



Law Council  
OF AUSTRALIA

# **Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia**

**Joint Standing Committee on Northern Australia**

**21 August 2020**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is particularly grateful for the expertise of its Indigenous Legal Issues Committee and the Australian Environment and Planning Law Group of its Legal Practice Section in leading the development of this submission. It acknowledges the contributions of the Law Society of Western Australia, Law Society of South Australia, Bar Association of Queensland, Indigenous Justice Committee of the Victorian Bar, Law Society of New South Wales, and New South Wales Bar Association.

## Executive Summary

1. The Law Council of Australia (**the Law Council**) welcomes the opportunity to make a submission to the Joint Standing Committee on Northern Australia (**the Committee**) in relation to its inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia (**the Inquiry**).
2. The incident at the Juukan Gorge is one example of the wide structural disconnect existing across the current legislative framework. Cultural heritage laws at the Commonwealth, state and territory levels have failed to incorporate recognition of the rights of First Nations peoples to land and waters. These regimes have not kept pace with the paradigmatic change precipitated by the High Court's decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
3. In particular, Commonwealth, state and territory laws have failed to conceptualise that the importance of land and waters lies in their connection to the diverse cultures of First Nations peoples, which are living cultures. Most of the existing cultural heritage protection regimes have severe limitations in their ability to identify relevant Aboriginal parties or include these parties in the decision-making process. This includes the lack of a systemic process by which to ensure appropriate First Nations representation or meaningful consultation, which would include the ability to seek review of a decision.
4. While there are some recent improvements (including particularly under the Victorian model), and a number of pieces of legislation are currently under review, coordinated reform is needed across Australia. This should occur at a national level and as part of a national approach, and be based in international human rights standards, including the principles of self-determination and free, prior and informed consent.
5. The position of the Law Council is that First Nations people must have the leading voice in managing their own cultural heritage. To this end, the Law Council sees great merit in proposing and pursuing a national framework for reform that secures some common principles across jurisdictions, developed through consultation with First Nations peoples, their representative bodies and broader stakeholders. This submission includes some preliminary suggestions as to what these principles might capture.
6. The Law Council recommends that Commonwealth, state and territory jurisdictions then pursue coordinated reforms measured against these common benchmarks. At the Commonwealth level, the Law Council supports replacing the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSHP Act**) with new standalone legislation that provides effective protection to First Nations cultural heritage, having regard to the deficits of the current Act's operation, and is accompanied by adequate funding of First Nations representative bodies in order to address current power imbalances. Careful consideration should also be given to the emerging findings from the current *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) review regarding the protection of First Nations cultural heritage, and the opportunities to improve its role in achieving this objective, as part of a broader suite of Commonwealth legislation. However, this does not displace the urgent need for new Commonwealth Indigenous heritage legislation as the centrepiece of Indigenous cultural heritage protection.

## Recommendations

7. The Law Council makes the following recommendations to the Inquiry:
- A national First Nations cultural heritage framework should be pursued, in consultation with First Nations communities, that secures high-level national principles against which existing laws across Commonwealth, state and territory jurisdictions should be benchmarked, and reformed.
  - Having regard to its international obligations and in accordance with Australia's acceptance of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**)<sup>1</sup> that 'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage', the Australian Government should reform Commonwealth laws for the protection of First Nations cultural heritage to make them effective.
  - In particular, consideration should be given to a new First Nations Cultural Heritage Act, which would replace the ATSIHP Act.
  - This reform process should be informed by consultation and a co-design process with Indigenous people and relevant findings from the current review of the EPBC Act, as well as the former Evatt Review recommendations.
  - At the same time, state and territory governments should be encouraged to strengthen their Indigenous cultural heritage laws, particularly in jurisdictions where existing provisions are inadequate and ineffective, in light of the national principles recommended above.
  - First Nations organisations have appropriate funding to facilitate their participation in the assessment and management of Indigenous cultural heritage, and to avail themselves of the new legislative protections effectively. Funding should be generally increased by the Commonwealth for the enforcement of Indigenous cultural heritage protection.
  - Reforms to the EPBC Act should be pursued to improve the EPBC Act's role in protecting Indigenous cultural heritage, as part of a broader suite of Commonwealth legislation in this area, and its genuine, respectful engagement with Indigenous Australians' knowledge and expertise of environmental and heritage issues. However, this does not displace the urgent need for new Commonwealth Indigenous heritage legislation as the centrepiece of Indigenous cultural heritage protection.
  - Reforms to the EPBC Act should be determined following Professor Samuel AC's current consultations with representatives from peak First Nations bodies regarding his interim report recommendations, and the release of his final report.
  - Immediate steps which should nevertheless be pursued in this area include:
    - Investment in strategic or large-scale assessment of areas of Indigenous heritage which could qualify for National Heritage listing to proactively identify areas which should be protected under the EPBC Act;
    - allocating sufficient human and financial resources to the Department's compliance and enforcement functions to ensure that persons or companies who fail to uphold the provisions of the EPBC Act or the

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<sup>1</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex.

conditions attaching to the approvals issued to them under the Act are held to account; and

- amending section 3 of the EPBC Act objects to incorporate references to the UNDRIP as an international instrument to which the EPBC Act seeks to give effect, and incorporating the *Akwe: Kon Guidelines*<sup>2</sup> into the EPBC Act in accordance with the recommendations of the *Convention on Biological Diversity (CBD)*<sup>3</sup> Conference of the Parties 7 recommendation.
- Practical barriers to seeking remedies to protect First Nations cultural heritage should be addressed, including significant backlogs in both native title claims at the Federal Court at a Commonwealth level, as well as state and territory court backlogs on land claims.
- A First Nations Constitutional Voice to Parliament should be established, along with the broader adoption of the Uluru Statement from the Heart, to ensure that First Nations people are heard at the highest levels on matters of enormous and enduring significance, including their cultural heritage.

## Context

### Introductory Remarks

8. The Law Council is not in a position to address in detail the specific incident of the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara, which gave rise to the present Inquiry. It does not purport to speak on behalf of the Traditional Owners, Puutu, Kunti Kurrama and Pinikura People, and has no evidence on the work, consultation practices or decision-making processes undertaken by Rio Tinto or the relevant authorities in relation to the destruction of the cave site to make way for the expansion of an iron ore mine.
9. It does, however, note that the cave site had deep historical and cultural significance and that Rio Tinto received ministerial consent in 2013 to destroy or damage the cave site under section 18 of the *Aboriginal Heritage Act 1972 (WA) (AH Act (WA))*. It also notes that this destruction caused deep distress for Aboriginal peoples and Traditional Owners.<sup>4</sup>
10. The Law Council considers that the destruction at the Juukan Gorge illustrates a systemic failure of the legislative framework at both the Commonwealth and state levels for the protection of First Nations cultural heritage.
11. It is another example of the ongoing disempowerment of First Nations peoples and the failure in Australia to properly recognise and implement the right to self-determination and the principle of free, prior and informed consent.
12. It represents a larger failure of the law to fully acknowledge and respect the leadership of Aboriginal and Torres Strait Islander peoples as the original custodians

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<sup>2</sup> Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities (2004, Montreal) <<https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>>.

<sup>3</sup> Opened for signature 5 June 1992, 1760 UNTS 69 (entered into force 29 December 1993).

<sup>4</sup> Professor Marcia Langton AM, 'Perspectives on the Destruction of Juukan Gorge', *Melbourne Sustainable Society Institute* (website, 5 June 2020); Michelle Stanley and Kelly Gudgeon, 'Pilbara Mining Blast Confirmed to Have Destroyed 46,000-Year-Old Sites of "Staggering" Significance', *ABC News* (online, 26 May 2020), quoting Mr Burchell Hayes, Puutu Kunti Kurrama traditional owner.

of lands and waters and important and irreplaceable cultural heritage, customs and practices.

13. Noting the following cultural, historical and archaeological bases on which the immense value of the cave site has been recognised, the Law Council also underlines the apparent loss of preservation of the heritage of humanity itself.

*Our people are deeply troubled and saddened by the destruction of these rock shelters and are grieving the loss of connection to our ancestors as well as our land.*<sup>5</sup>

*It saddens us that something that we have got a deep connection to has been destroyed. It's terrible. That site for us, that's where our ancestors were occupying their traditional land. From generation to generation stories have been passed down to us around that occupation. Traditionally we hand that heritage down to the next generation, but in this case we won't have anything to show the next generation and to tell them stories about what has happened there and what's been passed down from our ancestors.*<sup>6</sup>

*This is a devastating loss of cultural and historical significance.*<sup>7</sup>

*These caves, along with several other places, held the evidence of the astonishing antiquity of human occupation of this continent. As such, as important as they were to the Aboriginal traditional owners, [they were also important for] their significance for further understanding of deep human history ...*<sup>8</sup>

*Given the worldwide rarity of sites of such antiquity, the rock shelters were also of outstanding archaeological importance ... speak[ing] directly to worldwide understanding of what it means to be human, in utterly unique ways.*<sup>9</sup>

*The site was found to contain a cultural sequence spanning over 40,000 years, with a high frequency of flaked stone artefacts, rare abundance of faunal remains, unique stone tools, preserved human hair and with sediment containing a pollen record charting thousands of years of environmental changes. ... In many respects, the site is the only one in the Pilbara to contain such aspects of material culture and provide a likely strong connection through DNA analysis to the contemporary traditional owners of such old Pleistocene antiquity.*<sup>10</sup>

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<sup>5</sup> Michelle Stanley and Kelly Gudgeon, 'Pilbara Mining Blast Confirmed to Have Destroyed 46,000-Year-Old Sites of "Staggering" Significance', *ABC News* (online, 26 May 2020), quoting Mr John Ashburton, Chair of the Puutu Kunti Kurrama Land Committee.

<sup>6</sup> Ibid, quoting Mr Burchell Hayes, Puutu Kunti Kurrama traditional owner.

<sup>7</sup> Australian Institute for the Conservation of Cultural Material, 'Destruction of Pilbara Caves' (Statement, 9 June 2020).

<sup>8</sup> Professor Marcia Langton AM, 'Perspectives on the Destruction of Juukan Gorge', *Melbourne Sustainable Society Institute* (website, 5 June 2020).

<sup>9</sup> Victoria Laurie, 'Destroyed Aboriginal Sites at Juukan Gorge "of Global Importance": Archaeologists', *The Australian* (online, 18 June 2020), quoting the Society for American Archaeology. See also World Archaeological Congress, 'Statement on the Destruction of the Juukan Gorge Indigenous Sites in the Pilbara, Western Australia, by the Mining Company Rio Tinto' (Statement, 9 June 2020).

<sup>10</sup> Gregg Borschmann, 'Report Reveals Rio Tinto Knew the Significance of 46,000-Year-Old Rock Caves Six Years Before it Blasted Them', *ABC News* (online, 5 June 2020), quoting Dr Michael Slack.

14. Finally the incident at the Juukan Gorge must also be considered in the context of environmental conservation and the recent finding from the *Interim Report of the Independent Review into the Environment Protection and Biodiversity Conservation Act (Interim Report)*<sup>11</sup> that 'Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat'.<sup>12</sup>
15. The Law Council expresses its dismay at the destruction of the caves at the Juukan Gorge and the loss this represents for the people of Australia, both Indigenous and non-Indigenous.
16. However, it also keeps at the forefront of this submission the fact that the heritage value of sites such as the Juukan Gorge have often been viewed in terms of an archaeological and historical context, rather than as an integral part of First Nations' cultures, traditions and law. This has privileged non-Indigenous valuation of sites over Indigenous valuation. Professor Graeme Samuel AC in the abovementioned Interim Report has said that the value given to First Nations' concerns has been 'symbolic' and 'tokenistic'.<sup>13</sup>
17. The Law Council urges an approach to heritage protection in Australia that recognises that the primary reason that sites connected to Aboriginal and Torres Strait Islander peoples are considered significant is because they are part of a living culture of Australia's First Nations peoples, intimately connected to their traditional ownership of land and traditional custodial responsibilities. By not recognising the integral relationship between cultural and natural heritage and traditional ownership of land, there is a disconnected approach to heritage protection, where important sites of significance fail to be recognised and protected, as this devastating example in relation to the Juukan Gorge caves illustrates. Aboriginal traditional owners and communities must have the leading voice in managing their own cultural heritage.

## Law Council Approach

18. In this submission, the Law Council sets out and assesses in general terms the legislative framework for protecting cultural heritage in Australia, focusing in particular on the rights and interests of First Nations peoples. It directly addresses Terms of Reference (a) and (f) to (j) of the Inquiry.
19. The Law Council's approach is underpinned by several of its longstanding objectives and positions as an independent organisation. The policy statements of the Law Council outline several commitments relevant to the current Inquiry, including:
  - promotion of 'the maintenance and promotion of the rule of law',<sup>14</sup> which incorporates a number of principles, including:
    - 'Executive powers should be carefully defined by law, such that it is not left to the Executive to determine for itself what powers it has and when and how they may be used';<sup>15</sup>
    - 'where legislation allows for the Executive to issue subordinate legislation in the form of regulations, rules, directions or like instruments,

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<sup>11</sup> Professor Graeme Samuel AC, *Interim Report of the Independent Review into the Environment Protection and Biodiversity Conservation Act* (June 2020) 1.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.* 6.

<sup>14</sup> Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011) 2.

<sup>15</sup> *Ibid.* 4.

- the scope of that delegated authority should be carefully confined and remain subject to parliamentary supervision’;<sup>16</sup>
- ‘Executive decision making should comply with the principles of natural justice and be subject to meaningful judicial review’;<sup>17</sup> and
  - ‘States must comply with their international legal obligations whether created by treaty or arising under customary international law’;<sup>18</sup>
  - ‘challenging legislation, policies and practices that discriminate against and violate Indigenous Australians’ human rights, and impede their substantive equality before the law’;<sup>19</sup>
  - ‘promoting implementation of the UNDRIP and awareness of its provisions amongst members of the legal profession and the community generally’;<sup>20</sup>
  - ‘working in partnership with Indigenous communities/organisations to promote Indigenous Australians’ rights and interests, respect for Indigenous Australian cultures, knowledge, perspectives and practices, and the reinvigoration and strengthening of Indigenous legal systems, laws and institutions’;<sup>21</sup>
  - ‘to promote the implementation of Australia’s international human rights obligations, federally and in the states and territories, through appropriate constitutional, legislative, administrative and other measures’;<sup>22</sup>
  - ‘to promote the recognition, application and justiciability of international human rights standards across the Australian legal system’;<sup>23</sup>
  - ‘to promote respect for human rights by Australian corporations and other incorporated and non-incorporated entities, including through implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs)<sup>24</sup> and human rights impact assessment processes’;<sup>25</sup>
  - among other things, ‘the Law Council recognises that Aboriginal and Torres Strait Islander peoples’:<sup>26</sup>
    - ‘possess distinct cultures and identities and unique relationships with their lands, waters and resources’;
    - ‘have been subject to significant dispossession, marginalisation and discrimination, and continue to experience widespread disadvantage, including in [their] ... participation in the political, economic, social and cultural life of the nation’;

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid 5.

<sup>19</sup> Law Council of Australia, *Policy Statement: Indigenous Australians and the Legal Profession* (February 2010) 3.

<sup>20</sup> Law Council of Australia, *Policy Statement: Indigenous Australians and the Legal Profession* (February 2010) 3.

<sup>21</sup> Ibid.

<sup>22</sup> Law Council of Australia, *Policy Statement on Human Rights and the Legal Profession: Key Principles and Commitments* (May 2017) 6.

<sup>23</sup> Ibid.

<sup>24</sup> The *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* were developed by the Special Representative of the Secretary-General, on the issue of human rights and transnational corporations and other business enterprises. They were annexed to his final report to the Human Rights Council (UN Doc A/HRC/17/31) and endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011.

<sup>25</sup> Law Council of Australia, *Policy Statement on Human Rights and the Legal Profession: Key Principles and Commitments* (May 2017) 6.

<sup>26</sup> Law Council of Australia, *Policy Statement: Indigenous Australians and the Legal Profession* (February 2010) 2.

- 'have the right to self-determination and to recognition and protection of their distinct culture and identities';<sup>27</sup>
  - 'through their representatives, have a right to be consulted about and participate in decision-making concerning legislative and policy changes affecting their rights and interests';
  - face particular cultural, linguistic, economic and geographic barriers in seeking legal assistance and access to justice; and
  - 'the Law Council also recognises and endorses increasing international attention to human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment'.<sup>28</sup>
20. The Law Council incorporates the expert advice of its committees and sections, and the input of its state and territory constituent bodies, throughout this submission.
21. The Law Council also draws upon its past work, including most recently its submissions to the current statutory review of the EPBC Act and to the Australian Human Rights Commission concerning its *Free and Equal: An Australian Conversation on Human Rights* inquiry.<sup>29</sup>

## Overview of the Australian Legislative Framework

### Commonwealth Legislation

22. In Australia, the main pieces of legislation relevant to protecting tangible and intangible cultural heritage at the Commonwealth level are:
- the ATSIHP Act;
  - the EPBC Act;
  - the *Native Title Act 1993* (Cth) (**Native Title Act**);
  - the *Protection of Moveable Cultural Heritage Act 1986* (Cth) (**PMCH Act**); and
  - the *Copyright Act 1968* (Cth) (**Copyright Act**) (with respect to some intangible heritage).

### State and Territory Legislation

23. However, the primary responsibility for protecting tangible Aboriginal cultural heritage lies with the states and territories, across the following primary pieces of legislation, some of which overlap with the first four Commonwealth statutes mentioned above:
- the AH Act (WA);
  - the *Aboriginal Heritage Act 1988* (SA) (**AH Act (SA)**);
  - the *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACH Act (Qld)**);

<sup>27</sup> As provided under (inter alia) the International Covenant on Civil and Political Rights (**ICCPR**) art 1(1), the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) art 1(1) and the UNDRIP art 3.

<sup>28</sup> Law Council of Australia, *Policy Statement on Human Rights and the Legal Profession: Key Principles and Commitments* (May 2017) 4.

<sup>29</sup> Law Council of Australia, Submission to the Department of Agriculture, Water and the Environment, *Statutory Review of the Environment Protection and Biodiversity Conservation Act 1999* (Cth) (20 April 2020); Law Council of Australia, Submission to the Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (13 November 2019).

- the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (**TSICH Act (Qld)**);
  - the *Aboriginal Heritage Act 2006* (Vic) (**AH Act (Vic)**);
  - the *National Parks and Wildlife Act 1974* (**NPW Act (NSW)**);
  - the *Aboriginal Relics Act 1975* (TAS);
  - the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT);
  - the *Heritage Act 2004* (ACT); and
  - the *Heritage Objects Act 1991* (ACT).
24. The Western Australian Government began a review of the AH Act (WA) on 9 March 2018. As part of its review, the Minister for Aboriginal Affairs released a discussion paper which sets out its proposals for new legislation to protect Aboriginal cultural heritage in Western Australia.<sup>30</sup> The proposals include:
- changes to how heritage is defined to better reflect a living culture that is central to the wellbeing of Aboriginal people;
  - a streamlined approvals pathway for land use proposals that avoid or minimise impact on Aboriginal heritage; and
  - the establishment of local Aboriginal heritage services and an Aboriginal Heritage Council to actively engage Traditional Owners and Knowledge Holders in decision-making for heritage places to which they have a connection.
25. The drafting of the draft exposure bill has commenced and is expected to be released for public comment later in 2020.<sup>31</sup>
26. Similarly, Queensland is undertaking a review of the ACH Act (Qld) and the TSICH Act (Qld). The key areas for potential reform in the Queensland Government's Consultation Paper relate to ownership, identification of relevant parties and the 'last claim standing' provision in the legislation, the Duty of Care Guidelines, compliance, and the recording of Aboriginal cultural heritage.<sup>32</sup> The Government has indicated that parliamentary processes considering proposed changes to the legislation will occur later this year.
27. In recent years, certain states have also introduced their own human rights statutes, which bring legislated human rights obligations for protecting First Nations' rights and interests, and may interact with the cultural heritage regime in that jurisdiction (discussed further below). These are:
- the *Human Rights Act 2019* (Qld) (**HR Act (Qld)**);
  - the *Human Rights Act 2004* (ACT) (**HR Act (ACT)**); and

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<sup>30</sup> Department of Planning, Lands and Heritage (WA), 'Review of the Aboriginal Heritage Act 1972' (Discussion Paper, March 2019) <<https://www.dplh.wa.gov.au/getmedia/ab8c0b4a-7941-4b31-aa89-658b74c976ad/AH-Review-AHA-discussion>>.

<sup>31</sup> Ibid.

<sup>32</sup> See Department of Aboriginal and Torres Strait Islander Partnerships (QLD), 'Review of the Cultural Heritage Acts' (Consultation Paper, 2019) <<https://www.datsip.qld.gov.au/resources/datsima/programs/consultation-paper-review-cultural-heritage-acts.pdf>>.

- the *Charter of Human Rights and Responsibilities Act 2006 (HR Charter (Vic))*.<sup>33</sup>

### **Burra Charter**

28. First adopted in 1979 at a meeting of the Australia International Council on Monuments and Sites (**Australia ICOMOS**) at Burra, South Australia, the Burra Charter<sup>34</sup> sets out basic principles and procedures to be followed in the conservation of places of cultural significance. The current version of the Burra Charter was adopted in 2013.
29. According to the Burra Charter, cultural significance means:
- aesthetic, historic, scientific, social or spiritual value for past, present or future generations. Cultural significance is embodied in the place itself, its fabric, setting, use, associations, meanings, records, related places and related objects. Places may have a range of values for different individuals or groups. (Article 1.2, The Burra Charter).*
30. The Burra Charter outlines the ‘Burra Charter Process’, which is based on the premise that, in order to implement a management policy for a place of cultural and heritage significance, the significance of that place must be adequately understood first.<sup>35</sup> Australia ICOMOS has produced Practice Notes on Understanding and Assessing Cultural Significance and The Burra Charter and Indigenous Cultural Heritage Management.<sup>36</sup>

### **Overview of International Laws and Standards**

31. International laws and standards apply to the rights and interests of First Nations peoples in protecting their cultural heritage. The Law Council addresses these under the following headings, which are detailed directly below: the broad international human rights conventions, which provide foundational human rights for all peoples, including Indigenous peoples; the UNDRIP, which is the specific and comprehensive standard for the recognition and implementation of the rights of Indigenous peoples; and the body of international law concerned solely with the preservation of cultural heritage.

### **International Conventions**

32. Australia is subject to obligations under the core international human rights treaties to which it is a party. The following treaties provide foundational protections for all people, including Indigenous people, through recognition of the right to self-determination and non-discrimination, and specific articles with respect to culture, social, education and religious rights, all of which may include rights to heritage. The rights are longstanding.<sup>37</sup>

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<sup>33</sup> See, eg, the HR Act (ACT), which includes subsection 27(2), protecting Aboriginal and Torres Strait Islander peoples’ distinct cultural rights. See also section 28 of the HR Act (Qld), and subsection 19(2) of the *HR Charter (Vic)*.

<sup>34</sup> Australia ICOMOS, *Charter for Places of Cultural Significance*.

<sup>35</sup> Burra Charter, art 6.

<sup>36</sup> Australia ICOMOS, ‘Understanding and Assessing Cultural Significance’, Practice Note Version 1: November 2013 <[https://australia.icomos.org/wp-content/uploads/Practice-Note\\_Understanding-and-assessing-cultural-significance.pdf](https://australia.icomos.org/wp-content/uploads/Practice-Note_Understanding-and-assessing-cultural-significance.pdf)>.

<sup>37</sup> The *Universal Declaration of Human Rights* (1948) was the first instrument to recognise the right to ‘participate in the cultural life of the community’ (art 27(1)), although it is silent on the concept of ‘cultural heritage’.

33. Common article 1 of the *International Covenant on Civil and Political Rights (ICCPR)*<sup>38</sup> and *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>39</sup> recognises that ‘all peoples have the right of self-determination’, by virtue of which ‘they freely determine their political status and freely pursue their economic, social and cultural development’.<sup>40</sup> These rights are to be provided ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.<sup>41</sup> The *International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)*<sup>42</sup> and the *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)*<sup>43</sup> prohibit discrimination on the basis of race and sex respectively, including in the context of enjoying cultural rights and participating in cultural life.<sup>44</sup>
34. Article 27 of the ICCPR provides that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, ‘to enjoy their own culture, to profess and practise their own religion, or to use their own language’.
35. Article 15 of the ICESCR provides for a right to ‘take part in cultural life’,<sup>45</sup> and an obligation on States to conserve, develop and disseminate culture.<sup>46</sup> All States including Australia are required to achieve the full realisation of this right, including those measures necessary for the conservation of culture.<sup>47</sup>
36. Various provisions of the *Convention on the Rights of the Child (CRC)*<sup>48</sup> provide for specific recognition of those same rights for children.<sup>49</sup>

### United Nations Declaration on the Rights of Indigenous Peoples

37. The UNDRIP is considered the comprehensive standard on human rights for Indigenous peoples and informs the way governments across the globe should engage with and protect the rights of Indigenous peoples.<sup>50</sup> Australia formally announced its support for the UNDRIP on 3 April 2009.
38. The UNDRIP is not a treaty and therefore it does not itself create legally binding obligations. However, many, if not all, of its provisions have been recognised as reflecting customary international law.<sup>51</sup> Its articles also echo many of the rights

<sup>38</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>39</sup> Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>40</sup> ICCPR art 1(1); ICESCR art 1(1).

<sup>41</sup> ICCPR art 2(1); ICESCR art 2(2).

<sup>42</sup> Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>43</sup> Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>44</sup> ICERD arts 1, 2 and 5; CEDAW arts 1, 3 and 13.

<sup>45</sup> ICESCR art 15(1)(a).

