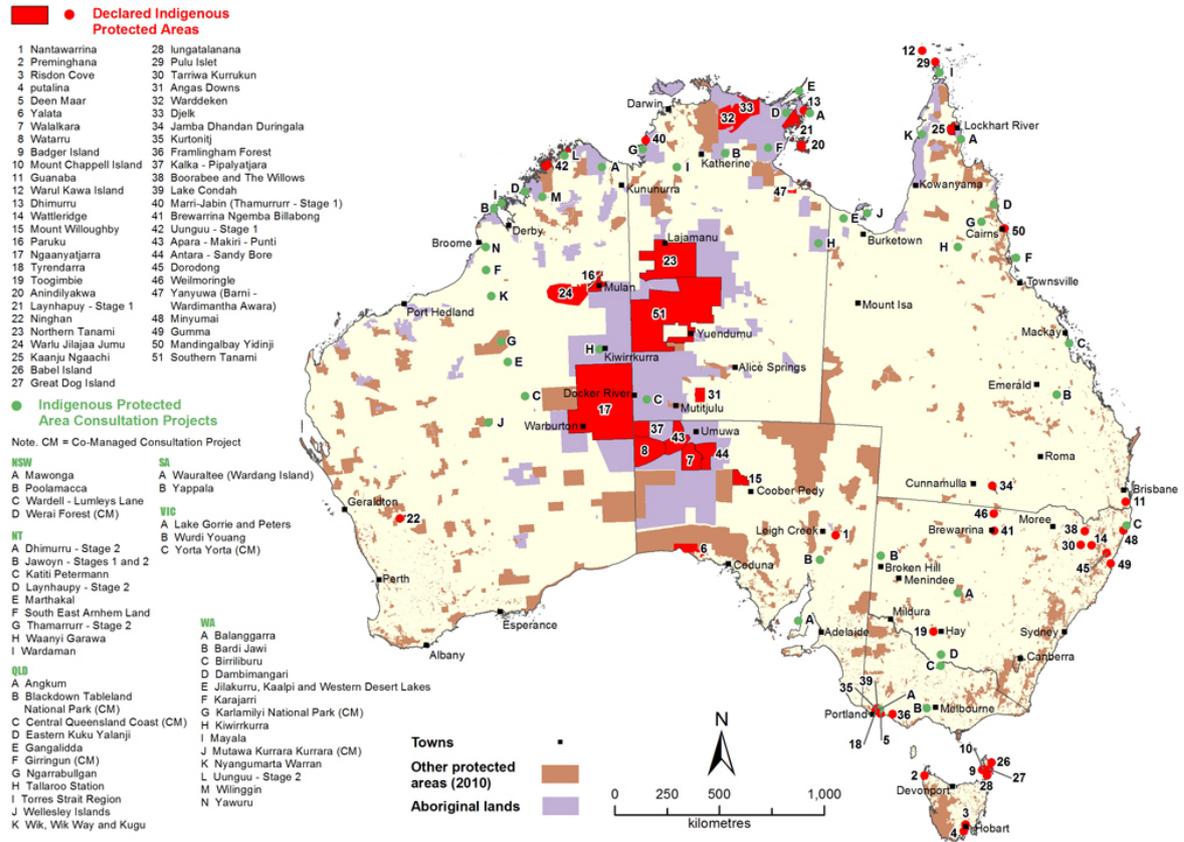
Indigenous Protected Areas (IPAs) emerged from the Australian Government's 1992 commitment to establish a system of protected areas that is comprehensive, adequate and representative of all the terrestrial bioregions of Australia. As some of the bioregions occur only on Aboriginal-owned land, a program was developed in collaboration with Indigenous representative organisations to provide funding and other support to enable Indigenous groups to establish protected areas on their own lands. IPAs are planned, voluntarily declared (or dedicated) as protected areas and managed by Indigenous people themselves. The IPA Program¹¹ is an Australian Government initiative to support these activities, and to formally recognise IPAs as part of the National Reserve System, but the IPAs are not government protected areas – there are declared, planned and managed by Indigenous people.

In recognition that many government protected areas had already been established on traditional estates without Indigenous peoples' consent, the IPA Program also includes funding to enable Indigenous peoples to negotiate enhanced engagement in the management of existing government-declared protected areas, including MPAs.

The first IPA was established in Nantawarrina in South Australia in 1998 and there are now over 50 IPAs across all Australian states and mainland territories (except the Australian Capital Territory) – see map below. There are currently an additional 34 IPA projects being planned, as well as seven “co-management” IPA projects focusing on enhanced Indigenous engagement in existing protected areas. Funding and advice to support the planning and management of IPAs is provided by the Australian Government, but IPAs are established by Indigenous people independently of legislation, in accordance with the International Union for the Conservation of Nature (IUCN) protected area *Guidelines* which state that protected areas can be managed by “*legal and other effective means*”. In practice, IPAs are typically managed by a combination of legal means (e.g. land ownership, community by-laws, legislated rights to use natural resources etc.) and other effective means (e.g. customary law, ranger patrols, liaison, education, signage, partnerships with conservation agencies, research etc.).

