Environmental Defenders Office

Submission on the draft Aboriginal Cultural Heritage Bill 2020 (WA)

9 October 2020

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Submitted to:

Department of Planning, Lands and Heritage (WA)
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A Note on Language

We acknowledge that there is a legacy of writing about Aboriginal and Torres Strait Islander peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. More generally, we have used the term Aboriginal people in this submission as it is the nomenclature used in the draft Aboriginal Cultural Heritage Bill 2020 (WA). 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

As noted at the beginning of the reform process in 2018, and then reinforced by the devastating destruction of Juukan Gorge, it is beyond doubt that the WA Aboriginal cultural heritage legislation needs a major overhaul. In this context, EDO welcomes the need for reform and many elements of the draft Aboriginal Cultural Heritage Bill 2020 (WA) (the **ACH Bill**).

There is an urgent need to reset the balance in favour of Aboriginal people. The ACH Bill must be judged against the fundamental principle that Aboriginal people must give their free, prior and informed consent in relation to decisions that impact protection of their heritage. EDO set out, in detail, the application of these principles to Aboriginal cultural heritage in our *Submission to the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (**Rio Tinto Inquiry**).[1]

There are several positive elements in the ACH Bill, including:

- an expansive definition of Aboriginal cultural heritage;
- the establishment of Local Aboriginal Cultural Heritage Services that will be able to negotiate the terms of access to, and destruction of, heritage sites;
- merits appeal rights for Aboriginal parties in relation to cultural heritage management plans; and
- transparent provisions for declaration of protected areas (which will be the highest form of protection).

However, we have some major concerns about the most critical elements of the ACH Bill. Our primary concerns revolve around **who** the decision-makers are and **how** decisions about destruction of culture are made; especially where there is disagreement between

[1] EDO, 'The Juukan Gorge Inquiry and First Nations cultural heritage' (21 August 2020) https://www.edo.org.au/publication/juukan-gorge-inquiry/

proponents and Aboriginal people. In this context, the ACH Bill is not best practice, and it is not in line with international norms of free, prior and informed consent.

The ACH Bill does not place Aboriginal people at the centre of all decision-making. In fact, for most major decisions under the ACH Bill, the Minister is the final decision-maker. This includes the critical decision on where there is a disagreement between an Aboriginal party and a proponent about a cultural heritage management plan relating to medium to high impact activities. It also includes decisions about protecting areas of "outstanding significance". There is no legal redress for Aboriginal people on refusals of applications for protected area declarations, and no ability to enforce the offence provisions. Again, this rests with the Minister or the CEO. Some other decisions rest with the ACH Council. The ACH Council only requires the Chairperson to be Aboriginal (with only a preference for other members to be Aboriginal) and, as a result, may not be an Aboriginal body.

These processes do not give effect to the principles of free, prior and informed consent, as Aboriginal people are not the primary decision-makers. Therefore, although this Bill sets up new and more transparent processes, and brings Aboriginal people into decisions they are not currently a part of, it does not fundamentally reset the balance.

Notwithstanding the above, our submission focuses on the processes proposed in the ACH Bill, and we have made sensible recommendations in key areas of concern, which we consider will substantially improve the Bill as presented.

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

In this submission we have provided detailed recommendations that will further entrench Aboriginal voices in the legislative process. EDO encourage the WA Government to use the historic opportunity that it has created to ensure that Aboriginal people have control over their heritage.

KEY RECOMMENDATIONS:

Australia's international obligations to protect cultural heritage and the importance of developing national standards

Recommendation 1: The WA Government should support a cross-jurisdictional review of all cultural heritage legislation and the development of national standards that are in line with international law.

Recommendation 2: When the ACH Bill is statutorily reviewed (pursuant to s280), the review should incorporate measurement against national standards that have been developed. Section 280 should be amended to state this explicitly.

Meaning of 'Aboriginal cultural heritage'

Recommendation 3: Section 10 should be amended to make clear that Aboriginal heritage can be (or be present on or in) land, an expanse of water or parts of the coastal seas of Western Australia.

Administration of the legislation: Aboriginal Cultural Heritage Council (ACH Council) and Local Aboriginal Cultural Heritage Services (Local ACH Services)

Recommendation 4: Section 17 be amended so that all members of the ACH Council must be Aboriginal people.

Recommendation 5: A sub-section be added to the s17(3) factors that, as far as practicable, members should be appointed from different parts of the State.

Protected Areas

Recommendation 6: There must be provision for the Aboriginal applicant to apply to the State Administrative Tribunal (**SAT**) for review of a decision by the Minister to refuse to declare a protected area. The Minister must also provide reasons for a refusal decision.

Management of activities that may harm heritage: Consultation and Assessing Harm

Recommendation 7: The Aboriginal party should be the decision-maker about whether an action is a minimal impact activity.

Recommendation 8: In the alternative to Recommendation 7, a process of notification of proposed minimal impact activities and a process for dispute resolution where an Aboriginal party is of the view that an activity is not a minimal impact activity should be set out in the ACH Bill.

Recommendation 9: Activities in the context of waterways should include provision of water licences pursuant to the *Rights in Water and Irrigation Act 1914* (WA).

Recommendation 10: The proposed 'tiered activities' list to identify minimal, low and medium-high impact activities must go through a process of public consultation prior to being prescribed in the regulations for the purpose of the legislation.

ACH Permits – for low impact activities only

Recommendation 11: Consideration should be given to a model through which the local Aboriginal party makes the decision to allow or refuse an ACH Permit. Alternatively, the relevant local Aboriginal party should make a formal recommendation (provided for in the statute) to the ACH Council about whether an ACH Permit should be granted or refused. Further, the local Aboriginal party should be able to apply to SAT for a review of a decision of the ACH Council to grant a permit.

Recommendation 12: Section 118(3) of the ACH Bill be amended such that it is clear that an ACH Permit can be cancelled/revoked if new information becomes available. Section 118 of the ACH Bill be further amended to add a provision that requires the ACH Council to notify the local Aboriginal parties where new information becomes available and provide a formal right to be heard about whether the ACH Permit needs to be cancelled/revoked or the conditions need to be changed.

ACH Management Plan (ACH MP) – for low and medium-high impact activities

Recommendation 13: Consideration should be given to a model through which the local Aboriginal party makes the decision to allow or refuse an ACH MP in all circumstances and then there would be an opportunity for the proponent to seek review in the SAT. Alternatively, where there is a dispute between a proponent and an Aboriginal party the ultimate decision should be made by the SAT, rather than by the Minister.

Recommendation 14: Provisions should be added such that Aboriginal parties can proactively put forward their own ACH MPs for their country to be approved by the ACH Council.

'…in the interests of the State'

Recommendation 15: The 'in the interests of the State' test should be replaced by a test that requires the decision-maker to consider ways in which the harm could be avoided or minimised. Alternatively, the definition of 'in the interests of the State' should be amended by:

- removing the word 'economic' and retaining the word 'social'; and

- inserting ‘particularly future generations of Aboriginal people’ after ‘the interests of future generations’.

Recommendation 16: In all sections where the Minister is making a decision that includes the criterion of ‘in the interests of the State’, an extra criterion should be inserted such that the Minister must be satisfied that their decision is consistent with the objects of the Act in s8.

Stop activity, prohibition and remediation orders

Recommendation 17: If an Aboriginal party makes a request for a stop activity order to the ACH Council, the ACH Council should have to make a recommendation to the Minister and the Minister should then be required to make a decision on whether to impose a stop activity order. Then, such a decision by the Minister would be made reviewable by all parties to the SAT.

Recommendation 18: A provision for 24 hour stop work orders issued by authorised officers (rather than the Minister) should be added to the ACH Bill.

Recommendation 19: There should be provision for the ACH Council to make an interim stop activity order that can be in place for 48 hours (during which time the ACH Council can make a recommendation to the Minister).

Compliance

Recommendation 20: The CEO of the Department consult with local Aboriginal parties about appointment of a person as an ‘Aboriginal heritage officer’.