<sup>46</sup> Ibid art 15(2). This is the key instrument enshrining a universal right to cultural life: United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 21 on the right of everyone to take part in cultural life*, UN Doc E/C.12/GC/21 (21 December 2009).

<sup>47</sup> ICESCR art 15(3).

<sup>48</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>49</sup> CRC arts 2, 3, 4, 14, 17, 20, 23, 29, 30, 31.

<sup>50</sup> Australian Government, Attorney-General’s Department, ‘Right to Self-Determination: Public Sector Guidance Sheet’ (website, undated) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>>. For further background on the UNDRIP, see also Law Council of Australia, Submission to the Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (13 November 2019) 12-14.

<sup>51</sup> International Law Association, *Rights of Indigenous Peoples*, 75th Conference, ILA Resolution No 5/2012 (30 August 2012); Federico Lenzerini, ‘Implementation of the UNDRIP Around the World: Achievements and Future Perspectives’ (2019) 23 *International Journal of Human Rights* 51. See also Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 456.

articulated in legally binding human rights treaties, but with a specific focus on Indigenous peoples.<sup>52</sup> Insofar as the UNDRIP relies on and elaborates well-established human rights in international treaty and customary law, it is binding on Australia.

39. The United Nations Human Rights Council has explained the special status of the UNDRIP in international law as follows:

*The UNDRIP represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law. The product of a protracted drafting process involving the demands voiced by indigenous peoples themselves, the Declaration reflects and builds upon human rights norms of general applicability, as interpreted and applied by United Nations and regional treaty bodies, as well as on the standards advanced by ILO Convention No 169 and other relevant instruments and processes.*

*The Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples. The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights. From this perspective, the standards of the Declaration connect to existing State obligations under other human rights instruments.<sup>53</sup>*

40. The Law Council strongly endorses UNDRIP's importance. While it recognises the UNDRIP in full, it emphasises the significance of article 3 in representing the 'fundamental principle underpinning Indigenous peoples' advocacy'<sup>54</sup> and underlying the other rights articulated in the instrument: the right to self-determination. The text of article 3 provides that:

*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

41. As noted above, the right to self-determination is also reflected in article 1 of both the ICCPR and ICESCR. At a minimum, it entails the entitlement of peoples to have control over their destiny and to be treated respectfully.<sup>55</sup> Self-determination is an

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<sup>52</sup> Australian Government, Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (website, undated) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>>.

<sup>53</sup> Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/HRC/9/9 (11 August 2008) [85]-[86].

<sup>54</sup> Megan Davis, 'To Bind or not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17.

<sup>55</sup> Australian Government, Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (website, undated) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>>. For further background on self-determination, see also Law Council of Australia, Submission to the Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (13 November 2019) 12-14.

'ongoing process of choice'.<sup>56</sup> As Professor Megan Davis has stated, 'almost universally, Indigenous peoples had been institutionalised to the extent that every aspect of their lives was controlled by the state'.<sup>57</sup> Self-determination reflects 'the idea that Indigenous people should have some control over the decisions that are made about their lives'.<sup>58</sup>

42. Related to this idea are articles 18 and 19 of the UNDRIP. Article 18 upholds Indigenous peoples' rights to participate in decision-making through their chosen representatives and to maintain their own decision-making institutions. Article 19 requires States to obtain 'the free, prior and informed consent' of Indigenous peoples before adopting legislative or administrative measures that may affect them.

43. The UNDRIP is also replete with recognition and protection of the cultural heritage of Indigenous people. The Law Council draws particular attention to article 11 as the core provision in the context of the present Inquiry, which provides that:

*(1) Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*

*(2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*

44. There are some important aspects of this article that encapsulate some core principles which Australia is required, under international law, including the abovementioned international conventions, to adopt:

- the practice of cultural traditions and customs is a right, and a right which is continuing;
- cultural traditions and customs include the protection of 'past, present and future' manifestations such as archaeological and historical sites which have past but also current and future significance;
- that the guiding principle for cultural, intellectual, religious and spiritual property is to protect and honour 'the free, prior and informed consent'<sup>59</sup> of Indigenous peoples for the use of such property; and
- that any relevant mechanism for protection, use or restitution be developed in co-operation and consultation with Indigenous peoples.

45. Several other articles beyond article 11 are also of relevance here:

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<sup>56</sup> Australian Human Rights Commission, 'Right to Self-Determination' (website, 30 April 2013) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination>>.

<sup>57</sup> Megan Davis, 'To Bind or not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17.

<sup>58</sup> *Ibid.*

<sup>59</sup> The principle appears at articles 10, 11, 19, 28 and 29 of the UNDRIP. The principle is elaborated in *Human Rights Council, Free, Prior and Informed Consent: A Human Rights-Based Approach*, UN Doc A/HRC/39/62 (10 August 2018).

- Article 8(1) recognises that Indigenous peoples and individuals have the right not to be subjected to ‘forced assimilation or destruction of their culture’. The provision provides a broad protection for culture which includes physical culture such as sacred sites and sites of cultural and historic significance. Under article 8(2), Australia must provide effective mechanisms to prevent and provide redress for ‘any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities’. Destroying a sacred site, offensive to a First Nations’ culture, falls within this provision.
- Article 12 provides that Indigenous peoples have the right to ‘manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies’ and ‘maintain, protect and have access in privacy to their religious and cultural sites’. Given the well-understood importance of sites of significance (including ceremonial sites), one can appreciate the central importance of the protection of such sites in order for First Nations people in Australia to enjoy the above rights.
- Article 28 provides that where lands, territories or resources that have been traditionally owned or occupied have been taken, occupied or damaged without ‘free, prior and informed consent’ then they have the right to redress by restitution or, failing that, ‘just, fair and equitable compensation’.
- Article 31 provides for related rights including the right ‘to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures including human and genetic resources, ... oral traditions, ... designs, ... and visual and performing arts’. Indigenous sites of significance should not be seen as worthy of protection only because of archaeological importance and antiquity. It is likely that such a site has current importance and plays an important role in oral traditions for the traditional owners in relation to land ownership, in ceremony and artistic expression and reciprocal responsibilities with traditional neighbours.

46. The Law Council contends that ensuring effective access for First Nations peoples to their rights must be a matter of the utmost priority throughout Australia,<sup>60</sup> not least in actions and decisions affecting First Nations’ cultural heritage. Ensuring Australia’s adherence to the UNDRIP must be at the heart of its approach.

### International Law on Cultural Heritage

47. A separate body of international law is concerned solely with the preservation of cultural heritage, and protection of cultural heritage in both peacetime and armed conflict.
48. The main instruments include the 1954 Hague Convention for the Protection of Cultural Property in Armed Conflict,<sup>61</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage (**World Heritage Convention**),<sup>62</sup> Convention on the Protection of Underwater Cultural Heritage,<sup>63</sup> CBD, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Heritage,<sup>64</sup> Convention for the Safeguarding of Intangible Cultural

<sup>60</sup> See, more broadly, Law Council of Australia, Submission to the Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (13 November 2019).

<sup>61</sup> Opened for signature 14 May 1954, 249 UNTS 215 (entered into force 7 August 1956).

<sup>62</sup> Opened for signature 16 November 1972, 1037 UNTS (entered into force 17 December 1975).

<sup>63</sup> Opened for signature 2 November 2001, 1037 UNTS 151 (entered into force 2 January 2009).

<sup>64</sup> Opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972).

Heritage,<sup>65</sup> and Convention on the Protection and Promotion of the Diversity of Cultural Expressions.<sup>66</sup>

49. The World Heritage Convention obliges States to identify and preserve their cultural heritage and natural heritage. Article 1 defines ‘cultural heritage’ for the purposes of the Convention as including:

*monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; ... [and]*

*sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.*

50. Article 5 sets out the obligations upon States, which include ‘to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage’.<sup>67</sup> Article 6 clarifies that ‘such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate’.<sup>68</sup>
51. A limitation in the way the World Heritage Convention is used in practice is that it is primarily associated by States and the international community with sites which are designated on the World Heritage List. Australia has many ‘natural sites’ on the World Heritage List, but only the Kakadu National Park, Uluru-Kata Tjuta National Park (which was re-nominated under cultural criteria in 1994), Tasmanian Wilderness and Willandra Lakes Region are recognised as ‘mixed natural and cultural sites’.<sup>69</sup>
52. The Law Council also observes that the World Heritage Convention only captures cultural and natural heritage of ‘outstanding universal value’. As foreshadowed in the introductory remarks at the beginning of this submission, this appears to privilege a system of valuation that is silent on the unique significance of cultural and natural heritage to Indigenous peoples, including Australia’s First Nations peoples.
53. The United Nations Educational, Scientific and Cultural Organisation (**UNESCO**) *Declaration Concerning the Intentional Destruction of Cultural Heritage*,<sup>70</sup> which is not legally binding, explains the impact of the intentional destruction of cultural heritage – ‘including cultural heritage linked to a natural site’<sup>71</sup> – and suggests actions that States should take to combat this. This Declaration utilises a language and scope that may better resonate with the objectives of First Nations peoples. For example, Article I declares:

*The international community recognizes the importance of the protection of cultural heritage and reaffirms its commitment to fight against its*

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<sup>65</sup> Opened for signature 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006).

<sup>66</sup> Opened for signature 20 October 2005, 2440 UNTS (entered into force 18 March 2007).

<sup>67</sup> World Heritage Convention art 5(4).

<sup>68</sup> Ibid art 6(1).

<sup>69</sup> United Nations Educational, Scientific and Cultural Organisation (UNESCO) World Heritage Centre, *World Heritage List* (website, undated) <<https://whc.unesco.org/en/list/>>.

<sup>70</sup> Declaration adopted by the 33<sup>rd</sup> sess of the UNESCO General Conference, Paris, 17 October 2003.

<sup>71</sup> *Declaration Concerning the Intentional Destruction of Cultural Heritage* art II(1).

*intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding generations.*

54. Article II extends the Declaration to acts representing ‘an unjustifiable offence to the principles of humanity and dictates of public conscience, in the latter case in so far as such acts are not already governed by fundamental principles of international law’.<sup>72</sup>
55. Article III, in suggesting measures to combat intentional destruction of cultural heritage, includes that States should endeavour ‘to ensure respect for cultural heritage in society, particularly through educational, awareness-raising and information programmes’,<sup>73</sup> and ‘adopt’ and ‘revise periodically’ the ‘appropriate legislative, administrative, educational and technical measures’ to protect cultural heritage at the highest standard.<sup>74</sup> Moreover ‘States should take all appropriate measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage, wherever such heritage is located’.<sup>75</sup>
56. The CBD also recognises the importance of preserving the cultural knowledge of Indigenous peoples. Article 8(j) of the CBD provides that:

*Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*

57. It is noted that the United Nations Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the CBD (**the Working Group**), at its meeting on 22 November 2019, made recommendations to the Convention of the Parties regarding *Development of a new programme of work and institutional arrangements on Article 8(j) and other provisions of the Convention related to indigenous peoples and local communities*.<sup>76</sup> These included that the Working Group:

3. Encourages Parties, according to national legislation, to increase efforts to facilitate the full and effective participation of indigenous peoples and local communities as on-the-ground partners in the implementation of the Convention, including by recognizing, supporting and valuing their customary laws, collective actions, including their efforts to protect and conserve lands and waters that they traditionally occupy or use towards the goals of the Convention, and engaging them, as appropriate, in the preparation of national reports, in the revision and implementation of national biodiversity strategies and action plans, and in the process for implementing the post-2020 global biodiversity framework for the Convention; [and]

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<sup>72</sup> Ibid art II(2).

<sup>73</sup> Ibid art III(3).

<sup>74</sup> Ibid art III(2).

<sup>75</sup> Ibid art III(1).

<sup>76</sup> *Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity*, CBD/WG8J/REC/11/2 (22 November 2019) <<https://www.cbd.int/doc/recommendations/wg8j-11/wg8j-11-rec-02-en.pdf>>.

4. Requests Parties and other Governments to report on the implementation of the new programme of work on Article 8(j) and other provisions of the Convention related to indigenous peoples and local communities, including the application of the various voluntary guidelines and standards developed under the aegis of the Ad Hoc Open-ended Inter-sessional Working Group on Article 8(j) and Related Provisions and adopted by the Conference of the Parties, as appropriate, through national reports, and to relevant subsidiary bodies, in order to determine progress made.

58. In addition, the Conference of the Parties to the CBD agreed upon the *Akwe: Kon Principles*. The *Akwe: Kon Principles* set out guidelines for parties to the CBD to ensure respectful engagement with Indigenous peoples as a means to ensuring conservation of biological diversity.

## National Legal and Conceptual Framework for Protecting First Nations' Cultural Heritage

59. In the Law Council's opinion, a structural disconnect exists between Commonwealth, state and territory cultural heritage protection laws and the tenure and ownership of land and waters by First Nations.
60. Commonwealth, state and territory governments have failed to incorporate the recognition of First Nations' title to land and, particularly, failed to recognise the paradigmatic change precipitated by the High Court's decision in *Mabo v Queensland (No 2)*.<sup>77</sup>
61. This was powerfully recognised by WA Minister, The Hon Ben Wyatt MLA, recently in the context of the AH Act (WA):

*[This legislation] came into being before Aboriginal people had their own organisations to empower them to engage with the political and economic might of government and industry. The Act was born 20 years before the High Court ruled that terra nullius was a lie and that Aboriginal people could assert their traditional rights to their culture and country in Australian law.*<sup>78</sup>

62. Heritage protection laws also fail to appreciate the significant shift in First Nations to government dialogue that has occurred more recently. In Victoria and the Northern Territory, the narrative is formed around respect for an unceded sovereignty asserted by the relevant First Nations. The recently released Queensland Government response to the Eminent Panel recommendations on the Path to Treaty process in that state includes agreement in principle to consider, in 2021, legislation recognising the sovereignty of the First Nations has never been ceded and is asserted to have continued to the present day.<sup>79</sup> Similarly, the Barunga Agreement entered into by the Northern Territory Government and the four statutory land councils in the Northern Territory recognises and respects First Nations sovereignty.<sup>80</sup>

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<sup>77</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>78</sup> Ben Wyatt, 'A Stronger Shelter for Indigenous Heritage', *The Australian* (online, 9 June 2020).

<sup>79</sup> Queensland Government, *Treaty Statement of Commitment and Response to Recommendations of the Eminent Panel* (August 2020) <<https://www.datsip.qld.gov.au/resources/datsima/programs/tracks-to-treaty/path-treaty/treaty-statement-commitment-august-2020.pdf>>.

<sup>80</sup> *The Barunga Agreement: A Memorandum of Understanding to Provide for the Development of a Framework for Negotiating a Treaty with the First Nations of the Northern Territory of Australia* (8 June 2018) <[https://www.nlc.org.au/uploads/pdfs/Barunga\\_Agreement\\_2018\\_Signed\\_Email.pdf](https://www.nlc.org.au/uploads/pdfs/Barunga_Agreement_2018_Signed_Email.pdf)>.

63. Importantly, former High Court Chief Justice, The Hon Robert French AC, relying on *Mabo (No 2)* and *Coe v Commonwealth* (1993) 118 ALR 193, has posited that ‘the notion of sovereignty under traditional law and custom in the sense of traditional authority over land and waters supported by a spiritual connection’ could be accommodated in the Australian legal framework, including in the ‘form of agreement between Indigenous and non-Indigenous Australians whether it be designated as a ‘treaty’ or by some other term’.<sup>81</sup> This may provide a way of ensuring that decision-making, including in relation to land and waters and cultural manifestations, remains with First Nations.

64. In a 2018 address, he stated that:

*The judgments from which I have quoted make it plain that within the non-Indigenous Australian legal and constitutional framework no claim for Indigenous sovereignty adverse to the Crown can be recognised. That said, concepts of sovereignty within the Indigenous legal framework and within the non-Indigenous legal framework are capable of co-existence. **That co-existence is relevant to the possibility of a form of agreement between Indigenous and non-Indigenous Australians whether it be designated as a ‘treaty’ or by some other term.***

*An agreement between Indigenous and non-Indigenous Australians could recognise and acknowledge the traditional law and custom of Indigenous communities across Australia, their historical relationship with their country, their prior occupancy of the continent and that there are those living today who have maintained and asserted their traditional rights and interests. **Such an agreement could accommodate the notion of sovereignty under traditional law and custom in the sense of traditional authority over land and waters supported by a spiritual connection.** To recognise that much, is to do little more than the common law already does in recognising rights and interests arising from land and waters under traditional law and custom. ‘Sovereignty’ is a colonising term and whether or not it is appropriate for its invocation by Indigenous people in this debate might at one time have been a question requiring serious reflection. Noel Pearson was sceptical about whether its use, as in international law, was appropriate for Indigenous peoples and preferred the term ‘self-determination’. Properly understood, however, sovereignty in its relation to recognition and agreement should not be a term which stands in the way of either.<sup>82</sup>*

65. Heritage protection laws do not currently recognise that sites are integral to existence and identity, and are, or represent, a connection to ancestors and ancestral beings. Sites are considered significant because they are a connection with land and waters that is unique to Aboriginal and Torres Strait Islander peoples and which goes beyond what the common law would classify as property, and is not limited by Australian tenure systems.

66. The Native Title Act provides an example of the way in which the interests of First Nations over land and waters can be recognised. Subsection 223(1) provides that native title means the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in relation to land and waters where ‘the rights and

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<sup>81</sup> The Hon Robert French AC, ‘Simple Justice – Recognition and Sovereignty’ (National Aboriginal Legal Conference, University of Western Australia, 25 September 2018).

<sup>82</sup> *Ibid* (emphasis added).

interests are possessed under the traditional laws acknowledged, and the traditional customs observed' by them. The High Court has held that those rights and interests derive from traditional laws and customs whose origins are in normative rules existing since before the assertion of sovereignty by the British Crown. The Native Title Act also makes clear that where native title rights and interests have been compulsorily converted to statutory rights and interests (such as by *the Aboriginal Land Rights (NT) Act 1976* (Cth)) then those titles too are covered by the expression native title (subsection 223(3)) in that they are not inconsistent with the recognition and coexistence of native title.

67. Prior to the decision in *Mabo v Queensland (No 2)*, a number of state and territory regimes had provided differing forms of ownership of land by Aboriginal people and Torres Strait Islanders. The *Aboriginal Land Rights (NT) Act 1976* (Cth) and the *Aboriginal Land Rights Act 1983* (NSW) are but two examples. Both provide for the vesting of land in Aboriginal people or organisations and both set up substantial administrative processes to ensure consultation and representation through Aboriginal bodies such as land councils and land trusts. Such title to land and the associated structures are almost half a century old now, yet the heritage protection regimes in New South Wales and the Northern Territory have been slow to formally integrate them into relevant protection processes.
68. A barrier exists in relation to people recognised as native title holders under the Native Title Act and the state and territory allied legislation meant to protect and recognise native title. The Native Title Act provides for the establishment of prescribed bodies corporate (**PBC**) to hold native title to land on behalf of or for the determined native title holders. However, heritage protection laws have not been adapted to these major developments in First Nations' ownership of land.<sup>83</sup>
69. As will be discussed in more detail below, the state and territory heritage protection regimes have severe limitations in their ability to identify the relevant Aboriginal parties or include these parties in the decision-making process.
70. The AH Act (WA), for example, does not require the consent of, or even consultation with, either the relevant PBC or the representative body formally recognised under the Native Title Act with interests in the area of a proposed project. This includes where the land the subject of a proposed mine has been lawfully recognised as subject to native title held by a PBC.
71. In the Northern Territory, the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) does not require consultation with either the traditional owners under the *Aboriginal Land Rights Act 1976* (NT) or the land councils established under that Act, but rather a wholly separate and unrepresentative Aboriginal Area Protection Authority.
72. In New South Wales, there is similarly a lack of requirement for formal consultation with either the native title representative body or the NSW Aboriginal Land Council and local Aboriginal land councils. Instead, a statutory advisory committee is established under the NPW Act (NSW), and consultation is only required with those who respond to notices.
73. At the Commonwealth level, heritage protection is fragmented between three different Commonwealth statutes: the ATSIHP Act, PMCH Act and EPBC Act. None of these statutes build upon the interests in land of First Nations and the bodies established to represent traditional Aboriginal and Torres Strait Islander owners with

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<sup>83</sup> In NSW land councils may make submissions with respect to heritage protection but perform a role akin to an interested party in a local government development dispute.

administration and management of their land. In addition to the likelihood that the relevant traditional owners will be missed in the identification of those who can speak for country – including the heritage values of a particular site – this disconnect also imposes substantial duplication of resources. It appears anomalous that the Commonwealth should have established and funded representative bodies to assist native title claimants and PBCs throughout the country yet allows the continuation of a heritage protection system that does not facilitate or require consultation with such representative bodies and those whom they represent. Those bodies have statutory obligations under the Native Title Act, as far as reasonably practicable, to identify the relevant First Nations people who need to be consulted and support them in negotiations regarding the terms upon which they may consent to a proposed development.

74. This structural disconnect means that small groups of traditional owners faced with a threat to their heritage as part of a development proposal are particularly vulnerable. They are likely to be without the assistance of a representative body, which has the resources to assist with development agreements including negotiation of an Indigenous Land Use Agreement (**ILUA**) and experience in assisting traditional owners to make appropriately authorised decisions. Even where First Nations are able to marshal their resources to commence negotiations, they frequently need to rely on the developer or the miner to fund legal representation, provide information relevant to the project and external heritage assessments and support arrangements needed to properly consult the traditional owners.
75. Within Australia's cultural heritage framework, the Law Council further suggests the existence of several damaging perspectives in the way the protection of First Nations' cultural heritage has been legislated to date. The first is the too-frequent assessment of cultural heritage sites based primarily on their archaeological value. Related to this is the tendency to see cultural heritage as something that is entirely tangible and that can be divorced from the present time and the surrounding land and waters. The third is the consideration of First Nations peoples as another interest group which is largely on par with all other interest groups in the context of development or planning consent processes.
76. From comments articulated through the various First Nations committees of its constituent bodies, the Law Council acknowledges that First Nations cultures are typically poorly understood, including by many Australian lawmakers and within the legal system itself. First Nations cultures are rich and diverse, developed through a continuous connection to this land for more than 60,000 years, and are living cultures, not ones which ended at the time colonisation commenced. Accordingly, while archaeological value is an important factor, such cultural heritage cannot be divorced from its contemporaneous role in maintaining First Nations cultures, identity and relationship with the lands and waters. As noted by scholars Lauren Butterly, Ambelin Kwaymullina and Blaze Kwaymullina in the context of the AH Act (WA), this legislation:

*... was drafted at a time when there was no consultation with Indigenous peoples, and based on a Eurocentric, anthropologically grounded 'museum mentality' that failed to understand that Indigenous heritage is living.*<sup>84</sup>

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<sup>84</sup> Lauren Butterly, Ambelin Kwaymullina and Blaze Kwaymullina, 'Opportunity is There for the Taking: Legal and Cultural Principles to Re-start Discussion on Aboriginal Heritage Reform in Western Australia' (2017) 91 *Australian Law Journal* 365.

77. The importance of this acknowledgement of the enduring nature of First Nations culture cannot be understated when viewed in the context of the devastating effect of colonial expansion on the transmission of knowledge and practices. Even the most basic understanding of the connection between First Nations' traditional laws and customs and the land to which they adhere reveals an inherent connection between sacred sites and other sites of significance, kinship relations and traditional custodianship of land. At the heart of those laws and customs are central aspects of Indigenous culture such as Dreamings, songlines and apocryphal beings, such as the Rainbow Serpent, depending on the First Nation concerned. Such beliefs are of great antiquity but remain central to the continuing laws, customs and traditions of Aboriginal people and Torres Straits Islanders.
78. A given site may be integral to traditional ownership of a given area and give rise to certain traditional obligations to look after that site and protect it from harm. The site may be a focal place for ceremony and used for the education of young people. Sites of significance can be the locus for renewal of the people and the environment, the source vesting life force, a point in the natural world, the destruction of which leads to great harm to its custodians, an integral part of a longer song or story line, an increase site, and have related sites nearby.
79. Justice Gordon examined the Aboriginal connection to land earlier this year in the High Court's landmark decision of *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3 (**Love and Thoms**), as follows:
- It is a connection with land and waters that is unique to Aboriginal Australians. As history has shown, that connection is not simply a matter of what the common law would classify as property. It is a connection which existed and persisted before and beyond settlement, before and beyond the assertion of sovereignty and before and beyond Federation. It is older and deeper than the Constitution. And the connection with land and waters that is unique to Aboriginal Australians does not exist in a vacuum. It was not and is not uniform. It was not and is not static; cultures change and evolve. And because the spiritual or religious is translated into the legal, the integrated view of the connection of Aboriginal Australians to land and waters is fragmented. But the tendency to think only in terms of native title rights and interests must be curbed.*<sup>85</sup>
80. This passage recognises the complex and changing nature of the content and connection of Indigenous cultural heritage. Importantly, it acknowledges that Indigenous culture, whilst deeply entwined with its connection to land and water, is more than just this, it is more than the mere objects and places themselves, encompassing as it does rich stories, songs and other intangible matters. It is a connection to land and water but it is more than that too. The heritage value of many Indigenous sites can only be understood if the intangible cultural heritage that accompanies it is understood. Heritage protection laws should allow for the valuing of First Nations' heritage which accommodates a holistic understanding of the importance of such sites.
81. Similarly, obligations should exist not only in relation to parts and features of the landscape that reflect traditional aspects of First Nations' cultures. Recognition of cultural heritage must extend to historical Aboriginal landscape, but also to parts and features of the lands which are significant to cultures of contemporary Aboriginal

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<sup>85</sup> *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3, [363] ('*Love and Thoms*') (Gordon J).

communities.<sup>86</sup> Cultural values are dynamic, and can change over time,<sup>87</sup> and can be derived from post-contact events, history, and relationships to land and water, as well as being embedded in traditions and relationships that are derived from, or occur as part of a continuity of pre-contact society.