¹⁰ <http://www.environment.gov.au/indigenous/seacountry/index.html>.

¹¹ <http://www.environment.gov.au/indigenous/ipa/index.html>



Map of Indigenous Protected Area projects in Australia

A national meeting of Indigenous representatives in 1997 defined an IPA in the following way:

An Indigenous Protected Area is governed by the continuing responsibilities of Aboriginal and Torres Strait Islander peoples to care for and protect lands and waters for present and future generations.

Indigenous Protected Areas may include areas of land and waters over which Aboriginal and Torres Strait Islanders are custodians, and which shall be managed for cultural biodiversity and conservation, permitting customary sustainable resource use and sharing of benefit.

This definition includes land that is within the existing conservation estate, that is or has the ability to be cooperatively managed by the current management agency and the traditional owners.

For the first 13 years of the IPA program, IPAs were established only on Indigenous-owned land, and IPAs now comprise over 25% of the total terrestrial protected area estate (the National Reserve System). More recently, some Indigenous groups whose traditional estates have been alienated by the establishment of government national parks, forest reserves, marine parks etc. have been planning to establish IPAs that co-exist with government protected areas. The first of these IPAs based on Indigenous country rather than Indigenous tenure was dedicated to Mandingalbay Yidinji people over their traditional country near Cairns in north-east Queensland in December

2011¹². The Mandingalbay Yidinji IPA includes all or part of the following government-declared conservation areas: national park, forest reserve, environmental reserve, terrestrial and marine world heritage areas, marine park, fish habitat area and local government reserve. The IPA management plan¹³ provides the framework for the recognition of Mandingalbay Yidinji cultural rights, interests and values across all the tenures within the IPA. Dedication of the IPA has been recognised by each of the government agencies with legal responsibility for the management of the separate tenures within the IPA and collaboration occurs through an implementation committee chaired by a representative of Mandingalbay Yidinji people.

This “country-based” approach to the establishment of IPAs over existing government protected areas provides an alternative, non-legislative pathway to co-management of protected areas, including MPAs; it relies on collaboration with government management agencies but is not dependent on state legislation. The second country-based IPA that co-exists with a government national park was declared in the Northern Territory in 2012¹⁴, and several more country based IPAs are currently in the planning stage in other jurisdictions.

Conclusions Policy and legislation overseeing the planning and management of Victoria's MPAs provide significant recognition of Indigenous cultural interests in sea country and significant opportunities for engagement in MPA planning and management. However, a ban on access to traditional marine resources within MPAs, other than as a determined native title right, falls short of international and Australian best practice.

The current review of Victoria's MPAs provides an opportunity for Traditional Owner groups, Victoria's Indigenous population more broadly and the government agencies responsible for managing MPAs and sea country resources to review how their respective interests and obligations can be addressed through the adoption of international best practices. Experience elsewhere in Australia and internationally indicates that the conservation and sustainability objectives of MPA managers can be achieved without unduly curtailing Indigenous customary rights to access, use and management marine areas and resources.

It is recommended that the following steps be undertaken to promote best practice recognition of Indigenous interests in Victoria's MPAs:

- 2 Traditional Owners groups consider developing and implementing sea country plans as an Indigenous-led mechanism to engage in the planning and management of Victoria's MPAs – including consideration of collaborative frameworks such as TUMRAs and IPAs.

¹² www.environment.gov.au/indigenous/ipa/declared/mandingalbay

¹³ See www.djunbunji.com.au

¹⁴ <http://www.environment.gov.au/indigenous/ipa/declared/yanyuwa.html>

- 3 Parks Victoria and other relevant State and Commonwealth agencies support interested Traditional Owners groups to develop and implement sea country plans for their customary coastal and marine areas.
- 4 Traditional Owner groups, separately and together (e.g. through a facilitated workshop process), consider how Indigenous informed consent and co-governance arrangements can be achieved for the existing MPAs and any future MPAs.
- 5 Traditional Owner groups and Parks Victoria utilise the World Parks Congress to be held in Sydney in 2014 to showcase their collaboration, achievements and best practice approaches to MPA management.

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Appendix 1

PROJECT SPECIFICATION

Preparation of a review and discussion paper on best practice recognition and engagement of Aboriginal traditional Owners and other Indigenous people in the use and management of Victoria's marine protected areas.

1. Scope

The objective of this project is to provide expert advice, to inform the VEAC Marine Investigation, on pathways and approaches for best practice recognition and engagement of Aboriginal Traditional Owners and other Indigenous people in the use and management of Victoria's existing marine protected areas (MPAs).

