

# KANGAROO: FIELDS OF STRUGGLE

By  
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## Abstract

*The Kangaroo, a symbol of the Australian landscape, is under attack by the Victoria government. Viewed as overabundant vermin, colonial law often authorizes killing many Kangaroos, a position that is directly at odds with the ancient law and custom of First Nations People. While Victoria law purports to protect the Kangaroo, in reality the current structure does more harm to the animal than good. This Article reviews the fields of struggle represented by the living tension of colonial law and chthonic law in Victoria and suggests genuine collaboration with First Nations and First Peoples to navigate this fraught terrain. Victoria must reconsider the fundamentals of its legal structure if all the residents of this land—including the Kangaroo—are to survive.*

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## I. Introduction

Magnificent, proud, and sacred. Plague, vermin, and overabundant. This Article explores the laws in Victoria, Australia, and the

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ways in which they impact the ancient and indigenous Kangaroo.<sup>1</sup> Additionally, this Article explores the Australian dilemma of the “field of struggle”<sup>2</sup> between colonial law and chthonic law,<sup>3</sup> which each have distinctive epistemologies and ontologies. Colonial laws, introduced within the last 250 years, purport to protect the Kangaroo, but upon examination, subject her to multiple harms by seeking to draw her into the colonial project.<sup>4</sup> This Article argues that the Kangaroo has become a symbol of perpetual resistance to colonialism by being a visible and persistent reminder of First Nations law and sovereignty. This argument is particularly relevant now whilst the Victorian Government is in the process of reforming animal cruelty and wildlife laws,<sup>5</sup> and as there is a progressive and deepening appreciation of First Nations Peoples and Animals<sup>6</sup> who existed here prior to colonisation.<sup>7</sup>

The continent now known as Australia was colonised in 1788 when the first fleet of ships from England arrived at Botany Bay to establish a penal colony.<sup>8</sup> When subsequent British newcomers decided to stay, they brought their laws and conceit with them, as well as

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<sup>1</sup> Throughout this Article, the feminine pronoun and proper noun are used for the Kangaroo as a form of active resistance against the patriarchal force of colonisation.

<sup>2</sup> Fiona Haines & Kate Macdonald, *Grappling with Injustice: Corporate Crime, Multinational Business and Interrogation of Law in Context*, 25 THEORETICAL CRIMINOLOGY 284, 285 (2021) (illustrating the term “field of struggle,” inspired by literature from Neil Fligstein, Doug McAdam, and Pierre Bourdieu, which illuminates the ways in which ambiguities in law can be used to resist and assist struggles within communities).

<sup>3</sup> Chthonic law is the oldest of all systems of law, and it recognises and centralises the sacred character of the cosmos. First Nations laws in Australia are of the chthonic legal tradition that emerge and are emerged through lived experience, story, and memory. See EDWARD GOLDSMITH, *THE WAY: AN ECOLOGICAL WORLD-VIEW* xv (rev. and enlarged ed. 1998) (“The inspiration must come from the world-view of vernacular societies, in particular from the chthonic world-view of the earliest period when people everywhere really knew how to live in harmony with the natural world.”). See also H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 58–92 (3d ed. 2007) (“Since all people of the earth are descended from people who were chthonic, all other traditions have emerged in contrast to chthonic tradition. It is the oldest of traditions; its chain of tradition is as long as the history of humanity.”).

<sup>4</sup> Cf. Damien Short, *Australian ‘Aboriginal’ Reconciliation: The Latest Phase in the Colonial Project*, 7 CITIZENSHIP STUD. 291, 307 (2003) (illustrating the term “colonial project” which encourages the continued defence of colonialism through “arbitrary dispossession and nation building”).

<sup>5</sup> See VIC. STATE GOV’T, *VICTORIA’S NEW ANIMAL CARE AND PROTECTIONS LAWS* 3 (2002) (explaining various plans for Victoria’s new animal care and protection laws).

<sup>6</sup> The term “First Animals” is used here to respectfully acknowledge the indigeneity, longevity, and belonging of the nonhuman animals that long pre-date the arrival of the British.

<sup>7</sup> See Joe Hinchliffe, *‘New Era’: More than 360,000 hectares of Queensland’s Cape York returned to traditional owners*, THE GUARDIAN (Sept. 6, 2022), <https://perma.cc/D6AJ-77A4> (accessed Feb. 8, 2023) (demonstrating Australia’s growing appreciation for First Nations by restoring ownership of land in Cape York to its traditional owners).

<sup>8</sup> *1788 to 1810 – Early European Settlement*, PARLIAMENT, <https://perma.cc/7JF3-HBCF> (accessed Mar. 21, 2023).

their sheep, foxes, and rabbits.<sup>9</sup> Kangaroos, as with many other Indigenous<sup>10</sup> groups, presented an uninterrupted barrier to colonists, who intended to make a sweeping claim of the continent by making it as much like England as possible.<sup>11</sup>

Long before the eighteenth century, First Nations Peoples in Australia had sophisticated and complex frameworks of law.<sup>12</sup> Their chthonic law encompassed all aspects of time (beyond linear time), place (beyond here and there), and the natural world (there is no other world), internal and external to the self.<sup>13</sup> First Nations law supported the maintenance of healthy communities by caring for Country.<sup>14</sup> By contrast, the novel colonial law encouraged the creation of wealthy economies by exploiting Country.<sup>15</sup>

To successfully create a wealth economy on a land where First Peoples were sovereign would require a crucial first step: Everything that was either already present or newly arrived on the continent would have to be systematically calculated, quantified, and rendered useful to the colonial project.<sup>16</sup>

The colonial project relies in great part on objectifying the Other<sup>17</sup> by diminishing them as inferior. For this, the colonists would have to ignore the legal sovereignty of First Peoples and render them

<sup>9</sup> *Merino Sheep Introduced*, NAT'L MUSEUM AUSTRALIA (Sept. 28, 2022), <https://perma.cc/58WZ-7GYG> (accessed Feb. 8, 2023); *Introduced Species to Australia*, CBHS YEAR 5 HIST., <https://perma.cc/AWS7-LNWB> (accessed Mar. 21, 2023).

<sup>10</sup> The terms "Indigenous," "First Nations," and "First Peoples" are used interchangeably according to context.

<sup>11</sup> Cf. Ken Gelder & Rachael Weaver, *The Transnational Kangaroo Hunt*, in *WORKING THE SOUTH: NINETEENTH CENTURY LITERARY CULTURE AND THE SOUTHERN SETTLER COLONIES 177, 177–81, 187–88* (Sarah Comyn & Porsche Fermanis eds., 2021) (describing settler domination over Kangaroos).

<sup>12</sup> *The Law and the Lore*, *WORKING WITH INDIGENOUS AUSTRALIANS* (June 2020), <https://perma.cc/DV7W-9QYA> (accessed Mar. 21, 2023).

<sup>13</sup> Maria Salvatrice Randazzo, *Chthonic Legal Traditions: A Standpoint Legal Research Paradigm for Comparative Analysis on Australian Indigenous Legal Orders*, 3 *DAYANA J. L. & CULTURE*, Jan. 31, 2019, at 1–2, 6, 14–17, 19.

<sup>14</sup> *Id.* at 17–20. "Country" can be loosely defined as all aspects of the land and environment, including everything and everyone within it, above it and beneath it, seen and unseen, known and unknown. It is known, understood, and shared through story, song, and ceremony. Law emerges from Country and is enacted through Country. Country is one's most fundamental Mother.

<sup>15</sup> Lara Dominguez & Colin Luoma, *Decolonizing Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment*, 9 *LAND* 1, 3–4 (2020).

<sup>16</sup> See Gelder & Weaver, *supra* note 11, at 188 (noting how early colonisers in Australia rendered Indigenous people as "useful" to the colonial project).

<sup>17</sup> The "Other" is an anthropological concept that arises typically when an anthropologist studies groups of which they are not a part. The concept of the Other is being reshaped in anthropology through the practice of reflexivity in social science research. However, it can be binary and exclusive, and was a colonial tool in the early days of the discipline. See generally JOHANNES FABIAN, *TIME AND THE OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT* 1–2 (2014) (arguing that othering is an anthropological and societal construct understood through temporal, historical, and political context).

‘savages.’<sup>18</sup> The colonists therefore had a duty to civilise the savages and assert dominion of the white European Christian over the ‘heathen’ residents of a wild and disobedient landscape that offended their religious sensibilities.<sup>19</sup> As one colonial judge remarked:

They (the Australian Aborigines) are the only savages in the world who cannot feel or ‘know that they are naked’; [sic] and we are taught in the scriptures that the eyes of man cannot be opened to what we call a civilised or artificial life, knowing good and evil, till he acquires a sense of shame.<sup>20</sup>

Why and how is this relevant to the Kangaroo? The Kangaroo is possibly the most powerful remaining demonstration that the colonial project has not yet been fully accomplished. She remains free and sovereign on this landscape and so is a threat when viewed through the colonial lens—from her propensity to travel along Dreaming tracks, through her sociology and kinship networks, to her mysterious biology, and the unique power and gentleness of her physical form. The Kangaroo does not respond to commands, and she cannot be controlled. Herein is a “field of struggle”<sup>21</sup> between chthonic law, which respects her, and colonial law, which claims to protect her but in fact condemns her.

This Article is a venture into unpacking the philosophical underpinnings of law with the understanding that laws are designed to benefit human life and uphold social values.<sup>22</sup> Colonial laws tend to bracket human existence as exceptional, so their laws may detrimentally impact other species whilst benefiting human life.<sup>23</sup> Chthonic law does not extricate human life from other lives or the environment on which all lives depend, so the laws themselves and their application contrast colonial law.<sup>24</sup>

This Article begins with a dive into First Nations law to learn about the ways in which chthonic law shapes the attitudes of First Peoples toward the world around them, including other species. Fol-

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<sup>18</sup> See *id.* at 26, 28 (stating that “the savage is *not yet* ready for civilization”) (emphasis in original).

<sup>19</sup> Jean Woolmington, *The Civilisation/Christianisation Debate and the Australian Aborigines*, 10 *ABORIGINAL HIST.* 90, 90–91 (1986) (explaining that Christian missionaries worked to “convert the heathen to Christianity and to introduce them to European civilization”).