82. The New South Wales (NSW) case of *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465 (**Darkinjung**) considered some of these cultural landscape interconnections. In its judgment, the Land and Environment Court of NSW found:

*Collectively, these definitions of the cultural landscape make clear that the physical aspects of a site (in this case the engraved figures and stone arrangement) should not be considered in isolation but in association with its surrounding spiritual, cultural and physical environment. Justice Toohey, in the Walpiri and Kartangaruru Kurintiji land claim at [69] - [70], cautioned that:*

*the word [site] may mislead by generating a tendency to think of sites as particular features of the landscape occupying relatively little space and rendering unimportant the country around them.*

*Paul Gordon [an Aboriginal stakeholder] makes this distinction clear:*

*The carving on the rock is not the site. The site is the carving and the surrounding area and cultural practice that took place at the site.*

*We look at an object on rock and we call it a woman site ... Why is it a woman on the rock? It's because of story attached to it and the journey that brings people to her and the journey that she keeps going on, and that's the cultural landscape which we haven't considered at all. We are just looking at an object, right there referring to that woman as an object when to us she is a living ancestral being who is still participating and is still doing things in country.<sup>88</sup>*

83. Further, the Court considered the importance (archaeologically, anthropologically and culturally) in determining the significance of a Women's Site, and its place in the cultural landscape. The proponent in this matter did not contest the significance of the Women's Site, and that it existed within a cultural landscape. However, it argued that there was no adequate evidence of the existence of a cultural landscape beyond the immediate physical limits of the Women's Site of such importance that it would preclude the proposed development.
84. The Court found that there was convincing evidence indicating the interrelatedness of the elements of the integrated cultural landscape between the Women's Site and other features in the wider area. These were summarised by the Court as follows:<sup>89</sup>

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<sup>86</sup> See, eg, New South Wales Government, Department of Environment and Conservation, *Aboriginal Cultural Heritage and Regional Studies: An Illustrative Approach* (General Report, 1 December 2006) 19-21 <<http://www.environment.nsw.gov.au/resources/cultureheritage/RegionalStudiesfinalSect2comp2.pdf>>.

An example may be historical camps on pastoral properties (which include burial areas) and which may be highly significant to the Aboriginal people who lived and worked there regardless of where they originally came from. *Mehmet v Carter* [2020] NSWSC 413, [512]-[614] is an example of a case of a burial dating from 1890 being regarded as an 'Aboriginal object' albeit in that case the person was buried on his own country.

<sup>87</sup> *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure* [2015] NSWLEC 1465, [329].

<sup>88</sup> *Ibid* [182]-[183].

<sup>89</sup> *Ibid* [206].

- *In Aboriginal belief the culture heroes themselves travelled across the landscape, between sites, and were active between sites in this creation journey, creating a cultural landscape which still exists. ...*
- *The extent of sites in the area, including those which relate to the evidence of past life, points to the fact that Aboriginal people traditionally, actively and intensively utilised an area which includes the Rocla land and probably stretching beyond. The area contains elements such as traditional food and water sources, walking routes, camping places, and abundant rock art, much of it relating to the travels of cultural heroes.*
- *Aboriginal witnesses referred to ceremonies, camping and other activities performed in and around the actual sites.*
- *They describe it as the habitat of traditionally important, and in some cases, totemic features of the natural environment. The natural features of this landscape have traditional associations.*
- *Aboriginal people see this landscape in a holistic way, rather than as dots on a map, and feel a strong attraction to it and a need to protect it as a whole.*
- *The fact that development has taken place in the regional cultural landscape does not negate its importance in Aboriginal eyes, nor does it mean that it is necessarily appropriate to conduct a quarrying operation within this landscape.*

85. It is also significant to note that the Court highlighted that, although the initial significance of the site might be archaeological, it continues to have contemporary social and cultural value as a tangible aspect of connection to land and culture:

*With respect to this issue, Ross outlines how the ascription of contemporary significance to a place upon the location of tangible evidence in this way in a relatively short time is well documented in Aboriginal cultural heritage literature, and comments that such contemporaneity of meaning does not necessarily reduce the significance of the meanings being assigned. The discovery of such a site, previously recorded as purely archaeological, corroborates a general sense of connection to country and acts to “map” people physically onto country. In a sense the tangible site supports the associations that people already experience and which previously were reported as vaguer feelings of connection and traditional beliefs. Each of the three Aboriginal groups interviewed by Ross stressed their connection to the country around Calga regardless of the existence of particular archaeological sites but the existence of the site acts as a tangible aspect of this connection. It is through the existence of this site that the women's existing knowledge about the country is reified and gives a specific point of connection to place. Ross explains that this kind of mapping onto country and place is a common occurrence in an ecological approach to Aboriginal cultural heritage management.<sup>90</sup>*

86. This recognition that the connection is ‘more than’ native title and ‘more than’ land, water or objects is an important one, which Indigenous people are increasingly keen to convey. Indigenous people have expressed their frustrations at the lack of understanding of their culture by non-Indigenous decision makers and legislators. The result is a legal framework where all too frequently rights and protections sought

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<sup>90</sup> Ibid [167].

by Indigenous people are not adequately or appropriately protected through the legal system at either the Commonwealth or state level.

87. Similarly, to deal with First Nations heritage as relevant to just another interest group or stakeholder devalues the importance of First Nations sites of significance. In this context, the New South Wales Bar Association has noted that a valuation model aimed at considering whether a person's water view will be impeded or shade thrown on the neighbour's backyard is not an equivalent process to the consideration of the importance of protecting sacred and other sites of cultural significance. In the context of mining operations, it states that there is a real distinction to be made between the farmer who may lose occupation and income as a result of a mine (which may be readily valued) and the interests of the traditional owners who will lose a central site which is timeless and central to both traditional ownership of land and the cultural beliefs of the First Nation concerned.
88. A key tool in rectifying the difficulties connected with this, is to increase Indigenous people's self-determination in the drafting and implementation of rights and protections for their culture, consistent with the UNDRIP, as set out above.
89. The call for increased self-determination and the incorporation of 'free, prior and informed consent' for Aboriginal peoples and communities is gaining increasing support in Australia as its legislative frameworks evolve to better recognise and protect fundamental rights.<sup>91</sup>
90. By providing self-determination mechanisms, active participation and control to First Nations with respect to decisions regarding their cultural heritage, the damage inflicted through the failures of lawmakers and the Australian legal system to adequately comprehend and understand First Nations values, culture, spirituality and relationship to land is diminished. Aboriginal traditional owners and communities must have a leading voice in managing their own heritage sites.

## Responses to the Terms of Reference

### (a) The operation of the *Aboriginal Heritage Act 1972 (WA)* and approvals provided under the Act

91. As noted above, the AH Act (WA) is the primary legislation governing preservation of Aboriginal cultural heritage places and objects in Western Australia (**WA**).<sup>92</sup> It is administered by the Minister for Aboriginal Affairs in WA. The main purpose of the Act is 'to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants'.<sup>93</sup>
92. The AH Act (WA) was the 'first legislation of its kind in Australia to protect Aboriginal places and objects'.<sup>94</sup> However, it has remained substantially unchanged for almost 50 years and, as put by the current Minister for Aboriginal Affairs in WA, The Hon

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<sup>91</sup> See, eg, Law Council of Australia, Submission to the Department of Agriculture, Water and the Environment, *Statutory Review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (20 April 2020).

<sup>92</sup> Government of Western Australia, Department of Planning, Lands and Heritage, Review of the Aboriginal Heritage Act 1972, 3.

<sup>93</sup> AH Act (WA), Long Title.

<sup>94</sup> Government of Western Australia, Department of Planning, Lands and Heritage, Review of the Aboriginal Heritage Act 1972, 2.

Ben Wyatt MLA, who is presiding over the current WA review, elements of the Act are no longer ‘fit for purpose’.<sup>95</sup>

93. The Act was amended in 1980 and 1995, the overall result of which was a ‘watering down’ of the protections provided by the legislation.<sup>96</sup> In recent times, it has been criticised as a rubber stamp for development. There have been more than 460 applications made under section 18 to impact Aboriginal heritage sites on mining leases over the last ten years, and, up until recent events, all have been approved.<sup>97</sup>

94. In the wake of the destruction of the caves at the Juukan Gorge, Minister Wyatt stated:

*I feel the pain of administering an outdated and inadequate system that led to this sad and regrettable outcome.*<sup>98</sup>

95. There have been various reviews of the AH Act (WA) since it was first enacted, which serve to illustrate these limitations and which have all, so far, failed to produce effective solutions. These reviews are discussed in **the Appendix**. The current review underway is also described below.

### Key Provisions and Limitations

96. The key provisions of the AH Act (WA) relating to approvals are sections 17 and 18.

97. Section 17 creates a general prohibition against alteration of an Aboriginal site. However, this prohibition is capable of being overridden under section 18, which allows the ‘owner of any land’, an expression defined in subsections 18(1) and 18(1A), to notify the Committee that he or she requires the use of the land for a purpose likely to violate the prohibition against alteration of an Aboriginal site.

98. Section 18 puts in place a statutory process whereby the Committee considers the notice and provides advice to the Minister and the Minister decides to either consent to or decline the owner’s use of the land for the notified purpose. Subsections 18(2) and 18(3) state:

(2) *Where the owner of any land gives to the Committee notice in writing that he requires to use the land for a purpose which, unless the Minister gives his consent under this section, would be likely to result in a breach of section 17 in respect of any Aboriginal site that might be on the land, the Committee shall, as soon as it is reasonably able, form an opinion as to whether there is any Aboriginal site on the land, evaluate the importance and significance of any such site, and submit the notice to the Minister together with its recommendation in writing as to whether or not the Minister should consent to the use of the land for that purpose, and, where applicable, the extent to which and the conditions upon which his consent should be given.*

(3) *Where the Committee submits a notice to the Minister under subsection (2) he shall consider its recommendation and having regard to the general interest of the community shall either —*

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<sup>95</sup> Ibid.

<sup>96</sup> T Chalone, ‘Aboriginal Heritage Act 1972: a clash of two cultures; a conflict between two laws’, *Report of a Parliamentary Internship with the Hon. Robin Chapple MLC* Murdoch University (2004) 254.

<sup>97</sup> Commonwealth, *Parliamentary Debates*, Senate, 11 June 2020, 2809 (Senator Siewert).

<sup>98</sup> Ben Wyatt, ‘A Stronger Shelter for Indigenous Heritage’, *The Australian* (online, 9 June 2020).

- (a) *consent to the use of the land the subject of the notice, or a specified part of the land, for the purpose required, subject to such conditions, if any, as he may specify; or*
- (b) *wholly decline to consent to the use of the land the subject of the notice for the purpose required,*

*and shall forthwith inform the owner in writing of his decision.*

99. Where consent is given, subsection 18(8) explicitly provides that an act undertaken pursuant to this consent and any conditions attached to it cannot constitute an offence.
100. The ‘Committee’ referred to in section 18 is the Aboriginal Cultural Materials Committee (**the Committee**), which is established under section 28 of the AH Act (WA). It is described in section 28 as an ‘advisory body’, the members of which ‘shall be selected from amongst persons, whether or not of Aboriginal descent, having special knowledge, experience or responsibility which in the opinion of the Minister will assist the Committee in relation to the recognition and evaluation of the cultural significance of matters coming before the Committee’.<sup>99</sup>
101. There is no requirement for Aboriginal representation on this Committee. It has as one of its primary functions, to evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons.<sup>100</sup> It must have regard to the factors set out in section 39, including ‘any existing use or significance attributed under relevant Aboriginal custom’,<sup>101</sup> but the wording of these provisions does not safeguard the inclusion of an Aboriginal perspective, let alone ensure that the views of the traditional owners or those First Nations people with knowledge of the cultural significance of the land, or recognised as speaking for country such as native title holders or Registered Native Title Bodies Corporate, are heard. Similarly, the Minister, in considering the Committee’s recommendation and making his or her decision, only needs to have ‘regard to the general interest of the community’.<sup>102</sup> These provisions do not mandate any obligation or process by which to take into any account any view of any Aboriginal custodian of any place or object which the Act is intended to protect.<sup>103</sup> They do not recognise the heritage outcomes resulting from agreements made under the Native Title Act between land use proponents and native title holders.<sup>104</sup> Nor do these provisions provide any process for any devolution of the advisory process to the vast regional areas of Western Australia.
102. While subsection 18(5) allows the land owner to ‘apply to the State Administrative Tribunal for review of the decision’, there is no equivalent statutory right of appeal or review of the Minister’s decision under section 18 for Aboriginal people who have

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<sup>99</sup> AH Act (WA) s 28.

<sup>100</sup> Ibid s 39(1)(a).

<sup>101</sup> Ibid s 39(2)(a). See also ss 39(2)(b)-(d) and 39(3).

<sup>102</sup> Ibid s 18(3).

<sup>103</sup> *Robinson v Fielding* [2015] WASC 108, [123] (Chaney J): ‘There is nothing in the process set out in s 18 which expressly requires consultation with Aboriginal people with interests in sites on the land the subject of a s 18 notice’.

<sup>104</sup> For example, the terms of section 31 native title agreements providing consent to future acts, remain confidential between the parties to them. The terms of ILUAs providing processes for future acts in the area subject to the ILUA may also be confidential to the ILUA parties. Notice of these arrangements are not provided under any State agencies and are not available via any publicly accessible sites. Absent a particular arrangement within the ILUA to bind future stakeholders, the relevant terms of the ILUA regarding protection of cultural heritage, may well not apply where there has been a change of ownership or interest in the tenures to which the ILUA otherwise applied.

custodial responsibility for places or objects in accordance with traditional law and customs.<sup>105</sup>

103. The statutory regime also does not provide any mechanism for withdrawal or variation of a consent under section 18 if circumstances have changed or new information is obtained following the granting of consent which may have been capable of altering the Minister's view as to the proper balance to be reached between the Committee's recommendation as to the 'importance and significance' of a site and the 'general interest of the community'.
104. There are other weaknesses that might be drawn out of these key provisions. Subsection 18(7) allows 'the removal of any object to which this Act applies from the land to a place of safe custody', but this inherently fails to recognise the deep connection between an object of significance to Aboriginal people and the land on which it is situated. The provision is also silent on what constitutes 'a place of safe custody', and does not presume that it resides with traditional owners.
105. Finally, recommendations made by the Committee do not impede Ministerial decisions,<sup>106</sup> and the Minister has a wide discretion under subsection 18(4) to set time limits on the work of the Committee, which has the potential to undermine its effective, proper and thorough consideration. The subsection provides as follows:
  - (4) *Where the owner of any land has given to the Committee notice pursuant to subsection (2) and the Committee has not submitted it with its recommendation to the Minister in accordance with that subsection the Minister may require the Committee to do so within a specified time, or may require the Committee to take such other action as the Minister considers necessary in order to expedite the matter, and the Committee shall comply with any such requirement.*
106. The absence of a requirement to consult Aboriginal people in heritage related decisions is contrary to the international human rights standards provided in the UNDRIP, including the principle of self-determination and norms requiring that Indigenous people provide free, prior and informed consent to actions affecting their interests.

### **Case of the Juukan Gorge**

107. Those deficiencies in the AH Act (WA) have had a significant part to play in the events which lead to the destruction of the caves at the Juukan Gorge in the Pilbara.
108. In 2013, Rio Tinto received Ministerial consent to destroy or damage the Juukan cave site under section 18 of the AH Act (WA). However, in a 2014 report by archaeologist Dr Michael Slack to Rio Tinto, it was confirmed that the site known as Juukan-2 (Brock-21) cave was rare in Australia and unique in the Pilbara.

*'The site was found to contain a cultural sequence spanning over 40,000 years, with a high frequency of flaked stone artefacts, rare abundance of*

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<sup>105</sup> See P McGrath, *Recent Developments in Heritage Reform, Land, People, Rights: News for Native Title Researchers* (10 May 2019). This aspect has been considered *not* to constitute racial discrimination sufficient to engage s 10 of the *Racial Discrimination Act 1975* (Cth) (see *Traditional Owners - Nyiyaparli People v Minister For Health Indigenous Affairs* [2009] WASAT 71, [32]-[34] (Chaney J) but section 9 of the *Racial Discrimination Act* has not been addressed.

<sup>106</sup> *Bunuba Dawangarri Aboriginal Corporation RNTBC v Oladipo Minerals* [2019] NNTTA 111, [52]-[53] (Member Cooley), referring to *Wintawari Guruma Aboriginal Corporation RNTBC v Minister Wyatt* [2019] WASC 33.

*faunal remains, unique stone tools, preserved human hair and with sediment containing a pollen record charting thousands of years of environmental changes,' Dr Slack wrote.*

*'In many of these respects, the site is the only one in the Pilbara to contain such aspects of material culture and provide a likely strong connection through DNA analysis to the contemporary traditional owners of such old Pleistocene antiquity.'*<sup>107</sup>

109. Dr Slack and his team removed 7,000 artefacts from the caves in 2014 and the executive summary to the 2014 report states: 'The results of the excavations at Brock-21/Juukan-2 are of the highest archaeological significance in Australia'.<sup>108</sup>
110. There is no provision in the AH Act (WA) which would allow the Minister to take into account the information acquired after the consent was given in 2013 and reverse the consent given.
111. Additionally, if the Puutu Kunti Kurrama and Pinikura Peoples, who are the custodians of the area, had wished to provide information to the Committee or the Minister to prevent the consent being given in 2013 or appeal that decision once it was given there is no process under the AH Act (WA) for them to do that.
112. What Aboriginal custodians have typically been required to do in order to participate in the processes under the AH Act (WA) is to mount challenges by way of judicial review applications to overturn administrative decisions which are directed to issues of decisions made beyond the jurisdiction of the decision-maker, after establishing that the Aboriginal person has a sufficient special interest in the subject matter of the decision to establish standing in the Court.<sup>109</sup>
113. The AH Act (WA) would be significantly improved if there were explicit requirements in the legislation for taking into account the views and wishes of First Nations people with knowledge about the relevant elements of cultural heritage under consideration in each instance. That can only be achieved in an appropriately systematic way, by establishing a comprehensive process of conferral of decision-making upon the traditional holders of the cultural material in question, which does not dilute the ultimate authority of the local landholders but is supported by land-based Indigenous bodies, which may include the existing native title corporate structures: Native Title Representative bodies and adequately resourced Registered Native Titles Bodies Corporate. These should be composed of Aboriginal people with cultural knowledge of the relevant region, with a capacity to engage expert advice and assistance appropriate to each decision to be made.

### **Existing Review**

114. As noted above, the WA Government is currently in the process of conducting a review of the AH Act (WA), which commenced with a consultation paper released on 9 March 2018. The drafting process for the proposed new Aboriginal heritage

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<sup>107</sup> Gregg Borschmann, 'Report Reveals Rio Tinto Knew the Significance of 46,000-Year-Old Rock Caves Six Years Before it Blasted Them', *ABC News* (online, 5 June 2020), quoting Dr Michael Slack.

<sup>108</sup> *Ibid.*

<sup>109</sup> Examples of such cases are: *Bropho v State of WA & WADC* (1990) 171 CLR 1; *Culbong v SECWA* (1989) Supreme Court WA, SC WA Lib No 7944 (Franklyn J); *Bodney v Trustees of Museum* (1989) Supreme Court WA, SC WA Library No 7959 (Franklyn J); *Van Leeuwin v Dallhold Investments* (1990) 71 LGPR 348; *Bropho v Minister for Aboriginal Affairs, Minister for Environment & Ors* (1990) Supreme Court of WA (Wallwork J); *Watson ex parte Bropho* (1992) SCWA (Wallwork J); *Robinson v Fielding* [2015] WASC 108 (Chaney J); *Abraham v Collier, Minister for Aboriginal Affairs* [2016] WASC 269; *Woodley v Minister for Aboriginal Affairs* [2009] WASC 251, [38].

legislation is underway.<sup>110</sup> A final round of formal public consultation will be scheduled later this year. The WA Government has foreshadowed that improved protection for Aboriginal heritage will be a key element of the new legislation, which will include:

- an updated definition of what constitutes Aboriginal heritage, cultural landscapes and place-based intangible heritage;
- all Aboriginal heritage continues to be protected under the new Act;
- encourage agreements between Aboriginal people and land use proponents;
- a new directory, to replace the Register of Aboriginal Places and Objects, which reflects the broader scope of heritage in the new legislation;
- offences and penalties brought into line with the *Heritage Act 2018* (WA) and other modern legislation;
- extending the period within which enforcement action must be commenced to five years;<sup>111</sup>
- better decision making will be a key element of the new legislation, which will include:<sup>112</sup>
  - early engagement by proponents giving Aboriginal people an active role in decisions about their heritage;
  - alignment between Aboriginal heritage processes, Native Title requirements and other state and Commonwealth regulations;
  - greater transparency in decision making with reasons for decisions to be published and the same rights of appeal available to Aboriginal people and land users;
  - a defined role for the Department of Planning, Lands and Heritage in providing early advice to all stakeholders regarding compliance with the new Act and the approvals pathway;
  - a Directory of Heritage Professionals to ensure heritage professionals are subject to greater rigour leading to consistent, high quality outcomes for Aboriginal parties and land use proponents; and
  - The Minister for Aboriginal Affairs will retain overall responsibility for the Aboriginal heritage system and may delegate certain decision-making powers to the new Aboriginal Heritage Council; and
- Aboriginal voices will be a key element of the new legislation, which will include:<sup>113</sup>

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<sup>110</sup> The Minister has recognised that ‘the *Aboriginal Heritage Act 1972* (WA) cannot be modernised through amendments [and a] complete overhaul is required through a new statute’: Ben Wyatt, ‘A stronger Shelter for Indigenous Heritage’, *The Australian* (online, 9 June 2020).

<sup>111</sup> Government of Western Australia, Department of Planning, Lands and Heritage, *Review of the Aboriginal Heritage Act 1972: Improved Protection* (Factsheet, undated) <<https://www.dplh.wa.gov.au/getmedia/2ed3bd98-fb2a-4d79-a859-26644dba7c85/AH-AHA-review-fact-sheet-Improved-Protection>>.

<sup>112</sup> Government of Western Australia, Department of Planning, Lands and Heritage, *Review of the Aboriginal Heritage Act 1972: Better Decisions* (Factsheet, undated) <<https://www.dplh.wa.gov.au/getmedia/88c4f24b-b290-4887-81dd-42ede660f5ee/AH-AHA-review-fact-sheet-Better-Decisions>>.

<sup>113</sup> Government of Western Australia, Department of Planning, Lands and Heritage, *Review of the Aboriginal Heritage Act 1972: Aboriginal Voices* (Factsheet, undated) <<https://www.dplh.wa.gov.au/getmedia/b489deb1-4301-4c34-a1a4-0386887e1b92/AH-AHA-review-fact-sheet-Aboriginal-Voices>>.

- consultation with Aboriginal people required in the identification, management and protection of their heritage;
  - requirement for an Aboriginal person to be the Chair of the Aboriginal Heritage Council;
  - priority given to Aboriginal people for membership on the Aboriginal Heritage Council providing advice and strategic oversight of the Aboriginal heritage system;
  - the provision for local Aboriginal Heritage Services to identify the right people to speak for country and make agreements regarding Aboriginal heritage management and land use proposals in specific geographic areas, and support the implementation of existing agreements; and
  - protected Areas will no longer be vested with the Minister for Aboriginal Affairs.
115. These proposals generally appear to be improvements on the current AH Act (WA). However, the above discussion suggests that consideration could also be given to:
- a more systemic process by which to ensure appropriate representation by bodies composed of Aboriginal people, which respects local land owners, their authority and their representation, and facilitates and resources access to other First Nations people with cultural knowledge of the local area concerned, other expert advice and secretariat support;
  - including explicit requirements in the legislation for consultation with the above-mentioned parties;
  - the ability to seek review of a decision should new, significant, compelling evidence of cultural heritage arise;
  - the sufficiency of resourcing to enable First Nations to represent their communities on cultural heritage issues; and
  - the degree to which the proposed amendments match or improve upon 'better practice examples' of other legislation, such as the Victorian model, and address the proposed national principles, both of which are discussed below.

## **(f) The interaction of state Indigenous cultural heritage regulations with Commonwealth laws**

116. The primary Commonwealth law for the protection of Aboriginal cultural heritage is the ATSIHP Act. In the absence of a state or territory statute effective to protect a heritage site, it is open for an Aboriginal person or group to apply to the Commonwealth Minister responsible for the ATSIHP Act to protect a 'significant Aboriginal area'. The ATSIHP Act is intended to operate concurrently with state and territory legislation operating in the same field. Subsection 7(1) specifically provides:

*This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.*

117. There is no legal impediment to the ATSIHP Act powers under sections 9 and 10 being exercised where State legislation has been applied to a site. In *Re Robert Bropho v Robert Tickner and Bluegate Nominees Pty Ltd* (1993) 40 FCR 165, Justice Wilcox found that building work was being undertaken which would soon irretrievably (except at great cost) damage the site which the applicant sought to protect and preserve. He concluded that the Commonwealth Minister had fallen into error of law

in rejecting the applicant's claims for declarations under sections 9 and 10 of the ATSIHP Act. His Honour was of the view that the fact that the WA Minister had exercised power under the AH Act (WA) was no impediment to the Commonwealth Minister's obligation to exercise the powers under the ATSIHP Act, saying:

*The Minister placed reliance on the Western Australian Act. But, by the time he made his decision, the Western Australian Minister had already consented under section 18 of that Act to the development proceeding. It was irrational to rely upon the Western Australian Act to ensure the protection and preservation of the site. Plainly, it would not.*<sup>114</sup>

118. The Minister appealed the decision of Justice Wilcox but the Full Court of the Federal Court in *Tickner v Bropho* (1993) 114 ALR 409 dismissed the appeal and took the analysis of the application of the ATSIHP Act further. Chief Justice Black held:

*If, as I have concluded, the Act requires the Minister to consider whether an area that is the subject of a valid application is a significant Aboriginal area and whether it is under threat of injury or desecration, I consider that it must also be concluded that there is, in all such cases, an obligation to obtain a report under s 10(4) and to consider the report and any representations attached to it.*

119. Justice Lockhart added:

*There is no question that the Minister has a discretion whether or not to make a declaration under s 10; but it is a discretion which must be exercised after the matters specified in paragraphs (b) and (c) have been considered.*

120. Justice French agreed, saying, 'the Minister cannot refuse a declaration without considering the competing interests using the procedures for which the Act has provided.'

