



Environmental
Defenders Office

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

14 August 2020

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Committee Secretary

Joint Standing Committee on Northern Australia

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Foreword Statement

The EDO acknowledges the severe distress that has been caused to, and continues to impact, the Puutu Kunti Kurrama and Pinikura peoples. We offer our deepest sympathies for their loss. However, we know that is not enough. We also offer our absolute commitment to support First Nations to protect, and make decisions about, their country.

‘Apologies cannot replace what is lost. We advocate for a better way to honour the things lost by reforming our national psyche, our laws and our values.’¹

EDO Board member, Joe Morrison, and EDO CEO, David Morris

¹ Joe Morrison, EDO Board, and David Morris, CEO EDO, ‘Remember these things lost by protecting what remains’ <<https://www.edo.org.au/2020/06/25/remember-things-lost-protect-what-remains/>>.

A Note on Language

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. In the international law context, we have used ‘indigenous peoples’ (with a lower case ‘i’) as is appropriate. In the domestic context, where possible, we have used specific references. Further, when referring to First Nations in the context of particular country we have used the term ‘Traditional Owners’. More generally, we have chosen to use the term ‘First Nations’. We acknowledge that not all Aboriginal and Torres Strait Islander peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

Executive Summary

This Inquiry is primarily focused by title on the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia. However, wisely, the inquiry includes consideration of whether regulation of impacts to First Nations’ cultural heritage in each Australian jurisdiction is effective and how laws may be improved to better protect First Nations’ cultural heritage.

We provide submissions on the following terms of reference:

- (a) the operation of the *Aboriginal Heritage Act 1972* (WA) and approvals provided under the Act;
- (f) the interaction, of state indigenous heritage regulations with Commonwealth laws;
- (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;
- (h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;
- (i) opportunities to improve indigenous heritage protection through the *Environment Protection and Biodiversity Conservation Act 1999*; and
- (j) any other related matters.

In providing these submissions, we pay our respects to the First Nations across Australia, to their elders past present and emerging. We recognise that their countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

The cultural heritage of First Nations has not been adequately recognised, respected or protected in this nation since Europeans arrived and our laws today are still failing to provide necessary respect and protection to both First Nations and their cultural heritage. This failure is a breach of our international law obligations, including under the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), which Australia has adopted. While UNDRIP is not legally binding, the rights (and consequential obligations on States) contained within it are derived from pre-existing human rights and international law developed under treaties to which Australia is a party and are binding on Australia. Our submission details these obligations and demonstrates the ways in which they are not being met by

Australia. Further, our recommendations offer ways not just to meet the international obligations but to fully respect First Nations self-determination and relationship to their Country.

The destruction of the Juukan Gorge rock shelters - cultural heritage of the Puutu Kunti Kurrama and Pinikura peoples - is shocking, and yet it is just one of innumerable actions which have caused the destruction of First Nations cultural heritage – legally – under Australian law. Sadly, the incident was not a surprise to the EDO as the inadequacy of cultural heritage laws, both Western Australian and Commonwealth, has been raised over many years by Traditional Owners, First Nations organisations, legal academics and lawyers.

EDO lawyers have assisted First Nations around Australia in their efforts to protect their cultural heritage from destruction. These submissions are based on this experience in working with State, Territory and Commonwealth laws designed to provide some level of protection to cultural heritage. We have worked with First Nations clients who have interacted with cultural heritage laws in many different ways, from litigation, engaging in law reform processes, through to broader First Nations-led environmental governance of country projects.

We have provided key recommendations for reform to help strengthen our legal systems across Australia to provide respectful and effective protection of First Nations’ cultural heritage and empowerment of First Nations to protect their own cultural heritage and which complies with Australia’s obligations under international law.

Key Recommendations:

Australia’s international obligations to protect cultural heritage

Recommendation 1: Cultural heritage legislation must be consistent with Australia’s international obligations and the *UN Declaration on the Rights of Indigenous Peoples*

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

Recommendation 2: Whilst acknowledging that the coronavirus led to some understandable delays (and that the situation must continue to be carefully monitored), high priority must be given to the *Aboriginal Heritage Act 1972 (WA) (AHA)* reforms.

Recommendation 3: All section 18 approvals under the AHA need to be reassessed under the reformed WA heritage laws.

Recommendation 4: The WA cultural heritage law reforms must provide statutory entrenchment of decision making about heritage by First Nations in relation to both significance of heritage and protection of heritage.

Recommendation 5: The WA cultural heritage law reforms must provide for merits appeal rights for First Nations in relation to decisions that impact their heritage. Further, merits appeal provisions must be reviewed across the Australian jurisdictions.

The interaction of state Indigenous heritage regulations with Commonwealth laws (TOR f)

Recommendation 6: A cross-jurisdictional review of all cultural heritage laws across Commonwealth, States and Territories should be undertaken. This review must be led by First Nations.

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 (TOR g) and how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites (TOR h)

Recommendation 7: First Nations must be the primary decision-makers about their heritage. First Nations decision-making processes must be respected, supported and properly resourced.

Recommendation 8: Definitions of heritage need to be guided by First Nations laws and heritage must be viewed as living and connected to country and sea country.

Recommendation 9: Cultural heritage legislation needs to mandate ‘respect’ for First Nations cultural values and where the destruction of a site will have a detrimental effect on culture or cultural identity, the site must be protected to be in-line with Australia’s obligations under international law.

Recommendation 10: First Nations must give their free, prior and informed consent in relation to decisions that impact protection of their heritage.

Recommendation 11: Determining how to operationalise free, prior and informed consent must be a key part of a review process of cultural heritage laws. This review must be led by First Nations.

Recommendation 12: All cultural heritage legislation must enumerate considerations and how they should be weighed up. Further, where legislation requires the consideration of other ‘interests’ in determining whether to protect or destroy, full statements about impact on First Nations heritage and culture must be required.

Recommendation 13: Cultural heritage, environment, water, development, native title and planning laws (at Local, State/Territory and Commonwealth levels) must be reviewed such that they operate coherently to protect First Nations heritage.

Recommendation 14: First Nations must have the legal right to enforce laws to protect their heritage and to seek redress for illegal damage to their heritage.

Recommendation 15: A review should be undertaken for each jurisdiction to consider the most culturally appropriate methods of determining who has the right and power to speak for cultural heritage of an area. This review must be led by First Nations.

Recommendation 16: Law reform processes of cultural heritage legislation must be pursued and given a high priority. In particular, law reform processes in jurisdictions with 1970s era heritage legislation must be prioritised.

Opportunities to improve Indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999 (TOR i)

Recommendation 17: Commonwealth laws relating to cultural heritage protection need a comprehensive review. This includes both the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the relevant parts of the EPBC Act. This review must be led by First Nations.

Recommendation 18: The EPBC Act must allow for Traditional Owners to be involved in proactively managing areas that have been listed as heritage places.

Recommendation 19: Determining significant impact on heritage pursuant to the EPBC Act must be assessed through a decision-making process led by Traditional Owners.

Other related matters (TOR j)

Recommendation 20: First Nations-led innovations in governance of country (environment and heritage) should be prioritised, supported, resourced and encouraged.

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1. Australia's international obligations to protect cultural heritage

(a) Overview

The right to the protection of cultural heritage² is intrinsically tied to other human rights, such as rights to culture, the maintenance of a distinctive Indigenous identity, self-determination, rights to land and territory and spiritual and religious beliefs and to the principle of equality and non-discrimination. Under international law, States cannot intentionally destroy the culture of Indigenous peoples, including sacred sites. States cannot destroy (or permit the destruction) of indigenous cultural heritage where it threatens the integrity of Indigenous culture or puts at risk cultural survival and cultural identity (and clearly, this will be the case for most, if not all, sacred sites). States must also provide avenues for Indigenous peoples to protect their rights to cultural heritage (including restitution of control and ownership of these sites) and to provide adequate redress where their rights are violated.

(b) International legal framework on the rights of Indigenous peoples with respect to their cultural heritage

Standards relating to the cultural heritage of Indigenous peoples are dispersed in several international regimes, to which Australia is a signatory. The starting point is the *United Nations Declaration on the Rights of Indigenous Peoples*.

(c) United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

Status of UNDRIP

Australia adopted UNDRIP in 2009. In a technical sense, as stated above, UNDRIP is not legally binding, but the rights (and consequential obligations on States) contained within it are derived from pre-existing human rights and international law developed under treaties that are binding on Australia. This includes, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) and the *International Covenant on Civil and Political Rights* (ICCPR). UNDRIP does not 'create new rights for indigenous peoples, but rather provide[s] a contextualised elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples'.³

² It should be kept in mind that the usual distinction between tangible and intangible cultural heritage is artificial in the context of indigenous peoples and that a holistic approach needs to be taken.

³ United Nations Human Rights Council (UNHRC), Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), *Study of the Expert Mechanism on the Rights of Indigenous Peoples - Free, Prior and Informed Consent: a human rights based approach*, A/HRC/39/62, 10 August 2018, para.3.

The former UN Special Rapporteur on Human Rights, James Anaya, explained that the implementation 'of the Declaration should be regarded as a political, moral and, *yes, legal imperative without qualification*'.⁴

Further, UNDRIP is often referred to as aspirational, but the rights (and consequential obligations on States) contained in UNDRIP 'constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world' (Article 43). The rights contained in the UNDRIP are not the ceiling, they are the floor.

Specific Rights

UNDRIP upholds the rights of indigenous peoples to develop their own cultures and customs, to the use and control of their ceremonial objects, not to be subjected to destruction of their cultures or to discrimination on cultural grounds, and to redress mechanisms for action that deprives them of their cultural values.⁵

UNDRIP includes the following explicit rights with respect to cultural heritage:

Article 11

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.

Article 11 also includes an obligation on States to provide effective mechanisms, including redress

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.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

⁴ Special Rapporteur James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, A/HRC/12/34, 15 July 2009, para.38.

⁵ See, UNHRC, EMRIP, *Study by the Expert Mechanism on the Rights of Indigenous Peoples on the Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage*, A/HRC/30/53, 19 August 2015, para.11.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 25

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

Article 31

1. Indigenous peoples have 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, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

The right to cultural heritage is also embedded in the larger right to culture. This is an important right which is enshrined in both the ICCPR and ICESCR. Article 27 of ICCPR provides:

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 the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 15(1) of ICESCR provides that “the States Parties to the present Covenant recognize the right of everyone...to take part in cultural life”.

This right to culture is also protected under ICERD, but on a different basis (i.e. the principle of non-discrimination and equality).

Importantly, international law prohibits States from destroying the culture of Indigenous peoples. Article 8 of UNDRIP states:

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) 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.

- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources.

...

What the prohibition on the destruction of Indigenous culture means for Australia in practice was explained by the UN Human Rights Committee (HRC) in *Angela Poma Poma v. Peru*. While States, like Australia, have the sovereign right to develop, that right is burdened where it puts at risk the cultural survival⁶ or cultural identity of Indigenous peoples, which the destruction of sacred sites does. Australia's economic development must be balanced against the right to culture and only measures that will have limited impact on Indigenous culture should be permitted. In *Angela Poma Poma v. Peru* the HRC said:

[A] State may legitimately take steps to promote its economic development. Nevertheless, ... economic development may not undermine the rights [to culture] protected by article 27 [of the International Covenant on Civil and Political Rights]. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. ... [M]easures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.⁷

The Committee on Economic, Social and Cultural Rights has said in its General Comment No.21 (para. 37):

Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts.

The obligation to respect the right to take part in cultural life "includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group...to have access to their own cultural and linguistic heritage...".⁸

The right to protection of cultural heritage, including sacred sites, is not dependent upon whether Indigenous peoples have legal title (recognised in domestic law) to the site or the land upon which the site is located.⁹

Further, Indigenous peoples have the right to have the control and ownership of their sacred sites

⁶ The Inter-American Human Rights Commission has interpreted survival as entailing more than physical survival. It must "be understood as the ability of the [people] to 'preserve, protect, and guarantee the special relationship that [they] have with their territory', so that 'they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected...'. That is, the term 'survival' in this context signifies much more than physical survival".

⁷ Human Rights Committee, *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, Apr. 24, 2009, para. 7.4.

⁸ Committee on Economic, Social and Cultural Rights, General Comment No.21 (2009), para.50.