Offences, penalties, defences and legal proceedings

Recommendation 21: The penalties for breach of an ACH Permit and ACH MP should be significantly increased.

Recommendation 22: Consideration should be given to how fines for particular offences may be distributed to the local Aboriginal parties that have been impacted.

Recommendation 23: Amendments should be made to the defence that a person ‘did not identify Aboriginal heritage’ that require that the harm to the heritage was not reckless. A separate offence for an act or omission where the person was reckless as to whether the act or omission was likely to harm Aboriginal cultural heritage should also be added.

Recommendation 24: Third party civil enforcement provisions should be added such that Aboriginal people can enforce breaches of the legislation. At a minimum, there should be

an opportunity for Aboriginal people impacted by heritage destruction to take enforcement action if the CEO decides not to prosecute for destruction of heritage.

Formulation of Guidelines

Recommendation 25: Section 267 be amended such that the ACH Council 'must' prepare guidelines within 6 months of the commencement of the ACH Bill. At a minimum, the consultation and due diligence guidelines must be produced prior to consultation or due diligence assessments taking place.

Recommendation 26: Section 268(4) and s269 be amended to add a requirement that in preparing and approving the guidelines the ACH Council and the Minister must consider the objects of the Act in s8 and the relevant statutory provisions that will give effect to the guidelines.

Review by State Administrative Tribunal

Recommendation 27: Consideration be given to models of merits review where Aboriginal bodies can be the review body for decisions.

Recommendation 28: The ACH Bill explicitly require that at least one SAT member hearing any matter under the cultural heritage legislation is Aboriginal.

Relationship between current *Aboriginal Heritage Act 1972* (WA) (AH Act) and ACH Bill

Recommendation 29: Provisions for transition from current s18 approvals to the new system be included in the ACH Bill and then a policy position be adopted to encourage (and make it possible for) s18 holders to transition across voluntarily. This may even include incentives for proponents to surrender their s18s.

Recommendation 30: There should be a moratorium on new section 18s. During the transition period the Aboriginal Cultural Materials Committee should start implementing a modified version of Part 8 of the ACH Bill. Alternatively, any s18 granted in the transition period should be granted with a condition that it be transitioned onto the provisions of the ACH Bill within 6 months of the end of the transition period.

CONTENTS

SUBMISSION

1. Australia's international obligations to protect cultural heritage and the importance of developing national standards

The ACH Bill should be judged against the fundamental international law principle that Aboriginal people must give their free, prior and informed consent in relation to decisions that impact protection of their heritage. In the context of this principle, EDO supports the development of national standards for best practice heritage protection that are developed by Aboriginal and Torres Strait Islander peoples.

Although the reform process for the ACH Bill pre-dates the destruction of Juukan Gorge, after that devastating incident there has been a lot more public discussion in this space and more calls for national approaches. We want the national momentum of this discussion to continue and for Aboriginal people from WA and the WA Government to be engaged with it. As a result, we see these major changes to the ACH Bill as a step in the right direction, but that there will be more work to do, and conversations to be had with Aboriginal people in WA, to ensure that the legislation continues to be informed by the development of national standards. With this in mind, the EDO sees the statutory review function in s280 of the ACH Bill as an important way to ensure that the new WA legislation will be reformed in line with these continuing national conversations.

a) Fundamental principle: Free, prior and informed consent

EDO set out, in detail, the application of international law principles to Aboriginal cultural heritage in our submission to the Rio Tinto Inquiry.[2] We particularly reference the *UN Declaration on the Rights of Indigenous Peoples* adopted by the UN General Assembly on 13 September 2007. In summary, under international law, states are required to consult with Indigenous peoples. The standard for consultation with Indigenous peoples is free, prior and informed consent (**FPIC**). This is a procedural standard (in that it informs the processes of consultation) as well as a substantive standard. The process of consultation must be carried out in good faith, and in all cases with the aim of achieving agreement or informed consent to development or a measure that will affect Indigenous peoples or communities.

There must be an absence of any type of coercion by the state or agents (including developers). Consultation must be prior, and best practice is to involve Indigenous peoples at the inception stage of a development. Consultation must be in a language that Indigenous peoples understand and inform them of all aspects of a project or a measure, including risks of the development or the impact of measures. From a substantive

[2] EDO, 'The Juukan Gorge Inquiry and First Nations cultural heritage' (21 August 2020) https://www.edo.org.au/publication/juukan-gorge-inquiry/

standpoint, states have a duty to take into account the concerns, demands and proposals expressed by the affected peoples or communities and due regard must be given to them in the final design of the development or measure.

FPIC must also be seen as a contextual right, which means that the substantive nature of FPIC depends on the circumstances. In circumstances where a development will threaten cultural and physical survival, including sacred sites or important sites, states are obligated to affirmatively obtain consent. In other words, Indigenous consent will be determinative of the development and the measure where there will be a substantive impact of Indigenous peoples, putting at risk their cultural survival. This higher standard undoubtedly is relevant and should apply in the cultural heritage context.

Our submission will draw attention to some parts of the ACH Bill that have incorporated FPIC, but will also raise several concerns about provisions that may fail to meet the FPIC standards.

b) National review of heritage legislation and formulation of standards

In Australia, protection of Indigenous heritage is predominantly regulated by State/Territory legislation and then also at a national level (albeit in a piecemeal way) by the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the *Environment Protection Biodiversity Conservation Act 1999* (Cth). Our submission to the Rio Tinto Inquiry set out the inadequacies in the interactions between these statutes and the gaps in protection this causes. We recommended in our submission that a cross-jurisdictional review of all cultural heritage laws (Commonwealth, States and Territories) should be undertaken and that this review must be led by Aboriginal and Torres Strait Islander people.[3]

In this context, EDO supports calls for the development of strong national standards for protection of Indigenous heritage that are in line with international law and will guide legislative review and reform. We note that it appears this discussion has already begun with the recent Ministerial Indigenous Heritage Roundtable on 21 September 2020 and the presentation of the *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia* and *Best Practice Standards for Indigenous Cultural Heritage Management and Legislation*.[4] EDO recommends that when the ACH Bill is statutorily

[3] EDO note that the Interim Report of the Independent Review of the EPBC Act also identified 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': p 30 (also see p 38). Available at: https://epbcactreview.environment.gov.au/resources/interim-report

[4] Commonwealth Department of Agriculture, Water and the Environment, 'Ministerial Indigenous Heritage Roundtable' (21 September 2020) https://www.awe.gov.au/news/stay-informed/communiques/ministerial-Indigenous-heritage-roundtable-21-sept-2020

reviewed pursuant to s280, the review should incorporate measurement against national standards that have been developed.

Recommendation 1: The WA Government should support a cross-jurisdictional review of all cultural heritage legislation and the development of national standards that are in line with international law.

Recommendation 2: When the ACH Bill is statutorily reviewed (pursuant to s280), the review should incorporate measurement against national standards that have been developed. Section 280 should be amended to state this explicitly.

2. Meaning of 'Aboriginal cultural heritage'

Proposal

In the ACH Bill, Aboriginal heritage has been defined broadly to include:

- Tangible and intangible elements recognised through 'social, spiritual, historical, scientific or aesthetic perspectives (including contemporary perspectives)';[5]
- Traditional and living heritage including: an area that contains tangible elements (an Aboriginal place); an object that is a tangible element (Aboriginal object); a group of areas interconnected through tangible and intangible elements (a cultural landscape); and Aboriginal ancestral remains.[6]
- Aboriginal tradition means: 'the traditions, observances, customs, beliefs, values, knowledge and skills of Aboriginal people of the State generally, or of a particular community or group of Aboriginal people of the State, and includes any such traditions, observances, customs, beliefs, values, knowledge and skills relating to particular persons, areas, objects or relationships'.[7]

Analysis

This definition is a positive feature of the ACH Bill. The wide-ranging definition is inclusive, and we particularly note the inclusion of:

- both tangible and intangible heritage;
- cultural landscapes; and
- both historical and contemporary perspectives.