121. However, in practice, the Law Council's constituent bodies advise that there has been minimal interaction between the Commonwealth and state Aboriginal cultural heritage laws, including through the exercise of the powers contained in the ATSIHP Act to override decisions made under state and territory legislation, as discussed in the next section.

## **(g) The effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions**

### **Commonwealth Jurisdiction**

#### **Aboriginal and Torres Strait Islander Heritage Protection Act**

122. The ATSIHP Act includes provisions whereby the Minister, upon application by an Aboriginal group or person, may make a declaration providing for the protection and preservation of an Aboriginal area or object.<sup>115</sup> Short-term declarations may be made for up to 60 days<sup>116</sup> and longer declarations made for any period specified.

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<sup>114</sup> *Re Robert Bropho v Robert Tickner and Bluegate Nominees Pty Ltd* (1993) 40 FCR 165, [43].

<sup>115</sup> ATSIHP Act ss 9-19.

<sup>116</sup> *Ibid* ss 9(1), 9(3).

Contravention of a declaration is an offence.<sup>117</sup> The Minister can apply to the Federal Court for an injunction to stop potential or ongoing breaches of the declaration.<sup>118</sup>

123. A significant area may be an area of land or water but must be of 'particular significance to Aboriginals in accordance with Aboriginal tradition'. 'Aboriginal' includes Torres Strait Islanders, while 'Aboriginal tradition' is defined to mean 'the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.'<sup>119</sup>
124. Before making a more permanent declaration the Minister must do two things: first, consult with her or his state or territory counterparts as to whether there is effective protection in that jurisdiction for the place or object;<sup>120</sup> and second, the Minister shall have received and considered a report commissioned by him or her with respect to the application for protection.<sup>121</sup>
125. If the Minister is satisfied that the state or territory laws effectively protect the area or object then he/she must revoke any temporary protection declaration.<sup>122</sup> The reporter must invite representations from the public and report to the Minister about the particular significance of the area to Aboriginal people, the nature and extent of the threat of injury to, or desecration of, the area, the extent of the area that should be protected, prohibitions and restrictions to be made with respect to the area, the effects the making of a declaration may have on the property or pecuniary interests of other persons (such as a developer or miner), the duration of any declaration, the extent to which the area is or may be protected by or under a law of a state or territory, and the effectiveness of any remedies available under any such law and any other matters.<sup>123</sup>
126. There is, in theory at least, sufficient legislative authority at a Commonwealth level to protect significant Aboriginal areas. However, the use of the ATSIHP Act has been minimal. In introducing the legislation in 1984, the then-Minister (the Hon Clyde Holding) stated, 'in practice, the Commonwealth sees this as legislation to be used as a last resort'.<sup>124</sup> The statistics quoted by the Victorian Aboriginal Heritage Council are that:<sup>125</sup>
  - Between 2011 and 2016: 32 applications were received for emergency protection under section 9; 22 applications were received for long-term protection under section 10; and 7 applications were received for protection of objects under section 12 of the ATSIHP Act. No declarations were made; and<sup>126</sup>

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<sup>117</sup> Ibid s 22.

<sup>118</sup> Ibid s 26.

<sup>119</sup> Ibid s 3.

<sup>120</sup> Ibid s 13(2).

<sup>121</sup> Ibid ss 10(1)(c), 10(4).

<sup>122</sup> Ibid s 13(5).

<sup>123</sup> Ibid s 10(4).

<sup>124</sup> Hansard, 9 May 1984, 2131.

<sup>125</sup> See Victorian Aboriginal Heritage Council, Submission to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (April 2020)

<<https://www.aboriginalheritagecouncil.vic.gov.au/review-environment-protection-and-biodiversity-conservation-act-1999>>.

<sup>126</sup> Ibid, citing *Australia State of the Environment Report* (2016) <<https://soe.environment.gov.au/>>.

- Between 2007 and 2013 there had been 130 applications under sections 9, 10 and 12 of the ATSIHP Act with no declarations made in 105 of the applications and decisions outstanding in the remaining 25.<sup>127</sup>

127. Further, the ATSIHP Act does not require consultation with any land-owning body, such as an Aboriginal Land Trust (in the NT) or an Aboriginal land council which holds a statutory title to land (such as in NSW). There is no mention in the ATSIHP Act of consultation with a PBC or a representative body established under the Native Title Act. Apart from the requirement to consider the section 10(4) report, the Minister is otherwise at liberty to determine the application without recourse to specific statutory criteria. There is no presumption in favour of protection of the area or object, nor anything to stop a Minister rejecting the report's recommendations if he or she considers the countervailing factors outweigh protection (eg economic benefit to third parties).

128. The Act has had minimal amendments and has failed to maintain pace with the increasing recognition of the importance of Indigenous culture to Australian society, the richness of that culture and the value in respecting, protecting and learning from it. Much has changed since it was passed in 1984. It predates a number of significant commitments by the Australian Government with respect to human rights and Indigenous self-determination. It also predates the common law recognition of native title commencing with *Mabo* and the legislative provisions enacted through the Native Title Act. Although these laws are not, of themselves, cultural heritage protection laws, they represent a massive shift in the understanding of Indigenous culture in Australia.

129. Section 4 of the ATSIHP Act provides:

*The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.*

130. The language is anachronistic and there is little to suggest that the ATSIHP Act is achieving its purpose of preservation and protection in an effective or adequate manner.

131. The few legal decisions concerning the use of the ATSIHP Act reveal that little is being delivered by way of lasting and permanent protection. Court decisions related to the ATSIHP Act have re-affirmed the ultimate discretionary power in the Minister to determine whether to protect a place, what significance to place upon it and how its value is to be weighed against other proprietary and pecuniary interests.<sup>128</sup> Existing examples suggest inaction, confusion and/or delay as key themes. This is illustrated by the case study below and the Dja Dja Wurrung Bark Etchings case study which is included in the **Appendix**.

#### Case Study: Caves at the Juukan Gorge – Western Australia

132. The reason for the failure to protect the Juukan Gorge site, given the statutory power of protection under the ATSIHP Act, on the face of it, is difficult to identify. It is reported that the federal Indigenous Affairs Minister, the Hon Ken Wyatt MP, says he received an 11th hour call from lawyers for the Traditional Owners advising him of

<sup>127</sup> Ibid, citing Productivity Commission, *Mineral and Energy Resource Exploration* (Report No 65, 2013).

<sup>128</sup> *Wamba Wamba Local Aboriginal Land Council and Murray River Regional Aboriginal Land Council v The Minister Administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and Murrays Downs Golf & Country Club Limited* [1989] FCA 210; *Tickner v Chapman*, [1995] FCA 1726.

the risk and asking for advice, and that he advised them to seek an injunction under Commonwealth heritage legislation.<sup>129</sup>

133. A nuance which the Traditional Owners and their advisers would have had to appreciate in the emergent circumstances with which they were faced is that the Minister responsible for the ATSIHP Act in the present Government is not the Minister for Indigenous Affairs, but the Minister for the Environment, the Hon Sussan Ley MP. It was to her that a section 9 application under the ATSIHP Act would have been required to be made.
134. The State Minister responsible for the AH Act (WA), the Hon Ben Wyatt MLA, had no power to intervene or overturn a section 18 AH Act (WA) decision consenting to the destruction of the site which the then-Minister, the Hon Peter Collier, made in 2013, when he was apparently unaware of the significance of the site.

### Review

135. From 1995 to 1996, Elizabeth Evatt AC independently reviewed the *ATSIHP Act*,<sup>130</sup> a move which followed the Kumarangk (Hindmarsh Island) cases.<sup>131</sup> Stakeholder problems which were identified in the report included that:
- it gave no role to Aboriginal people in decisions relating to protection or in the administration of the Act. Nor did it ensure that Aboriginal people would be consulted and have a right to negotiate questions of cultural heritage which arise in the development process. Furthermore, there was no provision to ensure that Aboriginal people would have an ongoing responsibility for the control or management of cultural heritage sites or for access to those sites. Nor did it cover all aspects of cultural heritage important to Aboriginal people. For example, it made no provision concerning intellectual property;
  - the power to protect areas and objects was discretionary. The Minister was not obliged to act, even if an area is of significance to Aboriginal people. He/she could revoke a declaration without any express requirement to consult the parties. The Act did not specify criteria which, when established, conferred a right to a declaration;
  - the Act was too complex, and hard to use. Operating alongside State and Territory laws, and other laws dealing with heritage and land rights, it added to rather than overcame confusion about the array of statutory regimes potentially available for heritage protection;
  - only four out of 49 declarations had been made under section 10, two of which were overturned by the Federal Court and one of which was revoked;
  - a lack of adequate procedures had led to delays, litigation and cost for applicants and other parties;
  - prolonged consultations between Commonwealth, state and territory Ministers had contributed to delays and ineffective outcomes; and

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<sup>129</sup> Calla Wahlquist, 'Juukan Gorge: Rio Tinto blasting of Aboriginal site prompts calls to change antiquated laws', *Guardian* (online, 30 May 2020) <<https://www.theguardian.com/australia-news/2020/may/30/juukan-gorge-rio-tinto-blasting-of-aboriginal-site-prompts-calls-to-change-antiquated-laws>>.

<sup>130</sup> Elizabeth Evatt, Parliament of Australia, 'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.' (Report no. 170 of 1996, July 1996).

<sup>131</sup> Clare Culvenor, 'Commonwealth heritage Protection Legislation' (2000) 5(3) *Indigenous Law Bulletin* 17, 1.

- the effectiveness of the Commonwealth Act was limited by the incompatible and inadequate legislation operating in a number of states and territories.<sup>132</sup>
136. The Evatt report made 58 recommendations, including for the adoption of agreed national minimum standards as the basis for uniform or model laws on Aboriginal cultural heritage protection, for adoption at State, Territory and Commonwealth levels.<sup>133</sup> A system of Commonwealth accreditation of state and territory laws, processes and determinations would then apply, where they complied with these minimum standards. As Shearing has summarised, the recommendations also included:
- *a broadening of definitions of Aboriginal cultural heritage to extend to areas and objects of significance to Aboriginal people in accordance with tradition (including traditions which have evolved from past traditions), and historical and archaeological sites;*
  - *a protection regime based upon automatic protection for areas and sites falling within the definition of Aboriginal cultural heritage through effective criminal sanctions;*
  - *the establishment of Aboriginal cultural heritage bodies with responsibility for site evaluation and the administration of relevant legislation;*
  - *the separation of assessments relating to the significance of sites and areas from decisions concerning land use – the former to be dealt with by Aboriginal cultural heritage bodies and the latter to be dealt with by the Executive; and*
  - *the integration of Aboriginal cultural heritage issues with planning and development processes from the earliest stage. To this end, the report recommended that planning and development processes include an effective consultation/negotiation process for reaching agreement between developers and the Aboriginal community facilitated by a responsible Aboriginal heritage body.*<sup>134</sup>
137. In August 2009, the Hon Peter Garrett, who was then the Federal Minister for the Environment, Heritage and the Arts, announced a review of the ATSIHP Act.<sup>135</sup> A Discussion Paper, *Indigenous Heritage Law Reform*, was released, setting out several proposed changes.<sup>136</sup>
138. The Discussion Paper stated that:

*The [Act] has not been effective in meeting its purpose, which was to provide a direct and immediate means for the Commonwealth to protect traditional areas and objects when there are gaps in state and territory legislation. Instead it has created uncertainty about decisions made under other laws, provoked disputes and led to duplication of decisions, with increased costs for all parties involved. The [Act] has not proven to be an effective means of protecting traditional areas and objects. Few*

<sup>132</sup> Elizabeth Evatt, Parliament of Australia, 'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.' (Report no. 170 of 1996, July 1996) (**Evatt report**), Ch 2.

<sup>133</sup> Ibid, Rec 5.2.

<sup>134</sup> Susan Shearing, 'One Step Forward? Recent Developments in Australian State and Territory Indigenous Cultural Heritage Laws' (2006) 3 *MqJICEL* 35, 39.

<sup>135</sup> See New South Wales Aboriginal Land Council, 'Significant Reforms to the ATSIHP Act', *Heritage Law* (website, undated) <<https://alc.org.au/cmwth-heritage-law-reforms/>>.

<sup>136</sup> New South Wales Aboriginal Land Council, 'Changes Proposed to the Protection of Aboriginal Culture and Heritage at the Federal Level' (Factsheet No 7, undated) <<https://alc.org.au/wp-content/uploads/2019/12/Cultural-and-Heritage7.pdf>>.

*declarations have been made: 93 per cent of approximately 320 valid applications received since the Act commenced in 1984 have not resulted in declarations. Also Federal Court decisions overturned two of the five long term declarations that have been made for areas.*<sup>137</sup>

139. Its reform proposals were intended to:

*...clarify responsibilities for protecting Indigenous heritage, to set standards of best practice nation-wide, to remove duplication of state and territory decisions that meet the standards, and to improve processes for Australian Government decisions about protection when the standards are not met.*<sup>138</sup>

140. These proposed changes included:

- the introduction of minimum national standards for the protection of Aboriginal culture and heritage; and
- new processes for applying to the Federal Minister for emergency and longer-term protection of areas and objects.<sup>139</sup>

141. However, these reform proposals were not implemented.

142. In 1998, the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 (Cth) 1998 was introduced. The bill introduced requirements for applicants to prove that protection was in the 'national interest' and that applicants had exhausted all state or territory remedies.<sup>140</sup> No Indigenous Heritage Advisory Board was instituted.<sup>141</sup> Requiring the exhaustion of state or territory remedies, where those legislative measures were deemed unsatisfactory,<sup>142</sup> was believed to 'waste valuable time and resources...risking the desecration of a significant area or object'.<sup>143</sup>

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<sup>137</sup> Lenny Roth, 'Aboriginal cultural heritage protection: proposed reforms' (NSW Parliamentary Research Service E-brief, 22 November 2015), citing Department of the Environment, Water, Heritage and the Arts, *Indigenous Heritage Law Reform: Possible reforms to the legislative arrangements for protecting traditional areas and objects* (August 2009) 4. It was also noted it was noted at the time that, 'In practice only 7% of applications [under the ATSIHP Act] have resulted in a declaration being made [by the Minister for how the area or object is to be protected]. This amounts to only 24 declarations in 25 years and some of these declarations have been overturned by the Federal Court.': New South Wales Aboriginal Land Council, 'Summary of Key Proposed Changes to the Federal Aboriginal and Torres Strait Islander Heritage Protection Act 1984' (Factsheet No 8, undated) <<https://alc.org.au/wp-content/uploads/2019/12/Cultural-and-Heritage8.pdf>>.

<sup>138</sup> Ibid.

<sup>139</sup> New South Wales Aboriginal Land Council, 'Significant Reforms to the ATSIHP Act', *Heritage Law* (website, undated) <<https://alc.org.au/cmwth-heritage-law-reforms/>>; New South Wales Aboriginal Land Council, 'Summary of Key Proposed Changes to the Federal Aboriginal and Torres Strait Islander Heritage Protection Act 1984' (Factsheet No 8, undated) <<https://alc.org.au/wp-content/uploads/2019/12/Cultural-and-Heritage8.pdf>>.

<sup>140</sup> Department of Environment and Heritage, 'The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making', August 2009. Proposal 8; Clare Culvenor. 'Commonwealth Heritage Protection Legislation'. (2000) 5(3) *Indigenous Law Bulletin* 17.

<sup>141</sup> Australian Human Rights Commission, *Native Title Report 2000: Chapter 4: Indigenous Heritage* (Report 2000, 23 February 2001).

<sup>142</sup> George Williams, 'Race and the Australian Constitution: From Federation to Reconciliation' (2000) 38(4) *Osgoode Hall Law Journal* 653-4.

<sup>143</sup> Department of Environment and Heritage, 'The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making', August 2009. Proposal 8. Clare Culvenor. 'Commonwealth Heritage Protection Legislation'. (2000) 5(3) *Indigenous Law Bulletin* 17.

143. The national interest test was considered too high a threshold for a last resort legislative measure<sup>144</sup> and 'national interest' was not defined in the bill.<sup>145</sup> Consensus on the bill and various amendments between the House of Representatives and the Senate could not be reached. Two Commonwealth parliamentary committees - the Parliamentary Joint Committee on Native Title and the Indigenous Land Fund and the Senate Legal and Constitutional (Legislation) Committee - were formed to decide on the validity of the Evatt recommendations. Both committees suggested the bill introduce the Evatt recommendations.
144. Further remarks about the ATSIHP Act, including its interaction with the EPBC Act, were made by Professor Graeme Samuel AC in his recently released *Interim Report of the Independent Review into the Environment Protection and Biodiversity Conservation Act (the EPBC Act Interim Report)*.<sup>146</sup> These are discussed below.

## **Environmental Protection and Biodiversity Conservation Act**

### Operation

145. The EPBC Act is the principal piece of Commonwealth legislation that addresses the environmental impacts from development at the Commonwealth level. Importantly, the Act is the vessel through which the Commonwealth upholds its obligations as signatory to a significant number of international treaties.
146. It is important to recognise that, other than impacts or potential impacts on Commonwealth land or waters, the EPBC Act does not regulate the 'environment' in a broad sense. This is the domain of state and territory legislation. Rather, the focus of the EPBC Act is on the regulation of matters of national environmental significance (**MNES**). At the moment, MNES are:
- listed threatened species and communities;
  - listed migratory species;
  - Ramsar wetlands of international importance;
  - Commonwealth marine environment;
  - world heritage properties;
  - national heritage places;
  - the Great Barrier Reef Marine Park;
  - nuclear actions; and
  - a water resource, in relation to coal seam gas development and large coal mining development.<sup>147</sup>

147. The EPBC Act includes in its objects at section 3:

*(c) to provide for the protection and conservation of heritage; and*

<sup>144</sup> Commonwealth, *Parliamentary Debates*, Senate, 22 November 1999 (Senator Cooney).

<sup>145</sup> Clare Culvenor. 'Commonwealth Heritage Protection Legislation'. (2000) 5(3) *Indigenous Law Bulletin* 17.

<sup>146</sup> Professor Graeme Samuel AC, *Interim Report of the Independent Review into the Environment Protection and Biodiversity Conservation Act* (June 2020).

<sup>147</sup> Department of Agriculture, Water and the Environment, 'Significant Impact Guidelines 1.1 - Matters of National Environmental Significance'.

*(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and*

*(e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and*

*(f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and*

*(g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.*

148. Importantly, the focus of the EPBC Act is the protection of the natural environment and its component parts. Moreover, the focus is on those aspects of the environment that are of national (or international) significance.<sup>148</sup>
149. One example of the role of the EPBC Act and the Commonwealth in this regard is the protection of the ancient rock art that exists on the Dampier Archipelago including the Burrup Peninsula (Murujuga) in the Pilbara region of Western Australia. The Dampier Archipelago is located adjacent to major gas and chemical facilities operated by a range of companies and the iron ore and salt export operations owned by Rio Tinto. The area was included on the National Heritage List in 2007 primarily for the indigenous heritage values stemming from the rock art and rock placements. It is now the subject of a World Heritage List nomination.
150. Chapter 4 of the EPBC Act enables a process of environmental impact assessment and Commonwealth Ministerial approval of an action that could have a significant impact on one or more MNES. The person proposing to take the action must consider whether or not the action proposed has the potential to have a significant impact on National Heritage values and, if so, refer the proposed action to the Commonwealth Minister for assessment and approval.
151. Significant Impact Guidelines state that an action is likely to have a significant impact on the National Heritage values of a National Heritage place if there is a real chance or possibility that it will cause:
- one or more of the National Heritage values to be lost;
  - one or more of the National Heritage values to be degraded or damaged; or
  - one or more of the National Heritage values to be notably altered, modified, obscured or diminished.<sup>149</sup>
152. In the context of the Dampier Archipelago, this means that any company proposing to operate in an area, or proposing to alter their existing operations, adjacent to the Dampier Archipelago and the rock art must consider the potential impact that their proposed action may have on the indigenous heritage value that is protected by the EPBC Act. Relevantly, it is the values that are protected – not merely physical objects within the formal boundaries of the listed area. This means that activities

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<sup>148</sup> Although some would argue that the protection of water resources in relation to large coal mine or coal seam gas development does not meet this criteria.

<sup>149</sup> Australian Government, Department of Agriculture, Water and the Environment, 'What is a referral, an action and "significant impact"?' (website, undated)  
<<https://www.environment.gov.au/heritage/management/referrals/what-is>>.

outside the boundary of the listed place that may have a significant impact on the values within the boundary can be regulated by the EPBC Act.

### Critique

153. As noted above, the EPBC Act focuses on nationally and globally significant areas that are included on the National and World Heritage lists and where those heritage areas have indigenous heritage values. The EPBC Act is not aimed specifically at the protection of Indigenous cultural heritage. However, the Law Council also highlights that its requirements and protections apply only to the very limited number of sites with extremely high Indigenous cultural heritage values that have been protected through registration as either a World Heritage or National Heritage site.<sup>150</sup>
154. Under the EPBC Act, Aboriginal cultural heritage matters are not required to be considered by the Commonwealth in conjunction with assessment and approval processes under Part 9 of the EPBC Act. The EPBC Act in fact has no mechanisms at all that require consideration of Indigenous community values and Indigenous knowledge in environmental and heritage management decisions.
155. This lack of consideration of Aboriginal cultural heritage in the approval process creates uncertainty for Aboriginal groups, often leading to last minute attempts to protect their heritage under the ATSIHP Act.
156. While some places of importance to First Nations people are specifically protected under the EPBC Act as places of National, Commonwealth or World Heritage – which in addition to the Dampier Archipelago, include Uluru-Kata Tjuta, the Willandra Lakes Region, Budj Bim Cultural Landscape, and the Brewarrina Aboriginal Fish Traps – there is nothing in the EPBC Act explicitly requiring the Environment Minister to address Aboriginal cultural heritage matters generally in assessment decision-making.
157. Instead, the EPBC Act has an *ad hoc* and unstructured method for considering Aboriginal cultural heritage, which formally takes the form of:
  - the Indigenous Advisory Committee (**IAC**);
  - joint management of Commonwealth reserves on Aboriginal-owned land; and
  - requirements for the Australian Heritage Council (**AHC**) to consult with Indigenous people who have rights or interests in some places under consideration.
158. In relation to the IAC, while it has an advisory function, its involvement in decisions and any advice it gives are not linked to any specific decisions under the EPBC Act. There is no requirement under the EPBC Act that the IAC advise decision-makers at all. The Environment Minister must first engage it and seek its views before it can be involved. Nor does it provide any independent advice on whether First Nations knowledge is properly incorporated into key decision-making processes, and any dialogue between the IAC and other statutory committees is *ad hoc* and informal.
159. The Department of Agriculture, Water and Environment has developed protocols for involving Indigenous Australians<sup>151</sup> but there is no requirement that these be followed, nor is there any enforceability mechanism under the EPBC Act or any

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<sup>150</sup> See EPBC Act, Division 1 – Requirements relating to matters of national significance, Subdivision A – World Heritage and Subdivision AA – National Heritage.

<sup>151</sup> See, eg, Engage Early – Guidance for proponents on best practice Indigenous engagement for environmental assessments under the *Environment Protection and Biodiversity Conservation Act 1999*.

adequate funding for implementation. The AHC (formerly the Aboriginal Heritage Commission) developed *Ask First: A guide to respecting Indigenous heritage places and values*, which identified the links between the landscape and Indigenous heritage values, and states that Indigenous Australians should give their consent before activities that involve their heritage proceed. But again, there is no requirement that this be followed.

160. In relation to the joint management of reserves, there are three joint management operations in place under the EPBC Act, relating to the Kakadu, Uluru-Kata Tjuta and Booderee national parks, whereby traditional owners lease the land back to the Director of National Parks (**DNP**) – a position created under Part 19 of the EPBC Act. Each park has a Board of Management. Nevertheless, these arrangements fall well short of the aspirations of the traditional owners involved. The DNP can overturn any decision of a Board and many Indigenous participants feel they are not empowered to make joint-management decisions. Other issues include a lack of sufficient representation on Boards, lack of employment opportunities, lack of recourse following a failure of implementation, and a failure to respect traditional owners' views on restriction to access to some sites.
161. In relation to the AHC, it provides support as an independent expert advisory body on heritage matters, and plays a key role in assessing places to be put on the National Heritage List or Commonwealth Heritage List. While there may be in place some requirements for the AHC to consult with Indigenous People in relation to places under consideration, its role is not to provide specific protection of Aboriginal cultural heritage and neither is there any requirement for consultation in relation to development assessments under the EPBC Act.