⁹ See next footnote and enjoying the right to culture is not dependent upon legal title to land.

returned to them. This is reflected at Article 28 of UNDRIP:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.¹⁰

In its General Comment 23 (1994), the Human Rights Committee observed that ‘culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples’.¹¹ With regard to the relationship between land and cultural rights, the approach is that, where land is of central significance to the sustenance of a culture, the right to enjoy one’s culture requires the protection of land.¹²

States are also obligated to *respect* Indigenous cultural heritage. Article 15 of UNDRIP provides: ‘Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations...’. The Committee for the Elimination of Racial Discrimination has recommended that State parties respect indigenous culture, history, language and way of life as an enrichment of the State’s cultural identity (CERD/C/IDN/CO/3, para.16). This is particularly relevant to ensuring that simplistic balancing acts between the interests of indigenous peoples and economic benefits of the larger community are not undertaken in determining whether to protect sites or not. The protection of indigenous culture must be considered to be in the public interest (and of benefit to the larger community) and an enrichment of the State’s cultural identity.

(d) Participation of Indigenous peoples in cultural heritage policies, free, prior and informed consent and specific measures

The HRC in its General Comment on Article 27 (right to enjoy culture) said, especially in the case of Indigenous peoples, that the enjoyment of the right to one's own culture may require both positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them.

States are obligated to allow and encourage the participation of Indigenous peoples in the design and implementation of laws and policies that affect them, which would include cultural heritage laws and policies.¹³

Indigenous peoples have rights to effective participation in decision-making processes relating to

¹⁰ This is similar to the Committee for the Elimination of Racial Discrimination (CERD). Based on Article 5 of ICERD, CERD has highlighted the need to: (...) recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.

¹¹ Para 7.

¹² UNHRC, EMRIP, *Study by the Expert Mechanism on the Rights of Indigenous Peoples on the Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage*, A/HRC/30/53, 19 August 2015, para.25.

¹³ Committee on Economic, Social and Cultural Rights, General Comment No.21, para.55(e).

cultural heritage. This includes that concerned communities and individuals should be consulted and be able to actively participate in the process of identification, selection, classification, interpretation, preservation/safeguarding, stewardship and development of cultural heritage.¹⁴

States are required to obtain Indigenous peoples' free, prior and informed consent (FPIC) when the preservation of cultural resources, especially those associated with their way of life and cultural expression are at risk.¹⁵ In these circumstances, FPIC requires affirmative consent (i.e. is a right to veto). The basis for this right to veto is derived from the right to culture and the prohibition on State's destroying Indigenous culture that risks indigenous cultural survival. In other words, FPIC is not an aspiration or a process, but a right in itself which must be reflected in the design of heritage legislation.

The Australian Government has repeatedly recognised the importance of consultation with affected Indigenous communities, in particular in the context of environmental protection, cultural heritage, and related impact assessments.¹⁶ As noted above, since 2009 the Federal Government has expressed its support for the UNDRIP.¹⁷ In 2016, it reiterated that support in the context of 'recognis[ing] the importance of consulting with Indigenous peoples on decisions affecting them and that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.'¹⁸

In its submission to the UN Expert Mechanism on the 2018 Rights of Indigenous Peoples Study on Free, Prior and Informed Consent, the Australian Government stated that:

The Australian Government recognises the importance of engaging in good faith with Aboriginal and Torres Strait Islander peoples in relation to decisions that affect them. We

¹⁴ UNHRC, EMRIP, *Study by the Expert Mechanism on the Rights of Indigenous Peoples on the Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage*, A/HRC/30/53, 19 August 2015, para.45.

¹⁵ EDO NT, *Submission to the Northern Territory Department of Environment and Natural Resources on draft Environment Protection Bill and draft Environment Protection Regulations* (2018), Attachment B: Australia's obligations under International Law to Consult with, and to Ensure the Free, Prior and Informed Consent of, Indigenous Communities, https://denr.nt.gov.au/_data/assets/pdf_file/0004/669739/21-submission.pdf.

¹⁶ See, e.g., Australian Heritage Commission, *Ask First*, supra note 10, p. 6 ("Consultation and negotiation are central to the Indigenous heritage management process outlined in this document."); Australian Government, Department of the Environment, *Engage Early: Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, February 2016 ("Dept of Environment, *Engage Early*"), pp. 3-4, <http://www.environment.gov.au/system/files/resources/3201a986-88e8-40f3-8c15-6e659ed04006/files/engage-early-indigenous-engagement-guidelines.pdf> ("The EPBC Act recognises that Indigenous peoples play an important role in the conservation and sustainable use of Australia's natural environment. It also recognises the importance of a co-operative approach between the Government, community, landholders and Indigenous peoples (Section 3(1)). Consultation with Indigenous peoples should not just be limited to matters of cultural heritage. Indigenous peoples should also be consulted on other protected matters that are likely to be impacted by the proposed action.").

¹⁷ In April 2009, the Australian government (having previously been one of four nations to vote against the adoption of the UNDRIP) "gave its support" to the declaration; <https://www.abc.net.au/news/2009-04-03/aust-adopts-un-indigenous-declaration/1640444>.

¹⁸ Australian Government, Department of the Environment, *Engage Early: Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, February 2016 ("Dept of Environment, *Engage Early*"), p. 3, <http://www.environment.gov.au/system/files/resources/3201a986-88e8-40f3-8c15-6e659ed04006/files/engage-early-indigenous-engagement-guidelines.pdf>

cannot overcome indigenous disadvantage or build on the strength of indigenous communities if governments do not consult effectively.¹⁹

The Federal Government needs to ensure that these statements are not tokenistic and meaningless but instead that our laws provide for full implementation of our international obligations to provide free, prior and informed consent.

Recommendation 1: Cultural heritage legislation must be consistent with Australia's international obligations and the *UN Declaration on the Rights of Indigenous Peoples*

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

The *Aboriginal Heritage Act 1972 (WA)* (AHA) has not been substantially amended since 1972. As has been noted, '[i]t 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'.²⁰ It is widely acknowledged that the legislation requires major reform and the current WA Aboriginal Affairs Minister, the Hon Ben Wyatt MLA, stated at the beginning of the contemporary reform process in March 2018 that the AHA 'is out-of-date, inefficient and ineffective'.²¹ In this context, we note the current reform process that has been delayed due to the intra-state travel restrictions that were in place in WA to protect First Nations communities. We understand the need for the delay but now look forward to seeing the draft bill released for public consultation in the very near future. Proper consultation must take place with First Nations and this takes time, but the Rio Tinto example demonstrates the risks in not making amendments to this legislation a priority.

Recommendation 2: Whilst acknowledging that the coronavirus led to some understandable delays (and that the situation must continue to be carefully monitored), high priority must be given to the AHA reforms.

This section will first address the recent history of the AHA and the severe inadequacies that were revealed well prior to the Rio Tinto incident. It will then move to discuss two particular issues that the AHA reform process must address: statutory entrenchment of decision making about heritage by First Nations and merits appeal mechanisms for First Nations. More broadly, the themes relating to the operation of the AHA are also relevant to the effectiveness and adequacy of state and federal laws which will be discussed together below.

¹⁹ Government of Australian, *Submission to the United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) – study on free, prior and informed consent* (2018), p. 1 <https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/FPIC/Australia.pdf>.

²⁰ Ambelin Kawaymullina, Blaze Kwaymullina and Lauren Butterly, 'Opportunity is There for the Taking: Legal and Cultural Principles to Re-Start the Discussion on Aboriginal Heritage Reform in WA' (2017) 91(5) *Australian Law Journal* 365, 365.

²¹ The Hon Ben Wyatt (WA Minister for Aboriginal Affairs), 'Aboriginal heritage legislation to be reviewed' (Media Statement, 9 March 2018) <<https://www.mediastatements.wa.gov.au/Pages/McGowan/2018/03/Aboriginal-heritage-legislation-to-be-reviewed.aspx>>.

(a) Recent history of AHA Act

Prior to the Rio Tinto incident, the inadequacies of the AHA Act were clear. In this respect, it was sadly not surprising that such a devastating incident could occur. In the contemporary context, this emphasises again the need to give priority to reform but also the need to ensure that current section 18 approvals do not continue to exist into the future. Section 18 approvals are in effect, approvals to destroy, damage, alter etc a heritage site (these will be discussed further below). It appears, from the media reports and the statements by Rio Tinto, that Rio Tinto had a valid section 18 approval. In effect, this approval made the devastating destruction of the Juukan Gorge lawful. This is a reflection on the total inadequacy of the legislation.

Recommendation 3: All section 18 approvals under the AHA need to be reassessed under the reformed WA heritage laws.

Only a few days prior to the Rio Tinto incident, the Minister representing the Minister for Aboriginal Affairs was asked in the WA Legislative Council how many section 18 applications for land described as a mining lease were brought before the APMC [Aboriginal Cultural Materials Committee] since 1 July 2010 and how many of these applications had been declined?²² The relevant Minister replied that there had been 463 applications and none of them had been declined.²³ The relevant Minister added that: ‘This confirms what I have consistently highlighted, the obligations under the *Aboriginal Heritage Act 1972* are not an impediment to the effective operations of the mining industry, particularly where mining companies enter into positive consultations with traditional owners.’²⁴ This statement failed to consider that having had no applications denied in nearly ten years is an indication that the system is not operating adequately. The Rio Tinto example then quickly confirmed that more ‘impediments’ were needed to ensure that First Nation’s cultural heritage was properly protected.

The inadequacy of the AHA was also put into the spotlight following the *Robinson v Fielding*²⁵ judicial review litigation in the Supreme Court of WA. The case was about Marapikurrinya Yintha which was a sacred site encompassing parts of Port Hedland Harbour in the Pilbara region that was placed on the Register of Aboriginal Sites in 2008. Justice Chaney held in that case that a decision that appeared to have been made by the Aboriginal Cultural Materials Committee (ACMC) (the statutory body pursuant to the AHA) in 2013 that Marapikurrinya Yintha was ‘no longer’ a site under the AHA was invalid.²⁶ The APMC’s decision was made due to some guidelines from the (then) WA Department of Aboriginal Affairs. These guidelines ‘set out additional criteria that were to be taken into account when determining whether a place is a “sacred, ritual or ceremonial site”’. These included:

- The meaning of “site” is narrower than “place”;

²² Western Australia, Parliamentary Debates, Legislative Council, 14 May 2020, 2703b-2703b (Hon Robin Chapple and Hon Stephen Dawson (representing the Minister for Aboriginal Affairs)).

²³ Ibid.

²⁴ Ibid.

²⁵ [2015] WASC 108 (*Robinson*).

²⁶ For a more detailed assessment of this case see: Lauren Butterly, ‘Update on Aboriginal heritage in the West: Successful judicial review application and debate surrounding legislative reform’ (2015) 30(4-5) *Australian Environment Review* 104.

- For a place to be a sacred site requires that it is devoted to a *religious use* rather than a place subject to mythological story, song or belief... [Emphasis added].²⁷

In the doctrinal legal context, Chaney J held that there was ‘no reason to read the expression “site” as being somehow narrower than “place”’ and further, there was no reason it must be devoted to ‘religious use rather than be subject to mythological story, song or belief’.²⁸ Therefore, in applying this policy, the APMC had misconstrued the relevant section of the AHA and fallen into jurisdictional error (there was also a successful procedural fairness ground to this case that will be discussed in the next section). Beyond the doctrinal context, this demonstrated that there was a concerted effort to limit the types of sites that were registered as sacred sites under the AHA. As will be discussed further below, limitations are often inherent in the Eurocentric/anthropological ways that definitions of heritage in legislation are drafted, but this policy went even further in its attempt to restrict what would be a site under the AHA.

The finding in *Robinson* then revealed that these guidelines had been used to make several other decisions. The reason that the applicants in the *Robinson* case became aware of the issue was because of a section 18 application. However, it appears that other Traditional Owners were unaware that their heritage sites had been determined to no longer be a site. After *Robinson* was handed down, the responsible Minister was asked in the Legislative Council about other sites that had changed status to ‘not a site’. In addition to Marapikurrinya Yintha, 22 other sites had changed status to ‘not a site’ on the basis of the interpretation that was challenged in *Robinson*.²⁹ It appears this number was not quite accurate as the APMC was directed to re-assess 35 heritage places in response to the *Robinson* decision.³⁰ The re-assessment decisions of 30 of these heritage places are detailed on the WA Department of Planning, Lands and Heritage (**DPLH**) website.³¹ Fourteen of those places were re-assessed as being an Aboriginal heritage site.³²

The example of *Robinson* and the aftermath reveals systemic failures in the protection of First Nations’ cultural heritage in WA. In particular, it exposes the danger of restrictive Eurocentric/anthropological definitions of heritage that determine protection of heritage without First Nations input and without involvement of relevant Traditional Owners. It also emphasises the importance of First Nations ownership over process and ongoing management of heritage sites. Although, given the way the WA legislation operates, all sites are not required to be on the Register to be protected, being on the Register gives sites an official legal status and puts them on the record. In the context of the re-interpretation of the definition of sacred sites that was challenged in *Robinson*, it appears that Traditional Owners were not given any information about the new policy and no opportunity to comment on the implications for their sites. This is clearly unacceptable and breaches Australia’s international law obligations to ensure First Nations participation in decision-making processes about their heritage.