<sup>20</sup> WILLIAM J LINES, *TAMING THE GREAT SOUTH LAND: A HISTORY OF THE CONQUEST OF NATURE IN AUSTRALIA* 27 (1991) (quoting New South Wales Chief Justice Barron Field).

<sup>21</sup> Haines & Macdonald, *supra* note 2, at 2–3.

<sup>22</sup> CJ Allsop of the Fed. Ct. of Austl., *Values in Law: How they Influence and Shape Rules and the Application of Law* (Oct. 20, 2016) (transcript available on the Federal Court of Australia Digital Law Library website).

<sup>23</sup> See, e.g., Ashleigh Best, *The Legal Status of Animals: A Source of Their Disaster Vulnerability*, 36 *AUSTL. J. EMERGENCY MGMT.* 63, 64 (2021) (discussing how “categorizing animals as property has extensive ramifications for their wellbeing and survival”).

<sup>24</sup> See GOLDSMITH, *supra* note 3, at xv, 14, 231–32, 302 (stating chthonic man recognises a hierarchical set of laws).

lowing the Introduction is a review of the ways in which colonial laws completely refashioned Australia. Upon arrival of the colonists, the first step to ridding the landscape of non-British humans and nonhumans was to expel First Peoples from their land and denounce First Animals as vermin.<sup>25</sup> A series of laws in Victoria facilitated this action.<sup>26</sup>

Next is an overview of the Kangaroo. Who is she, and what makes her such a robust symbol of Indigenous freedom? This Section scrutinises the European common law that still operates on Australian land to see how problematic the common law is when applied to the Kangaroo. The anthropological machine can sometimes be one of a lethal and bloody logic<sup>27</sup> when it functions on the perpetual differentiation of human and Other, white and Other, male and Other, and British and Other. For instance, when the Kangaroo is bounding through the landscape, she is totem,<sup>28</sup> kin of many; when she is standing in open grasslands, she is game;<sup>29</sup> when she is grazing on a farm, she is a pest;<sup>30</sup> when she is shot, she becomes a renewable resource to harvest.<sup>31</sup> Nothing has substantively changed since the early nineteenth century, when whatever stood in the way of agricultural enterprise, property acquisition, and wealth creation was cleared.<sup>32</sup> Therefore, the Kangaroo must either be commodified or killed. Victoria's current laws state she is protected, but different statutes converge to ensure those protections can never be fully actualised.<sup>33</sup>

This Article reviews the fields of struggle represented by the living tension of colonial law and chthonic law in Victoria and suggests genuine collaboration with First Nations and First Peoples to navigate this

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<sup>25</sup> See generally *Mallee Pastoral Leases Act 1883* (Vic) (Austl.) (declaring Kangaroos as vermin and explaining how land will be divided); cf. Woolmington, *supra* note 19, at 94 (finding that missionaries saw their shared responsibilities with the Aborigines as “one of the impediments that lie in the way of their becoming possessed of property”) (internal quotation marks omitted).

<sup>26</sup> *Mallee Pastoral Leases Act 1883* (Vic) (Austl.); *Sale of Crown Lands Act 1860* (Vic) (Austl.); *The Land Act 1869* (Vic) (Austl.).

<sup>27</sup> GIORGIO AGAMBEN, *THE OPEN: MAN AND ANIMAL* 33–38 (Werner Hamacher ed., Kevin Attell trans., 2004).

<sup>28</sup> *Interview with Indigenous Educator and Animal Activist Aunty Ro Mudyin Godwin*, ETHICAL EMILY (May 31, 2021), <https://perma.cc/4EDM-87GJ> (accessed Apr. 5, 2023) [hereinafter ETHICAL EMILY].

<sup>29</sup> *Meat Industry Act 1993* (Vic) s 3 (Austl.).

<sup>30</sup> *Kangaroo Control*, FARMER ASSIST, <https://farmerassist.com.au/pest-control/kangaroo-control/> (accessed Jan. 24, 2023).

<sup>31</sup> Rosie Cooney, *From Pests to Profits: Making Kangaroos Valuable to Farmers*, THE CONVERSATION (July 27, 2011, 4:43 PM), <https://perma.cc/UAV2-VZM4> (accessed Feb. 14, 2023).

<sup>32</sup> When one considers the continued struggle of the Australian environmental movement against the forces of corporate wealth creation, it becomes evident that nothing has substantively changed since the early nineteenth century. LIBBY CONNORS & DREW HUTTON, *HISTORY OF THE AUSTRALIAN ENVIRONMENT MOVEMENT* (United Kingdom: Cambridge University Press, 1999).

<sup>33</sup> See discussion *infra* Section VI (discussing the protections in place and the exceptions that allow Kangaroos to be killed lawfully).

fraught terrain. Victoria must reconsider the fundamentals of its legal structure if all the residents of this land—including the Kangaroo—are to survive.

## II. A Brief History of Law in Australia

### A. *First Nations Law*<sup>34</sup>

Despite colonial efforts, “Aboriginal law has run and continues to run across Aboriginal lands [and] remains the invisible mainstream law.”<sup>35</sup> First Nations law has been alive and well for millennia.<sup>36</sup> Whilst the dynamic nature of chthonic law meant that it varied between language groups, clans, and regions, its principles over time have been consistent; they are holistic, interdependent, and interrelational.<sup>37</sup>

Throughout the Australian continent, the governance of an aboriginal community is a system of personal and collective responsibility under the law.<sup>38</sup> Everyone of all ages participates in First Nations law through a dynamic process of oral transmission and a daily practice of enacting law on Country.<sup>39</sup> The law regulates human behaviour and relationships. Law connects people with one another and with Country through a system of unconditional love and responsibility.<sup>40</sup> This is layered with responsibilities specific to a particular clan’s Country, which carry consequences if not acted upon. These connections and responsibilities, as well as “the orality and communal nature” of chthonic law serve as “powerful inducements to consensus.”<sup>41</sup> Contravention of the law comes with penalties, like mandated sanctions for misdeeds.<sup>42</sup> No one is excluded.

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<sup>34</sup> Much of the content in this Section is from outside Victoria. In-depth descriptions of the principles of First Nations law were learned more easily from First Peoples outside Victoria.

<sup>35</sup> Irene Watson, *What Is the Mainstream? The Laws of First Nations Peoples in New Directions for Law in Australia: Essays in Contemporary Law Reform* 213, 217 (Ron Levy et. al eds., 2017).

<sup>36</sup> *Id.* at 215.

<sup>37</sup> AUSTL. L. REFORM COMM’N, RECOGNITION OF ABORIGINAL CUSTOMARY LAWS 62, 625, 641, 821 (1986); Randazzo, *supra* note 13, at 17–20.

<sup>38</sup> NAT’L HEALTH & MED. RSCH. COUNCIL, ETHICAL CONDUCT IN RESEARCH WITH ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES AND COMMUNITIES: GUIDELINES FOR RESEARCHERS AND STAKEHOLDERS 2, 7, 11 (2018).

<sup>39</sup> Massimo Amerena, *Something Before, That Still Remains: Experiential Treaty-Making on Kulin Country* 17 (Aug. 4, 2020) (M.S. thesis, Victoria University) (on file with the Victoria University research repository).

<sup>40</sup> *Tjilpi Bob Randall*, KANYINI, <https://perma.cc/QHL6-BYSD> (accessed Feb. 12, 2023); Anneloes Smitsman, *Indigenous Wisdom for a Whole Life*, UPLIFT, <https://perma.cc/QHL6-BYSD> (accessed Apr. 5, 2023).

<sup>41</sup> GLENN, *supra* note 3, at 62.

<sup>42</sup> The explanation of First Nations law changes from present tense to past tense depending on the topic being discussed. Some aspects of First Nations law, such as sanctions, are unable to be enacted because they conflict with colonial law, so they are spo-

First Peoples shared sovereignty over specific areas of land for different Tribes and language groups.<sup>43</sup> This reciprocity and accountability ensured the priority was on sustaining healthy communities; thus, protections for all species were built into First Nations laws.<sup>44</sup> Chthonic law is a complex and multi-layered concept that governs self, relationship to others, and Land.<sup>45</sup> Healthy First Communities are managed by maintaining the spirituality and sacredness of each person; for example, allowing children—who are born from Spirit—to grow in spiritually, emotionally, and mentally healthy environments and families.<sup>46</sup> The cultural fabric of the family, community, and society is designed to grow healthy human and spiritual beings, who consider all aspects of Country as sacred.<sup>47</sup> The basis of the human life in First Nations law is reciprocity and relationship: relationship to the self, relationship to other human beings, and relationship to Country.<sup>48</sup> One learns responsibility through story, song, dance, and ceremony as one grows up.<sup>49</sup>

One gradually passes through various initiations and develops the wisdom particular to their clan and Country. That wisdom is enacted in community moment by moment, day by day. “Granny law says that it is my responsibility now that the land has grown me up, that I care for my Country, care for my mother.”<sup>50</sup> Yankunytjatjara elder Tjilpi Uncle Bob Randall described this process by explaining the term *Kanyini*, which means unconditional love and responsibility.<sup>51</sup> *Kanyini*

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ken of in the past. The fundamentals of First Nations law that are still being enacted are spoken of in the continuing present. *Id.* at 68.

<sup>43</sup> *Australia’s First Peoples*, AIATSIS (Oct. 11, 2022), <https://aiatsis.gov.au/explore/australias-first-peoples> (accessed Apr. 5, 2023).

<sup>44</sup> JAMES DAWSON, AUSTRALIAN ABORIGINES: THE LANGUAGES AND CUSTOMS OF SEVERAL TRIBES OF ABORIGINES IN THE WESTERN DISTRICT OF VICTORIA 7 (1881).

<sup>45</sup> See Tjanara Goreng Goreng, *Tjukurpa Pulka The Road to Eldership: How Aboriginal Culture Creates Sacred and Visionary Leaders* 21, 23–24 (2018) (Ph.D. thesis, Australian National University) (on file with the Australian National University) (describing artwork and dreams that illustrate the complexities of chthonic law).

<sup>46</sup> *Id.* at 32, 36–37.

<sup>47</sup> *Id.* at 32, 37, 11, 125–128.