#### Interim Review

162. Much of the above has the been the subject of review by Professor Graeme Samuel AC in the EPBC Act Interim Review, which concluded that the statutory and regulatory regime was tokenistic and symbolic, saying:

*The EPBC Act heavily prioritises the views of western science, and Indigenous knowledge and views are diluted in the formal provision of advice to decision-makers. This reflects an overall culture of tokenism and symbolism, rather than one of genuine inclusion of Indigenous Australians.*

*While individuals may have good intentions, the settings of the EPBC Act and the resources afforded to implementation are insufficient to support effective inclusion of Indigenous Australians. The cultural issues are compounded because the Act does not have the mechanisms to require explicit consideration of Indigenous community values and Indigenous knowledge in environmental and heritage management decisions. Although protocols and guidelines for involving Indigenous Australians have been developed, resourcing to implement them is insufficient, and they are not a requirement. [Footnotes omitted]<sup>152</sup>*

163. The EPBC Act Interim Review also identified the misalignment between the EPBC Act and the ATSIHP Act:

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<sup>152</sup> Professor Graeme Samuel AC, *Interim Report of the Independent Review into the Environment Protection and Biodiversity Conservation Act* (June 2020).

*The ATSIHP Act does not align with the development assessment and approval processes of the EPBC Act. Cultural heritage matters are not required to be broadly or specifically considered by the Commonwealth in conjunction with assessment and approval processes under Part 9 of the Act. Interventions through the ATSIHP Act occur after the development assessment and approval process has been completed.*

*Contributions to the Review have highlighted the importance of considering cultural heritage issues early in a development assessment process, rather than Traditional Owners relying on a last minute ATSIHP Act intervention. The misalignment of the operation of the EPBC Act and the ATSIHP Act promotes uncertainty for Traditional Owners, the community and for proponents.*

*In their submissions, stakeholders have raised their concerns that the Commonwealth does not provide sufficient protection of Indigenous heritage and that fundamental reform is both required and long overdue<sup>153</sup>.*

164. The EPBC Act Interim Report's preliminary findings include that the EPBC Act is not fulfilling its objectives as they relate to the role of Indigenous Australians in protecting and conserving biodiversity, working in partnership with and promoting the respectful use of their knowledge.<sup>154</sup> It states that Indigenous Australians are seeking stronger national protection of their cultural heritage, and that the national-level arrangements are unsatisfactory. Nor does the EPBC Act meet the aspirations of Traditional Owners for managing their land. The settings for the Director of National Parks and the joint boards mean that ultimately, decisions are made by the Director.<sup>155</sup>
165. The key reform directions proposed by the Interim Review are discussed further below.

### **Native Title Act**

166. In some, but not all circumstances, the Native Title Act and the body of common law regarding native title form part of the suite of tools that enable Indigenous people to protect their cultural heritage.
167. The Aboriginal and Torres Strait Islander Social Justice Commissioner in the *Native Title Report 2000*<sup>156</sup> (NTR) conveniently summarised the role which the Native Title Act (cited in the below quotes as '*the NTA*') plays in protecting Aboriginal heritage, which is encapsulated in the procedural rights under the Native Title Act. The strongest of those is the 'right to negotiate' in relation to a 'future act'. As the NTR reported:

*The right to negotiate is designed to provide native title claimants or native title holders with the most comprehensive procedural rights where mining rights and certain compulsory acquisitions of native title rights are proposed.*

*Section 39 of the NTA is a pivotal provision in the right to negotiate process. When negotiations under s 31(1)(b) have not resulted in an agreement, s 39 provides criteria upon which the arbitral body can*

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<sup>153</sup> Ibid, Ch 2.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Australian Human Rights Commission, *Native Title Report* (2000) Chapter 4: Indigenous Heritage.

*determine whether an act may or may not be done and, if it may be done, whether conditions should be imposed.*

*Subparagraph 39(1)(a)(v) provides the criterion dealing with the protection of Indigenous heritage:*

*(1) In making its determination, the arbitral body must take into account the following:*

*(a) the effect of the act on: ...*

*(v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions.*

*To date, the determinations of the National Native Title Tribunal (NNTT) in its capacity as an arbitral body (where the parties have not consented to the determination) are not encouraging where the protection of Indigenous heritage is concerned.*

*In Western Australia, the grant of a mining lease or exploration licence contains an endorsement drawing the grantee party's attention to the provisions of the Aboriginal Heritage Act 1972 (WA). The NNTT has tended to defer the protection of Indigenous heritage to the grant condition imposed by the Government leaving it to be dealt with under the Aboriginal Heritage Act 1972 (WA) and the Commonwealth Heritage Act. The reasoning behind this approach is stated in the Waljen decision:<sup>157</sup>*

*The Aboriginal Heritage Act has been considered and explained in Tribunal determinations relating to the expedited procedure. An endorsement drawing the lessee's attention to its provisions is included on all mining leases...*

*In earlier decisions, the Tribunal has found that generally, but not always, the protections offered by the Aboriginal Heritage Act are adequate to ensure that there is not likely to be the interference with sites referred to in s.237(b) on the basis of grantee parties acting lawfully. The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) also provides for the use of emergency and permanent declarations to protect significant Aboriginal areas which are under a threat of injury or desecration.*

*Each case will have to be considered on its merits depending on the evidence, but on the face of it, looking at this criterion alone, there is no reason for the Tribunal to conclude that this legislative regime would necessarily be ineffective in protecting sites.*

*The NNTT has adopted this view despite its reservations about the Aboriginal Heritage Act 1972 (WA) when considering objections to the expedited procedure under s 32 of the NTA. In making determinations as to whether the expedited procedures should apply to a grant under the Mining Act 1978 (WA) the NNTT has consistently found that once the existence of a significant area or site on the area subject to the proposed grant is established, irrespective of the existence of the Aboriginal Heritage Act 1972 (WA), the expedited procedure should not apply. The*

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<sup>157</sup> *State of Western Australia and Thomas & Ors (Waljen) and Austwhim Resources NL, Aurora Gold (WA) Ltd* (1996) 133 FLR 124.

*reasons for those decisions is the possible operation of section 18 of the Aboriginal Heritage Act 1972 (Cth) which gives the minister and registrar of aboriginal sites the discretion to permit interference with areas or sites of significance.<sup>158</sup> This reasoning does not appear to have been as persuasive in NNTT decisions regarding s 39 of the NTA, such as in the matter of Waljen.<sup>159</sup>*

168. The NTR set out a detailed critique of the capacity of the Native Title Act, as amended in 1998, to protect Aboriginal heritage, which commenced as follows:

*The capacity of the NTA to protect Indigenous culture is limited in three ways.*

*The extinguishment of native title through the confirmation provisions in Division 2B of Part 2 of the amended NTA;*

*The denial and erosion of procedural rights by the amendments to the NTA. The amendments to the NTA have substantially reduced the procedural rights available to native title holders in relation to a broad range of future acts now covered by Division 3 of Part 2; and*

*The reliance in the NTA upon inadequate protection provided in Commonwealth, State and Territory heritage legislation. Where the protection of Indigenous heritage and native title coincide under the NTA the protection of Indigenous heritage is diverted to inadequate Commonwealth, State and Territory Indigenous heritage legislation.<sup>160</sup>*

169. The NTR detailed deficiencies of the Native Title Act as follows:

#### ***Denial of procedural rights***

*The amended NTA provides no procedural rights to native title holders in relation to a range of future primary production activities and acts giving effect to the renewal, re-grant, re-making or extension of certain leases, licences, permits or authorities. The effect of this denial of procedural rights is extensive, covering the agricultural land of Australia where native title continues to exist. In these instances, the protection of Indigenous heritage is left exclusively to Commonwealth, State and Territory legislative regimes of Indigenous heritage protection.*

*The relevant sections of the NTA are:*

*s 24GB: primary production activity or associated activity (other than forest operations, horticultural activity or aquacultural activity or, where a non-exclusive pastoral lease is to be used agricultural purposes), on non-exclusive agricultural and non-exclusive pastoral leases granted on or before 23 December 1996;*

*s 24IC: the renewal, re-grant, re-making or extension of leases, licences, permits or authorities granted on or before 23 December*

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<sup>158</sup> See, eg, *Dann (No.2)(Unggumi Ngarinyin)/Western Australia/GPA Distributors* (Unreported, NNTT) WO95/19, 10 June 1997, Sumner CJ; *Brownley (Bibila Lungkutjarra People)/Western Australia/ Aberfoyle Resources Ltd* (Unreported, NNTT) WO98/907, 4 November 1999, Lane, Mrs P.

<sup>159</sup> Australian Human Rights Commission, *Native Title Report (2000) Chapter 4: Indigenous Heritage*.

<sup>160</sup> *Ibid*.

1996, or a renewal re-grant etc under s 24IC or a lease etc created under s 24GB, 24GD, 24GE or 24HA.

### **Reduction of procedural rights**

*In relation to certain other government or commercial activities that may impair native title, the amendments to the NTA have reduced the procedural rights of native title holders from those available to holders of freehold title (the freehold test) to a mere right to be notified and a right to comment.*

*The procedural rights of native title holders are reduced to a right to comment in relation to the following acts:*

*s 24GB: the exceptions (forest operations, horticultural activity or aquacultural activity or native title holders, where a non-exclusive pastoral lease is to be used agricultural purposes) to the total denial of procedural rights of native title holders where primary production activity or associated activity occur on non-exclusive agricultural and non-exclusive pastoral leases granted on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;*

*s 24GD: grazing on, or taking water from, areas adjoining or near to freehold estates, non-exclusive agricultural and non-exclusive pastoral leases granted on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;*

*s 24GE: cutting and removing timber and extracting and removing sand, gravel rocks, soil or other resources from non-exclusive agricultural and non-exclusive pastoral leases granted on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;*

*s 24HA: the management and regulation (including through the grant of leases, licences and permits) of surface and subterranean water, living aquatic resources and airspace attract, for native title holders, a right to be notified and a right to comment;*

*s 24IB and s 24ID: the grant of freehold estate or the right of exclusive possession over land or waters pursuant to a right created by an act on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;*

*s 24JA and s 24JB: the construction or establishment of public works on land reserved, proclaimed, dedicated etc for a particular purpose on or before 23 December 1996 or on leases granted to a statutory authority of the Commonwealth, State or Territory on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment; and*

*s 24JA and s 24JB: the creation of a plan of management for land reserved, proclaimed, dedicated etc. for a particular purpose on or before 23 December 1996 or for leases granted to a statutory authority*

*of the Commonwealth, State or Territory on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment.*

*In addition, through the introduction of s 24KA, the amended NTA modifies the procedural rights of native title holders available under the freehold test in relation to acts providing facilities for services to the public. Where the construction of public facilities occurs on land covered by a non-exclusive agricultural or non-exclusive pastoral lease, the procedural rights of native title holders are the same as those of the lessee. The procedural rights afforded to a lessee are unlikely to secure the protection of Indigenous heritage and again, the responsibility for the protection of Indigenous heritage will fall upon Commonwealth, State and Territory legislative regimes. This is recognised in s 4KA(1)(d), which requires that laws of the Commonwealth, a State or a Territory make provision in relation to the preservation or protection of significant Indigenous areas, or sites.*

*The effect of this reduction of procedural rights is extensive, effectively covering all the following kinds of lands and waters over which native title continues to exist: parts of Australian agricultural land, surface and subterranean water, airspace, reserved land, dedicated land and leases granted to statutory authorities. The right to comment is unlikely to secure the protection of Indigenous heritage, particularly where the decision maker is free to ascribe minimal weight to such comments. In these instances, the responsibility for the protection of Indigenous heritage will fall upon Commonwealth, State and Territory heritage legislation.<sup>161</sup>*

170. The Native Title Act provides for Indigenous Land Use Agreements (**ILUAs**) between native title parties and those who may wish to do something affecting native title. ILUAs can cover a range of issues including future acts that are to be done; the surrender of native title rights and interests; the relationship between native title rights and interests and other rights and interests; compensation; or other matters such as cultural heritage, employment and economic development opportunities. As at 31 December 2015, there were 1038 registered ILUAs in Australia.<sup>162</sup>
171. As Tony McAvoy SC has said, referring to the impact of the ILUA process on native title rights, including the cultural heritage embedded in them:

*the native title system ‘embeds racism’ and puts traditional owners under ‘duress’ to approve mining developments or risk losing their land without compensation...the native title system ... coerces Aboriginal people into an agreement. It’s going to happen anyway. If we don’t agree, the native title tribunal will let it go through, and we will lose our land and won’t be compensated either. That’s the position we’re in...<sup>163</sup>*

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<sup>161</sup> Australian Human Rights Commission, *Native Title Report* (2000), Chapter 4: Indigenous Heritage.

<sup>162</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, Native Title Information Handbook (2016)

<[https://aiatsis.gov.au/sites/default/files/products/native\\_title\\_information\\_handbook/native\\_title\\_information\\_handbook\\_2016\\_national.pdf](https://aiatsis.gov.au/sites/default/files/products/native_title_information_handbook/native_title_information_handbook_2016_national.pdf)>.

<sup>163</sup> Ben Smee, ‘Native title system “embeds racism”, Australia’s first Indigenous silk says’, *Guardian* (online, 19 July 2018) <<https://www.theguardian.com/australia-news/2018/jul/19/native-title-system-embeds-racism-australias-first-indigenous-silk-says>>.

172. Associate Professor Kate Galloway, commenting on the present Inquiry, put it this way:

*Since the tragic and intentional destruction of the Juukan Gorge caves, it has been revealed that BHP is set to blast up to 40 significant Aboriginal sites in the Pilbara. Like Rio Tinto, it has the same ministerial permission to destroy places that are recognised as significant. When questioned about the approval, Ben Wyatt the WA Minister for Aboriginal Affairs flagged that the Act would soon be amended to replace the existing process. While this gives some hope of positive reform of such an egregious failure to uphold the Act's very purpose, of concern however, he indicated that the impending reforms would 'reinforce the need for land users to negotiate directly with traditional owners.'*

*One of the challenges for traditional owners is that the law situates their interests in culturally significant sites in between native title processes and cultural heritage. At the moment, where a native title claim is made or determined, traditional owners have a right to negotiate under the Native Title Act 1993 (Cth). This gives them a seat at the table with miners, and the scope to negotiate an Indigenous land use agreement (ILUA). ILUAs generally provide for benefits to be delivered to the native title holders—such as guaranteed jobs, or payments. The terms of ILUAs are confidential and once in place the terms are fixed. Importantly, native title holders cannot refuse permission for miners to use land. All they can do is try to gain some benefits in exchange for an otherwise guaranteed right of use. The miner has the upper hand.*

*In addition to the terms of ILUAs remaining confidential, they frequently contain provisions preventing native title holders from speaking publicly about action taken by the miners. The BHP proposals are a case in point. Traditional owners were not permitted under their ILUA from speaking out about the sites. The Guardian revealed that despite this prohibition their archaeologist had written to the WA department to notify it that they did not support the continued destruction of the significant cultural landscape.*

*It is telling then that the Minister, Ben Wyatt, said that he is 'cautious about governments interfering in private negotiations by registered native title holders'. Although the ILUA system is established under Commonwealth, not state, law, the sketched proposals for the WA cultural heritage reforms reflect the ILUA process, involving yet more consultation between miners and traditional owners—but without any substantive rights. The only reason there are 'private negotiations' is because that is all the state provides. The Minister's suggestion uses negotiation to privatise cultural heritage protection. As the state makes itself responsible for cultural heritage under the Act, leaving protection to a private negotiation process abnegates the very responsibility the state has undertaken.*

*Native title holders thus fall into a liminal space between multiple processes none of which affords them substantive rights to protect their country. On the one hand, although native title is a property right, it excludes mining rights leaving native title holders with a right to negotiate that falls well short of property as we understand it. On the other hand, although Aboriginal interests in the cultural landscape are inherent in its declaration as cultural heritage, cultural heritage law brings that landscape within the purview of the state, not traditional owners. Further, even with amendments to WA cultural heritage law that give a concession*

*to involving traditional owners in cultural heritage through negotiation, a right to negotiation again falls short of substantive rights to protect the land—while letting the state off the hook for taking action that would actually prevent destruction of significant sites.*<sup>164</sup>

173. Relying on the Native Title Act alone at the Commonwealth level to protect Aboriginal cultural heritage is therefore deeply problematic. That is not least because there are large parts of the country where native title has been extinguished, and significant Aboriginal cultural heritage can exist on private land where the procedures of the Native Title Act will never be engaged.
174. Further, the suggestion by mining companies that the Commonwealth does not need to become further involved in Aboriginal heritage protection and that they can be trusted to negotiate with traditional owners and reach agreements over heritage concerns,<sup>165</sup> apart from being demonstrated by the current subject of inquiry not to be reliable, overlooks the fact that traditional owners do not come to the negotiating table with the same resources and power as the miners.
175. Under the native title regime, the PBC/Registered Native Title Bodies Corporate who hold or manage native title have limited funding opportunities,<sup>166</sup> none of which are directed towards negotiating with mining companies.
176. Further, under the Native Title Act, if an agreement is not reached with native title parties within the 6 month negotiation period under the Native Title Act in respect of the grant of mining tenements in respect of which an 'expedited procedure' does not apply,<sup>167</sup> then the arbitral body under the Native Title Act determines whether or not the tenement shall be granted and, if so, on what conditions.<sup>168</sup> Typically the arbitral body determines that the grant be made and sometimes attaches to it generic heritage protection conditions.<sup>169</sup>
177. ILUAs under the Native Title Act<sup>170</sup> are frequently entered into, particularly with the larger mining companies, which cover project areas (involving multiple tenements associated with the project) or native title claim areas which may involve more than one project. Typically, they involve the same power imbalance as referred to above. Funding for independent advice to the native title parties is usually only available from the mining company and the expectation of government approval of the relevant mining project or projects is a given when entering the negotiations. Such agreements usually include a heritage protection protocol which includes an obligation on the native title parties to participate in heritage surveys to provide heritage clearance in respect of work programmes or site identification, with a view to avoiding site damage. However, where the project plans include economic benefits from activities involving site impact which is not able to be avoided, without

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<sup>164</sup> Griffith University, 'Cultural Heritage Stitch Up in WA', *Griffith News* (online, 15 June 2020).

<sup>165</sup> Lorena Allam and Calla Wahlquist, 'Mining industry opposes new laws for Aboriginal heritage sites despite Juukan Gorge failures', *Guardian* (online, 12 August 2020) <<https://www.theguardian.com/australia-news/2020/aug/12/mining-industry-opposes-new-laws-for-aboriginal-heritage-sites-despite-juukan-gorge-failures>>.

<sup>166</sup> PBC, Funding and Grants (website, undated) <<https://nativetitle.org.au/find/funding>>.

<sup>167</sup> Native Title Act s 35(1)(a).

<sup>168</sup> *Ibid* s 38.

<sup>169</sup> For example, in Victoria, in 17 cases arbitrated by the NNTT under the Native Title Act, no mining tenement application was rejected. In 10 of the cases, no conditions were imposed on mining companies and only minimal conditions in the others: Creative Spirits, *Native title issues & problems* (website, undated) <[https://www.creativespirits.info/aboriginalculture/land/native-title-issues-problems#Biased\\_arbitration\\_process](https://www.creativespirits.info/aboriginalculture/land/native-title-issues-problems#Biased_arbitration_process)>.

<sup>170</sup> Either Body Corporate Agreements on behalf of determined native title holders (Native Title Act ss 24BA-24BI) or Area Agreements on behalf of native title claimant groups (Native Title Act ss 24CA-24CL).

a significant economic impact, the ILUA provides that the Company may seek approval from the state or territory authority to impact the site and the ILUA includes covenants by the native title parties prohibiting objection or challenge to the approvals being obtained as consideration for the financial and other benefits which comprise the companies consideration for arriving at the agreement.

178. This situation was illustrated in the circumstances of the AH Act (WA) section 18 approval of the destruction between 40 and 86 sites in the Djadjaling (Hamersley) Range in the course of BHP's expansion of its South-flank iron ore mining operation. The Banjima Traditional owners and native title holders were bound by an ILUA entered into with BHP not to object to the section 18 application and their concerns only became publicly known indirectly through an archaeologist with knowledge of the impact of the mining operation.<sup>171</sup>

### **Protection of Moveable Cultural Heritage Act**

179. The PMCH Act places a limited and specific role in protecting Aboriginal cultural heritage. It places restrictions upon the movement of Australia's heritage of moveable cultural objects outside of Australia, including, through section 7(1)(b), 'objects relating to members of the Aboriginal race of Australia and descendants of the Indigenous inhabitants of the Torres Strait Islands'.
180. The PMCH Act operates by establishing National Cultural Heritage Control list (section 8) and controls the export of objects on that list and provides that objects exported without a permit or certificate are liable to forfeiture (section 9). Accordingly, it may have an impact in preventing Aboriginal cultural objects leaving the country, but does not otherwise protect Aboriginal cultural heritage.

### **Copyright Act**

181. Commonwealth intellectual property laws also have a role to play in protection of Indigenous cultural heritage. Attempts to incorporate Indigenous Cultural and Intellectual Property rights into Australia's existing intellectual property regime have so far been unsuccessful. That said, the suite of intellectual property laws is important to keep in mind when assessing Indigenous people's ability to protect expressions of their culture and to commercialise traditional knowledge. These Acts include the *Copyright Act 1968* (Cth), *Designs Act 2003* (Cth), *Patents Act 1990* (Cth), *Plant Breeder's Rights Act 1994* (Cth) and *Trademarks Act 1995* (Cth).

### **State Jurisdictions**

182. These issues highlighted above are not confined to Western Australia or the Commonwealth. All jurisdictions have deficiencies in their regimes, although some, such as South Australia and Victoria, provide foundations towards improving the protection of Aboriginal cultural heritage. The Law Council canvasses the strengths and weaknesses of different state regimes in the following sections, drawing on the views of its constituent bodies.

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<sup>171</sup> Lorena Allam and Calla Wahlquist, 'BHP to destroy at least 40 Aboriginal sites, up to 15,000 years old, to expand Pilbara mine', *Guardian* (online, 11 June 2020) <<https://www.theguardian.com/business/2020/jun/11/bhp-to-destroy-at-least-40-aboriginal-sites-up-to-15000-years-old-to-expand-pilbara-mine>>; Eliza Borrello, 'BHP halts destruction of 40 sacred Aboriginal sites amid outcry over Rio Tinto blasting of Juukan caves', *ABC news* (online, 11 June 2020) <<https://www.abc.net.au/news/2020-06-11/bhp-halts-aboriginal-site-destruction-after-rio-tinto-protests/12345566>>.

## Queensland

183. As noted above, Queensland currently has two laws that specifically relate to the protection and maintenance of Aboriginal and Torres Strait Islander Cultural Heritage: the ACH Act (Qld) and the TSICH Act (Qld). Both pieces of legislation are currently under review by the Queensland Government.
184. By way of feedback from its state constituent bodies, the Law Council understands that, while there has been community consultation, it is unclear whether a representative from each Aboriginal or Torres Strait Islander traditional owner group have been, or are being, consulted as part of this review process.
185. The Law Council further understands that the review should have regard to the following issues in the Queensland regime.
- Damage to cultural heritage may result in the payment of a pecuniary penalty. However, the penalty is payable to the State and is held on trust for the Aboriginal party or Torres Strait Islander party.
  - The legislation does not provide a mechanism for Aboriginal people or Torres Strait Islanders to receive compensation for damage of the cultural heritage connected to them and merely provides compensation to the property owner to repair the damage caused (see section 148).
  - Noting the example of Stolen Wages, moneys held on trust by the State may not be held or dispersed in compliance with the requisite fiduciary duty. There is no transparency as to where the compensation funds are used and whether it goes to the Aboriginal party or Torres Strait Islander party in recompense for destroying their cultural heritage and identity attached to it.
  - Amendments should be made to the regime to allow Aboriginal people and Torres Strait Islanders to be compensated for damage to cultural heritage. This is particularly necessary where native title claims have been dismissed, as cultural heritage is the only available mechanism for most groups in that situation.
186. Whilst the legislation is intended to be protective in nature, the practical effect of the legislation indicates that it is pro-proponent and anti-Indigenous.
- The duty of care guidelines are a self-assessment tool (section 28) and ordinarily rely on culturally significant sites to be pre-registered on the Cultural Heritage Register in conjunction with the proposed category of works. Whilst it is free to register sites, many Aboriginal and Torres Strait Islander people are averse to logging their sites on the database because:
    - there is fear that the intellectual property attached to those locations will be abused;
    - the publication of the sites will present an opportunity for damage to sites;
    - some Aboriginal parties or Torres Strait Islander parties maintain cultural practices around secrecy of certain sites;
    - recording of sites is costly and time consuming. It often requires on-ground recording and management as well as time to prepare data in a suitable format for registration. Costs considerations for Aboriginal parties include:
      - accessing remote areas;

- paying experts to assist groups (archaeologists);
  - paying for logistical support (vehicles, equipment, accommodation); and
  - the remuneration to the Cultural Heritage Surveyor for traditional knowledge holders of the cultural heritage objects and sites.
187. Given the result of the Juukan Gorge, stricter requirements must be required of proponents before undertaking works. This could include making a Cultural Heritage Survey compulsory regardless of the category of the activity proposed. This should be done to reflect the protective nature of the jurisdiction, namely, to protect and maintain Aboriginal and Torres Strait Islander cultural heritage in Queensland.
188. There are calls for standardised fees for cultural heritage surveys by proponent companies and their legal representatives. This is inappropriate as each group should be self-autonomous to negotiate their own fees for undertaking surveys. Cultural knowledge should be valued and remunerated accordingly.
189. The new HR Act (Qld) may have implications for the regime:
- On 1 January 2020, the HR Act (Qld) came into force in Queensland. This Act sets out a number of rights and includes section 28 which relates to the specific cultural rights that apply to Aboriginal people and Torres Strait Islanders.
  - Subsection 28(2)(a) of the HR Act (Qld) includes the right for First Nations peoples ‘to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings’.
  - Further, subsection 28(2)(e) includes the right for First Nations peoples ‘to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources’.
  - Decisions made under the ACH Act (Qld) and TSICH Act (Qld) by the Chief Executive, or their delegate, are decisions made by a public entity (section 9 of the HR Act (Qld)) to which the HR Act (Qld) applies. Therefore, consideration of section 28 of the HR Act (Qld) must take place when making decisions under the ACH Act (Qld) and TSICH Act (Qld). This further solidifies the need for stricter measures given the protective nature of the HR Act (Qld).