²⁷ Ibid 104. Also see *Robinson* [75].

²⁸ *Robinson* [88] and [98].

²⁹ Western Australia, Legislative Council, *Parliamentary Debates*, 21 April 2015, 2375b-2376.

³⁰ WA Department of Planning, Lands and Heritage, *Notice of assessment of Aboriginal heritage places by the Aboriginal Cultural Material Committee (ACMC)* <<https://www.dplh.wa.gov.au/getmedia/670574a8-c835-4a80-910a-0e562f051222/AH-Previous-acmc-reassessment-decisions>>

³¹ Ibid.

³² Ibid.

(b) The WA Aboriginal heritage law reforms must provide statutory entrenchment of decision making about heritage by First Nations

The model of the current AHA is predominantly based on applying for permission to damage, destroy or alter etc a site. Section 17 of the AHA provides an offence provision which prohibits damaging or destroying a heritage site or object and section 18 then allows for applications to breach section 17. A section 18 application is made to the ACMC and then the ACMC makes a recommendation to the Minister.

There is nothing in the section 18 process that mandates any involvement of First Nations. The ACMC does not require any First Nations members.³³ Further, there is no statutory process or obligations under the AHA for the ACMC to engage with Traditional Owners when section 18 applications are received.³⁴ The process of considering a section 18 application is therefore not transparent. It is apparent, on a practical level, that the ACMC does reach out to Traditional Owners. *Robinson* found that there was a procedural fairness requirement in relation to the ACMC in certain circumstances (but this was very specific to the factual situation of that case).³⁵ A factually specific or ad hoc process is not acceptable in the context of the state's primary heritage legislation.

The focus on section 18 also emphasises that the registering of sites, and involvement of Traditional Owners in that process, is not transparent and has no clear statutory requirements around it. The ACMC also performs a role in evaluating heritage sites 'on behalf of the community'.³⁶ There is no statutory detail as to how Traditional Owners should apply to register sacred sites. In practice, there is a form on the DPLH website.³⁷ The AHA also does not set out any role for Traditional Owners in decision making about sites. Instead, the legislation just sets out the things the ACMC must consider in 'evaluating the importance of places and objects'.³⁸ Some of these considerations would seem to necessitate some correspondence with Traditional Owners. However, again similar to section 18 applications, it is unacceptable that the legislation is silent on this point.

This can be contrasted with the approach taken under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (**NT Sacred Sites Act**). It establishes an independent statutory authority, the Aboriginal Areas Protection Authority (**AAPA**), which is governed by a board of senior First Nations custodians from across the Northern Territory. Proponents wishing to carry out works on land in the Northern Territory may apply for an Authority Certificate, which does not provide outright permission to destroy or desecrate the site, but instead provides an immunity from prosecution for a proponent if a site is damaged but work was carried out in accordance with a certificate.

³³ *Aboriginal Heritage Act 1972* (WA) s28(4).

³⁴ On this point, also see *Robinson* [123].

³⁵ *Robinson* [140]. Also see: Lauren Butterly, 'Update on Aboriginal heritage in the West: Successful judicial review application and debate surrounding legislative reform' (2015) 30(4-5) *Australian Environment Review* 104, 106.

³⁶ *Aboriginal Heritage Act 1972* (WA) s39.

³⁷ Western Australian Government, 'Aboriginal site preservation', *Information on how to report an Aboriginal site or damage to a site* (Web page) < <https://www.dplh.wa.gov.au/information-and-services/aboriginal-heritage/aboriginal-site-preservation>>.

³⁸ *Aboriginal Heritage Act 1972* (WA) s39(2).

It is the responsibility of the AAPA to consult with identified First Nations custodians as to the granting of an authority to the proponent.³⁹ The Act enables the AAPA to only grant an Authority Certificate where the AAPA is satisfied that the application poses no substantive risk of damage to or interference with a sacred site on or in the vicinity of the land or where an agreement has been reached between the custodians and the applicant.⁴⁰ The Certificate must specify the particular parts or areas of the land where an activity may be carried out, and any specific conditions as the AAPA believes the custodians wish, or as per any agreement reached.⁴¹

The current situation in Western Australia, where there is no statutory requirement to involve First Nations (or relevant Traditional Owners relating to particular sites) in either assessment of significance of sites or the section 18 process, is completely unacceptable and absolutely at odds with any sense of First Nations self-determination, First Nations decision-making and principles of free, prior and informed consent.

Recommendation 4: The WA cultural heritage law reforms must provide statutory entrenchment of decision making about heritage by First Nations in relation to both significance of heritage and protection of heritage.

(c) Appeal mechanisms

In addition to not providing any statutory requirement to involve First Nations in decision making, the current AHA also does not provide an opportunity for merits appeal by First Nations of a Minister's decision about a section 18 approval. Whereas, merits review to the State Administrative Tribunal is available to the applicant where their section 18 application has been refused.⁴² This means that the only option for First Nations to challenge a Minister's decision that impacts their heritage is judicial review. Judicial review is a difficult and expensive option and forces First Nations to make arguments within the narrow paradigm of grounds of review. Cultural heritage laws must give First Nations merits review rights so that they can present a full range of factual arguments including relating to their own laws.

We note that merits appeal rights for First Nations are also lacking in other jurisdictions. In the NT, for example, under the *NT Sacred Sites Act*, a proponent that has applied to the AAPA for an Authority Certificate (that provides an immunity from prosecution for a proponent if a site is damaged but work was carried out in accordance with a certificate) may apply to the Minister for Environment and Natural Resources if they are 'aggrieved' by a decision or an action of the AAPA, or if the AAPA fails to decide on an application or request within a 'reasonable time'.⁴³ However, there are no merits review rights afforded to custodians under the Act if an Authority Certificate is granted in circumstances where custodians have objected to it, or do not agree to the conditions on which it was granted. For example, the operator of the McArthur River Mine in the Gulf of Carpentaria, NT has applied to vary the conditions of an Authority Certificate it holds in relation to a sacred site on the mine site known as 'Damangani', which it is understood would, according to custodians of that site, impact on its cultural value, and despite contention over the correct

³⁹ *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s19F.

⁴⁰ *Ibid* s22.

⁴¹ *Ibid* ss33-35.

⁴² *Ibid* s18(5).

⁴³ *Ibid* s 30.

identification of custodians for sacred sites in relation to the mine site.⁴⁴ To our knowledge, the application remains under consideration, but if approved, the custodians have no right under the *NT Sacred Sites Act* (or other legislation) to seek legal redress.

We further note that the 2018 Draft Aboriginal Heritage Bill (NSW) did not extend merits review to First Nations.⁴⁵ Instead, similarly to the WA and NT examples, merits review of Aboriginal Cultural Heritage Management plans (to the NSW Land and Environment Court) was only provided to a proponent. As the EDO noted in its submission to the NSW Draft Aboriginal Heritage Bill consultation process:

In our view the imbalance of appeal rights is one of the most concerning aspects of the Draft Bill. It entrenches the systemic power of developers and private landholders over Aboriginal voices in decision-making, and erects barriers to Aboriginal access to justice that are contrary to the objects of the Draft Bill.⁴⁶

Recommendation 5: The WA cultural heritage law reforms must provide for merits appeal rights for First Nations in relation to decisions that impact their heritage. Further, merits appeal provisions must be reviewed across the Australian jurisdictions.

3. The interaction of state indigenous heritage regulations with Commonwealth laws (TOR f)

The legislation of the States/Territories is the main source of day-to-day regulation of heritage in Australia.⁴⁷ The Commonwealth legislation is a short piece of legislation that predominantly deals with declarations that can be made by the Federal Environment Minister to protect 'significant Aboriginal areas and objects'. In fact, the ATSHIP Act was 'originally enacted as an interim measure in 1984 and was to be replaced by national land rights legislation. This new land rights legislation never eventuated, and so in 1986 the ATSHIP Act was made permanent.'⁴⁸ As noted by the then Justice French in *Tickner v Bropho*: 'Informing [the ATSHIP Act's] enactment however, was the idea that it would be used as a protective mechanism of last resort where State or Territory legislation was ineffective or inadequate to protect heritage areas or objects'.⁴⁹

⁴⁴ Northern Territory Environment Protection Authority, McArthur River Mine Overburden Management Project McArthur River Mining Pty Ltd (Assessment Report 86, July 2018), pp 63-64 and pp 133-134, 135-136, 151-154

⁴⁵ 2018 Draft Aboriginal Heritage Bill (NSW), Clause 52. See: <https://www.environment.nsw.gov.au/research-and-publications/publications-search/draft-aboriginal-cultural-heritage-bill-2018>

⁴⁶ EDO NSW, *Submission on the Draft Aboriginal Cultural Heritage Bill 2018* (2018) EDO NSW, 'Submission on the Draft Aboriginal Cultural Heritage Bill 2018' (April 2018) https://www.edo.org.au/wp-content/uploads/2020/01/180413_ACH_Bill_2018_-_EDO_NSW_submission_-_FINAL.pdf p. 39. Further, EDO submitted: 'There should be equitable merit appeal rights for relevant Aboriginal people in relation to ACH [Aboriginal Cultural Heritage] Management Plans, or no merit appeal rights for developers. If both sides (or neither side) can appeal the decision, the playing field is levelled and the decision-maker can focus on the merits of the decision and not the likelihood of having to defend that decision in Court.'

⁴⁷ Gerry Bates (with contributions from Justine Bell-James, Lauren Butterly, Amy McInerney and Gerry Nagtzaam), *Environmental Law in Australia* (LexisNexis, 10th Edn, 2019) 543.

⁴⁸ *Ibid* 573.

⁴⁹ (1993) 40 FCR 183, 211.

Section 13 of the ATSIHP Act is the key section that sets out the relationship between the Federal Minister and the State/Territory legislation. Section 13(2) sets out that the Federal Minister shall not make a declaration in relation to an area ‘unless he or she has consulted with the appropriate Minister of that State or Territory as to whether there is, under a law of that State or Territory, effective protection of the area...from the threat of injury or desecration’. However, a failure to comply with this section would not invalidate the making of a declaration.⁵⁰ Section 13(5) also provides that where the Minister is ‘satisfied that the law of a State or of any Territory makes effective provision for the protection of an area... to which a declaration applies, he or she shall revoke the declaration to the extent that it relates to the area....’. Section 13 applies to declarations made under the relevant division in the ATSIHP Act, and this would appear to include both emergency declarations and ‘other’ (longer term) declarations.⁵¹

The crux of how the legislation appears to function is that, on declaration of the Federal Minister, the ATSIHP Act can operate to protect a significant First Nations area when the State/Territory cultural heritage legislation is deemed ineffective to protect that area. This places a huge (and unacceptable) burden on First Nations to first seek protection from the State/Territory and then apply for a declaration to another level of government. Further, since the enactment of the ATSIHP Act, very few declarations have been made.

It is difficult to find complete and accurate information and records about applications for declarations. The reporting is inconsistent. A graph in the 2011 *State of the Environment Report* seems to indicate that between enactment of the ATSIHP Act and 2011, nearly 150 applications were made for s10 (long term) declarations and over 200 for s9 (emergency) declarations (however, even that publication noted that: ‘Data may be inconsistent or incomplete as they are derived from records maintained by different agencies over more than two decades...’).⁵² In terms of actual declarations, it seems that approximately 14 declarations (including both ss9 and 10 declarations) have been made since enactment of the legislation. The 2011 *State of the Environment Report* went on to note in this context:

The ATSIHP Act has proven to be problematic:

The ATSIHP Act has not proven to be an effective means of protecting traditional areas and objects. Few 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. Australian Government Department of the Environment, Water, Heritage and the Arts, 80 p. 4

⁵⁰ ATSIHP Act, s13(4).