<sup>48</sup> *Reciprocity in Aboriginal Society Principles of Interconnectedness*, BACHELOR OF PSYCH., <https://perma.cc/G8H7-PZPH> (accessed Feb. 8, 2023); Irene Watson, *Aboriginal Relationships to the Natural World: Colonial ‘Protection’ of Human Rights and the Environment*, 9 J. HUM. RTS. & ENV’T 119, 119 (2018).

<sup>49</sup> *Law, Song, and a Meriam Moon Dance*, INDIGENOUS L. INST., <https://perma.cc/4337-5FF9> (accessed Feb. 8, 2023); *Storytelling in Aboriginal and Torres Strait Islander cultures*, QUEENSL. CURRICULUM & ASSESSMENT AUTH. INST., <https://perma.cc/JS4E-MPDB> (accessed Feb. 8, 2023).

<sup>50</sup> *The Land Owns Us*, GLOB. ONENESS PROJECT, at 3:39, <https://perma.cc/5MYS-HYPJ> (accessed Apr. 6, 2023).

<sup>51</sup> *Kanyini* is a word in the Pitjantjatjara language of Yankunytjatjara Nation explained by Tjilpi Bob Randall. *Tjilpi Bob Randall*, KANYINI, <https://kanyini.org/tjilpi-bob-randall/> (accessed Apr. 6, 2023); *Kanyini – Principles*, KANYINI, <https://perma.cc/P9AY-KDY4> (accessed Jan. 24, 2023).

emerged from the Dreaming<sup>52</sup> and contains codes of conduct based on four integrated pillars.<sup>53</sup> It begins with feet on Country: the place you belong, *Ngura*, Home.<sup>54</sup> Next is your family, kinship and connections.<sup>55</sup> This does not refer to a nuclear family like *migloo* (non-Indigenous), but instead to widespread cross-species connections.<sup>56</sup> It is *Walytjia*.<sup>57</sup> Next is the heart and spirit; *Kurunupa* is love and heart connection and is the basis for all action.<sup>58</sup> Listening to Country, caring for Country, in all the small nurturing ways; these all give rise to *Tjukurpa*, the fourth pillar.<sup>59</sup> This is utter faith in the Creator spirit and the stories of the Dreaming which have given us life principles.<sup>60</sup> *Tjukurpa* tells us the right way to live.<sup>61</sup>

The four pillars of *Ngura*, *Walytjia*, *Kurunupa*, and *Tjukurpa* become integrated as *Kanyini* in this way.<sup>62</sup> The first law, *Kurunupa*, is to respect the self, and is not separate from other pillars.<sup>63</sup> One cannot and does not extricate oneself from the Creator spirit, *Tjukurpa*, or from Country.<sup>64</sup> One is who they are *because* of the Creator spirit and Country. Disrespecting either of those would be a breach of the first law of self-respect.<sup>65</sup> The second law is to respect others, *Walytjia*, which is indicated through right relationship, reciprocity, and fulfilling

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<sup>52</sup> “Dreaming” is an English approximation of an Aboriginal concept. The Dreaming is the time before time, the place before place, where everything on Country is born from, and where everything on Country will return to. See VICKI GRIEVES, ABORIGINAL SPIRITUALITY, ABORIGINAL PHILOSOPHY: THE BASIS OF ABORIGINAL SOCIAL AND EMOTIONAL WELLBEING 8 (2009) (critiquing the English attempt to communicate the term); Jens Korff, *What is the Dreamtime or the Dreaming?*, CREATIVE SPIRITS (July 17, 2020), <https://perma.cc/UZ4Z-P6EX> (accessed Apr. 6, 2023) (explaining that “[t]he English language does not know an equivalent to express the complex Aboriginal spiritual concepts”).

<sup>53</sup> *Kanyini: The Four Dimensions of Aboriginal Life*, RESURGENCE & ECOLOGIST, <https://perma.cc/7W3U-497U> (accessed Feb. 9, 2023) [hereinafter RESURGENCE & ECOLOGIST].

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Anneloes Smitsman, *The Wisdom of Kanyini - Love with Responsibility*, EARTHWISE CTR. (Aug. 5, 2017), <https://perma.cc/4B67-KPYE> (accessed Feb. 10, 2023).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Tjanara Goreng Goreng, *Living in Shadows, Healing in the Law: An Aboriginal Experience of Recovery Using Psychotherapy and Aboriginal Spiritual Practice*, 10 PSYCHOTHERAPY & POL. INT’L 205, 207–08 (2012); see generally RESURGENCE & ECOLOGIST, *supra* note 53 (explaining that *Kurunupa* is a personal spirituality that you create for yourself by adhering to the beliefs and teachings that resonate with you).

<sup>64</sup> See generally *Tjukurpa*, AUSTRAL. GOV’T DEP’T CLIMATE CHANGE, ENERGY, ENV’T & WATER (Oct. 3, 2021), <https://www.dceew.gov.au/parks-heritage/national-parks/uluru-kata-tjuta-national-park/culture-and-history/tjukurpa> (accessed Feb. 13, 2023) (describing that *Tjukurpa* is the creation period in which the ancestors were created and providing answers to spiritual questions and rules for society).

<sup>65</sup> RESURGENCE & ECOLOGIST, *supra* note 53.



kinship responsibilities.<sup>66</sup> Finally, the third law is to respect Country, *Ngura*, which brings law into respect of the self and cannot be extricated from respect for Country.<sup>67</sup>

According to these laws, First Peoples have responsibility for the wellbeing and protection of First Animals through their totems, which connect with their birth and ancestral lineage.<sup>68</sup> Totems are not cursory—they are important ancestral relations.<sup>69</sup> Responsibility for a totem includes reciprocal care for that totem.<sup>70</sup> There exists a special communication, alliance, and kinship between them so that the totems “act as messengers for you throughout your life. You look after them, and they look after you.”<sup>71</sup>

There is a stringent restriction on the killing or eating of a totemic animal.<sup>72</sup> First Peoples, who have Kangaroo as their totem, would never harm her or eat her, as doing so is considered taboo.<sup>73</sup> Although hunting is still conducted as part of First Nations law, it is enacted in very particular ways and is not permitted in sacred places.<sup>74</sup> Hunting is not allowed in places on Country that “provide[] inviolable sanctuaries for Kangaroos, emus, and native animals of every kind.”<sup>75</sup>

Although chthonic First Nations law was alive, well, and fully operational, upon their arrival less than 250 years ago, the British declared that the laws of England were to apply immediately to all settled lands.<sup>76</sup> This occurred because the colonists held a grave misunderstanding of the First Nations. Unlike the new society, First Nations communities were comprised of many sovereigns.<sup>77</sup> To the British mind that may have expected the ‘man of the house’ to step forward, this meant that First Peoples had no laws,<sup>78</sup> particularly any

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<sup>66</sup> *Id.*; Fred R. Myers, *Emotions and the Self: A Theory of Personhood and Political Order Among Pintupi Aborigines*, 7 *ETHOS* 343, 351 (1979).

<sup>67</sup> RESURGENCE & ECOLOGIST, *supra* note 53.

<sup>68</sup> *Id.*

<sup>69</sup> *Cf.* Sherryn Groch, *What Do These Sacred Trees Tell Us About Aboriginal Heritage in Australia?*, SYDNEY MORNING HERALD (Oct. 31, 2020), <https://perma.cc/UBK6-LUTE> (accessed Jan. 24, 2023) (explaining how a child received their “directions tree”); Linda Mottram, *Djabwurrung Protestors Cleared Amid Fears for Sacred Trees in Victoria*, ABC NEWS (Oct. 26, 2020, 11:10 PM), <https://perma.cc/THQ9-ZML4> (accessed Jan. 24, 2023) (describing the spiritual value of the trees as “birthing trees”).

<sup>70</sup> Interview with Tjanara Goreng Goreng, Culturally Adopted Sister of Author, in Southern Grampians Cottages, Gariwerd (July 17, 2019).

<sup>71</sup> *Id.*

<sup>72</sup> Josef Haekel, *Totemism*, BRITANNICA, <https://perma.cc/UP2M-HREH> (accessed Apr. 6, 2023).

<sup>73</sup> *Id.*

<sup>74</sup> AUSTRALIAN L. REFORM COMM’N, *supra* note 37, at 883.

<sup>75</sup> *Id.*

<sup>76</sup> See J.M. BENNETT & ALEX C. CASTLES, *A SOURCE BOOK OF AUSTRALIAN LEGAL HISTORY* 247 (1979) (discussing treatment of land that was considered unoccupied).

<sup>77</sup> Rowan Nicholson, *Was the Colonisation of Australia an Invasion of Sovereign Territory?*, 20 MELB. J. INT’L L. 493, 493, 497 (2019).

<sup>78</sup> See Sidney Haring, *The Killing Time: A Legal History of Aboriginal Resistance in Colonial Australia*, 26 OTTAWA L. REV. 385, 409 (1994) (discussing the “absence of law” and the difficulty in applying common law to First Peoples in Australia).

relevant to land ownership. This belief took hold despite detailed diaries by colonists demonstrating they were aware of the intricate laws and deep knowledge held by First Peoples.<sup>79</sup> Following the logic of this misconception, any lands to which no one claimed *singular ownership* in the style of the British were overlaid with the laws of the colonial power.<sup>80</sup>

### B. Colonial Law

Colonisation is grounded in three endeavours, to command, to clear, and to control:<sup>81</sup> Commanding certain behaviours from society at large through suppressing other cultures, languages, and ways of being, often through force; clearing anything Indigenous that interferes with the colonial vision of the landscape and the actualisation of that vision; and controlling wealth and property by establishing courts and laws and ensuring social and political enforcement of those laws.<sup>82</sup>

The worldview that arrived on the shores of Australia was the pursuit of complete command and control over nature, through which all inconveniences would be cleared. After a period of poverty and disease in England,<sup>83</sup> and emboldened by the hope of industry and the promise of the machine,<sup>84</sup> this ‘new land’ offered an opportunity to unite and free the ‘civilised’ British human race from its past perils.<sup>85</sup> To actualise the colonial project would require the colonists to thoroughly overlay British customs, systems, laws, food, language, and animals upon all First Nations, First Peoples, and First Animals.

