



Submission

in response to

Victoria's Bushfire Management Strategy: Draft

prepared by

Environmental Justice Australia

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About Environmental Justice Australia

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. We are independent of government and corporate funding. Our legal team combines technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to community-based environment groups, regional and state environmental organisations, Aboriginal Traditional Owners (and their representative bodies), and larger environmental NGOs, representing them in court when needed. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

We also pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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No confidentiality is requested in relation to this submission.

Introduction

1. EJA has undertaken a range of work relating to the issue of bushfires in Victoria, bushfire management and bushfire strategy in general. These areas of work and engagement can be categorised into the following:
 - a. Legal and policy analysis and advice on use and application of cultural fire by Aboriginal Traditional Owners (also referred to as cultural burns or cultural burning in the Draft Strategy);
 - b. Ecological impacts and management of planned burning operations, including legal considerations;
 - c. Pollution impacts and management of planned burning operations, including legal considerations.
2. We will contend with each of these issues in turn in these submissions. Our experience and expertise in respect of each are relevant to the proposed Bushfire Management Strategy for Victoria.

General comments on the Draft Bushfire Management Strategy

3. The Draft Strategy is structured into 6 'domains', which broadly can be understood as encompassed a series of themes concerning fire management:
 - a. Safety and bushfire management risk, which might be said to align with the prevailing theme and discourse of fire management (in Australia as well as in Victoria) centring fire in the landscape as a pervasive (if seasonal) threat to which the appropriate mode of response is emergency.
 - b. Ecological and nature conservation issues, which recognise the function of fire and, more precisely, fire regimes, as intrinsic to the characteristics and processes of many ecosystems in Australia (SE Australian specifically). This theme acknowledges the pyrophilic nature of many ecological systems in Victorian landscapes and that the use and application of fire can have productive or adverse consequences for those ecological systems.
 - c. Cultural fire and exercise of Aboriginal self-determination through fire management, which is a theme given substantial expression in this Draft Strategy and appears in effect to acknowledge the extensive work Traditional Owner communities and leaderships have done in reviving knowledge and practices around fire management. The Draft Strategy refers to work at operational, institutional and governance levels.
 - d. Collaboration across government and community and across sectors.

- e. Evidence-based decision-making, including resource allocation based on reducing fire risk and impacts and incorporation of Traditional Owner knowledge alongside conventional science.
 - f. Increased capability and workforce diversity.
4. Taken together these features of the Draft Strategy seem at first blush to be largely unproblematic and would appear to reproduce emerging themes in existing fire policy in Victoria. What is far less certain is whether the package of actions and measures forms a clear, coherent and candid *strategy* for dealing with the issue of fire in the (non-urban) landscape, including contending with tensions and conflicts between sought outcomes, objectives and conduct, establishing hierarchies or priorities between them, and incorporating the reasoning (including science) on which they are to be resolved.
5. For example, the Draft Strategy appears to contain certain important, if not compelling, silences on the guidance one assumes the document is intended to provide:
- a. The outcomes sought from the three principal themes of the document (safety, ecological health, and Aboriginal self-determination) are not inherently well-aligned and in fact contain considerable tensions. There are no doubt circumstances where actions or approaches to fire management under each of these themes are in conflict and the Draft Strategy contains no express guidance on reconciling such tensions or conflicts. For example, use of extensive land clearing to construct fire breaks near properties or use of high intensive burning operations frequently have adverse ecological impacts and may operate in tension with cultural burning preferences and outcomes.
 - b. Not unrelated to the above point, policy concerning fire management in Australia (and reflected in the Victorian context) is heavily inscribed with preconceptions, norms and cultural values. The prevailing discourse of government and (settler) society is that fire in the landscape is a risk or threat and a phenomenon generating fear and anxiety. This normative context is aligned with and reinforced by the ordinary disaster framing of fire, the paramilitary model of fire services and treatment of fire suppression as analogous to war setting. That framework is further complicated by deeply embedded narratives and norms concerning associations with fire and conservation in landscapes and the pre- and post-invasion fate of landscapes (woodland and forested landscapes in particular), including violent clearance of Aboriginal peoples from the land, extensive changes to landscapes, and removal of routine use of fire in landscapes and knowledge of its use.
 - c. Further to the above points, the three primary themes contained in the Draft Strategy (safety, ecology, Aboriginal self-determination) generally rest or are based upon distinctive, if occasionally overlapping, models and paradigms of fire management, as expressed in official discourses, ecological science, popular narrative and Aboriginal language concerning fire in the landscape. Specifically, where in official discourse risks, threat and safety paradigmatically prevail,¹ in

¹ See eg Final Report of the NSW Bushfire Inquiry (2020), 157-8; see also Report of Royal Commission into Natural Disaster Arrangements (2020), Ch 2; Victorian Traditional Owner Cultural Fire Knowledge Group The Victorian Traditional Owner Cultural Fire Strategy (FoVTOC, 2022), 4: 'The Victorian government's fire management agencies have to date, applied a risk-based approach that emphasises the protection of life and property, and impeded Traditional Owner rights and obligations to care for Country.'