[5] ACH Bill s10(1).
[6] Ibid.
[7] ACH Bill s10(2).

We also note that the examples of 'traditional and living heritage' are expressed as 'including', so there could be other examples.

There is one point of clarification that should be made, which is the inclusion of sea country and water. Our submission is that section 10 should be amended to make clear that Aboriginal heritage can be (or be present on or in) land (as in terrestrial land), an expanse of water (like a river or lake) or parts of the coastal seas of Western Australia. The Victorian legislation includes equivalent provisions.[8]

Recommendation 3: Section 10 should be amended to make clear that Aboriginal heritage can be (or be present on or in) land, an expanse of water or parts of the coastal seas of Western Australia.

3. Administration of the legislation: Aboriginal Cultural Heritage Council (ACH Council) and Local Aboriginal Cultural Heritage Services (Local ACH Services)

a) Aboriginal Cultural Heritage Council (ACH Council)

Proposal

The ACH Council consists of:

- a chairperson, who is an Aboriginal person, appointed by the Minister; and
- a deputy chairperson appointed by the Minister; and
- between 4 and 9 other members appointed in accordance with the regulations.[9]

The Minister seeks nominations of persons for appointment to the ACH Council.[10] The Minister must ensure the members of the ACH Council have, between them, 'such knowledge, skills and experience as the Minister considers appropriate to enable them to effectively carry out the functions of the ACH Council'; 'as far as practicable, preference is given to appointing Aboriginal people as members of the ACH Council'; and 'as far as practicable, the gender composition of the ACH Council is balanced'.[11]

The ACH Council has several functions including: promoting public awareness of Aboriginal heritage; promoting the role of Aboriginal people in protection of heritage and management of activities that may harm Aboriginal cultural heritage; proactively assisting in identification and protection of heritage; and providing advice to the Minister.[12] The

[8] *Aboriginal Heritage Act 2006* (Vic) s5(1)-(2).
[9] ACH Bill s17(1).
[10] ACH Bill s17(2).
[11] ACH Bill s17(3).
[12] ACH Bill s18.

ACH Council also has an important function in determining Aboriginal heritage permit applications. We will discuss further below, in section 7, some concerns we have about the appropriateness of some of the functions of the ACH Council given it is a State-wide, and not local, body.

Analysis

i. Number of Aboriginal members of ACH Council

Given that the *Aboriginal Heritage Act 1972* (WA) (**AH Act**) had no statutory requirement to have an Aboriginal person on the Aboriginal Cultural Materials Committee, it is a positive step that the chairperson of the ACH Council must be an Aboriginal person. We welcome that it is proposed to be prescribed that there be a preference to Aboriginal members and gender balance. However, we are of the view that only having one position that must be filled by an Aboriginal person (and the rest as 'preference is given to appointing Aboriginal people') is not appropriate and not in line with reasonable expectations for decision-making relating to Indigenous heritage. There is a possibility, pursuant to the ACH Bill, that the ACH Council could end up with a majority of non-Aboriginal members.

There is other legislation in Australia where all positions are filled by Aboriginal people – such as the Aboriginal Heritage Council in Victoria,[13] the Aboriginal Heritage Committee in South Australia[14] and the Aboriginal Heritage Council in Tasmania.[15] In the Northern Territory, the Aboriginal Areas Protection Authority (**AAPA**) has 12 members and 10 of them must be 'custodians of sacred sites'.[16] This means that just over 80% of the members of the AAPA are Aboriginal people and that there is no statutory possibility that there will be a majority of non-Aboriginal members.

We note that the role of the ACH Council in the ACH Bill is quite central, and includes making decisions about permits, assessing whether consent to an ACH Management Plan (**ACH MP**) is informed, and also potentially mediating between parties in relation to ACH MPs. In this context, we understand from the explanation at the public consultation session that one of our lawyers attended,[17] that it is important to have members that, between them, have the requisite knowledge, skills and experience. We are of the strong view that such requisite knowledge, skills and experience can be met by an all Aboriginal person ACH Council. However, one way that this may also function is to have all Aboriginal

[13] *Aboriginal Heritage Act 2006* (Vic) s 131.
[14] *Aboriginal Heritage Act 1988* (SA) s7(2).
[15] *Aboriginal Heritage Act 1975* (Tas) s4(2).
[16] *Northern Territory Sacred Sites Act 1989* (NT) s6(2). We note that the Aboriginal Areas Protection Authority in the NT has very similar functions to the ACH Council, including examining and evaluating Authority Certificates (which are like permits) (s10(e)-(f)) and facilitating discussions between custodians of sacred sites and proponents (s10(a)).
[17] Midland Town Hall, 24 September 2020.

members on the ACH Council and then have access to any expert advice through a committee on specified technical matters if it proves necessary.

Recommendation 4: Section 17 be amended so that all members of the ACH Council must be Aboriginal people.

ii. Geographic distribution of members of ACH Council

We note that the equivalent legislation in South Australia adds another important consideration into the appointment process. Section 7(2) of the *Aboriginal Heritage Act 1988* (SA) requires that members are appointed: 'as far as is practicable, from all parts of the State'.[18] Given the wide variety of communities and country in Western Australia, a similar geographic consideration could be usefully added to section 17(3) of the ACH Bill.

Recommendation 5: A sub-section be added to the s17(3) factors that, as far as practicable, members should be appointed from different parts of the State.

b) Local Aboriginal Cultural Heritage Services (Local ACH Services)

Proposal

Local ACH Services are to be appointed by the ACH Council. The ACH Council is to, as far as practicable, appoint the Local ACH Services for different areas of the state.[19] The types of organisations that can apply to be a Local ACH Service are:

1. A native title party;

2. An organisation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) or *Corporations Act 2001* (Cth) – that represents the Aboriginal community of the area or the majority of the members of which are knowledge holders for the area; or

3. A native title representative body for the area.[20]

If there is an application from more than one body in relation to an area, then the order listed above is the order of priority that they should be considered.[21] When the ACH Council is considering an application for appointment as a Local ACH Service, the ACH Bill proposes the requirements for appointment are: comprehensive knowledge of local Aboriginal community in the area; endorsements of native title party or parties for the area; sufficient support of the local Aboriginal community in the area to ensure all the

[18] *Aboriginal Heritage Act 1988* (SA) s7(2).
[19] ACH Bill s31.
[20] ACH Bill s33.
[21] ACH Bill s33(2).

persons to be consulted are consulted as required; necessary skills to promote negotiations between people who propose to carry out activities in the area and knowledge holders for the area where it is proposed that the activities will be carried out; impartiality; has sufficient skills and resources to undertake the functions; and has in place a fee structure for the fees to be charged in connection with carrying out the functions.[22]

We note, there is an objection process if a body applies to be appointed and the ACH Council refuses to appoint the organisation as a Local ACH Service.[23]

Analysis

The establishment of Local ACH Services that will play a key role in negotiating ACH MPs, as will be discussed below, is a positive for the ACH Bill.

The connection between native title and heritage was missing from the AH Act given the era it was drafted. In this context, it is a positive part of the ACH Bill that this relationship is now transparent. EDO acknowledges that not all Aboriginal people will agree with the prioritisation of native title parties generally, or in specific situations, and that this may create disagreements within communities.

We acknowledge there are provisions in the ACH Bill that include participation of 'knowledge holders' which is a broader concept not linked directly to native title.[24] Knowledge holders have particular knowledge and have rights, interests and responsibilities in respect to places, objects or heritage more broadly.[25]

4. Overview of Types of Protective Mechanisms

Proposal

The ACH Bill contains four types of protective mechanism:

Protected Areas	• An area of outstanding significance that is protected. • Highest level of protection under the ACH Bill.
Aboriginal Cultural Heritage	• An ACH Permit is permission to do a specific action that will have a low impact on heritage.