This is relevant to the scope of VEAC's current Marine Investigation for a number of reasons. The most significant of these is the requirement, within the Victorian Environmental Assessment Act 2001 (section 18), that VEAC, in carrying out an investigation, consider the need to conserve and protect any areas which have ecological, natural, landscape or **cultural interest or significance**, recreational value or geological or geomorphological significance. For the VEAC marine investigation, the scope of "cultural interest or significance" would include Aboriginal cultural interests in the environments, resources and cultural areas / sites within the existing MPAs.

Sea Country planning has been considered in a range of marine areas over recent years, including south west Victoria. In addressing the above objective, this project will document and draw on the experience provided by this and other mechanisms for recognising and engaging with indigenous peoples about the use and management of the natural environment, and translate it to the specific circumstances of Victoria's MPAs. Smyth and Bahrtdt will bring to the project their expertise and experience with a range of comparable projects including development of the Kooyang Sea Country Plan in south west Victoria, and the input of indigenous peoples' views to the revised National Strategy on the Conservation of Australia's Biodiversity.

Information inputs and sources

This project will draw on existing relevant published and unpublished material, including the expert judgment and experience of the consultants (Smyth and Bahrtdt) – and other relevant experts as appropriate. Any such additional sources of advice must be sub-contacted by the consultants within the overall project budget. VEAC will provide and / or facilitate access to relevant documents, where possible.

Project outputs

The primary output of this project will be a report. This report must include a detailed bibliography documenting the information sources that underlie its contentions and conclusions. The report should be supported by appropriate QA / QC processes.

As the project develops, it may also be appropriate to also provide summary or derived documents from the above report for various audiences. The scope of these reports will be negotiated between FRB and the consultant.

2. Background

VEAC Marine Investigation

The Minister for Environment and Climate Change has requested VEAC to carry out an investigation into the outcomes of the establishment of Victoria's existing marine protected areas. The terms of reference for the investigation are:

Pursuant to section 15 of the Victorian Environmental Assessment Council Act 2001, the Minister for Environment and Climate Change requests the Council to carry out an investigation into the outcomes of the establishment of Victoria's existing marine protected areas¹.

The purpose of the marine investigation is to examine and provide assessment of:

- (a) the performance and management of existing marine protected areas in meeting the purposes for which they were established, particularly the protection of the natural environment, indigenous flora and fauna and other natural and historic values; and*
- (b) any ongoing threats or challenges to the effective management of existing marine protected areas, particularly in relation to the biodiversity and ecological outcomes.*

In addition to the considerations in section 18 of the Victorian Environmental Assessment Council Act 2001, the Council must take into account the following matters:

- (i) all relevant State Government policies and strategies, Ministerial statements and reports by the Victorian Auditor-General;*
- (ii) all relevant national and international agreements, policies and strategies, including ecosystem-based management approaches; and*
- (iii) relevant regional programs, strategies and plans.*

Three public submission periods are to be held and a discussion paper and a draft proposals paper are to be prepared. The Council must report on the completed investigation by February 2014.

The specific role of this project is to inform VEAC's assessment of Victoria's existing marine protected areas for term of reference (a) of the investigation. As described in section 1 above, a key specific driver for this project is the Victorian Environmental Assessment Act 2001 (section 18).

Appendix 2

IUCN Protected Area Category	Description
Ia Strict Nature Reserve	Areas set aside to strictly protect biodiversity and also possibly geological/geomorphological features, where human visitation, use and impacts are strictly controlled and limited to ensure protection of the conservation values. Such protected areas can serve as indispensable reference areas for scientific research and monitoring.
Ib Wilderness Area	Protected areas usually large unmodified or slightly modified areas, retaining their natural character and influence, without permanent or significant human habitation, which are protected and managed so as to preserve their natural condition.
II National Park	Large natural or near natural areas set aside to protect large-scale ecological processes, along with the complement of species and ecosystems characteristic of the area, which also provide a foundation for environmentally and culturally compatible spiritual, scientific, educational, recreational and visitor opportunities. Not all protected areas with “national park” in their name are in this category.
III Natural Monument or Feature	Areas set aside to protect a specific natural monument, which can be a landform, sea mount, submarine cavern, geological feature such as a cave or even a living feature such as an ancient grove. They are generally quite small protected areas and often have high visitor value.
IV Habitat/Species Management Area	Protected areas that aim to protect particular species or habitats and management reflects this priority. Many category IV protected areas will need regular, active interventions to address the requirements of particular species or to maintain habitats, but this is not a requirement of the category.
V Protected Landscape/Seascape	A protected area where the interaction of people and nature over time has produced an area of distinct character with significant ecological, biological, cultural and scenic value: and where safeguarding the integrity of this interaction is vital to protecting and sustaining the area and its associated nature conservation and other values.
VI Protected area with sustainable use of natural resources	Protected areas that conserve ecosystems and habitats, together with associated cultural values and traditional natural resource management systems. They are generally large, with most of the area in a natural condition, where a proportion is under sustainable natural resource management and where low-level non-industrial use of natural resources compatible with nature conservation is seen as one of the main aims of the area.