ecological sciences the function of fire as disturbance within ecological regimes (fire ecology as integral to ecosystem structure) is prominent,² and for Aboriginal communities' fire as intrinsic to 'health' of Country and maintenance of connection to Country is paramount.³ These approaches to fire and fire management are not necessarily, or easily, reconcilable. As we submit below, there are circumstances where existing preponderance of emergency modes of conduct, founded principally on the risk paradigm of fire management and construction of institutions and official practice around this model, fails to account for and accommodate appropriately, satisfactorily or indeed legally those other, effectively subordinated, models and discourses – namely, ecological objectives and Aboriginal objectives. Such dissonances or disjunctures are reflected for example in scholarly observations on Aboriginal fire management:

With respect to fire, this [Indigenous fire management] philosophical underpinning is markedly different to the ethos of prescribed burning, which is narrowly focused around assets (such as property and population centres) and which still carries many of the ideas that underpin the outdated fire-suppression framework, as reflected in the paramilitary approach to fire "fighting" and fire use that has the central aim of reducing fire Aboriginal Traditional Owners and Cultural Fire.⁴

6. In our submission a final Bushfire Strategy will need to provide guidance on reconciliation or management of such tensions and a reasoned approach for the position(s) adopted.

Aboriginal Traditional Owners and fire management

7. EJA has recently worked with DJAARA (Dja Dja Wurrung Aboriginal Corporation) on addressing legal and regulatory barriers to cultural fire management and identifying opportunities to develop and extend that sector. The submissions and opinions below are solely those of EJA.
8. A great deal has been written about the historic, cultural, ethnographic and ecological relationship of Aboriginal peoples in Australia to fire and to the use and application of fire in landscapes or, rather, on Country. We do not intend to reprise that literature, or debates associated with it, here. Suffice it to say,

Unlike prescribed burning for hazard reduction, Indigenous fire management is part of a range of cultural practices that are not simply designed around asset protection. Indigenous fire management protects sites and clears access through land ('Country' for Aboriginal Australians) for cultural uses—hunting, access to fish traps, ceremony, Country keeping, and many other purposes. Collectively, this is referred to as cultural burning. Cultural burning is conducted by Indigenous fire practitioners, who use traditional knowledge to assess the right time of the year and the right conditions for burning, operating under strict cultural protocols. Put simply, cultural burning is a holistic approach at landscape management that is based on an intimate understanding of places and is reflexive to local environmental conditions and cues. It is a method of landscape management that has many purposes, only one of which is hazard reduction. More than simply land management, the reciprocity between Australian Indigenous people and the world around them underscores a markedly different relationship between people and

² See eg Cary et al *Australia Burning: Fire Ecology, Policy and Management Issues* (CSIRO, 2003)

³ See eg Weir et al *Cultural Burning in Southern Australia* (Bushfire and Natural Hazards CRC, 2021)

⁴ Fletcher et al 'Catastrophic bushfires, Indigenous fire knowledge, and reframing science in Southeast Australia' (2021) 4 *Fire* 61, <https://doi.org/10.3390/fire4030061>. See also Smith et al 'Persuasion without policies: the work of reviving Indigenous peoples' fire management in southern Australia' (2021) 120 *Geoforum* 82, 91: '... while often highly supportive of intercultural management practices, white practitioners often framed Aboriginal culture as a risky variable in the already contentious work of fire management.'

landscapes from the European-style management paradigm that prevails in Australia today. This Indigenous relationship is one in which the health of people is linked to the health of the world around them (Country), an epistemology that obliges people to “care for Country”. This reciprocity is fundamental to the health, lives and livelihoods of Indigenous Australians, and reconnecting people to places through the lens of natural resource management has had significant and widespread social and cultural benefits and significant environmental benefits.⁵

9. The Draft Strategy takes its lead, in respect of cultural fire, from the VFTOC policy document *The Victorian Traditional Owner Cultural Fire Strategy of 2022*. That approach is broadly appropriate and Chapter 3 of the Draft Strategy (including outcomes and specific actions) seems consistent with that approach, with the exception of points noted below. The specific policy proposals in the Draft Strategy appear also to contend with key concerns arising in use and application of cultural fire, such as operational barriers to Traditional Owner use and application of fire and resistance of State institutions to norms, models and shifts in powers and authority relevant to Aboriginal burning regimes.
10. At the levels of practice, policy and law, these proposed directions in the Draft Strategy appear positive but, arguably, incomplete.

Clearer understanding of practical characteristics of Aboriginal fire management

11. In our view, the Draft Strategy does not fully or clearly grasp certain distinguishable practical features attributable to ‘cultural burning’ as a model of land management. In particular, the Draft Strategy would benefit from clarification of features consistent with the paradigm Fletcher et al identify above. We would suggest these include for example:
 - a. At the level of technique, use and application of fire is commonly low-intensity and slow (‘cool’) burning, producing mosaics of burnt and unburnt country, avoiding canopy burning, and applied to localised or ‘fine-grained’ conditions. It is typically applied with a view to protection of specific ecological features (such as flora and fauna) and/or achievement of certain ecological outcomes (such as productivity of plant or animal species). Applied with a high degree of experiential knowledge, through close association of specific landscapes, it is *akin to a craft applied to the land* rather than an ‘industrial’ scale method of applying fire to the landscape.⁶
 - b. At the level of land management, use and application of fire concerns ‘healing’ or ‘caring’ for land as an entity (Country) in a manner consistent with the spiritual, kinship or cultural connection to the land. As noted, the relationship to land is considerably more than reduction of ‘hazard’ or ‘risk’ but maintenance of a ‘holistic’ relationship to land. Use and application of fire to the landscape is ordinarily for a range of purposes.
 - c. At the social and cultural level, use and application of fire is part of wider set of social relations, protocols and needs, including for example discharge of cultural