[22] ACH Bill s34.
[23] ACH Bill s40. This decision then goes to the Minister, and the Minister may confirm the decision or make another decision.
[24] Guidelines may be prepared about determination of knowledge holders for an area: ACH Bill s267(b).
[25] ACH Bill s9.

Permit (**ACH Permit**)	
Aboriginal Cultural Heritage Management Plan (**ACH MP**)	• An ACH MP is an agreement between a proponent and 'Aboriginal parties'. • These agreements relate to low or medium-high impact activities.
Orders: stop activity; prohibition; remediation	• Stop activity order: To stop an activity for a limited period of time • Prohibition order: To stop an activity for a longer period (and even indefinitely) • Remediation: To remediate an area where harm has been done

Analysis

Overall, the EDO supports the breadth of the suite of protective mechanisms proposed in the ACH Bill. Further, we support that the application processes for Protected Areas, ACH Permits and ACH MPs as proposed are much more transparent than the processes provided for in the AH Act.

There are improvements that could be made to the operation and processes of each of these protective mechanisms, in particular, in order to ensure that Aboriginal parties can access legal redress, which we discuss below.

5. Protected Areas

Proposal

An application can be made by a knowledge holder for an area to be declared a protected area.[26] The area must be of 'outstanding significance', which means: that the cultural heritage is of outstanding significance to Aboriginal people including to an individual, community or group; and that the significance is recognised through social, spiritual, historical, scientific or aesthetic perspectives (including contemporary perspectives).[27] An area cannot be a protected area if there is an ACH Permit or an ACH MP in that area.[28]

[26] ACH Bill s65.
[27] ACH Bill ss63 and 65.
[28] Except where the holder of the permit or the parties to the ACH MP agree that the area can be changed so that those instruments do not apply to the application area: ACH Bill s65(3)-(4).

The application process is as follows:

Application made	An application is made to the ACH Council.[29] As part of this process, the ACH Council is to give written notice to each Local ACH Service for the area, each native title party for the area and each person who is identified as a knowledge holder for the area (and is not a native title party).[30] The notice is to give details of the application and to give an opportunity to make submissions to the ACH Council about whether the area should be declared.[31]
Preliminary assessment: ACH Council	The ACH Council forms a preliminary view about whether the area should be declared as a protected area.[32] If the ACH Council forms a preliminary view that it **should** be declared, then public notice of that decision should be given.[33] This then opens another opportunity for submissions – to the public.[34] If the ACH forms a preliminary view that it **should not** be declared, the ACH Council is to give the applicant for the protected area (and the parties notified as part of the initial application process) notice setting out this view.[35] A person who is given notice of this decision may request that the Minister consider the matter.[36] The Minister may confirm the preliminary view or request that the ACH Council give notice that they have formed a preliminary view that it should be declared.[37]
Recommendation: ACH Council to Minister	The ACH Council may recommend to the Minister that the area be declared or that it not be declared.[38]
Decision of the Minister	If the ACH Council makes a recommendation to the Minister, the Minister then may decide that a declaration should be made, or a declaration should not be made.[39]

[29] ACH Bill s65.
[30] ACH Bill s68.
[31] ACH Bill s68(2)(c).
[32] ACH Bill s69.
[33] ACH Bill s70.
[34] ACH Bill s70(2).
[35] ACH Bill s71.
[36] ACH Bill s71(2).
[37] ACH Bill s71(4).
[38] ACH Bill s72(2).
[39] ACH Bill s74(1).

	The Minister's decision is based on whether the statutory criteria are satisfied and what is in 'the interests of the State'.[40] If the Minister makes a decision that an area should be declared, the Minister may make it subject to conditions relating to management and access.[41]
Declaration of the Governor	If the Minister makes a decision that an area should be declared a protected area the Minister is to recommend to the Governor that the Governor declare the area to be a protected area.

Analysis

The addition of a clear and workable process for protected areas is a positive aspect of the ACH Bill. However, EDO has some concerns about the context where the Minister might refuse the application of a knowledge holder for a protected area.

The decision of the Minister about declaration of, or refusal to declare, protected areas is not reviewable on the merits by any person. There are sensible reasons why a decision to protect an area of "outstanding significance" should not be subject to merits review. However, we strongly recommend that the knowledge holder (the applicant for declaration) be entitled to merits review to the SAT of a decision by the Minister to refuse to declare a protected area.[42]

We are particularly concerned about the relationship between 'minimal impact activities' and a refusal of a declaration of a protected area. As will be discussed below (at section 6), minimal impact activities can be undertaken without a ACH Permit or ACH MP. We note from the recent public consultation session that one of our lawyers attended,[43] that it is intended that protected area declarations are to be used as a way to protect against 'minimal impact activities' that would otherwise generally be allowable under the processes proposed in the ACH Bill. It was suggested at the consultation session that the way Aboriginal people could seek to protect significant places from any minimal impact activities was to seek a protected area. Given the way that minimal impact activities are proposed to operate, that is, without statutory notice requirements to or consent by Aboriginal parties, protected area declarations are the only way proposed to allow for protection of sacred places from those activities. In that context, a decision to refuse a declaration of a protected area could have a significant impact on important heritage sites

[40] ACH Bill s74(2).
[41] ACH Bill s74(4).
[42] We note that this particular issue was clearly considered to be relevant as there is the extra provision to allow a preliminary recommendation that a protected area should not be declared to be reconsidered by the Minister. However, this reconsideration does not provide a full merits review opportunity.
[43] Midland Town Hall, 24 September 2020.

that should not be disturbed at all or should only be disturbed in ways that would require negotiation with a proponent. An Aboriginal party would have no legal redress on the merits, and no capacity to take enforcement proceedings or issue a stop activity order to prevent that harm from occurring.

We recommend that an Aboriginal applicant should be able to seek review of a Minister's decision to refuse a protected area declaration. The statutory review should be to the SAT and should be limited to the Aboriginal applicant.

Further, we note there is no requirement for the Minister to provide reasons in relation to decisions about protected areas. We submit that the Minister must provide reasons for their refusal decision (which could be provided for as part of the SAT review process).

Recommendation 6: There must be provision for the Aboriginal applicant to apply to SAT for review of a decision by the Minister to refuse to declare a protected area. The Minister must also provide reasons for a refusal decision.

We note that the Minister's discretion in relation to protected area declarations is the first instance in the ACH Bill where we see the Minister's ability to make a decision based on what is 'in the interests of the State'. We will address this issue separately below in section 9.

6. Management of activities that may harm heritage: Consultation and Assessing Harm

The part of the ACH Bill relating to ACH Permits and ACH MPs, begins with a general section that includes consideration of what 'consultation' means and also how to do a preliminary assessment of harm (ie. will it be minimal impact, low impact or medium-high impact).

a) Consultation

Proposal

Section 92 of the ACH Bill provides that consultation will depend on the circumstances of the activity, but should include the:

- Proponent making a genuine attempt to contact and consult with each person who is to be consulted;
- Proponent providing sufficient information about the proposed activity to each person consulted to enable them to understand the proponent's reasoning and intention;

- Each person to be consulted having an opportunity to clearly state their position on the proponent's proposal and explain that position;
- Proponent and each person consulted disclosing relevant and necessary information about their position as reasonably requested; and
- Proponent taking reasonable steps to follow up with a person who is to be consulted if there is no response to the initial contact or a reasonable request for further information.[44]

We note that guidelines on consultation may be formulated by the ACH Council.[45]

Analysis

Statutory provisions relating to appropriate consultation are a positive aspect of the ACH Bill. We particularly note the requirement for providing sufficient information and giving each person consulted the opportunity to clearly state their own position. It is clear that guidelines on consultation will need to be produced and that these guidelines will be crucial to how the legislation operates and whether principles of FPIC are complied with. Given how important these principles and procedures are, our preference would have been that they be included as part of the ACH Bill. However, given the current proposal and the time it will take to consult about appropriate guidelines, at Section 13 below, we suggest some changes to the way that guidelines (more generally) should be prepared and approved in the ACH Bill.