## New South Wales

190. First Nations cultural heritage laws in each of Australia’s jurisdictions suffer from similar shortcomings. However, the situation is most unique in NSW, where there is currently no stand-alone legislative protection for Aboriginal cultural heritage. The NPW Act (NSW) is the key legislation dealing with the protection of Aboriginal cultural heritage in NSW<sup>172</sup> and the very fact that such protections are found in legislation designed to protect flora, fauna and natural landscapes is well known to be a great affront to First Nations people in NSW. The NPW Act (NSW) provides the principal legislative provisions for the protection of places and objects of significance to Aboriginal people alongside provisions for the regulation of flora and fauna. In the Law Council’s view, this protection regime is anachronistic and contains serious deficiencies. Other protections are found in the *Heritage Act 1977* (NSW) and the

<sup>172</sup> For a list of the different pieces of legislation that have some protection effect on Aboriginal heritage, see NSW Office of Environment and Heritage, *Aboriginal heritage legislation in NSW: How the Aboriginal heritage system works* (2012) 4-6 <<https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Aboriginal-cultural-heritage/how-aboriginal-heritage-system-works-120401.pdf>>

*Environmental Planning and Assessment Act 1979* (NSW), although these are not specific to Aboriginal cultural heritage. Also under the *Aboriginal Land Rights Act 1983* (NSW), it is one of the roles of Local Aboriginal Land Councils to take action to protect the culture and heritage of Aboriginal persons within their area, but they do not have any specific powers in relation to heritage protection.

191. The most significant failing of the NSW regime is that ownership, management and control of Aboriginal cultural heritage is not vested in Aboriginal people. There is no legislative framework requiring Indigenous involvement in decisions regarding Aboriginal cultural heritage, and there is no clear path for Aboriginal people to say no to the destruction of Aboriginal cultural heritage. Further, Aboriginal groups are not properly resourced in relation to the protection of Aboriginal cultural heritage.
192. While an Aboriginal Cultural Heritage Advisory Committee (**ACHAC**) has been established under sections 27 and 28 of the NPW Act (NSW), it plays only an advisory role to the Minister on any matter relating to the identification, assessment and management of Aboriginal cultural heritage in NSW, including providing strategic advice on the plan of management and the heritage impact permit process.<sup>173</sup> Under the NPW Act (NSW), the persons responsible for implementing protections are the Minister and the Chief Executive, who is defined in section 5 as the Chief Executive of the Office of Environment and Heritage. However, the Law Council notes that this Office was overtaken in a Ministerial reshuffle in 2019, which created the new Department of Planning, Industry and Heritage.<sup>174</sup> The Environment, Energy and Science Group within this new Department 'includes the majority of the former Office of Environment and Heritage'.<sup>175</sup> Meanwhile, secretariat, logistical and strategic support to the ACHAC is administered by Heritage NSW – one of five Branches within the Community Engagement Group in the Department of Premier and Cabinet.<sup>176</sup>

#### NPW Act (NSW)

193. The key provisions in the NPW Act (NSW) concerning Aboriginal cultural heritage are contained in Part 6, which establishes a legislative scheme for the protection of 'Aboriginal objects and Aboriginal places'.
194. Aboriginal objects are defined in subsection 5(1) of the NPW Act (NSW) to mean:

*... any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.*

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<sup>173</sup> See NSW Office of Environment and Heritage, *Aboriginal Cultural Heritage Advisory Committee: Terms of Reference* (online, undated) <<https://www.heritage.nsw.gov.au/what-we-do/aboriginal-cultural-heritage-advisory-committee/achac-terms-of-reference-n/>>.

<sup>174</sup> Tina Perinotto, 'NSW's reshuffle leaves environment a small player in a big pond', *The Fifth Estate* (online, 2 April 2019) <<https://www.thefifthestate.com.au/articles/nsws-reshuffle-leaves-environment-a-small-player-in-a-big-pond/>>.

<sup>175</sup> See NSW Government, NSW Department of Planning, Industry and Environment, *About Us, Who We Are* (website, undated) <<https://www.environment.nsw.gov.au/about-us/who-we-are>>. The National Parks and Wildlife Service NSW is also part of the Department of Planning, Industry and Environment, and manages national parks and reserves, wetlands and World Heritage listed sites, as well as a number of Australian National Heritage sites: NSW National Parks and Wildlife Service, *About NPWS, Who We Are* (website, undated) <<https://www.nationalparks.nsw.gov.au/about-npws/who-we-are>>.

<sup>176</sup> See NSW Government, Heritage NSW, *What We Do, Heritage NSW* (website, undated) <<https://www.heritage.nsw.gov.au/what-we-do/about-heritage-nsw/>>.

195. Section 83 of the NPW Act (NSW) provides that certain Aboriginal objects are the property of the Crown. Under section 91, a person who becomes aware of the location of an Aboriginal object must notify the Chief Executive of its whereabouts.
196. The definition of 'Aboriginal objects' in subsection 5(1) of the NPW Act (NSW) does not include places of spiritual significance and such sites do not receive automatic protection under the Act. They are the subject of protection if they are first protected under section 84. This provides that:

*The Minister may, by order published in the Gazette, declare any place specified or described in the order, being a place that, in the opinion of the Minister, is or was of special significance with respect to Aboriginal culture, to be an Aboriginal place for the purposes of this Act.*

197. The NSW Aboriginal Land Council has noted that:

*Despite the hundreds of thousands of Aboriginal sites across NSW, only about 100 Aboriginal Places are formally protected under the current National Parks and Wildlife Act 1974.<sup>177</sup>*

198. Section 86 of the NPW Act (NSW) establishes criminal offences for harm or desecration of Aboriginal objects and Aboriginal places.<sup>178</sup>
199. However, section 87 then provides several exceptions to the application of these criminal offences, including where:

*the harm or desecration concerned was authorised by an Aboriginal heritage impact permit, and the conditions to which that Aboriginal heritage impact permit was subject were not contravened.<sup>179</sup>*

200. Under section 90 of the NPW Act (NSW) the Chief Executive may issue an Aboriginal heritage impact permit (**AHIP**), subject to conditions or unconditionally, and which may be issued in relation to a specified Aboriginal object, Aboriginal place, land, activity or person or specified types or classes thereof.
201. Sections 90A to 90C of the NPW Act (NSW) provide for the making of applications to the Chief Executive for the issue and transfer of an AHIP, and the approval or refusal of such applications. Sections 90D to 90J contain provisions for decisions concerning AHIPs, such as variations, or suspensions or revocations.
202. Pursuant to regulation 60 of the National Parks and Wildlife Regulation 2019 (NSW), an applicant for an AHIP has an obligation to undertake an Aboriginal community consultation process, which includes the ability for an Aboriginal person to register their interest in the application. Subsequent regulation 61 provides that an application for the issue of an AHIP must be accompanied by a cultural heritage assessment report, which must include any submissions provided by Aboriginal people during the consultation process, and the applicant must provide the application and the cultural assessment report to any registered Aboriginal party and the Local Land Council. That is, the views of Aboriginal people are reduced to a

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<sup>177</sup> NSW Aboriginal Land Council, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*, Submission to the Joint Standing Committee on Northern Australia, 20 July 2020.

<sup>178</sup> NPW Act ss 86(1), 86(2) and 86(4).

<sup>179</sup> *Ibid* s 87(1).

'submission' not unlike an interested party to an application for local planning permission.

203. Section 90K of the NPW Act (NSW) specifies the factors (which are exclusive) that the Chief Executive must take into account when making a decision in relation to an AHIP. Those considerations include actual or likely harm to the Aboriginal objects or Aboriginal place the subject of the application; steps that may be taken to avoid or mitigate that harm; the significance of the Aboriginal objects or Aboriginal place; the results of any consultation by the applicant with Aboriginal people (including any submissions made by Aboriginal people as part of a consultation required by the regulations); whether any such consultation substantially complied with any requirements for consultation set out in the regulations; and the social and economic consequences of making the decision.
204. Section 90L of the NPW Act (NSW) allows the applicant for, holder, or former holder of an AHIP to appeal to the Land and Environment Court from a decision of the Chief Executive. However, like the AH Act (WA), there is no appeal mechanism available to Aboriginal people who may be interested in the decision (including those who were consulted during the application process for the AHIP). However, there are open standing provisions with respect to breaches of the NPW Act (NSW).<sup>180</sup>
205. In relation to the efficacy of this criminal offences regime, the Law Council notes the following analysis in *Chief Executive, Office of Environment and Heritage v Ausgrid* [2013] NSWLEC 51:

*The inability of the NPW Act to adequately protect Aboriginal cultural heritage is in part due to the evidentiary burden of proving the significance of an Aboriginal object. The finding that Ausgrid's offence was of "moderate" environmental harm was a direct result of the inability of the prosecution to lead evidence as to the significance of the particular rock engraving and to prove this significance beyond reasonable doubt. The evidence led by the NSWALC [NSW Aboriginal Land Council] and MLALC [Metropolitan Aboriginal Land Council] failed to indicate why this specific rock engraving was culturally important. It focused on the general importance of rock engravings and the high rate of destruction of Aboriginal cultural heritage. This evidentiary issue ultimately led to the imposition of the relatively mild penalty of \$4,690.*

*In order to effectively protect Aboriginal cultural heritage for Aboriginal people, Aboriginal people should have responsibility for determining the significance of an object or area. This determination should not be hindered by the values, preferences or attitudes of people who are external to the Aboriginal culture. Aboriginal heritage is bound up with belief, law, community, cultural practice and identity. Its protection thus requires a holistic approach and should acknowledge the inability to separate notions of tangible and intangible heritage for Aboriginal people.<sup>181</sup> [footnotes omitted]*

206. The maximum sanctions for unlawful destruction of Aboriginal cultural heritage are relatively small (maximum penalties for the 'knowing offence': \$275,000 or imprisonment for one year for individuals; \$550,000 or imprisonment for two years

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<sup>180</sup> Although it should be noted that those open standing provisions are rendered inapplicable in relation to forestry activities by a privative clause contained in the *Forestry Act 2012* (NSW).

<sup>181</sup> Alison Packham, 'Between a rock and a hard place: legislative shortcomings hindering Aboriginal cultural heritage protection' (2014) 31 *Environmental and Planning Law Journal* 75-91.

for an individual in circumstances of aggravation; and \$1,100,000 for corporations under s 86(1) of the NPW Act (NSW) and are unlikely to be effective deterrents. In contrast, maximum penalties for similar offences under the *Protection of the Environment Operations Act 1997* (NSW), the *Environmental Planning and Assessment Act 1979* (NSW) and the *Native Vegetation Act 2003* (NSW) are in excess of \$1 million for individuals.

207. The Law Council further notes that, under the existing regime, proponents of State Significant Infrastructure or State Significant Development projects are exempt from the criminal offences set out in section 86 of the NPW Act (NSW) and are not required to seek AHIPS.
208. Beyond criminal offences, the NPW Act (NSW) also seeks to provide protection to Aboriginal objects and Aboriginal places by providing powers to the Minister and the Chief Executive to make orders preventing work that may harm or desecrate Aboriginal objects and Aboriginal places or land which is culturally significant to Aboriginal people and providing criminal sanctions for breaching those orders.<sup>182</sup> These powers include:
- The Chief Executive having power to make stop work orders (for 40 days and subject to successive extensions of 40 days) where the Chief Executive has the opinion that the action is likely to significantly affect an Aboriginal object or Aboriginal place, or that any action is being, or is about to be, carried out that is likely to significantly affect inter alia an Aboriginal object or Aboriginal place, or any other item of cultural heritage situated on land reserved under the NPW Act;<sup>183</sup>
  - The power for the Minister (following a recommendation by the Chief Executive) to make interim protection orders (for periods up to 2 years) prohibiting an owner or occupier of land from damaging or despoiling areas of land of natural, scientific or cultural significance.<sup>184</sup>
209. Also contained in Part 6A of the NPW Act (NSW) are:
- provisions for appeals to the Minister from stop work orders (section 91CC) and criminal sanctions for failing to comply with stop work orders (subsection 91AA(6));
  - provisions for notice prior to and after making an interim protection order, the duration and revocation of orders, and appeals against orders;<sup>185</sup> and
  - criminal sanctions for failing to comply with an interim protection order.<sup>186</sup>

#### Heritage Act 1977 (NSW)

210. The *Heritage Act 1977* (NSW) (**Heritage Act**) also provides a possible avenue for protection of Aboriginal cultural heritage in NSW. Examples of places listed on the Heritage Register specifically because of their Aboriginal heritage importance are Wooleybah Sawmill and Settlement, Ulgundahi Island, and Bomaderry Aboriginal

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<sup>182</sup> NPW Act (NSW) part 6A.

<sup>183</sup> Ibid s 91AA.

<sup>184</sup> Ibid ss 91A, 91B and 91D; National Parks and Wildlife Regulation 2019 r 82.

<sup>185</sup> Ibid ss 91C to 91F and 91H.

<sup>186</sup> Ibid s 91G.

Children's Home.<sup>187</sup> However, for other aspects of Aboriginal cultural heritage, the protection is principally under the NPW Act (NSW) provisions.

211. Under Part 3 of the *Heritage Act*, the State Minister can make interim heritage protection orders. Section 24 provides that the Minister can make interim heritage orders for items of State or local heritage significance as follows:

*The Minister may make an interim heritage order for a place, building, work, relic, moveable object or precinct that the Minister considers may, on further inquiry or investigation, be found to be of State or local heritage significance.*

*The Heritage Council is to provide advice to the Minister on the making of interim heritage orders, either at the request of the Minister or on its own initiative.*

212. The Heritage Council must include one member who possesses qualifications, knowledge and skills relating to Aboriginal heritage.<sup>188</sup>

213. Under section 25, the Minister can authorise local government bodies (councils) to make interim heritage orders for items of local heritage significance:

*The Minister may, by order published in the Gazette, authorise a council to make interim heritage orders for items in the council's area.*

*A council authorised under this section may make an interim heritage order for a place, building, work, relic, moveable object or precinct in the council's area that the council considers may, on further inquiry or investigation, be found to be of local heritage significance, and that the council considers is being or is likely to be harmed.*

#### Environmental Planning and Assessment Act 1979 (NSW)

214. In addition to the NPW Act (NSW), where there is activity proposed that may cause injury or desecration and it is activity that requires consent under the *EPA Act*, the areas susceptible to injury or desecration may be protected by incorporation of conditions in the relevant consent.
215. Previous section 80 of the *EPA Act* (the precursor to present section 4.16 of the *EPA Act*) provided that a consent authority is to determine development applications by either granting consent to the application (either unconditionally or subject to conditions) or refusing consent to the application. The *EPA Act* provides that, in determining a development application, a consent authority is to take into consideration certain matters that are of relevance to the relevant development including the likely impacts of the development, (including environmental impacts) on both the natural and built environments, and social and economic impacts in the locality and the public interest.
216. These matters are wide enough under the previous section 79C(1)(b) (now section 4.15(1)(b)) to permit the consent authority to have regard to issues concerning Aboriginal heritage and tradition but they are not express and do not approach the specificity of section 90K of the NPW Act (NSW) discussed above.

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<sup>187</sup> NSW Office of Environment and Heritage, *Aboriginal Heritage Legislation in NSW* (Final Publication, 1 May 2012).

<sup>188</sup> Heritage Act s 8.

217. The Independent Planning Commission of NSW (formerly the Planning Assessment Commission) undertakes extensive processes with major infrastructure or other projects:
- to determine the application for approval under State legislation for projects regarded as State significant development applications;
  - it conducts public hearings for applications;
  - it provides independent expert advice to the State Minister for Planning and Secretary of the Department of Planning and Environment prior to consent to a development.
218. The provisions under the NPW Act (NSW) are not directly applicable where there is a development consent for acts to be done even where they affect Aboriginal cultural heritage, as per section 91AA(4).<sup>189</sup> For example, the project under consideration in the *Darkinjung* decision discussed above was a 'major project' under the now-repealed Part 3A of the *EPA Act* (NSW), and therefore the NPW Act (NSW) did not have application. While the decision turned on the application of a number of the then NSW Office of Environment and Heritage policies, including its policy in respect of cultural landscapes,<sup>190</sup> the Law Council understands from the information provided by its constituent bodies that these policies were not ordinarily applied by the OEH in decisions regarding AHIP applications.
219. The creation of a Heritage Management Plan as part of a Development Consent is typically a response to applications that could otherwise be made to the Chief Executive Officer under the NPW Act (NSW) in relation to the specific sites the subject of the application.

## South Australia

220. As noted at the opening of this submission, the key provisions for protecting Aboriginal cultural heritage in South Australia are contained in the AH Act (SA). Section 23 of the AH Act (SA), which is the nearest equivalent to sections 17 and 18 of the AH Act (WA), provides that:

*A person must not, without the authority of the Minister—*

*(a) damage, disturb or interfere with any Aboriginal site; or*

*(b) damage any Aboriginal object; or*

*(c) where any Aboriginal object or remains are found—*

*(i) disturb or interfere with the object or remains; or*

*(ii) remove the object or remains.*

*Maximum penalty:*

*(a) in the case of a body corporate—\$50 000;*

*(b) in any other case—\$10 000 or imprisonment for 6 months.*

221. Before making a determination, giving an authorisation or declaring by regulation a site or object under the AH Act (SA), subsection 13(1) provides that the Minister must take all reasonable steps to consult with the Aboriginal Heritage Committee

<sup>189</sup> Of the NPW Act (NSW).

<sup>190</sup> See *Darkinjung*, [179]-[181].

established under part 2 of the AH Act (SA), as well as any Aboriginal organisation, Traditional Owners and other Aboriginal people that, in the opinion of the Minister, have an interest in the matter. Discretion is provided to the Minister under subsection 14(1) to give an authorisation ‘on such conditions as the Minister considers appropriate’.

222. The AH Act (SA) recognises Aboriginal people as the primary decisionmakers about what constitutes their cultural heritage under this legislative regime. Under subsection 13(2):

*When determining whether an area of land is an Aboriginal site or an object is an Aboriginal object, the Minister must accept the views of the traditional owners of the land or object on the question of whether the land or object is of significance according to Aboriginal tradition.*

223. The Act is also said to be designed to encourage proponents (eg a miner, researcher or government department) to first talk about their plans directly with Traditional Owners.<sup>191</sup> Under section 19H, an applicant for an authorisation under section 23 may, if there is a Recognised Aboriginal Representative Body (**RARB**) in respect of an area or an Aboriginal site, object or remains to which the application relates, negotiate and enter into a Local Heritage Agreement with the RARB.<sup>192</sup> Importantly, subsection 19H(2) provides that a RARB ‘may refuse to negotiate or enter an agreement under this section for any reason it thinks fit’.

224. The Consultation Paper for the Queensland Government’s *Review of the Cultural Heritage Acts* includes a discussion of this approach to identifying Aboriginal parties to include in decision-making processes in South Australia, comparing it to a similar scheme in Victoria, which is discussed below:

*Other jurisdictions, such as Victoria and South Australia, have developed a different approach to identifying Aboriginal parties. Victoria has established Registered Aboriginal Parties (RAPs) that are body corporates appointed and overseen by an Aboriginal Heritage Council (made up of Aboriginal representatives). The role of RAPs is to act as the primary source of advice on Aboriginal heritage matters, to consider applications and permits, to approve or refuse cultural heritage management plans and to enter into cultural heritage agreements. There are currently 12 appointed RAPs. South Australia has established Recognised Aboriginal Representative Bodies (RARBs) that are body corporates approved by an Aboriginal Heritage Committee made up of Aboriginal representatives. RARBs may enter into local heritage agreements with land users that are then brought to the Minister for authorisation. There are currently two RARBs in South Australia.<sup>193</sup>*

## Victoria

225. The key legislation in Victoria with respect to Aboriginal cultural heritage is the AH Act (Vic), which first came into effect in 2007. Victoria saw significant strengthening of its Aboriginal cultural heritage protection laws through the introduction of this piece of legislation, which has also been the subject of subsequent reviews and

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<sup>191</sup> Department of State Development, *Recognised Aboriginal Representative Bodies, Guideline 1* <<https://taawika.sa.gov.au/files/Guidelines.pdf>>.

<sup>192</sup> AH Act (SA) s 19H(1).

<sup>193</sup> Queensland Government, *Review of the Cultural Heritage Acts* (Consultation Paper) 9.

amendments, the most significant of which occurred in 2016.<sup>194</sup> Other statutes that impact upon Aboriginal cultural heritage in Victoria include:

- the *Traditional Owner Settlement Act 2010* (Vic) – it provides for the making of agreements between the State and traditional owner groups with respect to rights relating to land and interacts with the Native Title Act;
- the *Heritage Act 2017* (Vic) – the primary heritage legislation of the State. It is not solely aimed at Indigenous heritage, however a number of places and objects of value to Indigenous people are included on its register; and
- the *Planning and Environment Act 1987* (Vic) (**the PE Act (Vic)**) – which includes provisions in planning schemes directing decision makers for planning permits to consider a proposal's impact upon Aboriginal cultural heritage if relevant to the circumstances of the proposal. Although the protection of Indigenous culture through Victoria's planning schemes has, to date, only been by way of policy, the interaction of the PE Act (Vic) with the AH Act (Vic) is a powerful one because where a cultural heritage management plan is required, a planning permit cannot be issued until that plan is approved. This results in the identification and consideration of Indigenous cultural heritage at an early stage in the development and infrastructure lifecycle.

226. The main purposes of the AH Act (Vic) are to protect and promote respect for Aboriginal cultural heritage, to empower traditional owners as the protectors of their cultural heritage and to strengthen their ongoing right to maintain the distinctive spiritual, cultural, material and economic relationship with the land, waters and other resources with which they have a connection under traditional laws and customs.<sup>195</sup>

227. Unlike cultural heritage protections in other jurisdictions in Australia, the AH Act (Vic), since 2016,<sup>196</sup> has provided explicit protection (albeit limited) for intangible cultural heritage.<sup>197</sup> Thus, songlines, landscape and other intangible heritage are potentially capable of protection and registration, subject to the provisions of the AH Act (Vic).

### Operation

228. The key provisions of the AH Act (Vic) were summarised by Justice Kevin Bell in *Gunaikurnai Land and Waters Aboriginal Corporation v Aboriginal Heritage Council* [2016] VSC 569.<sup>198</sup> While there have been changes to the provisions of the AH Act (Vic) that are not reflected in his Honour's summary, including the then recent introduction of protections for Aboriginal intangible heritage (Part 5A), the Aboriginal Cultural Heritage Fund (Part 10A) and expansion of the Aboriginal Council's functions (subsection 132(2) and section 148), his Honour's summary nonetheless

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<sup>194</sup> The AH Act (Vic) came into effect on 28 May 2007. There have been two reviews of the AH Act (Vic) since that time, one around 2011-2012 and one in 2015-2016, the latter resulting in substantial amendments to the AH Act (Vic).

<sup>195</sup> Section 1 of the AH Act (Vic) (purposes). See also the more detailed objectives at section 3 of the AH Act (Vic).

<sup>196</sup> *Aboriginal Heritage Amendment Act 2016* (Vic), No 11/2016, which was assented to on 5 April 2016 and took effect from 1 August 2016.

<sup>197</sup> See sections 1(a), 3(k) 4(definitions), 12(aa) 37(3), 145(o), 145(1)(j), 145(1)(o) and Part 5A of the AH Act (Vic).

<sup>198</sup> *Gunaikurnai Land and Waters Aboriginal Corporation v Aboriginal Heritage Council* [2016] VSC 569, [16]-[24] (Bell J). This case was heard on 1 March 2016, with the decision handed down on 28 September 2016. Substantial amendments were made to the AH Act (Vic) by the Aboriginal Heritage Amendment Act 2016 which was assented to on 5 April 2016 and commenced on 1 August 2016, however it would appear these amendments are not reflected in his Honour's summary.

provides a succinct overview provided subsequent changes to the Act are borne in mind. The judgment records:

*In order (among other things) to protect Aboriginal cultural heritage from harm and afford appropriate status to Aboriginal people with traditional or familial links with such heritage, the Aboriginal Heritage Act makes provision for the ownership and control of Aboriginal cultural heritage (pt 2), protection of Aboriginal cultural heritage (pt 3), cultural heritage management plans (pt 4), cultural heritage agreements (pt 5), cultural heritage audit and stop orders (pt 6), protection declarations (pt 7), resolution of disputes regarding Aboriginal cultural heritage (pt 8), the administration of the legislation (pt 9), registered Aboriginal parties (pt 10) and enforcement of the legislation (pt 11). The Council and RAPs have important functions in the operation of the legislative scheme.*

*The Council is an expert body consisting of no more than 11 members appointed by the responsible Minister (s 131(1)). Each member of the Council must be an Aboriginal person who (s 131(3)):*

- (a) has, and can demonstrate, traditional or familial links to an area in Victoria;<sup>199</sup> and*
- (b) is resident in Victoria; and*
- (c) in the opinion of the Minister, has relevant experience or knowledge of Aboriginal cultural heritage in Victoria.*

*The functions of the Council are to advise the Minister in relation to the protection of Aboriginal cultural heritage (s 132(1)(a)) and the exercise of his or her legislative powers (s 132(1)(b)), to advise the Secretary in relation to the exercise of his or her legislative powers (s 132(1)(c)) and to perform certain specific registration functions, including to receive and determine applications for registration of Aboriginal parties under pt 10 (s 132(2)).*

*RAPs [Registered Aboriginal Parties] are the primary source of advice and knowledge for the Minister, Secretary and Council on matters relating to Aboriginal places located in or Aboriginal objects originating from their areas (s 148(a)). In addition, they have the following functions (s 148):*

- to consider and advise on applications for cultural heritage permits;*
- to evaluate and approve or refuse to approve cultural heritage management plans that relate to the area for which the party is registered;*
- to enter into cultural heritage agreements;*
- to apply for interim and ongoing protection declarations.*

*Cultural heritage permits operate to permit harm of Aboriginal cultural heritage that would otherwise be unlawful (pt 3, div 1). The Secretary is obliged to consult a relevant RAP in relation to an application for a cultural*

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<sup>199</sup> This was refined by the 2016 amendments and now requires that the person 'is a traditional owner or can demonstrate traditional ownership of an area in Victoria'.