To successfully apply the colonial triad, the colonists constructed and perpetuated the myth of nonexistence through the legal claim of *terra nullius*.<sup>86</sup> This foundational lie, that Country was substantively uninhabited upon British arrival, remains the seed of Australian and

<sup>79</sup> *Id.* at 391, 398, 402.

<sup>80</sup> J.M. BENNETT & ALEX C. CASTLES, *supra* note 76, at 247–48.

<sup>81</sup> Sally Engle Merry, *Review: Law and Colonialism*, 25 L. & SOC’Y REV. 889, 890, 894–95 (1991).

<sup>82</sup> See DAMIEN SHORT, RECONCILIATION AND COLONIAL POWER: INDIGENOUS RIGHTS IN AUSTRALIA 31–32, 65–66 (2008) (noting the early European colonisers’ convictions that Natives had no legitimate claim to land precipitated their forceful conquest of native land and were used to justify the creation of a legal system built to control people and property).

<sup>83</sup> See generally STEVEN KING, POVERTY AND WELFARE IN ENGLAND (2000) (describing and analysing poverty and welfare systems from 1700 to 1850).

<sup>84</sup> See LINES, *supra* note 20, at 55 (commenting on the transformation in England caused by industrialisation between 1780–1840, leading many to claim the triumph of man by machine and emboldening the generation).

<sup>85</sup> See *id.* at 52 (noting that colonial authorities aimed to turn Australia’s resources “into a commodity appropriate to capitalist production,” and populate “an uninhabited country [with] ‘civilized inhabitants’”).

<sup>86</sup> See Daniel Lavery, *No Decorous Veil: The Continuing Reliance on an Enlarged Terra Nullius Notion in Mabo [No 2]*, 43 MELBOURNE UNIV. L. REV. 233, 240 (2019) (noting that European explorers of the time expanded the concept of *terra nullius*, or uninhabited territory that belonged to no one, to apply to inhabited lands as well, adding to their justification of appropriating those territories).

Victorian law today. There was a need to control this wild emptiness, and everything already within it was positioned as a risk. Accordingly, the adage “It may be empty. But it’s wicked, and it’ll kill you if it can” was a common colonist’s mindset.<sup>87</sup>

### C. Colonial Law in Practice

To expedite the colonial project, an Act of British parliament established a court system in Australia in 1823.<sup>88</sup> The court system was based exclusively on the English model of law.<sup>89</sup> English Law would later be expressly enforced through the *Australian Courts Act*.<sup>90</sup> In September 1836, the state of Victoria, then Port Phillip, was proclaimed open to settlement, and the ‘unoccupied’ land was auctioned off.<sup>91</sup> In 1860, the Victorian Government passed a crucial piece of legislation pertaining to land, known as the *Nicholson Act*,<sup>92</sup> which would make ‘empty’ land available to freehold settlement.<sup>93</sup> The purpose of the Act was to divide large leaseholds into smaller parcels to make land, like other commodities in a capitalist society, freely transferable.<sup>94</sup> The *Nicholson Act* resulted in the transfer of large amounts of common land into the hands of private owners.<sup>95</sup> Because of the debt borne from purchasing land, there was an urgent need for people to make the land productive to pay those costs.<sup>96</sup>

New landowners were also responsible for feeding the colony. Knowing nothing of the veritable supermarket in the landscape around them, they removed anything that restricted production and wealth, which entailed clearing huge areas of open forest,<sup>97</sup> ring-barking ancient trees, and trampling delicate ecosystems with increasing numbers of ruminants.<sup>98</sup> In Western Victoria, less than ten years of animal agriculture caused utter devastation to the Western Plains, which has never recovered.<sup>99</sup>

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<sup>87</sup> LINES, *supra* note 20, at 184.

<sup>88</sup> *New South Wales Act 1823* (NSW) (Austl.).

<sup>89</sup> *Id.*

<sup>90</sup> Barry York, *Australian Courts Act 1828*, MUSEUM AUSTRALIAN DEMOCRACY (July 24, 2018), <https://perma.cc/9MH6-LCVN> (accessed Apr. 6, 2023).

<sup>91</sup> G. H. KNIBBS, OFFICIAL YEAR BOOK OF THE COMMONWEALTH OF AUSTRALIA 236 (1911).

<sup>92</sup> *Nicholson Act 1860* (Vic) (Austl.).

<sup>93</sup> *Nicholson Act 1860* (Vic) s 11 (Austl.).

<sup>94</sup> *The Squattocracy*, STATE LIBR. VICT., <https://perma.cc/L72P-WCW3> (accessed Apr. 7, 2023).

<sup>95</sup> JOHN QUICK, *The History of Land Tenure in the Colony of Victoria* 142, 158, 184 (1883).

<sup>96</sup> *Id.* at 185.

<sup>97</sup> Open forests were crafted over millennia by First Nations People. See BILL GAMMAGE, *THE BIGGEST ESTATE ON EARTH: HOW ABORIGINES MADE AUSTRALIA* 41–68 (2012) (describing how First Peoples managed land).

<sup>98</sup> *Id.* at 41–68, 107–09.

<sup>99</sup> *Id.* at 41–68.

In 1869, the *Land Act*<sup>100</sup> and the *Pastoral Leases Act*<sup>101</sup> consolidated and amended previous land legislation. Certain parcels of land would now require compulsory fencing and productivity.<sup>102</sup> The Kangaroo proved disruptive, and her relentless bounding freedom did not fit with the colonists' vision of a sheepish English agricultural life. To resolve this issue, the *Mallee Pastoral Leases Act*<sup>103</sup> of 1883 defined vermin to include Kangaroos, wallabies, other marsupials, and dingoes.<sup>104</sup> For the first five decades of colonisation, there was no control over the destruction of First Animals.<sup>105</sup> That legacy is still felt today, as Kangaroos and Wallabies continue to grow more scarce.<sup>106</sup> Newcomers who claimed First Nations land as their own have been allies in warfare against these nomad rangers. Non-Indigenous landholders have considered that their fleeting economic interest demands the extermination of these long-standing inhabitants of the land. In all the States, the war of extermination is going on.<sup>107</sup>

On January 1, 1901, the *Commonwealth of Australia Constitution Act* came into force, with complete legislative independence from Britain finally accomplished by the *Australia Act* in 1986.<sup>108</sup> However, Victorian laws remained imbued with the colonist values of wealth creation and racial superiority.<sup>109</sup> At the time of writing, many hold those same attitudes: There is still a war going on against Kangaroos in Australia.<sup>110</sup>

### III. The Kangaroo

Tourists come from around the world to see the Kangaroo in her native habitat. The Kangaroo invites intrigue and stimulates wonder, with her delicate face and gentle arms contrasted with her powerful

<sup>100</sup> *The Land Act 1869* (Vic) (Austl.); *Nicholson Act 1860* (Vic) s 11 (Austl.).

<sup>101</sup> *The Pastoral Leases Act 1869* (Vic) s 1 (Austl.).

<sup>102</sup> *The Land Act 1869* (Vic) pt 2, s 1 (Austl.).

<sup>103</sup> *The Mallee Pastoral Leases Act 1883* (Vic) s 1 (Austl.).

<sup>104</sup> *The Mallee Pastoral Leases Act 1883* (Vic) s 2 (Austl.).

<sup>105</sup> See John Seebeck, *The Conservation of Mammals in Victoria Development of Legislative Controls*, 19 J. AUSTRAL. STUD. 53–65 (1995) (providing a legislative explanation of the demise of native animals in Australia).

<sup>106</sup> ARTHUR H. S. LUCAS ASSISTED BY WILLIAM H. D. LE SOUEF, *THE ANIMALS OF AUSTRALIA: MAMMALS, REPTILES AND AMPHIBIANS* 70–71 (1909).

<sup>107</sup> *Id.*

<sup>108</sup> *The Constitution*, PARLIAMENT OF AUSTRALIA, <https://perma.cc/TY2S-3YZE> (accessed Feb. 11, 2023); *Australia Act 1986* (Cth) (Austl.).

<sup>109</sup> *Timeline: 1900's, RACISMNOWAY*, <https://racismnoway.com.au/about-racism/timeline/1900s> (accessed Feb. 8, 2023). See also *Haeckel's Racist Evolutionary Theory*, FINE ART AM., <https://perma.cc/TVVD-KV4J> (accessed Feb. 8, 2023) (explaining that Ernst Haeckel, a German biologist, philosopher and artist who mapped a genealogical tree displaying all life forms, promoted the work of Charles Darwin but incorporated a sense of white, human, European, and male exceptionalism that was absent from Darwin's work).

<sup>110</sup> See Ian Royall, *Dunkeld kangaroos: Tourist Town Split Over Night-Time Culling*, HERALD SUN (Aug. 26, 2020), <https://perma.cc/KCG8-WULE> (accessed Feb. 11, 2023) (discussing the killing of Kangaroos in Western Australia).

legs and tail. At one moment, she will let her pouch fall open to play with her joey, groom him, and safely show him the world. At the next moment, she will pull her pouch shut and bound away through any terrain at great speeds, keeping her young safe from predators. She has the wisdom to travel along Dreaming tracks to keep Country healthy.<sup>111</sup> She is an ecosystem architect, a seed germinator, and her biology is finely attuned with the environment.<sup>112</sup>

The Kangaroo's existence is beyond commanding, clearing, or controlling. Yet this chthonic wisdom is beyond the colonial mind and poses an egoistic challenge to the coloniser.

We are, indeed, a civilising race. When we came here the aborigines covered these wide plains in thousands. Where are they to-day? We have civilised them—they are dead.<sup>113</sup>

The only way to remove obstacles to colonial actualisation is to make the natural appear perilous, and to position the colonist as the wholesome saviour.<sup>114</sup> The Kangaroo is a proud First Animal and does not easily yield to the colonial triad of commanding, clearing, and controlling. So, the colonist must find a way to get her out and keep her out. This is a critical part of the colonial project; it positions the colonist as the bringer of prosperity who turns useless landscapes into profitable enterprises or turns what is not wanted into 'renewable resources.'<sup>115</sup> In the case of the Kangaroo, this means valuing her body at seventy-five cents per kilogram.<sup>116</sup> Even today, anyone who tries to help the Kangaroo, protect her and her young, go to her aid, stop her from being shot, tangled in fences, hit by cars, or bludgeoned to death, is denounced for interfering with the colonial ideal of ridding the landscape of anything that interferes with economic growth.<sup>117</sup>

<sup>111</sup> See *Aboriginal Art – The Dreaming*, ARTYFACTORY, <https://perma.cc/LJD2-WHX7> (accessed Mar. 21, 2023) (defining the aboriginal term, the “Dreaming,” as “the mystical process of creation . . . that establish[ed] a moral order, a respect for nature and a reverence for the ancestral spirits”). See also *Aboriginal Art Symbols – Kangaroo Footprint*, ARTYFACTORY, <https://perma.cc/3MAD-HK8E> (accessed Mar. 21, 2023) (“Kangaroos often feature in traditional Aboriginal art as part of a hunting or ‘Dreaming’ story.”).