b) Assessing harm – preliminary

Proposal

Due diligence assessments are proposed to be conducted as a preliminary determination about whether Aboriginal cultural heritage may be harmed by an activity – whether it will be minimal impact, low impact or medium-high impact.[46] These levels are proposed to be measured according to an amount of ground disturbance that will be prescribed in regulations. We note that at the public consultation session, Slide 20 of the presentation set out draft (based on two current Indigenous Land Use Agreements) 'Tiered Activities'. This slide categorised certain activities as minimal, low or medium-high impact. It was

[44] ACH Bill s92.
[45] ACH Bill s267(a).
[46] ACH Bill s93. There are also certain exempt activities that are either authorised under other laws or relate to recreational purposes: s90. These include: construction in accordance with the *Planning and Development Act 2005* (WA); travelling on an existing road; taking photographs for a recreational purpose; recreational activities in public waters or public places; clearing in accordance with the *Environmental Protection Act 1986* (WA); and burning done for fire prevention and reploughing a fire break.

stated at that session that these would go through a process of consultation prior to being prescribed in the regulations for the purpose of the legislation.

It is proposed that due diligence assessments must be undertaken in accordance with the ACH Management Code and guidelines on due diligence that are to be developed.[47]

Once the activity is assessed, the following pathways apply:

Activity	Authority	Notification
Minimal impact activity	A minimal impact activity is 'an activity that involves no, or a minimal level of, ground disturbance'.[48] Can carry out activity where: • it is not in a protected area; • the person has carried out due diligence; and • takes all reasonable steps to ensure that activity is carried out so as to avoid or minimise risk of harm.[49]	It is not clear if there are any notification requirements. They may be provided for in the Due Diligence Guidelines. May request the CEO of the Department[50] to provide a letter of advice that proposed activity is a minimal impact activity.[51] If requested, CEO is to provide the proponent with a letter of advice if CEO is satisfied that proposed activity is a minimal impact activity.[52]
Low impact activity	Can carry out activity where: • it is not in a protected area; • where there is an ACH Permit or ACH MP; and • takes all reasonable steps to ensure activity is carried out so as to avoid or minimise risk of harm.[53]	Must notify: each Local ACH Service [and if there is no Local ACH Service each native title party and each person who is identified in accordance with the guidelines as a knowledge holder; or if there is no native title party or no knowledge holder, each native title representative body for the area.][54]

[47] ACH Bill s95.
[48] ACH Bill s90.
[49] ACH Bill s101.
[50] CEO of the WA Department of Lands, Planning and Heritage.
[51] ACH Bill s104(1). Letter of advice can be used in evidence in proceedings for an offence (s104(4)) and it is not a requirement for a proponent to request or obtain such a letter before carrying out a minimal impact activity (s104(5)).
[52] ACH Bill s104(3).
[53] ACH Bill s102.
[54] ACH Bill s97(1) and (3).

Medium to high impact	Can carry out activity where: • it is not in a protected area; and • have an ACH MP.[55]	Must notify: same as low impact activity.

Analysis

The determination of whether an activity is minimal impact is crucial to the operation of the ACH Bill because a minimal impact activity can continue without any further application process beyond due diligence. EDO has concerns with three related issues: the focus on level of impact rather than where the activity takes place; the lack of transparency or input of Aboriginal people around the process for determining what is a minimal impact activity; and, more generally, impacts being focussed on 'ground disturbance'.

i. Focus on level of impact not specific place

EDO understands that for the legislation to be workable some activities should not need to go through a full ACH Permit/ACH MP process. However, at the moment, the way the ACH Bill will operate is such that the test is based on the amount of impact (minimal, low, medium-high) and not the place where the activity occurs (other than it cannot be a protected area). So, for example, as was raised by one of the Aboriginal participants at the public consultation, there may be some areas that taking photographs for recreational activities (which is in fact an exempt activity pursuant to the ACH Bill), if it involves walking in a particular place, might be very upsetting to Traditional Owners if there are cultural protocols relating to that area. Further, it could be that walking in the place at a particular time or by particular people may breach cultural protocols.

It seems that, other than anything that may be discovered and taken into account in the due diligence process (but it is not yet clear how that will operate), the only way to protect a place from a minimal impact activity is to get a declaration as a protected area. However, as noted above in Section 5, this may be refused by the Minister and there is no way to review that decision.

We submit that one way to address these problems is through a process of notification and opportunity to raise concerns as will be discussed in the next paragraph.

ii. Lack of transparency around process of determining minimal impact

[55] ACH Bill s103.

The lack of transparency around minimal impact activities is of concern. This is particularly so because these determinations will be made by proponents or people taking the activity (although that person has the option to get a letter confirming that it is a minimal impact from the CEO of the Department), with no explicit statutory requirement for input from or notice to affected Aboriginal people. Although it is intended that the ACH Regulations, ACH Management Code and any guidelines on due diligence will set out how decisions are made in more detail, there are no defined notice requirements for minimal impact activities in the ACH Bill. We note that a due diligence assessment includes identification of persons required to be notified or consulted. However, the ACH Bill then only sets out notification requirements for low and medium-high impact activities (and not for minimal impact activities).[56]

There should be a statutory process of notice, at a minimum. We submit that at least a notification to the ACH Council and the relevant Aboriginal parties within a certain time period before activities commence should be clearly set out in the ACH Bill in relation to minimal impact activities. If it is intended that Aboriginal people can seek a protected area declaration to protect their heritage from minimal impacts, Aboriginal people must at the very least receive notice a reasonable period before the activity is carried out.

Relatedly, there is no opportunity provided in the ACH Bill for concerns to be raised about whether a proposed activity is, in fact, a minimal impact activity in a particular area. If, for example, a proponent determined that their activity was minimal impact (and did not seek a letter from the CEO – which is optional pursuant to the ACH Bill) and it was in fact low impact and should have required a permit, there is no effective remedy for that unless they were to damage heritage and be prosecuted for that by the CEO. We note that the experience of the Victorian legislation is that there have often been substantive disputes about similar issues.

In this context, there is no ability to resolve disputes about whether something is minimal impact or something more. Applying the principles of FPIC, the relevant Aboriginal party should be entitled to make a decision about whether an activity is minimal impact. This decision could be reviewed by the SAT on application of the proponent. At a minimum, there should be an opportunity for relevant Aboriginal parties to seek a formal review of whether an activity is minimal impact by the ACH Council. The ACH Council should be entitled to review whether the activity is in fact minimal impact in the circumstances. Further, if the ACH Council determines that it is in fact a minimal impact activity, the Aboriginal party that raised the issue should have an opportunity to review that decision in the SAT.

[56] ACH Bill s93(c).

Recommendation 7: The Aboriginal Party should be the decision-maker about whether an action is a minimal impact activity.

Recommendation 8: In the alternative to Recommendation 7, a process of notification of proposed minimal impact activities and a process for dispute resolution where an Aboriginal party is of the view that an activity is not a minimal impact activity should be set out in the ACH Bill.

iii. Definition of minimal impact

We note that the definition suggests that there will be an amount of ground disturbance prescribed. One concern we have about a definition based on 'ground disturbance' is that it may not translate to protected water – for example the impacts of taking water.[57] We note that the draft 'Tiered Activities' states that a medium to high impact activity includes 'activities in water-ways which involve a new impact to the banks, bed or water flow'. The inclusion of water flow here is beneficial, but it does seem like the activity must be one that causes ground disturbance. The concept of activity is not defined in the ACH Bill, but we suggest that activities in the context of waterways should include provision of water licences pursuant to the *Rights in Water and Irrigation Act 1914* (WA).

Recommendation 9: Activities in the context of waterways should include provision of water licences pursuant to the *Rights in Water and Irrigation Act 1914* (WA).