⁵¹ For some commentary on s 7 ATSIHP Act (‘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’) see: EDO, ‘Ministerial declarations and protection of areas under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984’ (2020) (Cth) <https://www.edo.org.au/publication/ministerial-declarations-and-protection-of-areas-under-the-aboriginal-and-torres-strait-islander-heritage-protection-act-1984-cth>

⁵² State of the Environment Committee, *Australian State of the Environment thematic reports: Heritage* (Independent Report 2011) <https://soe.environment.gov.au/sites/default/files/soe2011-report-heritage.pdf?v=1488161945> p.751. State of the Environment 2011 Committee, ‘Australia: State of the Environment 2011: Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities’, p.751, <https://soe.environment.gov.au/sites/default/files/soe2011-report-heritage.pdf?v=1488161945>

A comparison of the numbers of applications and ministerial declarations suggests that the ATSIHP Act is consuming public resources with little obvious benefit (Figure 9.15).⁵³

The 2016 *State of the Environment Report* also commented on the inadequacies of the ATSIHP Act:

The ATSIHP Act has done little to fulfil its intended purpose of protecting significant Aboriginal areas or objects. Between 2011 and 2016, 32 applications were received for emergency protection under s. 9 of the Act, 22 applications were received for long-term protection under s. 10 of the Act, and 7 applications were received for protection for objects under s. 12 of the Act. During the past 6 years, no declarations under ss. 9, 10 or 12 of the Act were made (Figure HER17).⁵⁴

Due to the way the Commonwealth and State/Territory legislation interacts in relation to cultural heritage we submit that a cross-jurisdictional review of cultural heritage laws is undertaken as a benchmark. This review must be First Nations-led. Further, this recommendation ties in with our recommendation below that cultural heritage laws must be reviewed within the broader paradigm of reviewing all laws (environment, planning) that impact First Nations heritage.

Recommendation 6: A cross-jurisdictional review of all cultural heritage laws across Commonwealth, States and Territories should be undertaken. This review must be led by First Nations.

4. 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 (TOR g) and how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites (TOR h)

We have decided to address both Terms of Reference (g) and (h) together by focussing on broad themes that need to be considered in relation to improving the effectiveness and adequacy of cultural heritage legislation in Australia. We note upfront, to comply with Australia's international obligations significant cultural heritage should not be destroyed and, where it is, First Nations should be compensated.

Australia's contemporary laws relating to Aboriginal and Torres Strait Islander cultural heritage are quite varied. As noted in the part immediately above, Australia has heritage laws at the Commonwealth level and then separate pieces of legislation in each State/Territory. The

⁵³ Ibid 750.

⁵⁴Richard Mackay, *Australia state of the environment 2016: heritage* (independent report to the Australian Government Minister for the Environment and Energy, Australian Government Department of the Environment and Energy, Canberra 2016), <https://soe.environment.gov.au/sites/default/files/soe2016-heritage-launch-v27march17.pdf?v=1488844294> p. 84.

State/Territory statutes are in an 'era of reform'.⁵⁵ Currently, WA⁵⁶ and NSW⁵⁷ are in the process of reforming their legislation and Tasmania⁵⁸ has a review underway. All these jurisdictions have completely outdated legislation that was enacted in the 1970s.⁵⁹ NSW does not have a standalone Aboriginal heritage statute, but the reform process has led to the release of a draft bill that would be a standalone statute. Tasmania, NSW and WA have been through multiple rounds of reviews and reform processes prior to their current attempts and the contemporary NSW reform process appears to have paused.⁶⁰

Aboriginal heritage laws in Victoria, Queensland and the ACT have all been significantly reformed in the 2000s. Queensland is currently going through a further reform process.⁶¹ SA and NT both have contemporary legislation enacted in the late 1980s.⁶² The SA legislation had some reforms in 2016⁶³ and the NT Government commissioned a review into their legislation that reported in 2016⁶⁴ (but there does not appear to be an active reform process in that regard).

The major overhauls seen in Queensland and Victoria 'moved to implement legislative schemes that put Indigenous involvement at the centre of the regulatory system' (as compared to the current AHA model discussed above).⁶⁵ This is a good direction, but critiques continue to be

⁵⁵ Gerry Bates et al, *Environmental Law in Australia* (LexisNexis, 10th Edn, 2019) 543.

⁵⁶ WA Department of Planning, Lands and Heritage, Review of the *Aboriginal Heritage Act 1972*, commenced 2018. For more information: <https://www.dplh.wa.gov.au/aha-review>

⁵⁷ NSW Government, Heritage NSW, *Aboriginal Cultural Heritage Legislation and Reform*. For more information see: <https://www.heritage.nsw.gov.au/protecting-our-heritage/legislation/ach-legislation-and-reform/>

⁵⁸ Tasmanian Government, Statutory Review of the *Aboriginal Heritage Act 1975*, commenced 2019. For more information see: <https://www.aboriginalheritage.tas.gov.au/items-of-interest/statutory-review-of-the-aboriginal-heritage-act-1975>.

⁵⁹ The Tasmanian Heritage Minister recognised the then-titled "Aboriginal Relics Act 1975" was 'woefully inadequate' in 2017: Matthew Groom (then Heritage Minister), 'Talking Point: Relics Act shamefully disrespectful' (25 June 2016) <<https://www.themercury.com.au/news/opinion/talking-point-relics-act-shamefully-disrespectful/news-story/0651f8d4e5d167ff8552f806b4829331>>.

⁶⁰ For an example of a critique of one of the previous rounds of reform in WA see: Ambelin Kwaymullina, Blaze Kwaymullina and Lauren Butterly, 'Opportunity Lost: Changes to Aboriginal Heritage Law in Western Australia' (2015) 8(16) *Indigenous Law Bulletin* 24. A brief synopsis of the NSW reform process will be provided in the final section of this part below. For Tasmania, there was a round of consultation undertaken in 2006, and then there were minor amendments made in 2017: *Aboriginal Relics Amendment Act 2017* (Tas). The Second Reading Speech to the *Aboriginal Relics Amendment Act 2017* (Tas) identified that these amendments were an 'interim step' to address immediate areas of concern and that there would be future consultation about the legislation.

⁶¹ Queensland Government Department of Aboriginal and Torres Strait Islander Partnerships, Review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*, commenced 2019, see more information here: <https://www.datsip.qld.gov.au/programs-initiatives/review-cultural-heritage-acts>. Page 6 of this Consultation Paper provides a helpful summary of the various amendments provided to the Queensland cultural heritage laws since the 1960s.

⁶² Although the current *Northern Territory Aboriginal Sacred Sites Act 1989* in the Northern Territory replaced the previous *Aboriginal Sacred Sites Act 1978* (NT).

⁶³ *Aboriginal Heritage (Miscellaneous) Amendment Act 2016* (SA).

⁶⁴ NT Government, *Sacred Sites Processes and Outcomes Review PwC's Indigenous Consulting* <https://dlghcd.nt.gov.au/__data/assets/pdf_file/0004/297148/sacred-sites-review.pdf>. Noting the review was only of the *Aboriginal Sacred Sites Act 1989* (NT), not the *Heritage Act 2011* (NT) which also provides some protection for Aboriginal archaeological objects and places. The *Heritage Conservation Act 1991* (NT) was replaced by the *Heritage Act 2011* (NT) after a process of reform between 2008 and 2012.

⁶⁵ Gerry Bates et al, *Environmental Law in Australia* (LexisNexis, 10th Edn, 2019) 544.

raised,⁶⁶ including about whether they fulfil requirements of ‘free, prior and informed consent’⁶⁷ and no contemporary Australian model should be held up as the ultimate guide. This section raises several broad themes that need to be considered in relation to improving the effectiveness and adequacy of First Nations heritage legislation in Australia.

a) First Nations must be primary decision makers

Our overarching recommendation in this part is that First Nations must be the primary decision-makers in relation to their heritage. This includes making decisions on both significance and protection of their heritage and statutorily entrenched involvement in broader comprehensive planning processes. As part of this, First Nations decision-making processes must be respected and supported. This includes appropriate knowledge-holding processes (encompassing protection of Indigenous intellectual property and data sovereignty) and adequate funding and other resources.

Recommendation 7: First Nations must be the primary decision-makers about their heritage. First Nations decision-making processes must be respected, supported and properly resourced.

b) First Nations heritage must be recognised as living and connected

First Nations heritage must be recognised as living, contemporary and connected. As noted by Kwaymullina et al:

‘For Aboriginal peoples, heritage is a part of a vibrant, living culture. In contrast to the reductionist, results-focused linearity that underlies much of western legal thinking (including in relation to heritage), Aboriginal worldviews tend to be holistic, process-focused, and non-linear. Heritage in this regard is not isolated collections of objects or individual sites separate from Aboriginal environments, cultures and peoples, but part of a complex network of relationships through which Indigenous peoples have sustainably managed their homelands for thousands of years.’⁶⁸

If we take the WA legislation as an example, currently the AHA uses criteria that is still based in archaeological and anthropological models. The guidelines analysed in *Robinson* (and discussed

⁶⁶ Victorian Aboriginal Heritage Council, *Taking Control of Our Heritage: Discussion Paper on Legislative Reform of the Aboriginal Heritage Act 2006* (VIC), (June 2020), available online here:

<https://www.aboriginalheritagecouncil.vic.gov.au/taking-control-our-heritage>; See also the various submissions made to the Queensland Government Department of Aboriginal and Torres Strait Islander Partnerships, Consultation Paper - Review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*, 2019, online here: <https://www.datsip.qld.gov.au/programs-initiatives/review-cultural-heritage-acts>.

⁶⁷ See the various submissions made to the Queensland Government Department of Aboriginal and Torres Strait Islander Partnerships, Consultation Paper - Review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*, 2019, online here: <https://www.datsip.qld.gov.au/programs-initiatives/review-cultural-heritage-acts>. Also see: Graham Atkinson and Matthew Storey, ‘The Aboriginal Heritage Act 2006 (Vic): A Glass Half Full...?’ in Pamela McGrath (ed), *The Right to Protect Sites: Indigenous Heritage Management in the Era of Native Title*, AIATSIS Research Publications, 2016, 133-134.

⁶⁸ Ambelin Kwaymullina, Blaze Kwaymullina and Lauren Butterly, ‘Opportunity is There for the Taking: Legal and Cultural Principles to Re-Start the Discussion on Aboriginal Heritage Reform in WA’ (2017) 91(5) *Australian Law Journal* 365, 369. Also see: Blaze Kwaymullina and Ambelin Kwaymullina, “Learning to Read the Signs: Law in an Indigenous Reality” (2010) 34(2) *Journal of Australian Studies* 195; Irene Watson, “Kaldowinyeri-Munaintya: In the Beginning” (2000) 4(1) *Flinders Journal of Law Reform* 3.

above) also demonstrated how this criteria was sought to be further narrowed such that '[f]or a place to be a sacred site requires that it is devoted to a religious use rather than a place subject to mythological story, song or belief'.⁶⁹ Definitions of First Nations heritage must be drawn from First Nations legal systems and understandings of country and heritage.

We note that the submission to this Inquiry of our client, the Martuwarra Council (which brings together six Indigenous nations in the Kimberley region of Western Australia) states that heritage legislation must: 'Reimagine the way 'heritage' is understood and represented in legislation as a property of living cultural landscapes and healthy Living Waters'. The Martuwarra Council's submission details:

The CMNHP's [the Martuwarra Council's *Conservation Management Plan for the National Heritage Listed Fitzroy River Estate*] first position statement is that 'the concept of living water is central to sustaining heritage values.' 'Living Water' is an Aboriginal English term. Living Water is alive and often associated with a spiritual ancestor. For example, the Martuwarra has four different manifestations of the Rainbow Serpent from source to sea, which are recognised by the national heritage [EPBC] listing (Commonwealth Government 2011).

It is important to note that Living Waters are part of interconnected *systems*: of society, ecology, First Law, song lines and trading routes etc. Living waters are connected underground and throughout the cultural landscape i.e. physically/materially and metaphysically/spiritually connected. The Mary River Statement declares, 'Land, water and peoples and inextricably connected' (Delegates of the Mary River Water Forum 2009).

People must follow the correct protocols to maintain relationships with Living Waters.