⁵ Fletcher et al ‘Catastrophic bushfires, Indigenous fire knowledge, and reframing science in Southeast Australia’ (2021) 4 *Fire* 61, 4-5

⁶ See eg ‘Professor David Bowman ‘Notice to Given Information’ Royal Commission into National Natural Disaster Arrangements,

<https://naturaldisaster.royalcommission.gov.au/system/files/exhibit/PDB.500.001.0002.pdf>:

Although prescribed burning is often promoted as restoring Aboriginal patterns of fire management, this is rarely the case given the different methods employed. These two different practices result in contrasting fire mosaics: traditional Aboriginal management is characterised by highly patchy landscape burning, whereas ‘industrial’ prescribed burning typically treats large ‘blocks’ of landscape, creating a coarse mosaic.

obligations, development and transmission of living knowledge and lore, and maintenance (or revitalization) of community and family relations.

12. In our submission, the Draft Strategy would be well-advised to set out the need for technical, social and cultural content to cultural burning regimes to be identified and embedded in fire management plans and programs, giving effect to principles of self-determination in respect of this aspect of land management and subject to the needs and pace of Traditional Owner groups. General policy provisions of this type can be informed by legal frameworks considered below.

Full and express recognition of legal drivers of cultural fire management and their implications

13. Current fire administration and policy in Victoria does not in our view conform well to the law concerning Aboriginal Traditional Owner rights and interests as these relate to (or may relate to) fire management, it does not appear to be appropriately responsive to those laws, and it could better use key legal frameworks (see below) as guidance and controls in fire administration. Addressing this gap or omission would likely contribute to more coherent and effective strategy.

14. Exercise of legal rights and duties concerning Aboriginal Traditional Owner involvement in fire management is not well reflected in Victorian policy or practice. Specific shortcomings include:

- a. On the part of State agencies, responsiveness to and implementation of recognised Traditional Owner rights operating under the *Traditional Owner Settlement Act 2010* (Vic) ('Settlement Act') and agreements made under that Act (for those Aboriginal communities benefiting from arrangements under that Act);
- b. On the part of State agencies, responsiveness to and implementation of Aboriginal cultural rights available under section 19(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter Act').

15. Noting also that the 'anatomy' of law generally applying to bushfire management the role of law is pervasive, verging on incoherent,⁷ we are also of the view that careful consideration should be given to certain aspects of the common law, such as torts, as these govern current and emerging legal rights and interests Aboriginal Traditional Owners hold in land affected by fire management.

Traditional Owner rights and fire management

16. Various but not all Traditional Owner groups across Victoria are recognised as such by the State of Victoria under both Commonwealth and Victorian laws. For present purposes, our attention is on the recognition scheme provided for under the Settlement Act. The Settlement Act provides for recognition of enumerated Traditional Owner rights under section 9 where these are given effect through recognition and settlement agreements made under the Act ('settlement agreements'). Commonly, settlement agreements adopt recognised Traditional Owner rights as a whole into Settlement agreements. These rights are exercisable across areas to which settlement agreements apply. Additional arrangements

⁷ See McCormack et al 'An anatomy of Australia's legal framework for bushfire' (2022) 46 *Melbourne University Law Review* 1 (advance), https://law.unimelb.edu.au/data/assets/pdf_file/0004/4248868/McCormack-et-al-461-Advance.pdf

and provisions function to those lands for which joint management arrangements apply, such as joint management plans. Detailed procedural rights are also available to recognised Traditional Owners who have entered into land use activity agreements with the State. The latter may include negotiation or advisory rights concerning planned burning operations by the State (depending on the content of those agreements).