<sup>112</sup> AUSTL. WILDLIFE SHELTERS COAL., *INQUIRY INTO HEALTH AND WELLBEING OF KANGAROOS AND OTHER MACROPODS IN NEW SOUTH WALES 20–21* (2021).

<sup>113</sup> DONALD MACDONALD, *GUM BOUGHS AND WATTLE BLOOM, GATHERED ON AUSTRALIAN HILLS AND PLAINS* 41 (1887).

<sup>114</sup> AUSTL. WILDLIFE SHELTERS COAL., *supra* note 112, at 28. See also ROYAL ZOOLOGICAL SOC'Y OF N.S.W., *KANGAROOS AND MEN: THE AUSTRALIAN ZOOLOGIST* 61 (1970) (detailing a mid-twentieth century foray into a conference that attempts to understand the Kangaroo and consider Kangaroo welfare whilst prioritising the colonial agricultural endeavours).

<sup>115</sup> Catherine York & Rachael Bale, *Australians Hunt Kangaroos Commercially. Does It Make Sense?*, NAT'L. GEOGRAPHIC (Nov. 22, 2017, 15:46), <https://perma.cc/VA2N-8J3T> (accessed Feb. 8, 2023).

<sup>116</sup> Jane Cowan, *From Dusk to Dawn: A Night in the Life of a Roo Shooter*, ABC NEWS (July 3, 2018, 6:09 PM), <https://perma.cc/2F6R-BKWU> (accessed Feb. 8, 2023).

<sup>117</sup> Damien Cave, *U.S. Activists Try to Halt an Australian Way of Life: Killing Kangaroos*, NEW YORK TIMES (May 22, 2021), <https://perma.cc/M46V-ADSH> (accessed Mar. 21, 2023).

## IV. Nonhuman Animals and Victorian Law

Under common law, everything is classified under a tripartite system of persons, things, or actions.<sup>118</sup> Therefore, despite science and society arguing otherwise,<sup>119</sup> nonhuman animals are classified as things, property.<sup>120</sup> However, this property classification causes issues in the rights of the property owner. For example, if both a chair and a dog are property, and an owner has the right to destroy their property, then both could conceivably be taken apart and burned. This result is absurd.<sup>121</sup> Animal welfare laws try to address this problem,<sup>122</sup> but as long as nonhuman animals are considered property, animal welfare laws will never fully work.

The discipline and practice of law is society's attempt at a just and impartial authority, yet upon the most cursory examination, it is clearly shaped by specific interests.<sup>123</sup> Accordingly, law is employed best by those who have the capital to invest in their interests (which is often acquiring more capital) and to ensure that the law supports those ends. In the case of nonhuman animals, policymakers and legislators often work alongside institutions of power and capital, to ensure the notional observer remains satisfied about Australia's animal welfare standards, while the actual laws remain in the service of the least innocent ends.<sup>124</sup> Consequently, although the notion of animals as things is being substantively challenged,<sup>125</sup> it is unlikely that those

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<sup>118</sup> DEBORAH CAO, *ANIMAL LAW IN AUSTRALIA AND NEW ZEALAND* 64 (2015).

<sup>119</sup> See TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 348–49 (2d ed. 2004) (stating the notion that farmed animals being classified as legal property must be challenged); GARY L. FRANCIONE, *ANIMALS, PROPERTY, & THE LAW* 4 (1995) (stating that in a legal system in which animals are property, animal interests will never prevail even against trivial human interests); STEVEN M. WISE & JANE GOODALL, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* x–xi (2000) (stating that animals are no longer seen as mindless machines and that ethical concerns of human treatment of animals and their legal rights are surfacing everywhere in society); Geeta Shyam, *Is the Classification of Animals as Property Consistent with Modern Community Attitudes?*, 41 *UNIV. N.S.W. L. J.* 1418, 1420–23, 1425, 1430–32, 1435–41, 1443 (2018) (stating that the property status of at least some animals may not be consistent with contemporary attitudes).

<sup>120</sup> See SUE DONALDSON & WILL KYMLICKA, *ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS* 5 (2011) (explaining the source of animal welfare reform arises out of most cultures viewing animals as morally inferior to humans); DEBORAH CAO, *supra* note 118, at 66, 70 (describing Roman and Judeo-Christian roots of viewing animals as property within the law); PIERS BEIRNE, *MURDERING ANIMALS: WRITINGS ON THERIOCIDICIDE, HOMICIDE AND NONSPECIESIST CRIMINOLOGY* 3 (2018) (describing the human tendency to exclude animals from our moral community and instead position them as property).

<sup>121</sup> Alexandra Horowitz, *When it Comes to Dogs, We Shouldn't Call Ourselves 'Owners'*, *GLOBE & MAIL* (Sept. 8, 2019), <https://perma.cc/W9ZP-U6VJ> (accessed Mar. 21, 2023).

<sup>122</sup> See DONALDSON & KYMLICKA, *supra* note 120, at 3.

<sup>123</sup> Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L. J.* 814, 814, 821–22, 847, 850 (1987).

<sup>124</sup> *Id.* at 850.

<sup>125</sup> DONALDSON & KYMLICKA, *supra* note 120, at 14–16.

who have financial interests in exploiting animals will easily permit that to be changed in law. Australia's contemporary laws perpetuate the issues stemming from the classification of nonhuman animals as property.<sup>126</sup> The property status of animals remains anchored in various pieces of federal and state/territory legislation. Animals are considered "products" and "goods" under the *Competition and Consumer Act*,<sup>127</sup> and wild animals are considered "property" under the *Crimes Act*.<sup>128</sup>

In the early days of colonial law, there were some attempts to protect animals including the passage of the first animal welfare legislation in Tasmania in 1837.<sup>129</sup> *An Act for the Better Prevention of Cruelty to Animals 1837* endeavoured to protect introduced animals, including cows and horses, from cruel and improper treatment.<sup>130</sup> This Act was significant because, for the first time, animal welfare was placed within the paradigm of criminal law.<sup>131</sup> However, it did nothing for First Animals, which at least one colonist was cognisant of:

Short-sighted indeed are the Anglo-Australians, or they would long ere this have made laws for the preservation of their highly singular, and in many instances noble, indigenous animals; and doubly short-sighted are they for wishing to introduce into Australia the production of other climes . . . Let me then urge them to bestir themselves, ere it be too late, to establish laws for the preservation of the large Kangaroos, the Emeu, and other conspicuous indigenous animals: without some such protection, the remnant that is left will soon disappear, to be followed by unavailing regret for their apathy with which they had been previously regarded.<sup>132</sup>

Due to its isolated geography, Australia's native species are among the most unique in the world,<sup>133</sup> yet Australia leads the world in mammal extinctions.<sup>134</sup> Whilst global wildlife populations fell by 68% between 1970 and 2016, some Australian populations "plummeted by up to 97%."<sup>135</sup> The key forces of species loss and consequent biodiversity loss are habitat loss, introduced species, hunting, pollution,

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<sup>126</sup> SARAH MADDISON, *BEYOND WHITE GUILT: THE REAL CHALLENGE FOR BLACK-WHITE RELATIONS IN AUSTRALIA* (2011).

<sup>127</sup> *Competition and Consumer Act 2010* (Cth) ss 2C(3)c, 4(1)c (Austl.).

<sup>128</sup> *Crimes Act 1958* (Vic) pt I div 3(1)(196)(1) (Austl.).

<sup>129</sup> *An Act for the Better Prevention of Cruelty to Animals 1837* (Tas) (Austl.).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> JOHN GOULD, *KANGAROOS* 16 (1973).

<sup>133</sup> John C.Z. Woinarski et al., *Ongoing Unraveling of a Continental Fauna: Decline and Extinction of Australian Mammals Since European Settlement*, 112 *PROC. OF NAT'L ACAD. SCI.* 4531, 4538 (2015).

<sup>134</sup> ENV'T & COMMC'N REFERENCES COMM., *AUSTRALIA'S FAUNAL EXTINCTION CRISIS* 19 (2019).

<sup>135</sup> *World Wildlife Populations Fall 68%, Australia Contributes to Decline*, WORLD WILDLIFE FUND AUSTR. (Sept. 10, 2020), <https://www.wwf.org.au/news/news/2020/world-wildlife-populations-fall-68-australia-contributes-to-decline> (accessed Feb. 10, 2023).

and climate change associated with global warming.<sup>136</sup> The Kangaroo is vulnerable to the first three forces in particular: the clearing of open forests, which are her terrain, for the sake of urban sprawl or agriculture; unsustainable animal farming, where she is kept out or tangled up in fences; and the wildlife trade, where she is shot as a pest or for commercial gain, and her skin sold in the international market.<sup>137</sup> As the Australian Wildlife Shelters Coalition notes,

Australia's woeful record in relation to the protection of its environment and wildlife is a direct consequence of governments at all levels in Australia prioritising economic interests and in particular the sectional economic interests of the powerful agricultural sector over effective legal protections for native species and ecosystems and the long-term interests of the broader Australian community.<sup>138</sup>

As the people of Victoria become more involved in debate and dialogue about climate change, animal welfare, and First Nations culture, the more the laws that compromise them are coming under scrutiny.<sup>139</sup>

#### A. Contemporary Victorian Laws and the Kangaroo

Victorian acts begin with a purpose and definitions. The purpose and definitions frame the content of the act, and the contents should not contradict the purpose.<sup>140</sup> However, due to definitions, licensing, and exclusions built into statutes—particularly those affecting nonhuman animals—the contents often do contravene the statutes' stated purpose.<sup>141</sup> Consider, for example, the *Prevention of Cruelty to Animal Act*.<sup>142</sup> The purpose of the statute is to “(a) prevent cruelty to animals; and (b) to encourage the considerate treatment of animals; and (c) to

<sup>136</sup> Tessa Mazor et al., *Global Mismatch of Policy and Research on Drivers of Biodiversity Loss*, 2 NATURE ECOLOGY & EVOLUTION 1071, 1071 (2018).