Consequently:

- Natural and cultural care are interlinked (CMNHP position statement 2)
- Human and environmental wellbeing are linked to heritage
- Heritage around Living Waters requires active management to maintain reciprocal relationships
- Martuwarra flows are intrinsic to traditional and environmental uses and values (CMNHP position statement 6) therefore changes to flow may impact heritage

Better recognition is needed in the significance of broader cultural landscapes when assessing the impacts on cultural heritage arising from land use activities. As noted by Mortimer J in *Tasmanian Aboriginal Centre Inc v Secretary, Department of Primary Industries, Parks, Water and Environment [No 2]*:

...the landscape in the WTACL [Western Tasmanian Aboriginal Cultural Landscape] is one that has been inhabited by Aboriginal people for thousands of years. What survives of their life there is not limited to what survived when a white man visited the area for a few days in the late nineteenth century. The shifting nature of the dunes, the size of the area and the

⁶⁹ [2015] WASC 108 [25].

lack of comprehensive surveys means there is no reliable way to ascertain what physical manifestations of Aboriginal life in the area are still there. That may never be completely ascertained. In one sense, as much of the evidence in this proceeding makes clear, it does not matter what is currently visible and what is not because the value to Aboriginal people is in the whole of the landscape. The connection to their ancestors' way of life arises as much from the dunes, the beaches, the vegetation, and the sea life as from the artefacts which may be found in dedicated surveys.⁷⁰

Although imperfect, the Northern Territory's framework governing protection of Aboriginal cultural heritage provides a better example of how definitions of First Nations cultural heritage are guided by First Nations' conceptions of their cultural heritage. While the *Heritage Act 2011* (NT) is concerned with, and provides automatic protection of, Aboriginal and Macassan archaeological places and objects (and is therefore necessarily focused on tangible cultural heritage from a Eurocentric perspective), the *NT Sacred Sites Act* intends to measure significance in accordance with Aboriginal tradition rather than 'imposed scientific heritage criteria',⁷¹ by adopting the definition of a sacred site in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALR Act**), that is, as a 'site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition'.⁷²

Importantly, the word 'land' includes land covered by water (including such land in the Territorial sea) and the water covering land,⁷³ and 'Aboriginal tradition' means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships,⁷⁴ which expands the scope of protection.

The protection of sacred sites could be strengthened to explicitly expand definitions to ensure that sub-surface formations can be included as a sacred site or a feature of a sacred site, as it is widely acknowledged that sacred sites can, and do, extend underground.⁷⁵

The Victorian cultural heritage laws also provide recognition of intangible cultural heritage,⁷⁶ while other Acts are currently only limited to tangible heritage, such as objects, areas and areas without markings. We note the draft NSW Aboriginal Cultural Heritage Bill 2018 also includes provisions about intangible cultural heritage.⁷⁷

⁷⁰ (2016) 337 ALR 96, 150 [225]. We note that, Justice Mortimer's broader approach to defining the National Heritage values under the EPBC Act was overturned on appeal by the Full Court in *Secretary, Dept of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Inc* [2016] FCAFC 129; (2016) 244 FCR 21; (2016) 219 LGERA 64. This demonstrates one of the deficiencies of the EPBC Act in defining heritage too narrowly.

⁷¹ McGrath, P.F and Lee, E. 2016 The fate of Indigenous place-based heritage in the era of native title in McGrath, P.F. (Ed.) *The Right to Protect Sites: Indigenous Heritage Management in the Era of Native Title*. AIATSIS Research Publications, p 16.

⁷² *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth), s 3.

⁷³ *Northern Territory Sacred Sites Act 1989* (NT), s 3.

⁷⁴ *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth), s 3.

⁷⁵ It was, for example, recommended in the Final Report of the *Independent Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* that due to this, the Sacred Sites Act should be amended to protect all sub-surface features of a sacred site (p 285-286).

⁷⁶ *Aboriginal Heritage Act 2006* (Vic), Part 5A.

⁷⁷ Draft NSW Aboriginal Cultural Heritage Bill 2018, see for example: cl 12(2)(c).

The definition of ‘intangible heritage’ found in the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage includes oral traditions, performing arts, rituals, festivals and traditional crafts.⁷⁸ In revising the cultural heritage laws around Australia, the creation of definitions must be led by First Nations for the jurisdiction and this should be adopted in all relevant laws to better recognise the significance of these aspects of cultural heritage and to ensure their protection.

Recommendation 8: Definitions of heritage need to be guided by First Nations laws and heritage must be viewed as living and connected to country and sea country.

Recommendation 9: Cultural heritage legislation needs to mandate ‘respect’ for First Nations cultural values and where the destruction of a site will have a detrimental effect on culture or cultural identity, the site must be protected to be in-line with Australia’s obligations under international law.

c) Ensuring adequate and meaningful engagement prior to any decisions to meet free, prior and informed consent obligations

As noted above, free, prior and informed consent is a vital part of Australia’s international law obligations. In the context of heritage protection, free, prior and informed consent must be viewed as applying more broadly than just cultural heritage legislation. It must also apply to environmental and development laws (and other associated laws such as water and land administration). Further, as noted above, our overarching submission is that First Nations must be primary decision-makers.

Currently, no relevant cultural heritage, environment or development legislation in Australia adequately reflects the requirements of free, prior and informed consent obligations under our international law commitments outlined in the first part of this submission. A recent example of this failure is the finding of the Victorian Ombudsman’s *Investigation into the planning and delivery of the Western Highway duplication project*. The Ombudsman found that the Victorian Government had failed to provide for free, prior and informed consent in the planning and delivery of the Victorian Government’s Western Highway duplication project, which threatens a number of trees in the vicinity of Langi Ghiran State Park, to the east of Ararat, that were said to be sacred to Djab Wurrung traditional custodians.⁷⁹

However, we note that the NT’s *NT Sacred Sites Act* and ALR Act are considered to partially achieve the UNDRIP standard.⁸⁰ While not containing a general veto right, the *NT Sacred Sites Act* does place significant emphasis on the identification of and mandatory consultation with the custodians of sacred sites, together with either their agreement, or a finding by the AAPA that any potential works do not pose a substantive risk of damage or interference to a sacred site. Although, there are a number of aspects to the legislation that undermine these provisions,

⁷⁸ UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Article 2.

⁷⁹ Victorian Ombudsman, *Investigation into the planning and delivery of the Western Highway duplication project* (July 2020), available here: <https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/Investigation-into-the-planning-and-delivery-of-the-Western-Highway-duplicationproject.pdf?mtime=20200730083530>.

⁸⁰ McGrath, P.F and Lee, E. 2016 *The fate of Indigenous place-based heritage in the era of native title* in McGrath, P.F. (Ed.) *The Right to Protect Sites: Indigenous Heritage Management in the Era of Native Title*. AIATSIS Research Publications, p 134.

including the power of proponents to appeal to the Minister for an Authority Certificate to be issued, the fact that in operation, the system can result in significant pressure being placed on custodians to provide their agreement, or in some cases, assertions about the incorrect identification of custodians of sacred sites by proponents, as has been identified in respect of the controversial McArthur River Mine Overburden Management Project⁸¹ which is located in the remote Gulf of Carpentaria region in the NT.

Determining how to operationalise free, prior and informed consent must be a key part of a review process of heritage laws. This review must be led by First Nations people.

Recommendation 10: First Nations must have their free, prior and informed consent required to be sought in relation to all decisions that impact protection of their heritage.

Recommendation 11: Determining how to operationalise free, prior and informed consent must be a key part of a review process of cultural heritage laws. This review must be led by First Nations.

d) Weighing up other ‘interests’ in determining whether to protect or destroy

Cultural heritage legislation must enumerate considerations and how they should be weighed up, rather than leaving large discretion to a Minister. Further, where legislation requires the consideration of other ‘interests’ in determining whether to protect or destroy (in relation to sites that do not reach the significant threshold), full statements about impact on First Nations heritage and culture must be required. Decisions on First Nations heritage cannot be made simply on an economic cost/benefit analysis. As we noted above (in section 1 on international law), while States, like Australia, have the sovereign right to develop, that right is burdened where it puts at risk the cultural survival or cultural identity of First Nations, which the destruction of sacred sites does. Australia’s economic development must be balanced against the right to culture and only measures that will have limited impact on First Nations culture should be permitted.

The following case study of one of our clients demonstrates the inadequacies of the current situation in relation to weighing up ‘interests’:

Case study: Gomeroi Traditional Custodians against the Minister for the Environment

The EDO acted for Dolly Talbot as a member of the Gomeroi Traditional Custodians (GTC) in seeking judicial review in the Federal Court of two decisions by the Minister to refuse to make protective declarations under s 10 of the ATSIHP Act.

In April 2015, the GTC lodged an application under s.10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (ATSIHP Act) for the protection of areas and sites of significant cultural heritage value (Significant Areas) located on the Liverpool Plains near Breeza in north-western New South Wales. A second more comprehensive application was made in 2017 (together the Applications).

⁸¹ See for example, the submissions by the EDO and Northern Land Council in response to the draft Environmental Impact Statement for the McArthur River Mine Overburden Management Project, as annexed to the NTEPA’s Assessment Report 86: https://ntepa.nt.gov.au/_data/assets/pdf_file/0004/553081/mrm_overburden_assessment_report.pdf

The Applications were lodged because the Significant Areas will be destroyed by the construction of the Shenhua Watermark coal mine, a large new open-cut mine that has been approved on the Liverpool Plains.

The Significant Areas are an important cultural junction and part of a broader Aboriginal cultural landscape. They include sacred places and significant ceremonial corridors. The interlinked sites also include, but are not limited to, large grinding groove sites, scarred trees and artefactual objects of high order significance irreplaceable to the GTC. If the mega-mine of three open-cut pits went ahead, the existing landscape would not only be destroyed but would be replaced by a new, mine-created landscape.

The Minister in considering the Applications found that the Significant Areas were of “immeasurable” cultural value and that the construction of the mine would destroy or desecrate those Significant Areas, which meant that the Applications satisfied all the statutory criteria for protection.

Despite these findings, the Minister declined to make any declaration of protection for the Significant Areas because the Minister found that the financial benefits of the mine (as predicted by the mining company) outweighed their cultural and heritage value.

In July 2019 EDO, acting for the GTC, filed proceedings in the Federal Court challenging the lawfulness of the Minister’s decision to decline protection of the Significant Areas. Those proceedings were heard in March 2020.

On 22 July 2020, the Federal Court dismissed the GTC’s application for judicial review. The Federal Court found that it was lawful for the Minister to consider the social and economic benefits of the mine to the local community, even though here, the GTC had satisfied every criteria in the ATSIHP Act for a protective declaration of the Significant Areas.

The decision demonstrates that the ATSIHP Act is not fit for purpose. While it is designed to protect places of significance to Aboriginal people, this case demonstrates that the ATSIHP Act permits significant Aboriginal heritage to be destroyed for the sake of predicted short-term economic outcomes from mining. The reality is that in almost every case where such a site is threatened, the threat will come from a development project that carries with it some form of economic outcome for the state, or a region or locality.

There will always be economic or financial reasons not to protect our sacred sites from development proposals. Our laws need to set thresholds of when we say enough is enough. Our laws need to prioritise Aboriginal voices over short-term economic or financial gain. And we need decisions that are made independently from politics – that means taking these important decisions out of the hands of ministers and having these important decisions about whether or not to keep our heritage made at arms’ length.

The GTC have made a new application to the Minister under the ATSIHP Act for protection of the Significant Areas containing substantial new information.

Recommendation 12: All cultural heritage legislation must enumerate considerations and how they should be weighed up. Further, where legislation requires the consideration of other ‘interests’ in determining whether to protect or destroy, full statements about impact on First Nations heritage and culture must be required.

e) Lack of coherence between heritage, environment, water and planning laws

Siloing of heritage, planning and environmental laws, at Local, State/Territory and Federal levels, has led to a lack of coherent protection for First Nations heritage. Protection of heritage must be viewed on a larger, country-based, scale so that all living heritage can be protected by Traditional Owners. The submission of the Martuwarra Council notes this in particular:

The Martuwarra Council sees cultural heritage considerations as landscape scale and involving many interconnected factors. However, water and land use planning are not well integrated. Furthermore, cumulative impacts of proposed developments need to be considered. We note that clause 4 of the Environmental Protection Amendment Bill 2020 (WA) that is currently before Parliament would insert a section that states: ‘(1B) A reference in this Act to the effect of a proposal on the environment includes a reference to the cumulative effect of impacts of the proposal on the environment’. In the context of the EPBC Act, we note that the Interim EPBC Review stated that ‘with limited exceptions..., the cumulative impacts of decisions on the landscape are not well considered. This is a key shortcoming of the Act’.