17. Traditional Owner rights derived from section 9 of the Settlement Act are largely substantive rights. Various of these Traditional Owner rights are relevant to and in our view enable Victorian Traditional Owner use and application of cultural fire to the landscape, including for example:
 - a. The right to enjoy the culture and identity of the traditional owner group;
 - b. The maintenance of the distinctive spiritual, material and economic relationship with the land and the natural resources depending on the land;
 - c. The ability to use and enjoy the land;
 - d. The ability to conduct cultural and spiritual activities on the land;
 - e. The protection of places and areas of importance on the land.
18. In our view and submission, the use and application of cultural burning practices (including their revitalization) by recognised Traditional Owner groups maybe the exercise of one or more of the section 9 Traditional Owner rights within any agreement area and subject to arrangements under settlement agreements. Use and application of cultural burning as the exercise of a more general, recognized right is analogous to and consistent with the approach of the High Court on construction of native title rights.⁸ It is an appropriate approach to use for Settlement Act purposes.
19. Identifying the content and operation of Traditional Owner rights relies on identifying the relevant Traditional Owner law and custom. This requirement extends to specific law, custom and practice associated with cultural burning where that is an exercise of one of more the recognised rights.
20. The exercise of those rights operates to the extent of consistency with other Victoria laws. For example, with respect to use and application by Traditional Owners of cultural burning regimes on public lands to which the Forests Act applies, various provisions under that Act governing fire management are to be read and implemented (including at the operational and administrative level) in a manner consistent with exercise of Traditional Owner rights enabling cultural burning practices and programs. Setting out an appropriate and correct scope of, on the one hand, powers exercisable or duties to be performed by fire agencies under the Forests Act and, on the other hand, the manner of exercise of Traditional Owner rights associated with cultural burning cannot simply be a matter of administrative discretion of the State or State agencies. It should be developed in an appropriately detailed and forensic manner, with a view to reconciliation of statutory powers and/or duties and Aboriginal law, lore and custom. It is the latter that is commonly expression of the content of

⁸ *Leo Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33, [66]

Traditional Owner rights and provides guidance in fact and in law as to what is required of the State and its agencies in any particular circumstance.

21. In our submission, the Draft Strategy needs, additionally, to:
 - a. Expressly recognise the role and status of Traditional Owner rights (where they apply) in governing the use and application of cultural fire on lands to which Settlement Act arrangements apply. In other words, expressly take a rights-based approach to the use and application of cultural fire in the landscape.
 - b. Use recognised Traditional Owner rights and the method of (in)consistency in the exercise of those rights (as determined by Traditional Owners) with other legal provisions as the starting point for enabling self-determination in respect of cultural burning programs and practices (require reconciliation of laws where difference, tension or ambiguity).
 - c. Noting the beneficial character of the Settlement Act scheme, expressly include in the Draft Strategy that Victoria takes a liberal approach any questions of inconsistency or tension between existing laws and use of cultural burning as an exercise of recognised Traditional Owner rights (take a beneficial approach to reconciliation of laws).
 - d. Engage with recognised Traditional Owners where Settlement Act arrangements exist, or are contemplated, in order to determine how the implementation of cultural burning, where it is an exercise of recognised Traditional Owner rights, will give effect to those rights across all lands to which settlement agreements apply (typically all public lands) (establish a clear process for reconciliation of laws where difference, tension or ambiguity).
22. The above approach is appropriate in absence of law reform better recognising and governing use and application of cultural fire by Aboriginal Traditional Owners.
23. Reform of laws concerning management and administration of fire on public lands should, preferably, be undertaken in the medium-term (for example, 3-5 years) in order to better reflect the disposition of legal rights, duties and interests referred to above.

Charter rights and fire management

24. The Charter Act establishes a scheme for statutory recognition of human rights and arrangements by which those rights are given effect in Victoria. For current purposes two aspects of the Charter Act are specifically relevant to the Draft Strategy:
 - a. Provisions for Aboriginal cultural rights at section 19(2) of the Charter Act;
 - b. Requirements under section 38 of the Charter Act that requires public authorities to act in a manner not incompatible with human rights or fail to give human rights proper consideration in their conduct.

25. The Charter Act recognises Aboriginal cultural rights as ‘distinct’ and ‘protected and promoted’ by the Act.⁹
26. Section 19(2) provides:
- Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—
- (a) to enjoy their identity and culture; and
- (b) to maintain and use their language; and
- (c) to maintain their kinship ties; and
- (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.
27. Significantly, these cultural apply to Aboriginal persons generally and they are not limited to recognised Traditional Owners or Traditional Owner groups.
28. As with recognised Traditional Owner rights under the Settlement Act, these broad rights can be understood to include exercise of rights and, by extension, exercise of cultural rights by way of use and application of cultural burning practices. That exercise of rights arguably extends to its consistency with the scope of the general enumerated right (for example the right to maintain distinctive spiritual, material and economic relationship with the land... with which [the Aboriginal person has] connection under traditional laws and customs’.
29. The section 38 obligations apply broadly across the public sector. The concept of ‘public authority’ encompasses, for example, fire agencies and Ministers and Departments responsible for fire management or where fire management occurs (including on public lands).
30. The Draft Strategy makes no reference to Aboriginal cultural rights in its consideration of cultural fire management.
31. In our submission it can and should take the cultural rights scheme under the Charter Act as instructive and required guidance on integration of cultural burning and fire administration.
32. The manner by which rights set out under the Charter Act affect fire administration in Victoria differs from the manner by which the Settlement Act does so. Charter Act rights apply to the conduct and practices of public authorities. They apply to public authorities concerned with fire management on public or private land. Equally, they apply to authorities regulating fire use or prevention or public authorities responsible for control and management of lands on which fire occurs or is used.
33. Usefully, the effect of Charter Act rights on public authorities has been the subject to extensive judicial interpretation and guidance. This guidance is reflected in expert administrative guidance, for example, from the Victorian Human Rights and Equal

⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 1(2)

Opportunity Commission.¹⁰ Functioning at conceptual (principled) and at operational levels, this accumulated guidance is helpful to refine integration of cultural burning schemes into general fire management and to situate cultural fire within the overall scheme of fire management in Victoria. To put this another way, fire administration as it relates to cultural burning does not operate in a vacuum but rather it is aided extensively by human rights law (overlapping with Settlement Act arrangements), among which are key concepts and provisions on which the Draft Strategy appears to rely (such as self-determination).