<sup>137</sup> Candice Marshall, *Landlocked: Kangaroos Trapped by Urban Sprawl Have Nowhere Left to Go*, AUSTRAL. GEOGRAPHIC (Mar. 25, 2022), <https://perma.cc/QMK2-RJLN> (accessed Feb. 10, 2023); Karen Lapizco, *Breaking! The EU is the Largest Market for Kangaroo Meat and Skins; Citizens Are Now Calling For A Ban On Imports*, WORLD ANIMAL NEWS (Nov. 27, 2019), <https://perma.cc/XN72-SBDN> (accessed Feb. 10, 2023).

<sup>138</sup> AUSTRAL. WILDLIFE SHELTERS COAL., *supra* note 112, at 7.

<sup>139</sup> See Rochelle Morton & Alexandra L. Whittaker, *Understanding Subordinate Animal Welfare Legislation in Australia: Assembling the Regulations and Codes of Practice*, 12 ANIMALS 1, 3, 12 (2022) (discussing the scrutiny of subordinate animal welfare legislation across Australia's states and territories and how this legislation fails to adhere to consistent frameworks for animal welfare legislation); Aleisha Orr, *'Disproportionate' Punishments, 'Unacceptable' Conditions: Australia's Human Rights Record Under Scrutiny*, SBS NEWS (Jan. 12, 2023, 3:07 PM), <https://perma.cc/WYE3-3C2U> (accessed Mar. 31, 2023) (reporting on Australian laws that are criticised for disproportionately targeting and penalising climate activists and the deaths of Indigenous people while under police custody, among other social issues).

<sup>140</sup> VICT. L. REFORM COMM'N, PLAIN ENGLISH AND THE LAW 92 (1987); OFF. PARLIAMENTARY COUNS., OPC DRAFTING MANUAL 5, 11 (3.2 ed. 2019).

<sup>141</sup> See *Prevention of Cruelty to Animals Act 1986* (Vic) pt 1 ss 6–7 (Austl.) (listing a number of exceptions to the Act that allow for a variety of ways animals can still be harmed).

<sup>142</sup> *Prevention of Cruelty to Animal Act 1986* (Vic) (Austl.).



improve the level of community awareness about the prevention of cruelty to animals.”<sup>143</sup> The Kangaroo is an animal, and one would presume she is protected under this law. However, exemptions ensure she is not.<sup>144</sup> Note the bullet points and further discussion below—four key Victorian statutes affect the Kangaroo, and all fail to protect her.<sup>145</sup> Any protections afforded to her are easily removed through exemptions:

1. *Prevention of Cruelty to Animals Act*:<sup>146</sup> The exemptions<sup>147</sup> to the protections afforded by the Act ensure the Kangaroo is exempt from anti-cruelty laws.
2. *Wildlife Act*:<sup>148</sup> As a free roaming First Animal, the Kangaroo is covered by the Act, but Section 28 allows one to obtain a license to destroy her.<sup>149</sup>
3. *Catchment and Land Protection Act*:<sup>150</sup> If the Kangaroo is seen to interfere with colonial farming enterprises, she may fulfil the definition of an “established pest animal” in Part 8 of the Act and be destroyed.<sup>151</sup>
4. *Meat Industry Act*:<sup>152</sup> Part 1 designates Kangaroo, along with rabbits, hares, pigs, and goats (and potentially any other animal) as “game,” for which one may easily obtain a license to kill.<sup>153</sup>

In the *Wildlife Act*, the Kangaroo is protected as native wildlife;<sup>154</sup> however, in the *Catchment and Land Protection Act*, she can be classified as a pest.<sup>155</sup> Victorian laws are there to protect her, but in fact

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<sup>143</sup> *Prevention of Cruelty to Animal Act 1986* (Vic) pt 1 s 1 (Austl.).

<sup>144</sup> *Prevention of Cruelty to Animal Act 1986* (Vic) pt 1 s 6(1)(a) (Austl.); Morton & Whittaker, *supra* note 139, at 3, 12. *See also Meat Industry Act 1993* (Vic) pt 1 s 3 (Austl.) (classifying the Kangaroo as game and a consumable animal, and therefore subject to meat production for human consumption standards and regulations).

<sup>145</sup> *See infra*, Kangaroos and the Law diagram.

<sup>146</sup> *Prevention of Cruelty to Animals Act 1986* (Vic) (Austl.).

<sup>147</sup> *Prevention of Cruelty to Animals Act 1986* (Vic) pt 1 ss 6(1)(a), pt 1 ss 6(1)(d), pt 1 ss 6(1)(1B), pt 2 s 9(1)(j) (Austl.).

<sup>148</sup> *Wildlife Act 1975* (Vic) (Austl.).

<sup>149</sup> *Wildlife Act 1975* (Vic) pt IIIA ss 28A(1)(a), pt IIIA ss 28A(1AB)(a), pt IIIA ss 28A(1A) (Austl.).

<sup>150</sup> *Catchment and Land Protection Act 1993* (Vic) (Austl.).

<sup>151</sup> *Catchment and Land Protection Act 1993* (Vic) pt 8 s 67 (Austl.).

<sup>152</sup> *Meat Industry Act 1993* (Vic) (Austl.).

<sup>153</sup> *Meat Industry Act* (Vic) pt 1 s 3 (Austl.); *Wildlife Act 1975* (Vic) pt III s 22A(1) (Austl.).

<sup>154</sup> *See Wildlife Act 1975* (Vic) pt 1 s 3 (Austl.) (defining all indigenous, nonhuman species as “wildlife” for purposes of the Act). At the time of writing, the *POCTA* and the *Wildlife Act* were both in the process of being reformed. *Reforming Victoria’s Animal Care and Protection Laws*, AGRIC. VICT. (Feb. 1, 2023), <https://agriculture.vic.gov.au/livestock-and-animals/animal-welfare-victoria/reforming-victorias-animal-care-and-protection-laws> (accessed Feb. 7, 2023); *The Independent Review of Victoria’s Wildlife Act 1975*, ENGAGE VICT., <https://engage.vic.gov.au/independent-review-victorias-wildlife-act-1975> (accessed Feb. 7, 2023).

<sup>155</sup> *See Catchment and Land Protection Act 1993* (Vic) pt 8 s 58, pt 8 s 67 (Austl.) (granting the Minister authority to recommend any animal be classed as an “estab-

expose her to exploitative programs, like the Authority to Control Wildlife (ATCW)<sup>156</sup> licensing regime in Victoria and the Kangaroo H Management Program (KHMP).<sup>157</sup> These two programs create an explicit framework that normalises the Kangaroo’s slaughter through regimes of permission. No one can hunt, take, or destroy any wildlife;<sup>158</sup> that is, unless a person has a license to do so.<sup>159</sup>

The Office of the Conservation Regulator, through the Department of Environment, Energy and Climate Action (DEECA), issues ATCW licenses under the *Wildlife Act* for the ‘control’ of wildlife.<sup>160</sup> Any person wishing to control wildlife—including Kangaroos—on their property through any means—including killing—is required to apply for an ATCW license.<sup>161</sup> It takes approximately three minutes to find, complete, and submit the ATCW form. Although DEECA claims to advocate for the non-lethal management of Kangaroos,<sup>162</sup> the only requirement to demonstrate that all non-lethal options have been exhausted is a brief description of past and current attempts.<sup>163</sup> Thus, lethal methods are frequently used by farmers to control Kangaroos who pass through or graze on their property.<sup>164</sup> The only problem is what to do with the carcasses.

Landholders may have seen this dilemma as an economic opportunity. Subsequently, in 2014 the government established the Kangaroo Pet Food Trial (KPFT) which operated until 2018.<sup>165</sup> The KPFT al-

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lished pest animal” if they believe the animal meets certain conditions). *See also* A. E. Newsome, *The Ecology of Red Kangaroos*, 16 AUSTL. ZOOLOGIST 32, 46 (1971) (describing Kangaroos as pests competing with grazing livestock for limited vegetation).

<sup>156</sup> *Wildlife Act 1975* (Vic) pt IIIA s 28A(1)(a) (Austl.) (allowing the Secretary to “give written authorisation to a person to . . . hunt, take or destroy wildlife.”).

<sup>157</sup> *See Wildlife Management and Control Authorisations, Game Hunting*, VICT. STATE GOV’T, <https://www.vic.gov.au/wildlife-management-and-control-authorisations> (accessed Feb. 17, 2023) (explaining program that permits the take of Kangaroos.). Above, the letter “H” is used in place of the term “Harvest,” which is a misleading name for an initiative to kill indigenous wildlife. The harms of this program are grossly minimised through the deceptive use of language.

<sup>158</sup> *Wildlife Act 1975* (Vic) pt VII s 43(1) (Austl.).

<sup>159</sup> *Id.*

<sup>160</sup> *Wildlife Act 1975* (Vic) pt VII s 43(2)(a) (Austl.); *Wildlife Management and Control Authorisations*, VICT. STATE GOV’T, <https://www.vic.gov.au/wildlife-management-and-control-authorisations> (accessed Feb. 17, 2023); *Wildlife Management Methods: Kangaroos and Wallabies*, VICT. STATE GOV’T, <https://www.vic.gov.au/wildlife-management-and-control-authorisations> (accessed Feb. 17, 2023).

<sup>161</sup> *Wildlife Act 1975* (Vic) pt IIIA s 28A(1), pt IIIA s 28A(4) (Austl.); *Wildlife Management and Control Authorisations*, *supra* note 160.

<sup>162</sup> *Kangaroos*, VICT. STATE GOV’T (Mar. 31, 2022), <https://perma.cc/T6C5-TKK3> (accessed Feb. 11, 2023).

<sup>163</sup> CONSERVATION REGUL. VICT., APPLICATION FOR AN AUTHORITY TO CONTROL WILDLIFE 3–4 (2020).