We do note, more broadly, that similarly to our comments about the Consultation Guidelines above, listing the 'tiered activities' leaves a large issue to be determined in the future. EDO submit this must go through a process of consultation prior to being prescribed in the regulations for the purpose of the legislation. We do also have concerns about the ability of the regulation to list all potential situations. In that context, provision will need to be made for assessment of activities that may fall outside the list.

Recommendation 10: The proposed 'tiered activities' list to identify minimal, low and medium-high impact activities must go through a process of public consultation prior to being prescribed in the regulations for the purpose of the legislation.

7. ACH Permits – for low impact activities

Proposal

The process for applying for an ACH Permit is set out in the following table:

[57] We do note that Slide 20 included 'water sampling'; 'conducting tests for water' and maintaining and refurbishing water points as minimal impact activities.

Pre-application process	As outlined in the table in the section immediately above, a proponent who intends to carry out a low impact activity must notify the relevant persons of the details of the activity and give an opportunity to submit a statement about the person's views on the impact of the proposed activity on Aboriginal cultural heritage.[58] After the submission period, the proponent may apply to the ACH Council for an ACH permit. The application must include details of notifications about the proposed activity and any responses received.[59]
Application process: Application is made to the ACH Council[60]	On receipt of the application in the approved form, the ACH Council is to give public notice of the application.[61] This notice is to provide that any Aboriginal person may submit a statement about their views on the impact of a proposed activity.[62]
Assessment of application: ACH Council	ACH Council is to assess the application and grant an ACH Permit or refuse to grant a Permit.[63] ACH Permits expire after 2 years (unless it is cancelled or extended).[64] ACH Permits may be granted subject to conditions.[65] It is a condition on all ACH permits to notify the ACH Council if the permit holder becomes aware of any new information that identifies heritage that was not identified when the permit was granted or about the significance of the heritage that was not identified at the time the permit was granted.[66] As a result of any new information, the ACH Council may impose or amend a condition on the permit so as to avoid or minimise harm.[67]
After ACH Permit is granted	ACH Council may suspend or cancel the permit.[68] This can only be done if the ACH Council is no longer satisfied the permit meets the

[58] ACH Bill s105. Notification carried out in accordance with native title agreements/previous heritage agreement may be used to satisfy the notification requirements: s106.
[59] ACH Bill s107.
[60] ACH Bill s107.
[61] ACH Bill s108(1).
[62] ACH Bill s108(2).
[63] ACH Bill s111.
[64] ACH Bill s113.
[65] ACH Bill s118(2).
[66] ACH Bill s118(1).
[67] ACH Bill s118(3).
[68] ACH Bill s120.

	statutory requirements or the permit holder carries out an activity that is not authorised by the permit or breaches a condition.[69]
What if ACH Council refuses an ACH Permit (or refuses extension etc)? Proponent can object to Minister – Decision of the Minister	The proponent may object to the Minister if the ACH Council refuses to grant a permit, refuses to extend a permit, grants a permit subject to conditions, suspends/cancels a permit or imposes/amends/revokes a condition.[70] The Minister may confirm the decision of the ACH Council or make another decision.[71] This decision is to be based on whether the Minister is satisfied that the statutory requirements are made out and what is in 'the interests of the State'.[72]

Analysis

The ACH Permit system proposed is a lot more transparent than the process under the AH Act. The EDO welcomes this transparency and, in general, the ACH Permits are a positive feature of the ACH Bill. Further, the condition on all ACH Permits that they must notify the ACH Council of new information is an important provision (particularly in light of the incident at Juukan Gorge and the failure of section 18s to take into account new information).

However, EDO have two particular concerns about the ACH Permit process: that the local Aboriginal party is not the decision-maker and the involvement of local Aboriginal parties in the ACH Permit application process is quite limited; and that if there is new information it does not appear that the ACH Permit can be cancelled or revoked.

i. Lack of involvement of local Aboriginal parties and ultimate Ministerial decision

The nature of involvement of local Aboriginal parties (whether that be Local ACH Services, native title parties, knowledge holders or native title representative bodies) in the ACH Permit process is limited. In effect, the decision is made by the ACH Council (or in certain circumstances by the Minister) and the only opportunity for local Aboriginal parties to be involved is through submissions initially to the proponent and then to the ACH Council. Given that the ACH Council does not represent (or necessarily understand) local interests, we submit that alternative decision-making processes should be considered. This is particularly the case where the ACH Council is not an Aboriginal body (see recommendation 4 and accompanying analysis above).

[69] ACH Bill s120(2).
[70] ACH Bill s121.
[71] ACH Bill s121(5).
[72] ACH Bill 121(6).

We note that the Victorian legislation gives much more decision-making power to the local Aboriginal parties (in that legislation they are called Registered Aboriginal Parties (**RAPs**)). For example, RAPs can make decisions about granting or refusing heritage permits.[73] In granting permits, if the activity would (or is likely to) harm Aboriginal heritage, the RAP must consider the nature of the heritage, the impact of the activity on heritage and the extent to which the harm to the heritage could be minimised.[74] RAPs can also elect to evaluate a management plan prepared by a proponent and approve or refuse the plan.[75] In evaluating a management plan, the RAP must consider whether the activity will be conducted in a way that avoids harm and if that is not possible whether it minimises harm.[76] Pursuant to the Victorian legislation, if the RAP refuses a permit or a plan, then the proponent can apply to the Victorian Civil and Administrative Tribunal (the Victorian equivalent of the State Administrative Tribunal) for review.[77] While one might still criticise the Victorian model as not fully meeting the requirements of FPIC, in particular the tribunal's role, it does place agency with the local Aboriginal party.

The Victorian legislation puts the local Aboriginal parties much more in the 'driving seat' than the ACH Bill. RAPs are the key body in the Victorian legislation, whereas in the ACH Bill the ACH Council is the key body in relation to ACH Permits. There are differences between WA and Victoria in relation to geography, types of proponents and native title holdings, however, the Victorian legislation provides a model that better meets FPIC principles.

If substantively amending the process is not an option, one modification that could be made is that the relevant local Aboriginal party could make a formal recommendation to the ACH Council. At a minimum, this would give a formal and transparent role to the local Aboriginal party in the process. In addition, as detailed in section 3 above, the ACH Council must be an Aboriginal body.

Finally, it is not appropriate that the Minister be the review body on ACH Permits. For legal redress to be effective, it must be independent. As with the merits review provisions for ACH MPs, there must be merits review to the SAT for the local Aboriginal party concerned.

Recommendation 11: Consideration should be given to a model through which the local Aboriginal party makes the decision to allow or refuse an ACH Permit.

[73] *Aboriginal Heritage Act 2006* (Vic) s40.
[74] *Aboriginal Heritage Act 2006* (Vic) 40(4).
[75] *Aboriginal Heritage Act 2006* (Vic) ss55 and 63.
[76] *Aboriginal Heritage Act 2006* (Vic) s61(a) and (b). In effect, the RAP cannot refuse to approve a management plan prepared by a proponent only on the basis that they do not want the project; rather they must consider whether the activity can be conducted in such a way that minimises harm: s61(a)-(b) and Atkinson and Storey, 'The Aboriginal Heritage Act 2006 (Vic): A Glass Half Full…?' in McGrath (ed), *The Right to Protect Sites: Indigenous Heritage Management in the Era of Native Title* (AIATISIS Research Publications, 2016) 133-134.
[77] *Aboriginal Heritage Act 2006* (Vic) s116 and s121.

Alternatively, the relevant local Aboriginal party should make a formal recommendation (provided for in the statute) to the ACH Council about whether an ACH Permit should be granted or refused. Further, the local Aboriginal party should be able to apply to SAT for a review of a decision of the ACH Council to grant a permit.

ii. Cancellation or revocation of ACH Permit when new information available

Where new information is reported to the ACH Council there is no apparent power to enable it to cancel or revoke the ACH Permit in this circumstance (it can only impose or amend a condition). More broadly, it can suspend or cancel if it is no longer satisfied that the ACH Permit meets the statutory requirements, and this may fulfil that role. We also note that a stop activity order may be given if there is new information and this could potentially lead to a prohibition order, however that is a power exercised by the CEO. For clarity, and to remove future doubt, it should be set out in the ACH Bill that new information can lead to a cancellation/revocation of an ACH Permit.