34. In giving effect to section 19(2), all relevant agencies must contend with and work through the application of Aboriginal cultural rights enumerated under that provision to their conduct, practices and decision-making. They must do consciously and systematically. The legal test of compatibility of agencies' conduct with section 19(2) rights applies to:
- a. How and whether they act (for example, how they implement fire policies or engage in administrative practices);
 - b. How they fail to act (for example, in terms of not issuing authorisations or approvals or not doing so in a timely manner);
 - c. How they formulate proposals to act ((for example, design and implementation of fire planning).
35. In our submission, the Draft Strategy should include specific provisions for all fire agencies and other relevant agencies (such as public land managers) to use conscious and systematic methods ensure Aboriginal cultural rights are complied with, including where this approach is adapted to use and application of cultural burning as an exercise of those rights. VHREOC guidance includes specific steps for public authorities to work through at an operational level.¹¹
36. In properly and forensically accounting both for Charter Act rights and Traditional Owner rights, fire policy and administration can better identify and reconcile paradigms and directions in fire management. Moreover, this process can and should occur on a reasoned policy basis. In our submission it is also likely to require a demonstrative re-balancing and adjustment of power and decision-making responsibility toward Traditional Owners, including as the latter build capacity, acquire and adapt science, and revitalize cultural practices and knowledge associated with use and application of fire in the landscape.

Consideration of tortious duties owed to Traditional Owners where rights and interests in land or resources

37. We submit that one area of policy and practice Victoria needs to turn its mind to, whether through the Bushfire Strategy or elsewhere, is the question of application of torts law to existing and emerging Aboriginal Traditional Owner interests in land and natural resources, including where these interests may be affected by State fire operations such as prescribed burning and associated land clearing.

¹⁰ See eg VHREOC *The Charter of Human Rights and Responsibilities: A Guide for Public Sector Workers* (2nd ed, 2019)

¹¹¹¹ VHREOC *The Charter of Human Rights and Responsibilities: A Guide for Public Sector Workers* (2nd ed, 2019), see 14-15 in particular.

38. Arising from both native determinations and Settlement Act agreements, Traditional Owner entities are vested with unique property rights and interests in land and in certain instances in water and other natural resources. Aboriginal title established under the Settlement Act is one example. It is a form of freehold title vested subject to agreement-making with the State. It is a distinctive form of land title that continues to vest in public lands where that agreement-making occurs.
39. The Traditional Owner group benefiting from the vesting of Aboriginal title arguably are entitled to enjoy rights and benefits associated with that title, subject to the agreement-making, including for example inherent natural and cultural values associated with the land or values associated with Aboriginal title.
40. Those lands may be sites for use and application of fire operations by the State (or on behalf of the State), including prescribed or 'hazard reduction' burning operations. The conduct of these types of burning operations may affect Aboriginal title and rights or values Aboriginal title is intended to vest. In this respect, fire agencies conducting those burning operations may have duties at common law not to act (or fail to act) wrongfully in relation to a Traditional Owner groups' Aboriginal title rights and interests in the same land where operations are intended or occurring. Those duties may include a duty of care for example not to impair or interfere unreasonably with a Traditional Owner group's Aboriginal title.
41. In our understanding, application of tortious duties to rights and interests such as Aboriginal title has not been considered closely, if at all, in Victoria, including in relation to the State's use and management of lands where that form of title vests. Given the potential or likelihood for conventional (for example, prescribed or hazard reduction) fire operations to impact biodiversity and cultural values, such as through high-intensity fires or associated land clearing operations, we submit that close attention to the form and specific content of those duties by the State is warranted.
42. Potentially, duties such as tortious obligations toward Aboriginal rights- and interest-holders are not limited to rights in the nature of, or strictly analogous to, property rights. Other forms of statutory rights established in public lands, such as joint management rights, should be considered in this respect as well.

Environmental impacts of State burning operations and their management

Biodiversity impacts and assessment

43. EJA has steadily received enquiries on adverse environmental and biodiversity impacts of planned burning operations over many years. We have acted for community organisations in relation to these issues.
44. For present purposes we distinguish between burning or works operations undertaken in the course of fire emergencies (fire suppression) and those undertaken as part of planned operations, specifically but not solely on public lands (referred to as prevention and ecological purposes for example under the Forests Act). We focus mainly on the latter, which are often also referred to prescribed burning or hazard reduction burning. We note that actions taken during or in the immediate aftermath of bushfires may also have significant ecological impacts (for example, removal of large or hollow-bearing trees whether burnt or unburnt and clearing of fire breaks).

45. Generally, the proposed outcome under Chapter 2 of the Draft Strategy that fire regimes support healthy and resilient ecosystems and nature conservation is uncontroversial and positive. Use of best available science and cultural knowledge to do so¹² is also clearly desirable. Incorporation of climate science into planning and fire modelling is patently important if not imperative given the accelerating climate emergency (the relationship of fire management to climate change is not put in those terms however).
46. Notwithstanding the above comments, in our submission the Draft Strategy requires considerable strengthening and clarification with respect to ecological considerations. These include submissions, comment and opinion as follows.