<sup>164</sup> *See Wildlife Management Methods: Kangaroos and Wallabies*, *supra* note 160 (explaining common Kangaroo management methods utilised by farmers to control macropods, including Kangaroos).

<sup>165</sup> VICT. STATE GOV’T, KANGAROO PET FOOD TRIAL EVALUATION REPORT 2, 4–5 (2019).

lowed landholders to send Kangaroo carcasses to slaughterhouses for processing into pet food.<sup>166</sup>

KPFT was administered through the Department of Jobs, Precincts and Regions (DJPR).<sup>167</sup> In 2019, the government's own executive report into the trial recommended against continuing the program, acknowledging that it incentivised people to kill Kangaroos.<sup>168</sup> However, instead of acting on its own assessment and ending the KPFT, the government established a permanent program, renaming it the "Victorian Kangaroo Harvest Management Plan" (KHMP).<sup>169</sup> In January 2021, the government exposed Kangaroos to even more harms by expanding the KHMP to allow for them to be killed for human consumption as well.<sup>170</sup>

The government has manufactured many justifications for the destruction of the Kangaroo. One is the assertion that Kangaroos increased by 40% between 2018 and 2020 and are "over-populated."<sup>171</sup> Notwithstanding the Kangaroos who perished in the Victorian bushfires of 2019–2020,<sup>172</sup> this assumption is preposterous and biologically unfeasible for the Kangaroo.<sup>173</sup> Scrutiny for these reasons is justified<sup>174</sup> particularly considering that DJPR and DELWP<sup>175</sup> both sit under the authority of the Minister for Agriculture, whose job it is to ensure nothing stands in the way of the growth of the colonial farming industries.<sup>176</sup>

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<sup>166</sup> *Id.* at 2.

<sup>167</sup> *Kangaroo Management Plan to be Developed for Victoria*, PREMIER OF VICTORIA (Mar. 28, 2019), <https://perma.cc/R242-H4JL> (accessed Feb. 27, 2023).

<sup>168</sup> VICT. STATE GOV'T, KANGAROO PET FOOD TRIAL EVALUATION REPORT 5 (2018).

<sup>169</sup> VICT. STATE GOV'T, WATER AND PLANNING: KANGAROO HARVEST MANAGEMENT PLAN 32 (2021).

<sup>170</sup> *Paddock to Plate Option on the Table for Kangaroo Harvest*, PREMIER OF VICT., (Jan. 28, 2021), <https://perma.cc/3EP7-RRB6> (accessed Feb. 7, 2023).

<sup>171</sup> *Id.* Where the premise of "over-populated" comes from and who is the final arbiter of that notion remains a mystery.

<sup>172</sup> Reuters Staff, *About Three Billion Animals Harmed in Australian Bushfires, WWF Says*, REUTERS (July 20, 2020, 2:28 AM), <https://perma.cc/YJ2X-HS5T> (accessed Feb. 20, 2023).

<sup>173</sup> David Brooks, *The Number Game: Counting Kangaroos*, 11 ANIMAL STUD. J. 1, 26–28 (2022).

<sup>174</sup> Ondine Sherman, *Kangaroos: Pest or Precious?*, VOICELESS: ANIMAL PROT. INST., <https://voiceless.org.au/kangaroos-pest-or-precious/iceless> (accessed Feb. 14, 2023).

<sup>175</sup> At the time of writing, the DELWP (Department of Environment, Land, Water and Planning) was still an authority. DEECA (Department of Energy, Environment and Climate Action) is DELWP's functional equivalent.

<sup>176</sup> See *Who We Are*, DEP'T AGRIC., FISHERIES, & FORESTRY (June 27, 2022), <https://www.agriculture.gov.au/about/who-we-are#:~:text=senator%20the%20Hon%20Murray%20Watt,Read%20about%20our%20minister.> (accessed Mar. 22, 2023) (stating the Minister for Agriculture, Fisheries, and Forestry works to enhance the Australian agriculture industry, create new agricultural export opportunities, and manage biosecurity risks to Australia in order to "protect [Australia's] multi-billion dollar agricultural industries").

The Kangaroo is sacrificed to make way for the breeding and killing of vast numbers of sheep and cows,<sup>177</sup> to bring jobs and growth.<sup>178</sup> Animal farming is one of the greatest contributors to environmental degradation and ecosystem decline in Australia.<sup>179</sup> Unlike introduced animals,<sup>180</sup> Kangaroos are critical to healthy ecosystems.<sup>181</sup> Kangaroos bound on soft feet and long claws that assist in the germination of native grasses.<sup>182</sup> They graze the tops off the grasses so that they replenish, in contrast to introduced ruminants who rip grasses out by their roots.<sup>183</sup> They are so in harmony with the environment that they stop reproducing when the food supply is inadequate, with the males decreasing sperm production.<sup>184</sup> In addition to natural population controls, Kangaroos are subject to human hunting.<sup>185</sup>

### B. *First Nations and the Kangaroo*

Kangaroos are of cultural, social, and spiritual significance to Aboriginal people, “playing a significant role in maintaining . . . Song Lines [which are] centres of energy upon which culture and all humanity is dependent for sustaining its balance and centredness.”<sup>186</sup> However, within the colonial system, First Peoples have little involvement in government decisions about Kangaroos and the ways in which colonial laws impact them.<sup>187</sup> The exclusion of Aboriginal people from decisions concerning Australia’s wildlife, including Kangaroos, runs counter to demonstrating genuine respect for sovereign First Nations. First Peoples proudly hold traditional knowledge about Kangaroos, among other native animals, and the Australian land, which could con-

<sup>177</sup> The word “cattle” comes from “chattel,” meaning property, so it is not used in this Article. Content Team, *Chattel*, LEGAL DICTIONARY (Jan. 10, 2017), <https://perma.cc/QNH7-P5WZ> (accessed Feb. 14, 2023).

<sup>178</sup> Lorraine Murray, *The Australian Kangaroo Kill—That Is, “Cull,”* ENCYCLOPEDIA BRITANNICA, <https://perma.cc/94EY-MVJC> (accessed Feb. 14, 2023).

<sup>179</sup> Greg McFarlane, *Animal Agriculture is Key Driver of Ecosystem Decline, Government Told*, VEGAN AUSTRALIA, <https://perma.cc/3W7F-SP3W> (accessed Feb. 14, 2023).

<sup>180</sup> See *Introduced Species*, ULU?U-KATA TJU?A NAT’L PARK, <https://www.dcceew.gov.au/sites/default/files/documents/uktnp-a4factsheet-introducedspecies-small.pdf> (accessed Feb. 20, 2023) (“Introduced animals are species that have arrived from different countries or regions and established wild populations, often causing many problems in their new environment.”).

<sup>181</sup> *Kangaroos as Ecosystem Engineers*, INT’L KANGAROO PROT. ALL., <https://perma.cc/D3SE-L6GC> (accessed Feb. 15, 2023).

<sup>182</sup> Aunty Ro Mudyin Godwin, *Welcome by Aunty Ro Mudyin Godwin*, KANGAROO RANGERS, <https://perma.cc/JYS5-MBBX> (accessed Jan. 28, 2023).

<sup>183</sup> *Kangaroos*, HEDRICK’S ‘AROUND THE WORLD IN ONE DISPLAY,’ <https://perma.cc/HF4D-R9NL> (accessed Feb. 20, 2023).

<sup>184</sup> *Macropod*, TRISHANS OZ, <https://perma.cc/S96F-XKE6> (accessed Feb. 11, 2023).

<sup>185</sup> Catherine York & Rachael Bale, *Australians Hunt Kangaroos Commercially. Does it Make Sense?*, NAT’L GEOGRAPHIC (Nov. 21, 2017 3:46 PM), <https://perma.cc/Z6JN-QT8W> (accessed Feb. 7, 2023).

<sup>186</sup> ETHICAL EMILY, *supra* note 28.

<sup>187</sup> *Indigenous Perspectives*, THINK TANK KANGAROOS, <https://perma.cc/6HK4-GYNM> (accessed Mar. 22, 2023).

tribute to assessing and regenerating Country.<sup>188</sup> However, rather than genuine collaboration, the colonial project often usurps First Peoples by inviting them to participate in industries like colonial forms of hunting,<sup>189</sup> which risks refiguring their relationship with Country.

The ways in which Kangaroos are licensed to be killed by the government, and the disrespect shown to the Kangaroo, are of particular concern for First Peoples.<sup>190</sup> This was the motivation to establish the Australian Alliance for Native Animal Survival (AAFNAS) in 2010.<sup>191</sup> A First Nations elder<sup>192</sup> and expert advisor to the alliance is concerned that the government sanctioned mass killing of Kangaroos is damaging Dreaming tracks across the entire continent.<sup>193</sup> Thus, one of the aims of the alliance is to restore the Dreaming tracks upon which Kangaroos have always travelled.<sup>194</sup>

## V. Navigating Fields of Struggle

There are multiple laws actively in place on this continent, and there are fields of struggle between them. Colonial law has great power through its ability to usurp, commodify, command, control, and clear anything that gets in the way of economic growth. Everything and everyone can be given a price, and that price can be used to trade everything.

In the colonised land of Australia, all First Lives “are being harvested for assimilation by the colonial beast—the muldarbi. The states call it development and progress,” but it is more akin to a genocide.<sup>195</sup> On the other hand, there are the powers of ancestry and story in contemporary First Nations laws which are chthonic and can be traced back to the Dreaming which is “the beginning from which all other

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<sup>188</sup> *Id.*

<sup>189</sup> DANA THOMSEN & JOCELYN DAVIES, PEOPLE AND THE KANGAROO HARVEST IN THE SOUTH AUSTRALIAN RANGELANDS 7 (2007), <https://agrifutures.com.au/wp-content/uploads/publications/07-039.pdf> (accessed Feb. 10, 2023)

<sup>190</sup> See *Indigenous Perspectives*, *supra* note 187 (“Although Aboriginal people kill and eat kangaroos as part of their traditional diet, there are strict cultural protocols about how these practices are carried out. Traditional practices conflict with those used in the commercial industry.”).

<sup>191</sup> *Formation of the Australian Alliance for Native Animal Survival (AAFNAS)*, TASMANIAN TIMES (May 8, 2010), <https://perma.cc/M49F-2YS6> (accessed Feb. 8, 2023).