From our perspective, this shortcoming particularly impacts heritage. Heritage of cultural landscapes can be supported by robust assessment of cumulative and catchment scale impacts.... Where water is concerned, heritage conservation requires environmental conservation.

Commonwealth legislation (EPBC Act and ATSIHP Act) and State legislation

Situations can arise where heritage is protected pursuant to Commonwealth legislation but is still under threat through State legislation. This section presents two examples of this; one where the area was protected by an ATSIHP Act declaration and one where the area was within an EPBC listed National Heritage Area.

Case study: The Butterfly Cave – Federally “Protected”, But Still Under Threat

The Butterfly Cave and surrounding landscape, located in West Wallsend, NSW, has immeasurable social and cultural value arising from the strong spiritual and emotional attachment of Awabakal Aboriginal women to the Butterfly Cave and its association with sacred women’s business. An important feature of the Butterfly Cave is its privacy, which allows Awabakal women to carry out their traditional practices and sacred women’s business free from disturbance.

*In 2013, the NSW Environment Minister protected a smaller area of the site as an Aboriginal Place under s 84 of the National Parks and Wildlife Act 1974 (NSW). On 31 January 2019, Melissa Price, the then Minister for the Environment (**Minister**) made the Aboriginal and Torres Strait Islander Heritage Protection (Butterfly Cave, West Wallsend NSW) Declaration (2019) (**the Declaration**), pursuant to s 10 of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (CTH) (**ATSIHP Act**).*

The Declaration was made in response to an application made by the NSW Aboriginal Land Council (**NSWALC**) on behalf of the Awabakal Local Aboriginal Land Council (**ALALC**) in relation to the Butterfly Cave and its surrounds (the **Application**). Ms Anne Andrews, the chairperson of our client Sugarloaf and Districts Action Group Inc (**SDAG**), and other members of SDAG, are knowledge holders of the Butterfly Cave and played a critical role in the application for and assessment supporting the Declaration and the Aboriginal Place nomination under the NPW Act (NSW).

In making the Declaration, the Minister recognised the significance of the Butterfly Cave and surrounding area and that it was under threat of injury or desecration by Stage 7 and Stage 9 of an approved residential subdivision for the Appletree Grove Estate development (the **Development**). Stage 7 of the Development was amended to remove four lots following the making of the Declaration. The approved boundaries of Stage 7 and Stage 9 of the Development now lie immediately adjacent to the southern and northern boundaries respectively of the Declared Area.

The area the subject of the Declaration (**Declared Area**) is less than the area sought to be protected by NSWALC and ALALC in the Application. Although the Minister found that the traditional pathway to the Butterfly Cave is a significant Aboriginal area for the purposes of the ATSIHP Act and that it is under threat of injury or desecration from the Development, she declined to include it in the Declared Area. The reason for declining to protect the traditional pathway, despite its recognised significance, was that it would render part of the Development unviable.

On behalf of our client, we have written to the Minister and the Department of Agriculture, Water and the Environment (the **Department**) on a number of occasions raising our client's concerns that the construction of Stage 7 and Stage 9 of the Development contravenes s 6 of the Declaration, as it is likely to injure or desecrate the Declared Area. Contravention of s 6 of the Declaration is an offence pursuant to s 22 of the ATSIHP Act. These breaches include (but are not limited to): A water retention basin is proposed to be constructed within the boundaries of the Declared Area in contravention of ss 6(2) and 6(3)(a), (b), (c), (d) and (e) of the Declaration; and the construction of roads surrounding Stage 7 and Stage 9 of the approved Development will result in the clearing of vegetation on land surrounding the Declared Area that will increase the visibility of the Declared Area. This is a direct breach of s 6(3)(f) of the Declaration.

Only the Minister has express statutory powers to seek an injunction from the Federal Court under the ATSIHP Act in relation to criminal conduct that contravenes or attempts to contravene the Declaration, the commission of such conduct being a criminal offence under s 22 of the ATSIHP Act. Further, there are no civil enforcement provisions in the ATSIHP Act. Accordingly, our client, and other interested parties, including the Aboriginal women who continue to use the cave today, have no statutory power under the ATSIHP Act to seek an injunction or to commence civil enforcement proceedings to enforce the ATSIHP Act and to prevent contravention of the Declaration.

In recent correspondence, the Department advised our client that the most useful first step would be for our client to attempt to resolve the matter by speaking directly with the relevant Council, which approved the Development and/or the Applicant for the approved Development. We were surprised at this advice, given our client's long engagement with Council and the Developer and that Council has

no power to revoke the development consent it granted authorising the Development. Unless the Minister acts quickly to protect the Butterfly Cave and the Declared Area it will be irreversibly damaged despite being subject to Federal protection under the Declaration and ATSIHP Act. As at the date of this submission, the Minister has not responded to further correspondence from the EDO on behalf of our client, which has requested the Minister take action to enforce the Declaration.

Similarly, situations can occur where a decision is made by a State government that impacts an EPBC listed heritage area without seeking EPBC Act approval. This was evidenced in the re-opening of 4WD tracks in the National Heritage listed Western Tasmania Aboriginal Cultural Landscape (WTACL) within takayna /the Tarkine, Tasmania.⁸² The coastal area of the west coast of Tasmania, within takayna /the Tarkine, is one of the longest inhabited in Tasmania, and an area where Tasmanian Aboriginal people(s) have a continuing spiritual relationship with the land. This country is a cultural heritage landscape, rich in evidence of the continuous occupation of Tasmanian Aboriginal people(s), including hut depressions, high density midden deposits, petroglyphs, and known burial sites.

4WD tracks in this area were closed by the Tasmanian government in 2012 after extensive community consultation because of unacceptable impacts on Aboriginal cultural heritage. Part of the area was subsequently listed as a national heritage place, the Western Tasmania Aboriginal Cultural Landscape, because of the significance of its cultural heritage values. However, in 2014, a newly elected Tasmanian government announced that the tracks would be re-opened. Despite the national heritage listing, no approval was sought under the EPBC Act and no assessment of the impacts on the cultural values of this area to Tasmanian Aboriginal people(s).

EDO Tasmania represented the Tasmanian Aboriginal Centre in legal action taken in 2014-2016 to prevent the Tasmanian government from re-opening of the tracks. As a consequence of the legal action, the Tasmanian government referred the proposal for assessment under the EPBC Act. The Federal Minister's delegate decided on 16 October 2017 that the reopening of the tracks is a controlled action.⁸³ No approval can be granted until after a public environmental report has been submitted, public notice given and an assessment by the Federal Environment Department. The Tasmanian government now cannot reopen the tracks without EPBC Act approval.

If the Tasmanian Aboriginal Centre did not take action to enforce compliance with the EPBC Act, the State government was ready to open the tracks up without EPBC Act approval. This demonstrates the incongruent way that federal and subnational governments approach the protection of cultural heritage and the compliance and enforcement of laws that are intended to protect them.

⁸² For a more detailed explanation see: <https://www.edo.org.au/2018/03/09/4wd-tracks-in-takayna-the-tarkine/>

⁸³ http://epbcnotices.environment.gov.au/_portal/modal-form-template-path/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?id=cecd64b-6793-e711-aec9-005056ba00a7&entityformid=c2c88dfd-64a4-49bf-84fb-49edb9186137&languagecode=1033

State/Territory and Local environment/planning approvals and cultural heritage

The lack of connection between major State/Territory and Local planning and environmental approvals and cultural heritage laws means that requirements under cultural heritage laws are often an afterthought and can be forgotten entirely, particularly where the laws are not enforced by the relevant departments. The momentum created from having the major approvals secured can render the consultation with First Nations seemingly tokenistic, pressured and the development as approved a *fait accompli*.

This critical issue was recognised in the Northern Territory's *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory*.⁸⁴ In that Inquiry, it was identified that there was evidence of proponents for gas and fracking operations in the NT, upon receiving all other required approvals, were withdrawing pending applications for Authority Certificates, given they were not mandatory under the *NT Sacred Sites Act*. This resulted in a recommendation, since adopted, that proponents were required to obtain an Authority Certificate prior to the grant of environmental approvals.⁸⁵

However, this mandatory requirement for an Authority Certificate now only applies in the context of petroleum activities,⁸⁶ rather than across all types of development, resulting in a lack of cohesion across other regulatory frameworks for development, planning and environmental approvals in the NT. It also means that regulators may fall back on the requirement of an Authority Certificate as a condition of approval in an attempt to overcome this regulatory weakness, as in the case of the McArthur River Mine Overburden Management Project in the Northern Territory,⁸⁷ or separate sacred site protections are negotiated via agreements (e.g. for mining) under the *Native Title Act 1993* (Cth). This creates inequitable regulatory arrangements and leads to inconsistent protections across different projects.

Further, some regulatory frameworks only require self-assessment by the proponent of the cultural heritage on site, rather than requiring consultation with First Nations, such as Queensland. A recent issues paper on the Queensland cultural heritage laws under review found that many stakeholders were critical of the Queensland Duty of Care Guidelines, which must be followed by proponents in fulfilling their obligations under the cultural heritage laws, for 'promoting an approach to risk assessment which reduces or avoids the need for land users to consult with Aboriginal parties in managing the cultural heritage impacts of their activities'.⁸⁸ There is no requirement that consultation with First Nations should occur prior to or during the assessment process for major

⁸⁴ *Scientific Inquiry into Hydraulic Fracturing of Onshore Unconventional Reservoirs*, Final Report (2018) <https://frackinginquiry.nt.gov.au/>.

⁸⁵ *Ibid*, recommendation 11.1, see pp 279-281.

⁸⁶ It is included in the Petroleum (Environment) Regulations 2016 (NT) rather than the Sacred Sites Act

⁸⁷ See recommendation 16 of the NTEPA's Assessment Report 86 for this project

https://ntepa.nt.gov.au/_data/assets/pdf_file/0004/553081/mrm_overburden_assessment_report.pdf. This was subsequently integrated as a condition of the Variation of Authorisation issued under the NT's Mining Management Act 2001 dated 18/8/2019.

⁸⁸ Department of Aboriginal and Torres Strait Islander Partnerships, *Cultural Heritage Duty of Care Guidelines Review*, Issues Paper, (2017) 4, <https://www.datsip.qld.gov.au/resources/datsima/people-communities/cultural-heritage/issues-paper.pdf>

planning or development approvals, which would inform decisions around the location and methods of developing or interacting with the site pertinent to the major approvals.

There are other instances where regulatory frameworks are provided which completely override cultural heritage laws that would normally apply. This is the case for BHP's Olympic Dam copper-uranium mine in South Australia, which is governed by the *Roxby Downs (Indenture Ratification) Act 1982* (SA). This Act overrides inconsistent laws that would otherwise apply to some areas of the activity, including environmental and cultural heritage laws.⁸⁹ The Act further locks in the application of the *Aboriginal Heritage Act 1979* (SA) as it applied when passed in 1979, and prevents the application of any reforms to that Act which have been made since without the consent of the proponent.⁹⁰

To ensure that cultural heritage matters on a site proposed for development are given full consideration early in any development proposal process, the requirement to consult with and seek approval from the First Nations with interests in the site should be undertaken prior to any major approvals being granted. A review is required of all legislation which seeks to override regulations providing for First Nation's consultation requirements and cultural heritage protections.

Regulation of environmental and natural resources impacts and cultural heritage

Another key issue is the disparate way in which environmental and natural resource impacts are regulated, with water use regulated under different laws to other environmental impacts. Many water use regulations around Australia provide for some recognition of the need to provide for cultural flows, but the adequacy of these regulations is questionable. For example, Murray Lower Darling Rivers Indigenous Nations, a confederation of Sovereign First Nations from the Southern part of the Murray Darling Basin, has raised concerns that the obligations of the Murray Darling Basin Plan to protect the rights, interests and cultural obligations of First Nations in the Murray Darling Basin is not being provided for meaningfully.⁹¹ In their submission to the Productivity Commission Murray Darling Basin Plan, Five-Year Assessment, they state: 'First Nations communities across the Basin continue to experience the erosion of their cultural rights and traditions as a result of unsustainable extraction limits, poor compliance and inadequate consultation and engagement.'⁹²

The development of dams is also known to jeopardise the lands of First Nations through flooding, frequently without adequate consultation or free, prior and informed consent being sought. For example, in NSW the development of the Warragamba Dam will increase flooding upstream, further damaging significant Indigenous sites, for example of the Gundungurra peoples.⁹³ A representative

⁸⁹ *Aboriginal Heritage Act 1979* (SA), s 9.