Acknowledge the biodiversity crisis and its extent

47. Regardless of desired alignment with documents such as the Victorian Biodiversity Strategy, there is little or no evidence the State is on a trajectory intended by that policy or otherwise that biodiversity outcomes in Victoria are stabilizing or reversing from poor and declining trajectories.¹³ Among other things, Victoria's threatened species list is large and growing. Acknowledgement of the existing state of biodiversity in Victoria and the role and manner in which fire management (including design and implementation of appropriate fire regimes) contributes to or ameliorates this biodiversity crisis is absent from the Draft Strategy. The Strategy would be assisted by careful consideration of how, and under what conditions, fire management and fire regimes contribute to biodiversity conservation and recovery or, conversely, degrade biodiversity and its recovery. Uncertainties on these questions are notorious and should be acknowledged, compounding scientific and policy controversies. Nevertheless, policy judgments should be made on the science preferred and why.
48. In approving or adopting the Draft Strategy in the absence of the above considerations, it is arguable that the Minister (or Secretary, or whomever in government is approving the policy) would be acting inconsistently with certain biodiversity objectives set out under section 4 of the *Flora and Fauna Guarantee Act 1988* (Vic) and, more relevantly, acting without any real basis for discharging his or her duty under section 4B of that Act. Without acting on the basis of actual biodiversity conditions, it is not clear that proper consideration in the manner required under section 4B can be said to be applied to the making of the Bushfire Strategy.
49. In any case, it is an arguable requirement of the duty operating under section 4B that, in making the Bushfire Strategy, the Minister (or any other public authority involved in making the Strategy) clearly and transparently step out how that duty is being discharged in and through the making of the Strategy, including in respect of each principal element of section 4B.¹⁴ It is not sufficient merely to recite the duty.¹⁵

¹² Draft Strategy, 31

¹³ Commissioner for Environmental Sustainability *State of the Environment Report: Scientific Assessments Part 111 (Biodiversity)* (2018), <https://www.ces.vic.gov.au/sites/default/files/publication-documents/SoE2018%20Scientific%20Assessments%20Part%20III%20Section%200.pdf>

¹⁴ Specifically, in relation to proper consideration of the objectives and the Act in the performance of functions (subsection (1)) as well as the consideration requirements of subsection (3).

¹⁵ The legal standard of 'proper consideration', being derived from the analogous duty under Victorian human rights law, imports a similar standard of rigor, reasoning and application: see for example the analysis in *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111, [141]

Uses and abuses of adaptive management

50. References to adaptive management are made without appropriate context and they are best vague and unhelpful. Concepts of adaptive management are only appropriate or helpful where used as a device to achieve identified environmental outcomes or states and intended pathways to achieve those outcomes. The best-known example is application of the precautionary principle. Adaptive management may be a technique employed as step-wise interrogation in the face of uncertainty to avoid environmental harm or degradation. Adaptive management is not in itself the end. Rather it is a device informed by an environmental standard (avoiding or preventing environmental harm or degradation) and which must be reasonably and transparently directed to that end.
51. If adaptive management is to be used in the context of fire planning and operations in order to achieve the stated ecological outcome it must be clearly stipulated that it is to be used to identified, scientifically-informed and risk-weighted ends, such as avoiding ecological degradation or contributing to ecological recovery. Transparent, reasoned and adapted procedures for adaptive management in the fire management context are necessary.¹⁶ They should preferably be in regulatory (statutory) form. Judicial guidance on the concept is available.¹⁷ That guidance includes the dictum that a ‘suck it and see’ approach to adaptive management is not acceptable.¹⁸

Failure to undertake proper or effective environmental assessments prior to fire operations or planning

52. It is axiomatic that deliberate use and application of fire in the landscape and/or works associated with suppression, prevention or use of fire in the landscape are actions likely to affect biodiversity; whether positively or adversely depends on a variety of factors such as their contribution to appropriate or inappropriate fire regimes in a given ecosystem.
53. Considerable attention is paid in the Draft Strategy to the information base intended to inform those actions and its uses (for example through modelling, information systems, use of decision ‘tools’ and so forth).
54. Methods and practices of environmental assessment are essential to making decisions on fire management (including planning and operations) reasonably capable of achieving the ecological outcome sought in Chapter 2 of the Draft Strategy.
55. The Draft Strategy contains reference to ‘environmental values assessments’ as well as reliance on existing and, presumably, emerging information systems (‘decision support tools’). It is entirely unclear how these arrangements function or are intended to function as devices for environmental (ecological or biodiversity) assessment – presumably in order to meet the ecological outcome.