Further, where new information becomes available, there is no requirement for the ACH Council to notify local Aboriginal parties or seek their views. We suggest that this should be added as a requirement in the ACH Bill, along with a formal opportunity for the Aboriginal party to be heard – orally and in writing, including the leading of their own information and evidence – on whether the ACH Permit should be cancelled/revoked or the conditions ought to be changed.

Recommendation 12: Section 118(3) of the ACH Bill be amended such that it is clear that an ACH Permit can be cancelled/revoked if new information becomes available. Section 118 of the ACH Bill be further amended to add a provision that requires the ACH Council to notify the local Aboriginal parties where new information becomes available and provide a formal right to be heard about whether the ACH Permit needs to be cancelled/revoked or the conditions need to be changed.

8. ACH Management Plan – for low and medium-high impact activities

Proposal

An ACH MP must set out:

- an impact statement about the impact of the activities;
- processes to be followed if there is new information;
- methods by which the activities are managed so as to avoid or minimise harm;
- the extent to which harm is authorised;

- the conditions to be complied with; and
- specify the period of the plan.[78]

A provision that is included in a native title agreement, or a previous heritage agreement, may be incorporated into a ACH MP if it relates to the matters specified in the legislation.[79] An ACH MP is binding on subsequent proponents.[80]

The process for applying for an ACH MP is set out in the following table:

Pre-application process	As set out in the table in section 6 above, the proponent is to consult with each Aboriginal party that they are required to consult with. This is to be done within a reasonable time and in accordance with the consultation guidelines.[81] A proponent is to give notice to Aboriginal parties of the proponent's intention to seek an ACH MP and use their best endeavours to reach an agreement with the Aboriginal parties about the terms of the proposed plan.[82] There will be a prescribed period for reaching an agreement (this has not yet been determined).[83]
Where the proponent and the Aboriginal party **do agree**: Application for an 'approval' of a ACH MP	
If the proponent and the Aboriginal party agree – application for approval to ACH Council	If the proponent and each Aboriginal party agree on an ACH MP, an application can be made for approval.[84] The application for approval is made to the ACH Council and must include evidence that each Aboriginal party has given informed consent to the plan, details of consultation and any responses to the proposal by any person who has been consulted.[85] Consent is not 'informed consent' unless the proponent has given to the Aboriginal party: • full and proper disclosure of information about the activity that the proponent intends to carry out under the plan;

[78] ACH Bill s123.
[79] ACH Bill s124.
[80] ACH Bill s157.
[81] Consultation carried out in accordance with a native title agreement or previous heritage agreement may be used to satisfy the requirements to the extent they comply with the requirements: ACH Bill s126.
[82] ACH Bill s127(1).
[83] ACH Bill s127(2).
[84] ACH Bill s128.
[85] ACH Bill s131(2).

	• a clear explanation of the risk of reasonably foreseeable harm to Aboriginal cultural heritage posed by the activity and the nature of that harm; • a clear explanation of the steps that are available to be taken so as to avoid or minimise that risk; and • consent is given voluntarily and without coercion, intimidation or manipulation.[86] ACH Council may approve the ACH MP or refuse to approve.[87] The ACH Council can only approve if they are satisfied that there has been consultation with each person to be consulted about the activity and each Aboriginal party has given informed consent.[88] ACH MP is in effect until the plan is cancelled, plan expires in accordance with its terms or the activities to which the plan relates are completed.[89] ACH Council can suspend or cancel a ACH MP if they are no longer satisfied it meets the statutory requirements.[90]
What if ACH Council refuses to approve an ACH MP that the proponent and Aboriginal parties have agreed? [or refuses to amend or cancel etc] - Proponent or Aboriginal party can object to Minister – Decision of the Minister	If the ACH Council refuses to approve an ACH MP, refuses to amend or suspends or cancels, the proponent or an Aboriginal party to the proposed plan may object to the Minister.[91] The Minister may confirm the decision of the ACH Council or make another decision.[92] This decision is to be based on whether the Minister is satisfied that the statutory requirements are made out and what is in 'the interests of the State'.[93]
Where the proponent and the Aboriginal party **do not agree**: Proponent applies for 'authorisation' of a ACH MP	
Application made to ACH Council for	The proponent may apply to the ACH Council for authorisation of an ACH MP where the period for negotiation has ended and the

[86] ACH Bill s130.
[87] ACH Bill s134.
[88] ACH Bill s135.
[89] ACH Bill s136.
[90] ACH Bill s137.
[91] ACH Bill s139.
[92] ACH Bill s139(5).
[93] ACH Bill s139(6).

authorisation: ACH Council may make a recommendation	proponent has not been able to reach agreement with an Aboriginal party about the terms of the ACH MP.[94] This application must include details of consultation, details of responses by the persons consulted and details of negotiation.[95] The ACH Council may assist the parties to reach agreement and act as a mediator.[96] The ACH Council may make a recommendation to the Minister to authorise the ACH MP or to refuse to authorise the ACH MP.[97] The ACH Council can only make a recommendation if it is satisfied that: there has been consultation with each person to be consulted and there are reasonable steps in place to avoid or minimise risk of harm.[98]
Final decision on authorisation: Minister's decision	The Minister may authorise the ACH MP as set out in the recommendation, authorise another ACH MP or refuse to authorise an ACH MP.[99] This decision is to be based on whether the Minister is satisfied that the statutory requirements are made out and what is in 'the interests of the State'.[100] ACH MP is in effect until the plan is cancelled, plan expires in accordance with its terms or the activities to which the plan relates are completed.[101] Minister can suspend or cancel the ACH MP if they are satisfied it no longer meets statutory criteria.[102] The Minister can authorise an amendment to an ACH MP where the parties do not agree.

When considering an application for an approval or authorisation of an ACH MP, the ACH Council can make a determination that heritage is of 'State significance'.[103] State significance means that the heritage is of exceptional importance to the cultural identity of the State.[104] Guidelines are to be issued by the ACH Council about factors to be

[94] ACH Bill s140(1).
[95] ACH Bill s140(2).
[96] ACH Bill s143.
[97] ACH Bill s145. The ACH Council may recommend the Minister authorise the ACH MP provided in the application, submitted during the authorisation process or another plan prepared by the Council: s146(2).
[98] ACH Bill s146.
[99] ACH Bill s147(1).
[100] ACH Bill s147(2).
[101] ACH Bill s148.
[102] ACH Bill s149.
[103] ACH Bill s152.
[104] ACH Bill s90.

considered in determining this.[105] Before making this determination, public notice is to be given by the ACH Council and submissions can be made in response.[106]

If heritage is determined to be of State significance, it has the following impact on an ACH MP application process:

- Where the proponent and the Aboriginal party **do not agree** (application for an authorisation) then it continues through that process so the Minister makes the final decision.

- Where the proponent and the Aboriginal party **do agree** it gets removed from the ACH Council process and instead goes through the process so the Minister makes the final decision.

Analysis

The ACH MP process proposed is a significant improvement on the AH Act that did not contain any provisions about plans or agreements. It is important that the ACH Bill provides a transparent process for agreement making and that it contains provisions that create minimum requirements for 'informed consent'. We also note that the ACH Bill contains a 'no contracting out' provision which provides that a term of a contract/agreement that tries to exclude, limit or modify the operation of the ACH Bill has no effect.[107] This would seem to mean that proponents cannot use native title agreements to avoid the requirements of the legislation.[108] This is a positive element of the ACH Bill and increases transparency around agreement making.