⁹⁰ *Aboriginal Heritage Act 1979* (SA), s 9(10).

⁹¹ Murray Lower Darling Rivers Indigenous Nations, *Submission to the Productivity Commission Murray Darling Basin Plan, Five-Year Assessment*, 27 April 2018, online here: https://www.pc.gov.au/data/assets/pdf_file/0006/227634/sub072-basin-plan.pdf

⁹² *Ibid*, p. 2.

⁹³ ABC News, *Water NSW argues against more environmental assessments around Warragamba Dam wall*, 5 August 2020, <https://www.abc.net.au/news/2020-08-05/water-nsw-amends-warragamba-dam-wall-proposal/12527164>; Wollondilly Advertiser, *Indigenous groups say the state government is not fulfilling a promise to comprehensively investigate*

of the Gundungurra peoples has reportedly asked for more survey work to be undertaken in relation to cultural heritage on the site proposed to be flooded, particularly given the impact of bushfires on other areas of their cultural heritage.⁹⁴

The proposed Urannah Dam in Queensland is another example, whereby the proponent details in the Initial Advice Statement the significant cultural heritage matters that show up on the search of the Queensland cultural heritage database on the site proposed to be flooded.⁹⁵ The proponent recognises that ‘high risk landscape features such as ephemeral water sources are commonly identified as places of importance to Aboriginal people and may include the Broken River and Massey Creek. Over such an extensive area, there is a high chance of Indigenous cultural heritage being present.’⁹⁶ The proponent goes on to detail that, in order to determine Aboriginal parties for the project area, a review of Native Title claims has been undertaken, and that Aboriginal cultural heritage investigations will be undertaken with the EIS and a Cultural Heritage Management Plan will be developed. There is no mention of consultation having been or planned to be undertaken with the First Nations whose cultural heritage will be impacted by this project, nor any reference to the need for free, prior and informed consent to be obtained prior to them undertaking it. Principles of free, prior and informed consent require these issues to be considered upfront. Whereas, this situation demonstrates that only very basic cultural heritage issues are being engaged with while proposals are already being put forward.

Native title laws, agreements and cultural heritage

The EDO does not provide advice in relation to native title law. However, it is important to note the complex relationship between native title and cultural heritage laws. As identified by Associate Professor Kate Galloway: ‘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.’⁹⁷ It is notable that the AHA does not make reference to native title (which is perhaps not a surprise given it was enacted in 1972), yet the interaction between cultural heritage and native title appears to impact the day-to-day efficacy of cultural heritage laws.

One element of this relationship is native title agreements and their interaction with cultural heritage laws. These interactions are not transparent, and this makes it difficult to assess if cultural heritage is being adequately protected. The relationship between native title (particularly native title agreements) and cultural heritage laws, in the broader context of environment, planning and resources laws, needs to be reviewed.

Indigenous sacred sites affected by the Warragamba Dam wall raising proposal, 7 July 2019, <https://www.wollondillyadvertiser.com.au/story/6205440/indigenous-groups-condemn-state-governments-warragamba-dam-sacred-sites-investigation/>.

⁹⁴ Ibid.

⁹⁵ Bowen River Utilities, Initial Advice Statement, 30 March 2020, <http://eisdocs.dsdp.qld.gov.au/Urannah%20Project/IAS/Urannah%20Project%20initial%20advice%20statement.pdf>.

⁹⁶ Ibid, p. 79.

⁹⁷ <https://news.griffith.edu.au/2020/06/15/a-cultural-heritage-stitch-up-in-wa/>

Recommendation 13: Cultural heritage, environment, water, development, native title and planning laws (at Local, State/Territory and Commonwealth levels) must be reviewed such that they operate coherently to protect First Nations heritage

f) Lack of ability of First Nations to enforce laws to protect own cultural heritage

There are insufficient powers held by First Nations to take action where the cultural heritage matters of concern to them are under threat of damage or are damaged. Instead First Nations must rely on the relevant government department to take legal action on their behalf where their cultural heritage is illegally damaged, destroyed or threatened with illegal damage. These features are evident in the Butterfly Cave case study example above.

Any law that seeks to provide a protection for some personal or collective interest and yet does not provide a right for that interested person or collective to undertake legal action to ensure protection or recompense for the destruction of that interest can be considered to be an unjust law. Forcing First Nations to rely on the government to defend their interests is inappropriate and acts as a remnant of paternalism of the colonial State over First Nations.

A recent example of this issue has arisen in Western Australia with respect to sacred sites of the Malarngowem peoples.⁹⁸ A mining company applied for a section 18 consent pursuant to the AHA but this was declined. However, an 'aerial viewing of the site on Sunday June 7 [2020] by Traditional Owners and the Kimberley Land Council uncovered ongoing operations'.⁹⁹ As noted by the Kimberley Land Council (KLC): 'The destruction of the area is causing significant distress for the Traditional Owners, the Malarngowem people...'¹⁰⁰ Further, as noted by the CEO of the KLC, 'Whilst we welcome the Minister declining the Section 18 application, it didn't stop the damage being done and it can't undo that damage now. The Malarngowem Traditional Owners should not be forced to sit back and watch their cultural sites being destroyed when the Government, who is supposed to protect our cultural heritage, has the power to act'.¹⁰¹ Under the AHA, only the government can bring a prosecution. The Traditional Owners have no opportunity to take enforcement action.

In Queensland, the State is empowered to take reactive action to punish non-compliance with the obligations not to unlawfully harm or possess Aboriginal or Torres Strait Islander cultural heritage and with the cultural heritage duty of care.¹⁰² While the State does have proactive powers to give a stop order to prevent potentially harmful or adverse activities from being carried out, such orders have only been issued seven times since the introduction of the Cultural Heritage Acts in 2003.¹⁰³ Suffice to say it is highly likely that cultural heritage has been illegally damaged in Queensland more than seven times since 2003. The Queensland Land Court has power to grant injunctive relief to prevent cultural heritage from being damaged or destroyed, however we understand injunctive relief has only been granted on one occasion. First Nations people need to otherwise rely on the

⁹⁸ <https://www.klc.org.au/east-kimberley>

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² *Aboriginal Cultural Heritage Act 2003* (Qld) ss 23, 24, 26.

¹⁰³ Mark E. O'Neill, 'A Completely New Approach' to Indigenous Cultural Heritage: Evaluating the Queensland Aboriginal Cultural Heritage Act' (2018) 9(1) *The International Indigenous Policy Journal* 1, 11.

State to institute proceedings with respect to breaches of offences in the Cultural Heritage Acts, where it is difficult to succeed as the standard of proof is beyond reasonable doubt.¹⁰⁴ The Queensland legislation also operates to prevent the State from being liable to prosecution for an offence relating to cultural heritage,¹⁰⁵ so there is also no effective deterrent against government departments damaging cultural heritage when they carry out activities or projects.¹⁰⁶

The above examples and provisions demonstrate the inadequacies in providing meaningful and effective methods of ensuring the cultural heritage laws are enforced, and to empower First Nations to prevent, stop or seek redress for illegal actions. First Nations should not have to rely on the relevant Department to protect their cultural heritage, particularly where the relevant Departments are so frequently under resourced to undertake this work.

In the case of the Northern Territory, there are limited avenues for redress on the part of custodians. AAPA alone has the statutory responsibility for conducting prosecutions.¹⁰⁷ While the *NT Sacred Sites Act* has been described as giving ‘arguably the strongest cultural heritage protection powers in Australian legislation’,¹⁰⁸ it is widely acknowledged that the Act contains weak enforcement provisions, and that the AAPA lacks the resources to discharge its prosecution responsibilities under the Act,¹⁰⁹ meaning it lacks real teeth. The AAPA also has limited powers to prevent interference with sacred sites, beyond prosecution.

Further, financial penalties for desecration or destruction should be significantly increased. The Bootu Creek Case¹¹⁰ was the first successful prosecution for the desecration of a sacred site in the NT,¹¹¹ under which the operator of the Bootu Creek mine near Tennant Creek in the NT was fined \$120,000 and \$30,000 for the desecration of a sacred site and contravening the conditions of an Authority Certificate respectively. While this was an important landmark case, such penalties for offences are unlikely to be a significant enough deterrent for wrongdoing and do not sufficiently recognise the cultural importance of sacred sites. Of course, it should also be acknowledged that financial penalties alone are not sufficient to rectify the damage that is caused, both to the site itself and to custodians, by the desecration/destruction of sites.

The *NT Sacred Sites Act* would therefore also benefit from the provision of legal rights to First Nations to seek injunctive relief to prevent damage, as well as inclusion of provisions which require proponents, whether they hold an Authority Certificate or not, to stop work immediately

¹⁰⁴ Queensland South Native Title Services Limited, *Aboriginal Cultural Heritage Act 2003* Review Submission (March 2009).

¹⁰⁵ *Aboriginal Cultural Heritage Act 2003* (Qld), section 3(2).

¹⁰⁶ Queensland South Native Title Services Limited, *Aboriginal Cultural Heritage Act 2003* Review Submission (March 2009).

¹⁰⁷ *Northern Territory Sacred Sites Act 1989* (NT), s39

¹⁰⁸ McGrath, P.F and Lee, E. 2016 The fate of Indigenous place-based heritage in the era of native title in McGrath, P.F. (Ed.) *The Right to Protect Sites: Indigenous Heritage Management in the Era of Native Title*. AIATSIS Research Publications, p 10

¹⁰⁹ NT Government, *Sacred Sites Processes and Outcomes Review PwC's Indigenous Consulting* <https://dlghcd.nt.gov.au/__data/assets/pdf_file/0004/297148/sacred-sites-review.pdf>.

¹¹⁰ *Aboriginal Areas Protection Authority v OM (Manganese) Ltd* [2013] NTMC 019.

¹¹¹ We note that it was also reported as ‘a landmark case and the first successful prosecution by a government authority of a mining company for desecration under Australian law’: Sally Brooks, ‘Penalties for damaging sacred Indigenous sites should be increased, review recommends’ (ABC News, 13 June 2016) <https://www.abc.net.au/news/2016-07-13/review-indigenous-sacred-sites-laws-missed-opportunity-nlc/7623986>

should they damage or desecrate a site in the course of undertaking work on or near a sacred site and to provide the AAPA with powers to issue emergency stop work orders if a sacred site is at risk of damage or desecration.¹¹² First Nations must also be provided with the right to seek damages for destruction of their cultural heritage illegally.

Recommendation 14: First Nations must have the legal right to enforce laws to protect their heritage and to seek redress for illegal damage to their heritage.

g) Addressing the issue of who is appropriate to speak for country

We are aware that there are concerns around the regulation of how to identify the appropriate First Nations and entities to meet consultation requirements in some jurisdictions. This regulation differs between jurisdictions.

In the Northern Territory, the AAPA is the body responsible for administering the Sacred Sites Act. It is governed by a 12-member board, 10 of whom are respected senior Aboriginal people that are custodians of sacred sites in the Northern Territory. One of the AAPA's main functions is to facilitate discussions between custodians of sacred sites and persons performing or proposing to perform work on or use land comprised in or in the vicinity of a sacred site, with a view to their agreeing on an appropriate means of sites avoidance and protection of sacred sites.¹¹³ However, there is opportunity under the Sacred Sites Act for proponents to meet with custodians directly and enter into agreements regarding sacred sites that can influence the conditions of an Authority Certificate.¹¹⁴ While the AAPA must approve such agreements, this has, in some circumstances, led to accusations of proponents 'cherry-picking' custodians so that proper identification of and consultation with all relevant and affected custodians of a particular sacred site are circumvented. There is no requirement to consult with Aboriginal custodians under the *Heritage Act 2011* (NT), however if the Heritage Council receives an application to carry out work on a place or object that is, or is in, a sacred site under that Act, they are required to obtain the advice of the AAPA.¹¹⁵

In Queensland, to identify Traditional Owners, the relevant cultural heritage Acts rely on the definitions of native title parties in the *Native Title Act 1993* (Cth), known as the 'Last claim standing' method. This method provides that Aboriginal and Torres Strait Islander peoples are the appropriate party who should be consulted based on the hierarchy set up in the Native Title Act:

- registered native title holders;
- registered native title claimants;
- previously registered native title claimants, if the claim was the last claim registered and there is no other registered native title holder or claimant – this is the 'last claim standing' provision; or
- if there are no native title parties - the Aboriginal or Torres Strait Islander people with particular knowledge about traditions, observances, customs or beliefs associated with

¹¹² NT Government, *Sacred Sites Processes and Outcomes Review PwC's Indigenous Consulting* <https://dlghcd.nt.gov.au/__data/assets/pdf_file/0004/297148/sacred-sites-review.pdf>.