¹⁶ Cf McDonald and Styles ‘Legal strategies for adaptive management under climate change’ (2014) *Journal of Environmental Law*, doi: 10.1093/jel/equ003

¹⁷ See eg *Newcastle and Hunter Valley Speleological Society v Upper Hunter Shire Council and Stoneco Pty Ltd* [2010] NSWLEC 48, [184]-[189]

¹⁸ *Newcastle and Hunter Valley Speleological Society v Upper Hunter Shire Council and Stoneco Pty Ltd* [2010] NSWLEC 48, [184] per Preston CJ:

Adaptive management is a concept which is frequently invoked but less often implemented in practice. Adaptive management is not a “suck it and see”, trial and error approach to management, but it is an iterative approach involving explicit testing of the achievement of defined goals.

56. Failure of fire agencies to undertake appropriate, proportionate, transparent and effective assessment of environmental values likely to be affected by fire planning and operations is a consistent theme in public concerns over fire management raised with EJA. For example, failure by fire agencies to account properly for known threatened species populations in proposed burning zones, failure to avoid harm to or protect key ecological assets (such as hollow-bearing trees), or failure to design or plan burning operations appropriate to localised ecological conditions (for example, applying fire to fire-sensitive vegetation types) are among the concerns raised with EJA.
57. In our submission, environmental assessment processes applying to both fire planning and fire operations are largely inadequate and cannot be said to be 'fit for purpose'. Heavy reliance on digital datasets, modelling and 'desktop' methods to assess biodiversity values is patently insufficient, as it has been shown to be in other natural resource management contexts.¹⁹ Real climatic shifts now occurring and which are structurally changing on-ground conditions merely exacerbate existing problems concerning environmental assessment and conventional fire management. Environmental assessment arrangements applying to fire administration need to be substantially reviewed and overhauled.
58. The Bushfire Strategy should to set out the steps the Victorian Government will take to establish a scheme for environmental assessment for fire management reasonably capable of informing decision-makers (at planning and operational levels) and safeguarding biodiversity values.²⁰
59. Such a scheme may be appropriately scaled in terms of assessment procedures based on context, intensity, urgency and sensitivity of affected biodiversity values (what is often referred to as 'risk-based' models). For example, this type of approach is taken under Victorian planning law for management of native vegetation.²¹ Requirement for on-ground (ground-truthed) assessment of biodiversity is effectively the default position of that scheme. In our submission, ground-truthed assessments of prescribed or planned burning operations or, as far as practicable, other works associated with fire operations (whether prevention or suppression) also need to inform environmental assessment of fire planning and operations.

¹⁹ See *Friends of Leadbeaters Possum v VicForests (No 4)* [2020] FCA 704

²⁰ See the well-known test for environmental impact statements set out in *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402, from which general principles of environmental assessment can be discerned. The following summary derives from *F & D Bonaccorso Pty Ltd v City of Canada Bay Council (No 2)* [2007] NSWLEC 537, [48]:

1. An environmental impact statement must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible environmental consequences of the proposed development...
2. The purpose of an environmental impact statement is to alert the decision maker and the public to the inherent problems of the proposed development, to encourage public participation, and to ensure that the decision maker takes a hard look at what is proposed...
3. The environmental impact statement is not required to be perfect. It need not cover every topic or explore every avenue...
4. The environmental impact statement must not be superficial, subjective or non-informative...
5. It should be comprehensive in its treatment of subject matter and objective in its approach...

²¹ DELWP *Guidelines for the Removal, Destruction or Lopping of Native Vegetation* (2017); DELWP *Assessors Handbook: Applications to Remove, Destroy or Lop Native Vegetation* (2018).

60. Integration with Aboriginal Traditional Owner models of and activity in fire assessment and monitoring is high desirable. Public participation is a cornerstone principle and procedures for public participation should be included in assessment approaches. Assessment might occur at the strategic level in relation to fire planning and in respect of specific fire operations as forms of individual impact assessment procedures (or a combination of the two).
61. In matters that have come to our attention, even where fire operations (such as planned or prescribed burns) are likely to impact on nationally listed threatened species those actions are not referred to the Commonwealth Environment Minister for decision-making under the EPBC Act. A cursory search of the Commonwealth EPBC Act referrals database indicates that very few actions that include prescribed or planned burning operations are so referred. It is our view this response is likely to reflect widespread non-compliance on the part of fire agencies (probably in all Australian jurisdictions) with referral and assessment requirements of the EPBC Act. Systemic failure of EPBC Act compliance in respect of fire operations is perhaps not surprising in the context of systemic failure of compliance of other land management impacts on MNES (such as land clearing impacts on threatened species).²² That does not render it acceptable.

Air pollution and planned burning operations in Victoria

62. A second significant area of environmental impacts associated with bushfire management that, in our submission, the Draft Strategy does not adequately contend with and with which a final Strategy should respond to is the problem of air pollution (or air quality) arising from fire management.
63. An accumulating body of evidence is available establishing links between bushfires and adverse human health impacts.²³
64. We accept that there is a distinction to be made between human health impacts from bushfires as a substantially natural phenomenon and human health impacts arising from fire that are the product of intentional and planned human activities (noting the former category is, under current climate conditions, not straightforward). For clarity, we do not include in the latter category, for present purposes, fires ignited illegally. We are primarily concerned with the question of planned or prescribed burning operations conducted by, or under the auspices or permission, of the State.
65. We also accept that there are circumstances in which planned or prescribed burning operations are required and consistent with appropriate land and environmental management, subject to our submissions above. Indeed, our support of Traditional Owner burning arrangements above are consistent with this proposition. Our contentions are broadly with the manner and nature of fire regimes used and limits and gaps in fire administration and applicable legal frameworks.