<sup>192</sup> Keely Boom, *Food Fight - Aboriginal Elders Take on the Kangaroo Industry*, THE CONVERSATION (Sept. 7, 2011), <https://perma.cc/L8EM-F342> (accessed Feb. 6, 2023); *First Nations First*, GREEN MUSIC AUSTL., <https://perma.cc/J6CM-8T7Y> (accessed Feb. 13, 2023); Peter McConchie, *Bushfire Healing Australia*, AMRITA AUSTL., <https://amritaaustralia.org.au/bushfire-healing-australia/> (accessed Feb. 13, 2023).

<sup>193</sup> *Indigenous Perspectives*, *supra* note 187.

<sup>194</sup> *Id.*

<sup>195</sup> Irene Watson, *First Nations, Indigenous Peoples: Our Laws Have Always Been Here*, in INDIGENOUS PEOPLES AS SUBJECTS OF INT’L L. 96 (Irene Watson ed., 2018) (internal quotation marks omitted). In Tanganeakald language, *muldarbi* means demon spirit or, in this context, the project of colonialism. IRENE M. WATSON, RAW LAW: THE COMING OF THE MULDARBI & THE PATH TO ITS DEMISE 3 (1999).

beginnings emerge.”<sup>196</sup> Through a connection with the Dreaming, First Nations law holds the power to know and to understand the whole, and the parts of the whole, keeping Country and all communities within Country, healthy.<sup>197</sup>

First Nations law is reciprocal, relational, and transgenerational; economic activities were not for personal profit or economic gain.<sup>198</sup> When First Peoples gave things away, it was not because they did not value property that they owned, but because “they placed a higher value on fulfilling kinship obligations,” which reinforced social bonds.<sup>199</sup>

The colonial project and chthonic law are at odds because each is grounded in a fundamentally different world view; one in short-term economic growth and the other in long-term healthy communities.<sup>200</sup> Colonial law does not have the benefit of long-term analysis.<sup>201</sup> First Nations law, by contrast, has proven its ability to maintain, sustain, and retain healthy communities through the law of reciprocity and looking after spirit, kin, and Country.<sup>202</sup>

What might it look like if First Peoples were invited as equals to the table to help resolve this dilemma? What if First Nations genuinely participate, and no one is shut out? Victoria’s current laws are already deeply embedded in the colonial worldview.<sup>203</sup> Unless there is a decision by the government to do differently now, coloniality will simply reshape itself into another assimilationist framework. A solution may be for the Victorian government to collaborate with First Peoples at every step of the decision making and dialogue process to genuinely work out ways of caring for Country by caring for everyone in the most essential ways, without exception. Alternatively, advancing laws without authentically seeking collaborative governance with First Peoples risks epistemicide.<sup>204</sup> To continue the current “economic

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<sup>196</sup> Ambellin Kwaymullina, *Aboriginal Nations, the Australian Nation-State and Indigenous International Legal Tradition*, in *INDIGENOUS PEOPLES AS SUBJECTS OF INT’L L.* 6 (Irene Watson ed., 2018).

<sup>197</sup> *Id.* at 7–9.

<sup>198</sup> Watson, *supra* note 195, at 99–104.

<sup>199</sup> RICHARD BROOME, *ABORIGINAL AUSTRALIANS* 16–17 (2d ed. 1982).

<sup>200</sup> Alex Putzer et al., *The Rights of Nature as a Bridge between Land-Ownership Regimes: The Potential of Institutionalized Interplay in Post-Colonial Societies*, 11 *TRANSNAT’L ENV’T L.* 501, 503 (2022) (describing how colonial society experiences conflict due to frequent land grabs, motivated by economic growth).

<sup>201</sup> *1822 to 1842 - The First Legislature*, PARLIAMENT NSW, <https://perma.cc/4DWQ-TYD7> (accessed Feb. 15, 2023) (noting that British colonisers passed the first legislative Act in New South Wales in 1823).

<sup>202</sup> BROOME, *supra* note 199, at 16.

<sup>203</sup> ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 111 (2007).

<sup>204</sup> BOAVENTURA DE SOUSA SANTOS, *EPISTEMOLOGIES OF THE SOUTH: JUSTICE AGAINST EPISTEMICIDE* 92 (2014); Patrick D Nunn & Nicholas J Reid, *Aboriginal Memories of Inundation of the Australian Coast Dating from More Than 7000 Years Ago*, 47 *AUSTRAL. GEOGRAPHER* 11, 41 (2015).

growth,” the “progress and development” agenda ensures the decline of life on earth, and the death of many species including, likely, our own.

## VI. Concluding Thoughts of Caution

The Kangaroo’s ancestry and existence as totem can be traced back to the Dreamtime and, hence, she represents a great contrast to the colonial project.<sup>205</sup> Her exploitation demonstrates the ways in which Victoria’s laws are imbued with colonial ideas of human exceptionalism and the appeal of wealth at any cost. The colonial project of wealth creation must find a way to claim that which is free and to commodify that which has no price. The Kangaroo, as a First Animal, represents the colonisers failure to full possess and domesticate what is original, wild, First, and Indigenous. The Kangaroo is free and has not yet been fully colonised, although the attempts to do so are becoming ever more grievous. Ultimately, she cannot be controlled, and she should not be farmed.<sup>206</sup>

Europeans arrived with their farm animals for the purpose of commercialising them.<sup>207</sup> Mild mannered, quiet, and obedient, the sheep<sup>208</sup> has been the long welcome companion of the coloniser. The nature of her species is to internalise her suffering, anxiety, and trauma; she quickly acquiesces.<sup>209</sup> Not so the Kangaroo. The only way to remove the Kangaroo from her landscape is to position her socially and politically as the foe of farming and progress while culturally and legally affording her only a veneer of protection. As explored in this Article, current legislation appears to craft socially acceptable ways to exploit Kangaroos, rather than ensuring her welfare.

Although some First Nations People kill and eat Kangaroos as part of their traditional diet, some certainly do not and would never.<sup>210</sup> There are strict cultural protocols about how these practices are carried out, and intricate laws that govern how everyone on Country is to be treated.<sup>211</sup> The ways in which current legislation permits mass slaughter, with little oversight, no reprimand, and the destruction of social cohesion of mob and the settling in of transgenerational trauma and gross modification of the gene pool contravenes First Nations laws broadly throughout Australia.<sup>212</sup> Traditional practices conflict with

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<sup>205</sup> *Kangaroo Totem and Dreamtime Stories*, YARN, <https://perma.cc/28NX-UAT4> (accessed Feb. 14, 2023).

<sup>206</sup> Michael Dahlstrom, *Debate Over Radical Plan to Farm Kangaroos in Australia*, YAHOO! NEWS (July 27, 2021), <https://perma.cc/2JBK-M7DA> (accessed Feb. 15, 2023).

<sup>207</sup> PETER JOHN CHEN, *ANIMAL WELFARE IN AUSTRALIA: POLICY AND POLITICS* 5 (Sydney Univ. Press 2016).

<sup>208</sup> Sheep are descendants of the wild mouflon of Eastern Europe. *The Story of Sheep*, AUSTRAL. PERSIAN SHEEP ASS’N, <https://perma.cc/2B6M-79KM> (accessed Feb. 10, 2023).

<sup>209</sup> *The Hidden Lives of Sheep*, PETA, <https://perma.cc/5TCP-NTCG> (accessed Feb. 10, 2023).

<sup>210</sup> ETHICAL EMILY, *supra* note 28.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

those used in the commercial industry.<sup>213</sup> The colonial state usurps First Nations into its world view by licensing First Peoples to rid the landscape of Kangaroos.<sup>214</sup> If the colonial government genuinely seeks alliance with First Nations, and First Peoples are to take care of Country and look after all species within that Country, then all killing that contravenes First Nations law must cease.<sup>215</sup>

In the past, the complexity of Indigenous epistemologies has been misunderstood and routinely infantilised or ignored.<sup>216</sup> Colonial Australia does not have the solutions to our current crisis of biodiversity decline, environmental degradation, and species extinction. Victoria's current laws regarding animals are failing their stated purpose: The regimes of animal protection are not working, and the licensing and exemptions make those protections fundamentally meaningless.

Progress and development have had an appropriate place in history, but they do not offer solutions to the incipient collapse of our social, cultural, and environmental worlds. Not everything, nor everyone, can be sacrificed for unending growth. Colonial law, which became a tool of violence<sup>217</sup> that legitimised—and continues to legitimise—harmful practices, was the perfect instrument to establish a new nation. But now there are no other lands to take and colonise. Therefore, caution should be taken in crafting new laws that affect First Animals like Kangaroos, particularly considering that every new law in Australia is a crime built on the unlawful fabrication of *terra nullius*.<sup>218</sup>

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<sup>213</sup> Royce Kurmelovs, 'Like Champagne, Mate: How a US Kangaroo Ban Could Kill Off an Indigenous Opportunity', *THE GUARDIAN* (Mar. 13, 2021), <https://perma.cc/NF6M-JJWJ> (accessed Feb. 10, 2023).

<sup>214</sup> *Licenses to Harm Kangaroos*, N.S.W. DEP'T PLAN. & ENV'T (Jan. 18, 2023), <https://perma.cc/C94R-BEQL> (accessed Apr. 10, 2023).

<sup>215</sup> *Victorian Traditional Owner Game Management Strategy*, FED'N VICTORIAN TRADITIONAL OWNER CORPS., <https://perma.cc/4BS3-LRGS> (accessed Jan. 28, 2023). Note that "Traditional Owners" refers to First Nations People.

<sup>216</sup> Janet Hunt, *Engaging with Indigenous Australia—Exploring the Conditions for Effective Relationships with Aboriginal and Torres Strait Islander Communities*, 5 *CLOSING GAP CLEARINGHOUSE* 1, 8 (2013) (discussing how the Australian government could engage with Indigenous ideologies).

<sup>217</sup> S. M. den Otter, *Colonial Justice in British India: White Violence and the Rule of Law by Elizabeth Kolsky Review*, 56 *VICTORIAN STUD.* 126, 126–27 (2013).

<sup>218</sup> See Lavery, *supra* note 86, at 236–37, 239.