¹¹³ *Northern Territory Sacred Sites Act 1989* (NT), s 10(a).

¹¹⁴ *Northern Territory Sacred Sites Act 1989* (NT), s 22(1)(b).

¹¹⁵ *Heritage Act 2011* (NT), s 75(d).

the area who have responsibility, or are a member of a family or clan group with responsibility.

As a result, a native title claimant that was not able to prove native title may nonetheless be the relevant party to negotiate with even if there are First Nations in the area with particular knowledge about traditions, observances, customs or beliefs associated with the area who have responsibility.¹¹⁶ A number of submissions made to the *Revenue and Other Legislation Bill 2018* (Qld) indicated that the ‘last claim standing’ provision should not be reinstated, as it is ‘culturally inappropriate’.¹¹⁷

Recommendation 15: A review should be undertaken for each jurisdiction to consider the most culturally appropriate methods of determining who has the right and power to speak for cultural heritage of an area. This review must be led by First Nations.

h) Need to prioritise reform processes

As noted in the introduction to this part, there are several reform processes ongoing at this time. Further, as noted in our part in response to Term of Reference (a), whilst we acknowledge that the coronavirus led to some understandable delays (and that the situation must continue to be carefully monitored), high priority must be given to the WA reform process. It is important to emphasise that reform must be done right and that this takes time. Designing reform processes that incorporate principles of free, prior and informed consent and the proper involvement (including in design planning and leadership) of First Nations is an important part of that process. As a result, we have based our recommendation around notions of ‘priority’; this is to indicate that resources and time for these reform processes must be prioritised by governments.

As one example, we note the lengthy delays in the NSW process. The contemporary reform process in NSW began in 2011 with the NSW Government establishing a working party to oversee the process of reforming Aboriginal cultural heritage legislation.¹¹⁸ This working party produced draft recommendations and a discussion paper in 2013.¹¹⁹ That same year, the NSW Government released a response to the recommendations and consultations were held.¹²⁰ There was then a long break in the formal processes from a public perspective. In September 2017, the NSW Government then released a related proposed new legal framework for Aboriginal cultural heritage for consultation.¹²¹ In February 2018, the NSW Government released the draft Aboriginal

¹¹⁶ Department of Aboriginal and Torres Strait Islander Partnerships, *Cultural Heritage Duty of Care Guidelines Review: Submission Analysis Revised* (2017), 8.

¹¹⁷ For example, see Submission No 14, Queensland South Native Title Services, *Economics and Governance Committee on the Revenue and Other Legislation Amendment Bill 2018*.

¹¹⁸ NSW Government, *Reforming the Aboriginal Cultural Heritage System in NSW: Draft recommendations to the NSW Government: A Discussion Paper* (2013) page v <<https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Aboriginal-cultural-heritage/reforming-aboriginal-cultural-heritage-system-draft-recommendations-to-NSW-government-20130139.pdf>>.

¹¹⁹ *Ibid.*

¹²⁰ NSW Office of Environment and Heritage, *Reforming the Aboriginal Cultural Heritage System in NSW* (Publication, October 2013) <https://www.environment.nsw.gov.au/research-and-publications/publications-search/reforming-the-aboriginal-cultural-heritage-system-in-nsw>.

¹²¹ NSW Office of Environment and Heritage, *A proposed new legal framework: Aboriginal cultural heritage in New South Wales*, (Publication Framework 2018) <https://www.environment.nsw.gov.au/research-and-publications/publications-search/a-proposed-new-legal-framework-aboriginal-cultural-heritage-in-nsw>.

Cultural Heritage Bill.¹²² There was then public consultation on the draft bill and submissions were received. The NSW Government provided a summary of submissions report in December 2018.¹²³ As at August 2020, the relevant NSW Government website states that: ‘The NSW government is currently reviewing the draft Bill to see how it can be improved and is committed to further public consultation.’¹²⁴ This demonstrates a significant delay and indicates that priority must be given to ensuring the reform processes continue to move forward.

While several recommendations were made during a review of the Northern Territory Sacred Sites Act in 2016 to improve protections for sacred sites, to our knowledge the Northern Territory Government has yet to implement any of the recommendations. The Northern Territory Government released the ‘Land and Sea Action Plan’ in April 2019, which detailed a number of actions to be taken by the AAPA with respect to improving the efficiency and effectiveness of administrative processes under the Sacred Sites Act, however such action regrettably does not appear to relate to improving protection of sacred sites under the Sacred Sites Act. There would also be value in holistically reviewing and amending the *Heritage Act 2011* (NT), including consideration of basic amendments such as including a requirement to maintain a register of Aboriginal archaeological places and objects and a requirement to report damage of cultural heritage; along with a statutorily entrenched right for First Nations to apply for merits review if an application to carry out work on an Aboriginal archaeological place or object is approved, which is greatly needed in all cultural heritage laws.

Recommendation 16: Law reform processes of cultural heritage legislation must be pursued and given a high priority. In particular, law reform processes in jurisdictions with 1970s era heritage legislation must be prioritised.

5. Opportunities to improve indigenous heritage protection through the *Environment Protection and Biodiversity Conservation Act 1999* (TOR i)

There is a great opportunity to improve the EPBC Act to ensure First Nations-led protection of country (and sea country). Country should be viewed as inclusive of environment (terrestrial, freshwater and marine), culture and heritage. Currently, there is a general lack of transparency about how the EPBC Act operates in relation to protection of heritage and its interaction with the ATSHIP Act. Further, there is a specific lack of transparency as to involvement of Traditional Owners in decision-making about their heritage pursuant to the EPBC Act.

In relation to the former, we note the *Interim Report of the Independent Review of the EPBC Act* (**Interim EPBC Report**) identified that:

¹²² NSW Government, *Draft NSW Aboriginal Cultural Heritage Bill* (2018) <https://www.environment.nsw.gov.au/research-and-publications/publications-search/draft-aboriginal-cultural-heritage-bill-2018>

¹²³ Office of Environment and Heritage, *Aboriginal Cultural Heritage in NSW* (Summary of submissions report, September 2018) <https://www.heritage.nsw.gov.au/assets/Uploads/files/ACH-reforms-Summary-of-Submissions-Report-2018.PDF>.

¹²⁴ NSW Government, *Aboriginal Cultural Heritage Legislation and Reform*, (Web Page) <<https://www.heritage.nsw.gov.au/protecting-our-heritage/legislation/ach-legislation-and-reform/>>.

Indigenous Australians are seeking stronger national protection of their cultural heritage. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) provides last-minute intervention and does not work effectively with the development assessment and approval processes of the EPBC Act. The national level arrangements are unsatisfactory.¹²⁵

Further, the Interim EPBC Report noted:

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.¹²⁶

In this context, we agree with the key reform direction proposed in the Interim EPBC Report that:

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.¹²⁷

Further, we emphasise that this review must be led by First Nations and have a focus on consultation with Traditional Owners.

With respect to the involvement of Traditional Owners in decision-making specifically, the Interim EPBC Report further noted:

Although protocols and guidelines for involving Indigenous Australians have been developed; resourcing to implement them is insufficient, and they are not a requirement... The Department has issued guidance *Engage Early – Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*. This sets out expectations for applicants for EPBC Act approval, it is not an enforceable standard or requirement. Furthermore, it is not transparent how the Environment Minister addresses Indigenous matters in decision-making for Act assessments.¹²⁸

The lack of transparency in relation to both the EPBC's role in heritage protection and Traditional Owner involvement in decision-making has raised practical concerns for Traditional Owners. The

¹²⁵ Graeme Samuel, *Interim Report of the Independent Review of the EPBC Act* (June 2020) 30.

¹²⁶ *Ibid* 33-34.

¹²⁷ *Ibid* 30. Also see 38.

¹²⁸ *Ibid* 33.

Martuwarra Council's submission sets out their concerns about the way their heritage will be protected through the EPBC listed West Kimberley National Heritage Place:

Under the EPBC Act, if an action will cause a significant impact to the West Kimberley National Heritage Place then it will be deemed a controlled action and will have to go through an assessment process.

- However, it remains unclear to us which potential impacts will be deemed 'significant', and whether or not the Act will effectively protect heritage in practice.
- Furthermore, there is insufficient guidance for proponents on how to work constructively with Traditional Owners on heritage protection, and on what stage to engage.
- There is concern that assessments of heritage impact will be referred back to the WA state government under the bilateral agreement process.

The effectiveness of heritage protection under the EPBC Act is still largely untested in relation to the Martuwarra's water. To the best of our knowledge, the West Kimberley national heritage listing has not prevented any potentially destructive activity from going ahead. So far, no proponents have asked the Council for advice. National heritage does not appear to be taken particularly seriously in the WA government's various water and economic development plans (notwithstanding that these plans are still in development. The current government's "no dams" commitment is also a positive move).

The Council is seeking to be proactively involved in managing the Heritage Listing

That final submission about proactive involvement is so important. We note that the Interim EPBC Review also identified this issue:

Contributors to the Review highlighted that the EPBC Act should more actively facilitate Indigenous participation in decision-making processes. Specifically, contributors called for normalisation of incorporating Aboriginal and Torres Strait Islander knowledge in environmental management planning and environmental impact assessment through culturally appropriate engagement.¹²⁹

The current controlled action model of the EPBC Act is based on specific projects as they arise rather than considering country as whole. We strongly support the Martuwarra Council's submission that part of how the EPBC Act engages with heritage must allow for Traditional Owners to be involved in proactively managing areas that have been listed as heritage places pursuant to the EPBC Act. We also emphasise the Martuwarra Council's sentiment that determining 'significant impact' in relation to heritage pursuant to the EPBC Act is not transparent. Further, and relatedly, we submit that determining significant impact on First Nations heritage must be assessed through a decision-making process by Traditional Owners.

¹²⁹ Ibid 36.

Recommendation 17: Commonwealth laws relating to cultural heritage protection need a comprehensive review. This includes both the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the relevant parts of the EPBC Act. This review must be led by First Nations.

Recommendation 18: The EPBC Act must allow for Traditional Owners to be involved in proactively managing areas that have been listed as heritage places.

Recommendation 19: Determining significant impact on heritage pursuant to the EPBC Act must be assessed through a decision-making process led by Traditional Owners.

6. Other related matters (TOR j)

(a) Opportunity for First Nations-led innovation

An integrated review of all legislation that impacts cultural heritage is a unique and exciting opportunity for First Nations-led governance innovation. This innovation must be driven by listening to First Nations and supporting them to develop (or continue to develop) their governance models. There are many Traditional Owners who are doing and proposing new ways of doing First Nations-led collaborative governance over country and sea country. Just one example is the Martuwarra Council. Their submission to this inquiry sets out their proposed Traditional Owner-led collaborative water governance model over the Martuwarra/Fitzroy River.

The Indigenous Protected Area (IPA) framework demonstrates First Nations-led governance innovations that contribute to managing country and protecting heritage. IPAs now make up a large proportion of the National Reserve System (NRS) and make a significant contribution to Australia's international environmental obligations on protected areas. However, currently IPAs do not have a secure legal basis or funding. IPAs should be recognised as matters of national environmental significance under the EPBC Act. This would extend to Sea Country IPAs, which should also be included in the marine equivalent of the NRS: the National Reserve System of Marine Protected Areas. We also suggest that the EPBC Act include a framework for IPAs that provides long term security that the program will continue but is not so prescriptive as to undermine the current benefits of flexibility.

Currently, siloed environment, water, heritage and planning laws make it harder for Traditional Owners to implement their own innovative governance models that manage and protect their country (including their heritage). There is an opportunity right now for a review that would prioritise First Nations-led governance and explore ways in which the legal system could support and encourage such innovation.

Recommendation 20: First Nations-led innovations in governance of country (environment and heritage) should be prioritised, supported, resourced and encouraged.