*heritage permit (s 38)<sup>200</sup> and must refuse the application if the RAP objects (s 40(3)).<sup>201</sup>*

*Cultural heritage plans are a mechanism for assessing the nature of any Aboriginal cultural heritage in an area and making recommendations<sup>202</sup> for the protection and management of any such heritage that is identified (s 42)(1). A RAP may evaluate proposed plans (s 55)(1) and refuse to give its approval if it does not adequately address relevant specified matters (s 61).*

*Cultural heritage agreements are a mechanism for the management and protection of Aboriginal cultural heritage (s 68(1)), including the protection, maintenance and use of such heritage in the nature of places or objects and the right of Aboriginal people to access and use, and the rehabilitation of, such places or objects (s 68(2)(a)-(d)). At least one of the parties to a cultural heritage agreement must be a RAP (s 69(2)) and such an agreement cannot take effect without the consent of all RAPs for the relevant area (s 72(1)).*

*Interim (s 96(1)) and ongoing (s 103(1)) protection declarations may be made by the Minister for the protection of Aboriginal places and objects. RAPs have the right to apply for such declarations (ss 96(2)(b) and 103(2)(b)).*

229. As can be seen from this summary, and in accordance with its objects, the AH Act (Vic) empowers Indigenous people to make decisions affecting their own cultural heritage. It is the traditional owners, through the Registered Aboriginal Parties (**RAP**), that must decide whether to approve a cultural heritage management plan (**CHMP**) or cultural heritage permit (**CMP**).
230. The Law Council particularly emphasises the right of refusal under section 61, which ensures that consultation with First Nations peoples is not merely a box ticking exercise for government and industry, but grants real control to the traditional owners over the outcome of the consultation. However, as noted below, this does not grant the power to First Nations/traditional owners to impose further restrictions before approving, which removes a certain level of decision-making capacity by not allowing for a balancing exercise (which may then impact financial considerations eg having to wholly forego development in order to sufficiently protect site, when further restrictions could have mitigated concerns).
231. This framework – and its relation to the international human rights laws and standards considered earlier in this submission – was the subject of comment by Justice Kevin Bell in *Briggs v Aboriginal Heritage Council* [2019] VSC 25:

*The Act creates a framework for the protection of Aboriginal cultural and intangible heritage in Victoria (s 1(a)). In that framework, traditional owners of particular land and waters (in the Aboriginal vernacular, 'country') are empowered as protectors of their cultural heritage on behalf of Aboriginals and all other people (s 1(b)). To that end, Aboriginal people themselves are recognised as the primary 'guardians, keepers and knowledge holders' of Aboriginal cultural heritage (s 3(b)). An implicit*

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<sup>200</sup> Now repealed.

<sup>201</sup> Since amended.

<sup>202</sup> Following the 2016 amendments, the CHMP now contains 'conditions' rather than 'recommendations': see s 42(1)(b)(ii).

*purpose of these provisions is to contribute to ensuring and realizing the rights of all peoples to self-determination specified generally in common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and elaborated specifically with respect to Indigenous peoples in the articles of the United Nations Declaration on the Rights of Indigenous Peoples.*

...

*The most important mechanism for giving effect to the principle of protecting Victoria's Aboriginal heritage through Aboriginal people themselves which the Act enshrines is the appointment of RAPs for particular areas by the Council. A RAP is the primary source of advice and knowledge for all levels of government in relation to Aboriginal places and objects and has the statutory power to give agreement to what would otherwise be an offence with respect to the land, waters and objects concerned.*

232. This increased role in decision making for Indigenous people was by design, not accident. In introducing the Bill for the Victorian Act in April 2006, the then Minister stated:

*[T]he government has conducted a broad ranging consultation process in developing new Aboriginal cultural heritage legislation, starting in 2004 with Aboriginal communities and ending in December 2005, following the release of an exposure draft of the bill. One of the strongest messages taken from consultations with indigenous communities was the need to recognise the role of traditional owners in managing their heritage.<sup>203</sup>*

233. This quality is in stark contrast to the provisions in, for example, the ATSIHP Act, in which Aboriginal people are reduced to making applications that are then determined by a Minister who has wide discretion whether or not to make the declaration and for which there is no provision for merits review of the Minister's decision.

#### *Cultural Heritage Management Plans*

234. The Law Council understands that two key provisions for the management of Indigenous cultural heritage in Victoria are the grant of CMPs and the approval of CHMPs. The AH Act (Vic) allows CHMPs to be prepared voluntarily.<sup>204</sup> The key incentive for voluntary preparation of a CHMP is that acting in accordance with an approved CHMP will permit activities that might otherwise be found to constitute harm to an Indigenous Aboriginal place or object. It, therefore, is a mechanism for permitting conduct that might otherwise constitute an offence under section 27 and 28 of the AH Act (Vic).<sup>205</sup>

235. More commonly, a CHMP is prepared because one is required under the AH Act (Vic). Failure to prepare a CHMP where one is required is an offence.<sup>206</sup> The preparation of a CHMP is mandatory:

- where the Aboriginal Heritage Regulations require a plan;<sup>207</sup>

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<sup>203</sup> Victoria *Parliamentary Debates (Legislative Assembly)* 6 April 2006, 1033, Hon J E Thwaites.

<sup>204</sup> AH Act (Vic) s 45.

<sup>205</sup> Ibid s 29. See discussion in *Friends of the Surry Inc & Ors v Minister for Planning* [2012] VCAT 1106, [1], [14]-[23].

<sup>206</sup> AH Act (Vic) s 46(2)-(7).

<sup>207</sup> Ibid ss 46(a) and 47.

- where the Minister directs the preparation of a plan;<sup>208</sup>
  - where an Environmental Effects statement is required under the *Environmental Effects Act 1978 (Vic)*; <sup>209</sup>
  - where an impact management plan or comprehensive impact statement is required under the *Major Transport Projects Facilitation Act 2009 (Vic)*;<sup>210</sup> and
  - where a certified Preliminary Aboriginal Heritage Test (**PAHT**) has determined a CHMP is required.<sup>211</sup>
236. The Law Council understands that the effect of this provision has increased awareness of and compliance with the AH Act (Vic) because the failure to prepare a CHMP (where one is required) is often picked up as part of the planning assessment process. It ensures that CHMPs are prepared at an early stage of planning for proposals since the relevant statutory authorisation, such as a planning permit, cannot be issued until the CHMP is approved.
237. Following a number of decisions in the Victorian Civil and Administrative Tribunal (**VCAT**) over approximately the last ten years, Councils and experienced participants in the state planning system are now well aware that VCAT will not (and indeed, cannot) proceed to determine an application where a CHMP is required and has not been approved.
238. VCAT has refused to determine planning permits where the information contained in the approved CHMP was for an earlier proposal that is not sufficiently similar to the current proposal and where the information in the CHMP is inaccurate. This has included numerous instances where VCAT or parties have picked up at the last minute that a CHMP was required but had not been prepared. Although this submission does not go into those decisions at length, there are a number of significant decisions, which illustrate these principles.<sup>212</sup>
239. Further, VCAT in its planning permit merits review proceedings, uses a standard form,<sup>213</sup> which asks whether a CHMP is required for the proposal. Many Councils, no doubt at least partly in response to VCAT's past decisions, require permit applicants to identify at the permit application stage whether a CHMP is required.
240. The requirements for a CHMP, together with the requirement under section 52 of the AH Act (Vic) that the CHMP must be approved prior to other statutory authorisations being granted, play an important role in increased awareness and compliance with the AH Act (Vic) and therefore ultimately in the protection of Aboriginal cultural heritage.

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<sup>208</sup> Ibid ss 46(b) and 48.

<sup>209</sup> Ibid ss 46(c) and 49.

<sup>210</sup> Ibid ss 46(d) and 49A.

<sup>211</sup> Ibid ss 46(e) and 49B-49C.

<sup>212</sup> See, eg, *Stanley Pastoral Pty Ltd v Indigo SC (Includes Summary) (Red Dot)* [2015] VCAT 36; *Grebe Investments Pty Ltd v Bass Coast SC (Red Dot)* [2018] VCAT 1570; *Beatty v Hobsons Bay CC* [2015] VCAT 1795; *Merunovich v Melbourne CC* [2015] VCAT 609; *Pffar v Campase SC (Includes Summary) (Red Dot)* [2015] VCAT 44; *Lake Park Holdings Pty Ltd v East Gippsland SC & Ors (includes Summary)(Red Dot)* [2014] VCAT 826; *Bayview on Hesse Pty Ltd v Queenscliffe BC (Includes Summary) (Red Dot)* [2013] VCAT 1772] and *Lynbrook Village Developments Pty Ltd v Casey CC & Ors (includes Summary) (Red Dot)* [2011] VCAT 1380.

<sup>213</sup> See the Table 1 in the *Practice Note PNPE2* available through the VCAT website, [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au)

## Strengths

241. Generally speaking, the AH Act (Vic) is clearly drafted and has improved the protection of Indigenous cultural heritage in Victoria. Mechanisms that have been key to this outcome, include:
- that Aboriginal cultural heritage is protected irrespective of whether it is registered or not and that it is illegal to harm Aboriginal cultural heritage without the appropriate approval mechanism such as an approved CHMP or cultural heritage permit;<sup>214</sup>
  - detailed regulations that do substantial 'heavy lifting' in the protection mechanisms available through the regime;
  - the requirement that where a CHMP is required, it must be approved prior to the grant of other statutory authorisations affecting the development of the land;<sup>215</sup>
  - that the heritage significance is not lost if the cultural heritage is damaged or modified;<sup>216</sup> and
  - the recording of information in the searchable ACHRIS database and limitations placed on access to that database to preserve sensitive and secret data. However, as with any repository of information, there is a risk that sensitive and sacred material may be released or used in ways contrary to the provisions of the AH Act (Vic). Further consultation and research is required to assess if this is providing a disincentive for registration of Aboriginal cultural heritage.
242. The Victorian experience also illustrates the benefits of mapping areas identified for cultural heritage sensitivity. VicPlan, the free, official state-wide online planning zone and overlay information service includes maps identifying land of potential cultural heritage sensitivity (as identified in accordance with the provisions of the Aboriginal Heritage Regulations, for example because it is near a waterway or part of a lunette and keeping in mind that the ACHRIS dataset contains protected information available to a limited number of people).<sup>217</sup> These maps are widely used and help raise awareness of the potential Aboriginal cultural heritage value of areas of land at an early stage.

## Weaknesses

243. However, while the AH Act (Vic) provides a relatively robust mechanism for the protection and evaluation of Indigenous cultural heritage, there remain inadequacies and gaps that are the cause of frustration for Indigenous people. These include:
- the limitations upon the ability to refuse to approve a CHMP and the absence of the ability to refuse approval because the proposal will have an unacceptable impact upon Indigenous cultural heritage;<sup>218</sup>
  - the lack of power to impose additional conditions as part of the CHMP approval process;<sup>219</sup>

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<sup>214</sup> Sections 27-29 of the AH Act (Vic), but note s 79G. See *Friends of the Surry Inc & Ors v Minister for Planning* [2012] VCAT 1106, [27].

<sup>215</sup> Ibid s 52(1). See also s 50 definition of 'statutory authorisation'.

<sup>216</sup> Ibid s 8.

<sup>217</sup> Victoria State Government, *VicPlan* (online, undated) <<https://mapshare.vic.gov.au/vicplan/>>.

<sup>218</sup> AH Act (Vic) ss 63(3)-(4).

<sup>219</sup> Ibid s 40(2).

- the lack of protection where the intangible cultural heritage is ‘widely known to the public’;<sup>220</sup>
- the requirement that there be a commercial use of registered intangible cultural heritage before the offence provision for intangible cultural heritage is triggered;<sup>221</sup>
- the limited opportunity to prevent projects proceeding where there is uncertainty about the extent of cultural heritage which is affected (due to limited testing) and the difficulties in revoking approvals or to change conditions where the heritage values of the site or object impacted by the permitted activity are greater than were known at the time the approval was granted;
- the need for better funding and governance training for RAPS to ensure they have the means to adequately assess and protect cultural heritage and to participate in proceedings where cultural heritage matters are raised;
- the need for sufficient funding for adequate enforcement of the AH Act, through prosecution of offences, applications for stop orders and other mechanisms for ensuring effective compliance with the provisions of the AH Act; and
- that where there are multiple groups seeking to speak for country, those not part of the RAP are disempowered and their concerns may not be adequately or appropriately addressed.

244. If the AH Act (Vic) were to be used as a starting point for the drafting of improved laws for the protection of Indigenous cultural heritage in other jurisdictions, including at the Commonwealth level, such legislation should seek to avoid these inadequacies which compromise the effectiveness of the Victorian legislation and its value in protecting Aboriginal cultural heritage in Victoria.

#### *Funding of Registered Aboriginal Parties*

245. In order to ensure RAPs are able to engage appropriately and effectively in the assessment, management and protection of their cultural heritage, adequate funding is required. Under the Victorian system, part of the funding comes by way of fees paid by proponents to the RAPs as part of the cultural heritage assessment process. However, particularly in the case of regional RAPs who may not undertake assessment work on a regular basis, the fees are insufficient to fund the resources required to provide effective assessment and engagement.

246. Further work is required to identify appropriate funding and support sources to ensure meaningful engagement.

247. In *Pfarr v Campaspe SC (Includes Summary) (Red Dot)* [2015] VCAT 44, the VCAT made the following comment about the absence of the RAP in a hearing concerning a proposed telecommunications facilities that was in an area of cultural heritage sensitivity and for which the planning scheme required consideration of impact upon Indigenous cultural heritage, despite a CHMP not being required. It said:

*The Aboriginal people that have traditional or familial links with cultural heritage in the Mount Camel area is a body known as the Taungurung Clans Aboriginal Corporation (the TCAC). The TCAC is the relevant Registered Aboriginal Party (RAP) under the Aboriginal Heritage Act 2006. Its members are recognised as the ‘primary guardians, keepers and*

<sup>220</sup> Ibid s 79B(1) definition of ‘Aboriginal Intangible Heritage’.

<sup>221</sup> Ibid s 79G.

*knowledge holders of Aboriginal cultural heritage' in the Mount Camel area.*

*The TCAC was given notice of the Application for Review and was invited to but chose not to participate in the proceeding. We agree with the Tribunal's observation in the preliminary proceeding that the TCAC's choice was 'most unfortunate' given the 'apparent ... significance' of the Mount Camel area. For reasons that we will come to, it has made more difficult our task of assessing the impact of the facility on cultural heritage.*

248. While the Law Council is not privy to the reasons for the RAP's failure to participate in that proceeding, it is not unusual for some RAPs to lack the funding, support and familiarity with the appeals process to actively participate in the process.

### Northern Territory

249. In the Northern Territory, the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) does not require consultation with either the traditional owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) or the Land Councils established under that Act.<sup>222</sup> It is the Aboriginal Area Protection Authority (**the Authority**) that is tasked under section 19F with determining the 'custodians' of the relevant sacred site. After four decades of conducting land claims and identifying traditional owners of land in their respective parts of the Northern Territory, the Land Councils have invaluable resources, archives and understanding of traditional ownership conducted by and controlled by Aboriginal people. By contrast, the Authority is a relatively small body with limited resources and not guided by the experience, history of research or the representative nature of the Land Councils. The result is that notwithstanding the professionalism and history of protecting sacred sites of those at the Authority, there is a distinct possibility that the process of protecting heritage undertaken, will omit consultation with the correct traditional owners, as determined by Aboriginal law, traditions and custom.

## **(h) How Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites**

### National Principles

250. There is currently no existing piece of Commonwealth, state or territory legislation that adequately protects the cultural heritage of First Nations peoples, although analysis of both the strengths and weaknesses of the AH Act (Vic) provides perhaps the best starting point for identifying the types of improvements required to guarantee the protection of culturally and historically significant sites.
251. While the cultural heritage regimes are different in each jurisdiction, the Law Council sees great merit in proposing and pursuing a national framework for reform that secures some high-level principles. Such principles should be developed through consultation with First Nations peoples, their representative bodies and broader stakeholders.

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<sup>222</sup> Land Councils may, however, nominate members to be considered by the Minister for appointment to the Aboriginal Areas Protection Authority established under the Act: *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s 6.

252. While it would also need to consult internally further on their precise content, the Law Council suggests that, in its preliminary view, these principles might capture at least the following:

- Decision-making is an act of self-determination for First Nations;
- Cultural heritage legislation should be directed towards the recognition and protection of First Nations cultural heritage;
- Cultural heritage regimes must be consistent with Australia's international obligations and the UNDRIP;
- Cultural heritage regimes must be consistent with the native title right to access, maintain and protect place and sites of importance (or other similar formulations);
- First Nations decision-making processes must be accommodated and respected in relation to use, management and impacts on cultural heritage;
- First Nations must control the information gathering processes related to their cultural heritage, and ensure that their data sovereignty and intellectual property is adequately protected;
- First Nations must be the decision-makers in respect of the significance of their heritage;
- First Nations must be the decision-makers in respect of the protection of heritage situated on lands or waters owned or managed by them, or on Crown Land;
- First Nations must give their free, prior and informed consent in relation to decisions in respect of the protection of heritage on private lands;
- Processes must ensure First Nations are resourced to undertake comprehensive assessments in relation to cultural heritage impacts, whether this is provided by proponents or governments;
- Cultural heritage decision-making processes should be integrated with planning systems in all jurisdictions where appropriate;<sup>223</sup>
- The assessment of Aboriginal cultural heritage values must include all aspects of values in the Burra Charter, not merely an assessment of archaeological significance.<sup>224</sup> It will also be necessary to have regard to a broader landscape context when assessing values, before land management decisions are taken;
- Where a Minister is empowered to override heritage protection then there should be a presumption in favour of protection and only after the Minister has considered statutorily expressed criteria and obtained the consent of affected First Nations custodians;
- First Nations should have standing to appeal from decisions that adversely affect or do not protect First Nations' cultural heritage. Such decisions should be subject to merits and judicial review;
- First Nations heritage legislation which authorises activity impacting upon cultural heritage should include clear, effective and accessible mechanisms which enable such permission, once given, to be amended or in extreme cases revoked, if the impact upon the First cultural heritage, or the significance of the

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<sup>223</sup> Eg, in some parts of Western Australia there are no town planning schemes and the concept of integration with planning schemes would be misunderstood. If operating under a State Agreement, planning laws are inapplicable in any case.

<sup>224</sup> Darkinjung, [471].

cultural heritage, is greater than was understood when the permission was granted;

- Each First Nation should be funded to establish and maintain a keeping place of knowledge about their cultural heritage; and
- There should be mechanisms to provide traditional owners or custodians to obtain a remedy for damage to and loss of cultural heritage by way of compensation or reparation, where legislative requirements are breached.

253. The Law Council further considers that Indigenous cultural heritage laws across Commonwealth, state and territory jurisdictions should be benchmarked against the national principles, once agreed, and reformed where they fall short.

#### **Recommendation**

- **A national First Nations cultural heritage framework should be pursued, in consultation with First Nations communities, that secures high-level national principles against which existing laws across Commonwealth, state and territory jurisdictions should be benchmarked, and reformed.**

#### **Strengthening legislation**

254. There is a clear need for improved protection of Indigenous cultural heritage at the Commonwealth level. Relevant laws must be strengthened and modernised to provide a comprehensive Commonwealth mechanism for the assessment, management and protection of Indigenous cultural heritage. It would seem most likely that a new standalone Act is needed in this context, which would replace the ATSIHP Act.

255. This process should be strongly informed by the advice from, and engagement with, Indigenous people and relevant findings from the current review of the EPBC Act, as well as the former Evatt Review recommendations. Indigenous people must be adequately supported and funded to enable this consultation to be effective. There should also be a standard consultation of key stakeholders across government, environmental groups, mining and exploration representatives and developers.

256. Subject to such consultation, the new legislation would overcome current deficits and incorporate key features which draw from the proposed principles above, including:

- it would enable self-determination, by providing Indigenous people with the decision making powers for the assessment, protection and management of their cultural heritage;
- it would include effective, accessible procedures for seeking the Act's protections of cultural heritage;
- It would not be limited to a last resort measure, but enable national intervention early in development assessment processes;
- it would adopt a comprehensive definition of cultural heritage. This would move beyond archaeological values and include protection of both the tangible and intangible elements of the contemporary and historical cultural landscape derived from post-contact events, history and relationships to land and water, as well as being embedded in traditions and relations that are derived from, or

are part of a continuity of pre-contact society. Regard would be had to the broader landscape context when assessing such values;

- that Aboriginal cultural heritage is protected irrespective of whether a place is registered or not (ie automatic protection), and it is illegal to harm Aboriginal cultural heritage without the appropriate approval mechanism, as under the Victorian regime. This differs from the registration-based system that applies for World Heritage and National Heritage sites protected through the EPBC Act. Indigenous cultural heritage should be protected regardless of whether it is registered. It will not always be feasible or appropriate to register places for this purpose. The process of registration can be lengthy and expensive, particularly for overstretched Aboriginal organisations. Further, certain sites are only known to local Aboriginal communities, or are the subject of secret and sacred cultural practices. There may also be a disincentive to register places due to fears that they will be damaged by others, or that the intellectual property may be exploited;
  - where a Minister is empowered to override heritage protection then there should be a presumption in favour of protection and only after the Minister has considered statutorily expressed criteria and obtained the consent of affected First Nations custodians;
  - First Nations peoples should have standing to appeal from decisions that adversely affect or do not protect First Nations' cultural heritage, including through merits and judicial review;
  - it should include a provision which enables authorisation of activity impacting upon cultural heritage, once given, to be amended or in extreme cases revoked, if the impact upon the First Nations cultural heritage, or the significance of the cultural heritage, is greater than was understood when the permission was granted;
  - it would be consistent with the native title right to access, maintain and protect place and sites of importance (or other similar formulations);
  - it would address the ownership of cultural heritage. The first part of the process of protection of First Nations cultural heritage should involve identifying persons who have traditional or familial links to the cultural heritage and establish the right to speak on the issue in question. This is likely to involve cooperation with state and territory regimes or independently establishing local and regional Indigenous decision-making bodies to gather information and make decisions. First Nations decision-making processes must be accommodated and respected in relation to use, management and impacts on cultural heritage; and
  - the relevant Minister should be the Minister for Indigenous Australians, rather than the Minister for the Environment, given that the core concern is Indigenous cultural heritage rather than the environment.
257. To realise principles of free, prior and informed consent in practice, it is critical to ensure that First Nations organisations have appropriate funding to facilitate their participation in the assessment and management of Indigenous cultural heritage, and to avail themselves of the new legislative protections effectively. Funding should be generally increased by the Commonwealth for the enforcement of Indigenous cultural heritage protection. Consideration should be given proponents' contributions.
258. In terms of interaction with state and territory legislation, it may be most efficient and effective for all parties concerned in protecting cultural heritage for there to be bilateral agreements between Commonwealth and state/territory governments under

which the assessment material relied upon by one jurisdiction can be utilised by the other jurisdiction.

259. At the same time, state and territory governments should be encouraged to strengthen their Indigenous cultural heritage laws, particularly in jurisdictions where existing provisions are inadequate and ineffective, having regard to the national principles recommended above. Whilst there remains room for improvement in the Victorian legislation, it provides a starting point for other jurisdictions looking to strengthen Aboriginal cultural heritage protections and to introduce mechanisms for Indigenous self-determination in the assessment, management and protection of tangible and intangible Indigenous cultural heritage. The Law Council considers that several aspects of this regime could usefully serve as the basis for drafting improved legislation in other jurisdictions.
260. As with Commonwealth reforms, detailed and meaningful consultation with Indigenous people will be an important part of future law reform in this area, as will mechanisms for funding Indigenous bodies given duties and responsibilities under the future legislation.