²² See eg Ward et al 'Lots of loss with little scrutiny: the attrition of habitat critical for threatened species in Australia' (2019) *Conservation Science and Policy*, <https://doi.org/10.1111/csp2.117>

²³ See eg Williamson et al 'A transdisciplinary approach to understanding the health effects of wildlife and prescribed smoke regimes' (2016) 11 *Environmental Research Letters* 125009; Haikerwal et al 'Impact of smoke from prescribed burning: is it a public health concern?' (2015) 65 *Journal of the Air and Waste Management Association* 5 592; Dennekamp and Abramson 'The effects of bushfire smoke on respiratory health' (2011) 16 *Respirology* 198.

66. Further to the above, then, in our submission an important gap evident in the Draft Strategy is when and how fire management in Victoria engages with pollution law. The principal pollution control law in Victoria, the *Environment Protection Act*, was reformed in 2017. The new centrepiece of that law is a 'general environmental duty' requiring all persons undertaking activities that might give rise to the risk of harm from pollution (or waste) to minimize that risk so far as reasonably practicable. This is a duty that applies *prima facie* to State agencies engaged in burning operations.
67. The duty to minimize risk of harm from (in the present instance) intentional use and application of fire in the landscape is subject to a broad concept of 'harm' and include cumulative harm. For example, consideration of harm and the risk of harm in conducting fire operations requires accounting for compounding effects of air pollution from fires combined with other sources of air pollution. Additionally, the duty may apply to air pollution effects across an airshed from multiple fire operations.
68. The duty is conditioned by a legal standard of reasonableness, elements of which are set out in section 6 of the *Environment Protection Act 2017*. We do not intend to canvass here the application of those elements to fire management activities. Suffice it to say that judgements as to the timing, nature, intensity, location and other factors associated with those activities need to engage with the calculus and weighting exercise required by section 6. That is an exercise that should be done systematically and genuinely, not least given clearly difficult balancing and assessment to be undertake as to significant risk of harms to human health associated with burning operations as against risks of failing to undertake fire operations (which may generate greater degrees of air pollution risk for example from naturally-ignited bushfires).
69. In our submission, the Bushfire Management Strategy should set out how fire agencies and the State will deal with pollution risks associated with burning operations in a manner that engages and complies with this new core provision of the *Environment Protection Act 2017*.

Law reform directions required and should be signalled in the Strategy

70. Having regard to the submissions, commentary and opinions above, in our view there are various areas in which legislation governing bushfire management requires updating, amendment and reform. The proposals below are not intended to be exhaustive.
71. The Strategy should signal reform of the Code of Practice for Bushfire Management on Public Land in order to incorporate expressly and in detail how fire management and administration under that instrument is to be reconciled with cultural burning arrangements. Alternatively, a new Code of Practice for Cultural Fire Management on Public Land should be developed as a means of progressing that reconciliation.
72. The Strategy should signal directions for reform of fire provisions under the Forests Act, which include a distinct scheme governing cultural fire management and prepared consistently with relevant UNDRIP principles. Without limiting scope for other reforms, including those reconciling statutory provisions with Traditional Owner or Aboriginal cultural rights in fire management, reform could include statutory recognition of institutional functions for Aboriginal Traditional Owner fire authorities in a manner analogous, for

example, to New Zealand regulatory co-existence with Maori authority with respect to fisheries management.²⁴

73. The Strategy should signal directions for reform of the CFA Act in order to better reflect the emerging role, function and scope of cultural burning and contend with important ancillary matters and barriers (such as insurance requirements or other indemnities).
74. The above reform programs could or should be undertaken with a view to preparation by State agencies for participation in State treaty negotiations and by extension mindful of duties under Part 3 of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) and the agreed Treaty Negotiation Framework.
75. Legislative and regulatory instruments governing bushfire management should, in their review, revision and/or amendment, be required to account for and devise strategies to minimize harms associated with climate change. Additionally, or alternatively, the Strategy could foreshadow amendments to Schedule 1 of the Climate Change Act 2017 (Vic) in order to insert the making and implementation of fire planning instruments under relevant Acts as actions or decisions susceptible to section 17 of that Act.
76. A scheme for environmental assessment of proposed burning operations should be devised and given statutory form or support and include minimum content generally consistent with the principles articulated in *Prineas*,²⁵ as adapted to fire planning and operations. Overhaul of environmental assessment of fire operations in this vein should be signalled by the Strategy.
77. The Strategy should set out steps to be taken and timeframes to be complied with in order that fire agencies and other relevant bodies (such as public land managers) to engage with and conform to the 'general environmental duty' under the Environment Protection Act 2017. Alternatively, or additionally, the Strategy should signal the Government's intention to prepare an Order under section 156 of the Environment Protection Act 2017 providing for how those bodies are to minimize the risks of harm to human health or the environment from fire operations (where these occur on public lands).

²⁴ See *Fisheries (Kaimoana Customary Fishing) Regulations 1998* (NZ)

²⁵ See footnote 20 above