#### **Recommendations**

- **Having regard to its international obligations and in accordance with Australia's acceptance of the UNDRIP that 'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage', the Australian Government should reform Commonwealth laws for the protection of First Nations cultural heritage to make them effective.**
- **In particular, consideration should be given to a new First Nations Cultural Heritage Act, which would replace the ATSIHP Act.**
- **This reform process should be informed by consultation and a co-design process with Indigenous people and relevant findings from the current review of the EPBC Act, as well as the former Evatt Review recommendations.**
- **At the same time, state and territory governments should be encouraged to strengthen their Indigenous cultural heritage laws, particularly in jurisdictions where existing provisions are inadequate and ineffective, in light of the national principles recommended above.**
- **First Nations organisations have appropriate funding to facilitate their participation in the assessment and management of Indigenous cultural heritage, and to avail themselves of the new legislative protections effectively. Funding should be generally increased by the Commonwealth for the enforcement of Indigenous cultural heritage protection.**

#### **(i) Opportunities to improve Indigenous heritage protection through the EPBC Act**

261. The relevant reform directions proposed by the Interim Review are below.

- The proposed new National Environmental Standards<sup>225</sup> should include specific requirements relating to best practice Indigenous engagement, to enable Indigenous views and knowledge to be incorporated into regulatory processes.
- The national level settings for Indigenous cultural heritage protection need comprehensive review. This should explicitly consider the role of the EPBC Act in providing protections. It should also consider how comprehensive national level protections are given effect, including how they interact with the development assessment and approval process of the Act.
- Indigenous knowledge and western science should be considered on an equal footing in the provision of formal advice to the Environment Minister. A proposed Science and Information Committee should be responsible for ensuring advice incorporates the culturally appropriate use of Indigenous knowledge.
- Where aligned with their aspirations, transition should occur to Traditional Owners having more responsibility for decision-making in jointly managed parks. For this to be successful in the long term there is a need to build capacity and capability, so that joint-boards can make decisions that effectively manage risks and discharge responsibilities.
- Improved outcomes for Indigenous Australians will be achieved by enabling co-design and policy implementation.
- The role of the existing Indigenous Advisory Committee should be substantially recast as the Indigenous Knowledge and Engagement Committee, whose role is to provide leadership in the co-design of reforms and advise the Environment Minister on the development and application of the National Environmental Standard for Indigenous engagement.<sup>226</sup>

262. These reform directions go beyond the EPBC Act, recognising that it forms part of a broader suite of Commonwealth legislation with respect to the protection of Indigenous cultural heritage, and the critical importance of this objective.

263. The Law Council welcomes these findings, including that:

- the suite of national-level laws that protect Indigenous cultural heritage in Australia needs comprehensive review;
- that cultural heritage issues must be dealt with early in a development assessment process and that national intervention needs to be available sooner in this process; and
- that there must be sustained engagement with Indigenous Australians to co-design reforms that are important to them.

264. These points are reflected in its above discussion of reforms of Indigenous cultural heritage laws.

265. The Law Council submits that reforms in this area will fundamentally rely on introducing new Commonwealth legislation to replace the ATSIHP Act as the principal, and most appropriate, vehicle of change. While the EPBC Act should have

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<sup>225</sup> The EPBC Act Interim Report also proposes that legally enforceable National Environmental Standards should be the foundation for effective regulation. The Standards should focus on outcomes for matters of national environmental significance, and the fundamentally important processes for sound and efficient decision-making. Standards will provide certainty—in terms of the environmental outcomes the community can expect from the law, and the legal obligations of proponents: Professor Graeme Samuel AC, *Interim Report of the Independent Review into the Environment Protection and Biodiversity Conservation Act* (June 2020), Ch 1.

<sup>226</sup> *Ibid.*

an important role in the protection of Indigenous heritage, the primary source of protection of such heritage is best dealt with by the Commonwealth through robust and effective new Indigenous cultural heritage protection legislation.

266. This will permit the EPBC Act to retain its current focus on MNES – that is, nationally and globally significant areas that are included on the National and World Heritage lists. As noted above, the EPBC Act's requirements and protections apply only to the very limited number of sites with extremely high Indigenous cultural heritage values that been protected through registration as either a World Heritage or National Heritage site. Amending the EPBC Act as the principal Commonwealth means of protecting Indigenous cultural heritage – incorporating non-registered places of very real, but local, significance, and intangible cultural heritage - would require a very substantial shift in its scope, purpose and execution. Moreover, it is administered by the Minister for Environment, rather than the Minister for Indigenous Australians, which as discussed above, is incongruous.
267. However, while it was consulting more widely on the Interim Review's broader findings at the time of drafting this submission, the Law Council supports its recommendations in relation to the development of National Environment Standards as a means of ensuring consistent, outcomes-based management of impacts, including impacts on cultural heritage values. It also supports the other reform directions regarding Indigenous cultural heritage, which are outlined above.
268. The Law Council also notes that Professor Samuel AC is also undertaking a detailed engagement with representatives from peak First Nations bodies in relation to the recommendations in the Interim Report so as to make more detailed and nuanced recommendations for the Final Report due in October 2020. The Law Council suggests that this consultation and the Final Report should form the basis of reform of the EPBC Act to improve cultural heritage protection.
269. In terms of immediate opportunities to improve indigenous heritage protection through the EPBC Act, the Law Council sees three important avenues.
270. First, indigenous heritage can only be protected by the EPBC Act once it has been identified. Investment in strategic or large-scale assessment of areas of Indigenous heritage that could qualify for National Heritage listing should be undertaken to proactively identify those areas that are worthy of protection under the EPBC Act (in addition to protection under the ATSIHP Act). Sharing of data between State and Territory regulators and the Commonwealth Department of Agriculture, Water and the Environment will support this.
271. Secondly, once Indigenous heritage areas have been listed and attract the protection of the EPBC Act, the Act must be rigorously applied and enforced. The Law Council notes the recent report of the Australian National Audit Office on the referral, assessment and approval of actions under the EPBC Act<sup>227</sup> which concluded that the Department of Agriculture, Water and the Environment's administration of referrals, assessments and approvals of controlled actions under the EPBC Act is not effective. The Department must address the issues raised in this report.
272. The EPBC Act has sufficient enforcement tools within it to ensure, in theory, that the values of Indigenous heritage areas that are included on the National (or World)

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<sup>227</sup> Auditor-General Report No.47 2019–20 Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999 (25 June 2020).

Heritage Lists are protected from harm. These tools have been used in the past<sup>228</sup>. It is critical that sufficient human and financial resources are allocated to the Department's compliance and enforcement functions to ensure that persons or companies who fail to uphold the provisions of the EPBC Act or the conditions attaching to the approvals issued to them under the Act are held to account.

273. Thirdly, the Law Council reiterates that as a more immediate measure, the EPBC Act should be amended in accordance with items 1 and 2 of Recommendation 13 of the Law Council of Australia's submission to the Samuel Review,<sup>229</sup> namely:

*Recommendation 13*

*Considering Australia's obligations under UNDRIP, the Law Council recommends:*

- *amendment of section 3 of the EPBC Act objects to include references to the UNDRIP and the 2030 Agenda for Sustainable Goals as international instruments to which the EPBC Act seeks to give effect;*
- *that the Akwe: Kon Guidelines (Akwe Go) be incorporated into the EPBC Act in accordance with the recommendations of the CBD Conference of the Parties 7 recommendation; and*
- *the EPBC Act should be reviewed against the UNDRIP to ensure that the processes and mechanisms contained in the Act itself and the implementation of those mechanisms are harmonious with the UNDRIP.*

**Recommendations**

- **Reforms to the EPBC Act should be pursued to improve the EPBC Act's role in protecting Indigenous cultural heritage, as part of a broader suite of Commonwealth legislation in this area, and its genuine, respectful engagement with Indigenous Australians' knowledge and expertise of environmental and heritage issues. However, this does not displace the urgent need for new Commonwealth Indigenous heritage legislation as the centrepiece of Indigenous cultural heritage protection.**
- **Reforms to the EPBC Act should be determined following Professor Samuel AC's current consultations with representatives from peak First Nations bodies regarding his interim report recommendations, and the release of his final report.**
- **Immediate steps which should nevertheless be pursued in this area include:**
  - **Investment in strategic or large-scale assessment of areas of Indigenous heritage which could qualify for National Heritage listing to proactively identify areas which should be protected under the EPBC Act;**

<sup>228</sup> In February 2010, cement producer Holcim Australia was required to give an enforceable undertaking for the purposes of section 486DA of the EPBC Act following an incident in late 2008 where work at the company's quarry at Nickol Bay was alleged to have damaged part of the Dampier Archipelago National Heritage place. Holcim was required to spend at least \$280,000 in improvements to its management practices and enter into cultural heritage agreements with three Aboriginal groups in the area.

<sup>229</sup> Department of the Environment and Energy, 'Independent Review of the EPBC Act' <[www.epbactreview.environment.gov.au/about-review](http://www.epbactreview.environment.gov.au/about-review)>.

- **allocating sufficient human and financial resources to the Department's compliance and enforcement functions to ensure that persons or companies who fail to uphold the provisions of the EPBC Act or the conditions attaching to the approvals issued to them under the Act are held to account; and**
- **amending section 3 of the EPBC Act objects to incorporate references to the UNDRIP as an international instrument to which the EPBC Act seeks to give effect, and incorporating the Akwe: Kon Guidelines into the EPBC Act in accordance with the recommendations of the CBD Conference of the Parties 7 recommendation.**

## **(j) Any other related matters**

274. In addition to the issues identified by this submission within the drafting and conceptual frameworks of the laws themselves, First Nations people also experience significant practical challenges in seeking to access, activate and enforce heritage protections within the legislation.
275. As noted above, the challenges include the costs – in terms of time, economic and social costs – and resources required to trigger or pursue a mechanism or remedy to protect heritage. This is further complicated by significant backlogs in both native title claims in the Federal Court at a Commonwealth level, as well as land claims in NSW.
276. These challenges must be considered and addressed in order to improve heritage protections for First Nations cultures.
277. Finally, this area of law and policy illustrates the importance of enshrining in the Constitution a First Nations Voice to Parliament to ensure First Nations people are heard, at the highest levels of the Australian polity, on the structural problems with the protection and management of their cultural heritage and how they could be improved. The Law Council supports the adoption of the Uluru Statement from the Heart, including a First Nations Voice.

### **Recommendations**

- **Practical barriers to seeking remedies to protect First Nations cultural heritage should be addressed, including significant backlogs in both native title claims at the Federal Court at a Commonwealth level, as well as state and territory court backlogs on land claims.**
- **A First Nations Constitutional Voice to Parliament should be established, along with the broader adoption of the Uluru Statement from the Heart, to ensure that First Nations people are heard at the highest levels on matters of enormous and enduring significance, including their cultural heritage.**

# Appendix

## AH Act (WA) – Previous Reviews

### 1995 Senior Review

278. Dr Clive Senior conducted a review of the AH Act (WA) in 1995. The Executive Overview of his Report stated:

*There is a general recognition from all sides that the Act is not working satisfactorily. In recent years it has been the source of much conflict involving Aboriginal people, developers and government itself, often in prolonged and contested litigation. Procedural uncertainty must bear a large part of the responsibility for these disputes and in particular the uncertainty as to how Aboriginal sites are to be avoided and, if they cannot be avoided, what mechanisms should be used to resolve disputes.*<sup>230</sup>

279. The Senior Review aimed to update the provisions of the legislation to reflect the needs and expectations of Aboriginal people and the broader community, while maintaining the broad principles underlying the legislation.<sup>231</sup> In particular, as Tracy Chaloner helpfully summarises, it was supposed to address the following deficiencies in the regime, which had been identified as a source of frustration to Aboriginal people, government and industry:

- *paternalistic provisions which reflect a 1960s approach;*
- *administrative processes are not clear;*
- *little guidance for developers as to compliance with the Act prior to beginning development;*
- *procedure to apply for consent to use land are outdated and provide no certainty or time limits;*
- *unequal rights to appeal under section 18 of the Act;*
- *the Act does not expressly bind the Crown; and*
- *the Act provides no dispute mechanism.*<sup>232</sup>

280. These deficiencies remain, with the exception, as the High Court made clear in *Bropho v Western Australia* (1990) 171 CLR 1, that an inference is to be drawn that the AH Act (WA) binds the Crown.

### 2000 Proposed Redraft

281. In 2000, the WA Government announced that it would begin drafting new legislation 'with the intention that it will repeal and replace the *Aboriginal Heritage Act 1972*'.<sup>233</sup>

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<sup>230</sup> Clive Senior, *Review of the Aboriginal Heritage Act* (Report, Government of Western Australia, Perth, 1995) ix. See also Tracy Chaloner, 'The Aboriginal Heritage Act 1972: A Clash of Two Cultures; A Conflict of Laws' (2004) [December] *Murdoch University*; Clive Senior, 'Resource Development and Aboriginal Heritage Protection Under State Legislation: Recent Proposals' (University of Western Australian and Murdoch University, Centre for Commercial and Resources Law, *Resource Development and Aboriginal Land Rights Conference*, 28 August 1992).

<sup>231</sup> Tracy Chaloner, 'The Aboriginal Heritage Act 1972: A Clash of Two Cultures; A Conflict of Laws' (2004) [December] *Murdoch University*.

<sup>232</sup> Tracy Chaloner, 'The Aboriginal Heritage Act 1972: A Clash of Two Cultures; A Conflict of Laws' (2004) [December] *Murdoch University*.

<sup>233</sup> *Ibid*, quoting Western Australia Legislative Assembly, *Hansard* (2000), Question 1013.

However, as Tracy Chaloner notes, 'with a change in government in February 2001, the redraft was never made public'.<sup>234</sup>

### 2014 Proposed Amendments

282. The most recent proposal for change (saving the current review) occurred through the introduction of the Aboriginal Heritage Amendment Bill 2014 (WA). The Bill proposed several key amendments, which Brad Wylenko, writing for Clayton Utz, has summarised as follows:

- *a more streamlined process of assessment of places and objects, by enabling the CEO of the Department of Aboriginal Affairs (DAA) to carry out assessments relating to Aboriginal Sites for the purposes of section 5 and 6 of the Act, protected areas under section 19 of the Act, and Aboriginal cultural material under section 40 of the Act;*
- *changes to the section 18 approvals process to allow any person to make an application, rather than just the owner of the land. The CEO would also be able to fast-track approvals by:*
  - *declaring that there does not appear to be an Aboriginal site on the land, which will act as a defence to a charge under section 17 of the Act;*
  - *granting an expedited permit with or without conditions where the site will not be adversely affected by the activity;*
- *establishing a register of declarations and permits to record all current and historical approvals; and*
- *introducing measures to strengthen compliance and enforcement, including substantially higher penalties, extension of time to prosecute offences, power to issue infringement notices and power for the courts to issue remediation orders.*

New regulations were proposed to:

- *assist the CEO to identify Aboriginal places and objects by the creation of additional criteria for the evaluation of the importance and significance of Aboriginal places and objects;*
- *enable the DAA to recover costs for services, such as processing approval applications; and*
- *improve the quality of information on the Register of Aboriginal Sites and Objects (currently Register of Places and Objects) and the Register of Declarations and Permits.*<sup>235</sup>

283. The 2014 Bill proved controversial and the State Government received strong feedback that Aboriginal people had not been properly consulted on the proposed changes. There was a petition to Parliament with more than 1,600 signatures requesting further consultation with the WA Indigenous community; a rally on the steps of Parliament House with more than 60 traditional owners and elders representing each region of Western Australia (some travelling vast distances to be present in Perth); and the issues were formally raised by a WA Indigenous land

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<sup>234</sup> Tracy Chaloner, 'The Aboriginal Heritage Act 1972: A Clash of Two Cultures; A Conflict of Laws' (2004) [December] *Murdoch University*.

<sup>235</sup> Brad Wylenko, 'Changes to WA's Aboriginal Heritage Laws Open for Comment', *Clayton Utz Knowledge* (online, 16 June 2014) <<https://www.claytonutz.com/knowledge/2014/june/changes-to-wa-s-aboriginal-heritage-laws-open-for-comment>>.

council (Kimberley Land Council) at the United Nations Permanent Forum on Indigenous Issues in New York.<sup>236</sup> Ultimately, however, the 2014 Bill did not proceed through Parliament before the change of Government in 2017.

### **Aboriginal Cultural Materials Committee Guidelines 2013**

284. The Committee adopted Guidelines relating to section 5 of the AH Act (WA) in July 2013. These Guidelines set out criteria – additional to the criteria already specified in section 39 of the AH Act (WA) – to be considered when determining whether a place is a sacred, ritual or ceremonial site. Greg McIntyre has summarised these criteria as follows:

- *the meaning of 'site' is narrower than 'place';*
- *for a place to be a sacred site means that it is devoted to a religious use rather than a place subject to mythological story, song or belief;*
- *for a sacred site associated with Travelling Ancestors:*
  - *there are stories and songs that celebrate the activities of ancestral figure(s); and*
  - *either there are events which occurred to the ancestral figure at that place; or*
  - *the ancestral figure left some mark or thing that has form (eg a spring or rock formation);*
- *for sacred sites associated with figures or powers, the place is associated with a figure or a power which belongs to the country or was always there.*<sup>237</sup>

285. In 2015, the WA Supreme Court in *Robinson v Fielding* [2015] WASC 108 (**Robinson**) concluded that these Guidelines adopted for the determination of what is an Aboriginal site under the AH Act (WA) were inconsistent with the definition of 'Aboriginal site' in the AH Act (WA). This decision contradicted the approach the Registrar of Aboriginal Sites had been taking to Aboriginal Sites, which had seen 22 sites removed from the Register.<sup>238</sup> This approach, as determined by the Guidelines, threatened to leave any sacred site not associated with ritual or ceremonial activity unprotected by the AH Act (WA).<sup>239</sup> It also removed from such sites the requirement under the AH Act (WA) that the Minister for Aboriginal Affairs could conclude that it is in the community interest to excavate, destroy, damage, conceal or alter the site.<sup>240</sup> The *Robinson* decision caused the government to reconsider the content of the Guidelines and their application to the assessment of sites.

### **ATSIHP Act – Case Study: Dja Dja Wurrung Bark Etchings in Victoria**

286. In 2005, the Federal Court heard judicial review applications involving declarations under the ATSIHP Act. Dja Dja Wurrung Aboriginal elders sought to rely on provisions of the ATSIHP Act (since repealed) to keep historic bark etchings created by

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<sup>236</sup> Lauren Butterly, Ambelin Kwaymullina and Blaze Kwaymullina, 'Opportunity is There for the Taking: Legal and Cultural Principles to Re-start Discussion on Aboriginal Heritage Reform in Western Australia' (2017) 91 *Australian Law Journal* 365, 366-7.

<sup>237</sup> Greg McIntyre, 'Aboriginal Heritage: The Rainbow Serpent – When Guidelines Misguide' (2015) 8(18) *Indigenous Law Bulletin* 3, 4.

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

members of the Dja Dja Wurrung People in Australia. They were the only known Aboriginal bark etchings of their kind to have survived to the present day.

287. These bark etchings were included in an exhibition presented by Museums Victoria from March to June 2004. There were a number of bark etchings the elders sought to retain in Australia, including two bark etchings and a ceremonial piece that had been lent by the British Museum and the Royal Botanic Gardens, Kew.
288. Upon the close of the exhibition, the British organisations pressed for the return of the objects. An application was made for an emergency declaration under section 21C of the ATSIHP Act (a provision that was subsequently removed by an amending act in 2006). On 18 June 2004 the first emergency declaration under section 21C was made requiring that the objects be kept at the Museum, that the State of Victoria and the Museum negotiate with the traditional owners as to the future location of the objects. Successive declaration orders were made on 18 July 2004, 15 August 2004 and 14 September 2004.
289. On 14 October 2004, a modified order was made directing that the bark etchings remain at the Museum and that the Minister for Aboriginal Affairs Victoria expedite the resolution of requests for Temporary and Permanent Declarations regarding the cultural heritage objects.
290. On 14 November 2004 and 14 December 2004 successive further emergency declarations were made.
291. Upon judicial review, the Federal Court held that an emergency declaration made under section 21C of the ATSIHP Act could only be made once, and that the subsequent declarations were beyond power. Accordingly, it set aside the subsequent declarations.<sup>241</sup>
292. Attempts by the Dja Dja Wurrung elders to compel the Victorian Minister for Aboriginal affairs to make a declaration of preservation under section 21E and to compulsorily acquire the objects under section 21L of the ATSIHP Act were unsuccessful.<sup>242</sup>

### Djab Wurrung application relating to the Western Highway

293. The section of the Western Highway between Buangor and Ararat is part of a state government road duplication project. It has a troubled and chequered background which has included two appeals to the Supreme Court<sup>243</sup> and two judicial review applications in the Federal Court.<sup>244</sup>
294. In 2010 the Minister for Planning made a declaration that an Environmental Effects Statement (**EES**) was required.<sup>245</sup> An EES was published in September 2012. There was an inquiry and advisory committee hearing, the results of which were published

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<sup>241</sup> *Museums Board of Victoria v Carter* [2005] VCA 645 at [46]-[50].

<sup>242</sup> *Carter v Minister for Aboriginal Affairs* [2005] FCA 667.

<sup>243</sup> *Mackenzie v Head, Transport for Victoria* [2020] VSC 328; *Mackenzie & Ors v VicRoads & Ors* [2016] VSC 698.

<sup>244</sup> *Clark v Minister for the Environment* [2019] FCA 2027 (No 1) – a successful judicial review proceeding in which the Commonwealth Minister’s decision was quashed for a second time; *Clark v Minister for the Environment* (No 2) [2019] FCA 2028 – an unsuccessful interlocutory joinder application to join the State of Victoria represented by Major Road Projects Victoria.

<sup>245</sup> See *Mackenzie v Head, Transport for Victoria* [2020] VSC 328 for the background to this troubled infrastructure proposal.

in a report dated February 2013.<sup>246</sup> The Minister then made his decision with respect to the EES, which allowed the proposal to proceed, subject to various requirements.

295. In October 2013 a Cultural Heritage Management Plan was approved by the then Registered Aboriginal Party (**RAP**), Martang Pty Ltd. Its RAP status was later revoked, with the Eastern Marr Aboriginal Corporation being appointed the RAP in late 2019.<sup>247</sup>
296. In November 2015, the project proponent, VicRoads, released a media statement which admitted that whilst the initial estimate of trees to be removed was 221 large old trees and 249 scattered trees, it was now estimated that up to 1,645 large old trees and scattered trees would need to be removed in a worst-case scenario, with the actual number of trees to be removed being 885.<sup>248</sup> It is presumed this tree assessment was conducted under the ecological requirements of the EES, not under the Indigenous cultural heritage requirements.
297. Vegetation and tree removal commenced in August 2016.<sup>249</sup> There was substantial community concern at the extent of tree removal, both from an ecological perspective and a cultural heritage perspective. There was a high degree of tension amongst Indigenous groups, with Martang, Eastern Marr Aboriginal Corporation and Djab Wurrung elders all seeking active, and at times conflicting, roles in the protection of their cultural heritage.
298. The trees to be removed included scar trees and a hollow birthing tree said to have been used for 50 generations by local Indigenous women when giving birth.<sup>250</sup> The cultural heritage to be impacted was highly significant, yet the necessary approvals had been given through the Victorian legislative framework.
299. In early February 2017, VicRoads became aware the planning scheme controls that permitted the works had expired and work on the affected part of the road immediately ceased.<sup>251</sup> Preliminary works then commenced again in January 2018, but ceased for a number of months from June 2018 due to the activity of protestors.
300. In June 2018, an application was made by Djab Wurrung elders, seeking a declaration for protection under the ATSIHP Act. That application resulted in two government decisions to refuse to make the declarations sought, both of which have been set aside by the Federal Court. The first set was aside as a result of consent orders between the parties and the second following a fully contested hearing.

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<sup>246</sup> Inquiry Report and Advisory Committee Report for the *Western Highway Duplication Section 2 – Beaufort to Ararat (EES)* [2013] PPV 12.

<sup>247</sup> Statement from Tim Kanoa, Executive Director of Aboriginal Victoria dated 23 September 2019 which sets out that Martang Pty Ltd was the RAP from 2007 and approved a CHMP in October 2013, but that from 2017 work was also undertaken with the Eastern Maar Aboriginal Corporation (EMAC) and Djab Wurrung Elders. The Djab Wurrung set up a tent embassy at the site and maintain an active voice with respect to cultural heritage issues. Martang Pty Ltd ended up ceasing to be the RAP. See Victorian Government, Aboriginal Cultural Heritage Management Plan Western Highway Duplication (online, 23 September 2019) <<https://www.aboriginalvictoria.vic.gov.au/aboriginal-cultural-heritage-management-plan-western-highway-duplication>>.

<sup>248</sup> *Mackenzie v Head, Transport for Victoria* [2020] VSC 328, [10].

<sup>249</sup> *Ibid*, [9].

<sup>250</sup> See Bianca Hall, 'Temporary reprieve for ancient Djab Wurrung trees', *The Age* (online, 13 September 2019) <<https://www.theage.com.au/national/victoria/temporary-reprieve-for-ancient-djab-wurrung-trees-20190913-p52r3a.html>>; and Sophie Cunningham, 'The Djab Wurrung Birthing Tree', *The Monthly* (online, July 2019) <<https://www.themonthly.com.au/issue/2019/july/1561989600/sophie-cunningham/djab-wurrung-birthing-tree#mtr>>.

<sup>251</sup> *Ibid*, [13].

301. On 6 December 2019, the Federal Court determined the Commonwealth Minister had made an error of law and directed that the application for a declaration be referred back to the Minister to remake the decision. As this was a judicial review proceeding, not a merits review, the Court did not direct the Minister as to what decision she should make upon her further consideration.
302. As of the time of writing, it is not known whether the Minister has made a decision.
303. Although successful before the Federal Court, the Djab Wurrung continue to be left with uncertainty as to whether their cultural heritage will be protected. Their application for a declaration under the ATSIHP Act remains without a valid decision, more than two years since it was first submitted.
304. The Djab Wurrung remain concerned about the impacts the road project will have upon their cultural heritage. They disagree with the compromise reached between the proponent and the Eastern Marr Aboriginal Corporation, which was not the RAP at the time that compromise was reached. There is no legal impediment to the destruction that they are seeking to prevent through their application.
305. It is difficult to see how in these circumstances, the outcome is a positive one. It is one where there has been a great deal of delay. A great deal of uncertainty. But there is little to suggest that the Act is delivering a timely and appropriate level of protection in circumstances where the Victorian process have emerged sorely lacking.