The process set out for the applications for approval where the Proponent and Aboriginal party agree and the ACH Council makes the decision to approve the ACH MP appear reasonable and puts the local Aboriginal party as a main negotiator. Further, the informed consent requirements are a major positive of the ACH Bill. Although, as noted in section 6 above, the consultation guidelines will be a key part to ensuring this process meets FPIC.

However, where the Aboriginal party and the proponent agree, but the ACH Council refuses to approve the ACH MP, the Minister has the final decision. Similarly, where heritage is determined to be of State significance the Minister makes the final decision. The Minister as the decision-maker is not consistent with FPIC requirements.

EDO's primary concern is where the Proponent and the Aboriginal parties do not agree. In effect, this decision will always ultimately be made by the Minister. While the Minister's

[105] ACH Bill s151.
[106] ACH Bill s153.
[107] ACH Bill s272.
[108] ACH Bill s272.

decision will be reviewable by both proponents and Aboriginal parties to the SAT, this does not meet the test of being FPIC by Aboriginal people. It is not the Aboriginal people affected who make the primary decision, it is the Minister.

The decision to allow heritage to be destroyed is central to heritage legislation, as is how disputes about this are resolved. These decisions have been taken out of the hands of the Aboriginal people whose country, culture and relationships will be immediately affected – sometimes irreparably. Further, and importantly, having this sort of Ministerial power may also cause a power differential in all negotiations pursuant to the future legislation because the Minister's discretion is always looming in the background

As noted in the previous section, there are other examples of a different model, for instance in Victoria, where the local Aboriginal party makes the decision and the proponent has a right of appeal to the equivalent tribunal. If substantively amending the process is not an option, other modifications could include removing the Minister's ultimate decision and instead allowing SAT to hear the matter where there is a disagreement between a proponent and an Aboriginal party and to make the determination, for instance, on a referral. Similar consideration should be given to the other instances where the Minister has the ultimate decision.

We will discuss consideration of 'in the interests of the State' separately in the next section.

Recommendation 13: Consideration should be given to a model through which the local Aboriginal party makes the decision to allow or refuse an ACH MP in all circumstances and then there would be an opportunity for the proponent to seek review in the SAT. Alternatively, where there is a dispute between a proponent and an Aboriginal party the ultimate decision should be made by the SAT, rather than by the Minister.

The ACH Bill only empowers a proponent to put forward an ACH MP. We submit that provisions should be added such that Aboriginal parties can put forward their own ACH MPs for their country to be approved by the ACH Council. This would allow local Aboriginal parties to proactively manage their heritage. Such provisions are seen in the Victorian legislation.[109]

In this context, heritage legislation should be seen as an opportunity to support Aboriginal-led environmental governance. There are many Traditional Owners who are doing and proposing new ways of doing Aboriginal-led collaborative governance over country and sea country. Just one example is the Martuwarra Fitzroy River Council. Their

[109] *Aboriginal Heritage Act 2006* (Vic) s44.

submission to the Rio Tinto Inquiry set out their proposed Traditional Owner-led collaborative water governance model over the Martuwarra/Fitzroy River which is a registered heritage place.[110]

Recommendation 14: Provisions should be added such that Aboriginal parties can proactively put forward their own ACH MPs for their country to be approved by the ACH Council.

9. '…in the interests of the State'

Proposal

In making several important (and ultimate) decisions in the ACH Bill,[111] the Minister's discretion involves consideration of the criterion: what is 'in the interests of the State'. This term is defined as:

> ***in the interests of the State*** includes —
>
> (a) for the social or economic benefit of the State, including Aboriginal people; and
>
> (b) the interests of future generations…[112]

Analysis

The definition of 'in the interests of the State' arguably allows for the interests of Aboriginal people in protecting culture to be considered, but at the same time requiring a balancing exercise against other economic or social benefits. This is of concern in circumstances where we have seen Ministers, at both State and Commonwealth levels, making decisions that clearly put economic interests above the interest of protecting culture.[113] EDO have concerns that this balancing exercise may, and likely will, allow a Minister to make decisions that are not in the interests of local Aboriginal people that have responsibilities to that cultural heritage, and contrary to the spirit of the Act.

Further, and equally importantly, this test, as it now stands, may make it harder for Aboriginal people to successfully review a decision of a Minister to the SAT even where a

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[110] Submissions are available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge/Submissions

[111] ACH Bill s74(2) (declaration of a protected area); s121(6) (ACH Permits where there is an objection to a decision of the ACH Council); s139(6) (ACH MPs where there is an objection to the recommendation of the ACH Council); s147(2) (authorisation of a ACH MP); ss181 and 184 (prohibition order)

[112] ACH Bill s 9.

[113] See, for example: EDO, 'Environment Minister can still act to protect sacred sites after Gomeroi woman loses Court action' (22 July 2020) https://www.edo.org.au/2020/07/22/gomeroi-court-judgment/

de novo appeal exists. This is because of the power differential between the relevant Aboriginal body arguing that protection of their cultural heritage is 'in the interests of the State' as opposed to the view of a Minister for the Crown arguing what is in the interests of the State.

That this is the test to be applied to some decisions relating to ACH Permits, ACH MPs and protected area declarations is of grave concern, particularly in circumstances where the Minister is the primary decision-maker.

Overall, we submit that a better test, rather than the interests of the State test, would be a test that requires the decision-maker only to consider ways in which the harm could be avoided or minimised such as is in the Victorian legislation.[114] Such a test also does not meet FPIC principles but, at least, has less of a weighing up exercise in the context of the interests of the State.

However, if the 'in the interests of the State' test will be retained, we have some suggestions that will better enable Aboriginal perspectives and cultural heritage values to be taken into account. We suggest two amendments to the wording of the definition of 'in the interests of the State' and one additional criterion that should be added to all Ministerial discretions that use this phrase. The definition should be changed by:

- removing the word 'economic' and retaining the word 'social'. The test should not be able to be exercised purely based on economic reasons and 'social' is itself a broad term.

- by inserting 'particularly future generations of Aboriginal people' after 'the interests of future generations'.

In addition, in those sections where the Minister is making a decision that includes the criterion of 'in the interests of the State', the Minister must be satisfied that their decision is consistent with the objects of the Act in s8.

Recommendation 15: The 'in the interests of the State' test should be replaced by a test that requires the decision-maker to consider ways in which the harm could be avoided or minimised. Alternatively, the definition of 'in the interests of the State' should be amended by:

- **removing the word 'economic' and retaining the word 'social'; and**

- **inserting 'particularly future generations of Aboriginal people' after 'the interests of future generations'.**

[114] See, for example, *Aboriginal Heritage Act 2006* (Vic) s40(4)(c) and s120(b).

Recommendation 16: In all sections where the Minister is making a decision that includes the criterion of 'in the interests of the State', an extra criterion should be inserted such that the Minister must be satisfied that their decision is consistent with the objects of the Act in s8.

10. Stop activity, prohibition and remediation orders

Proposal

The ACH Bill contains three types of orders that can function to stop activities (and then prohibit them for longer periods including indefinitely) and/or provide for remediation.

Order	Who can make order and in what circumstances?
Stop activity order - stop for a short time	Minister may make an order to stop an activity if Aboriginal heritage (a place, object, ancestral remains, cultural landscape that is within a protected area) requires protection because: • an activity is being carried out and is harming heritage (or the activity is being carried out and there is an imminent risk of harm or it will be carried out imminently and will involve a risk of harm); and • the activity is not authorised (or it is authorised under an ACH permit or ACH MP but new information has emerged).[115] A stop activity order lasts for 60 days unless cancelled earlier.[116] The ACH Council is to consider whether the Aboriginal cultural heritage subject to the stop activity order requires a prohibition order and is to make a recommendation to the Minister to give a prohibition order or not give a prohibition order.[117] ACH Council must give notice and an opportunity for submissions, before their recommendation to the person that was given the stop activity order, to each Local ACH Service and if there is no Local ACH Service each native title party and each person who is a knowledge holder (and if no knowledge holder or native title party, each native title representative body).[118]
Prohibition order – longer term orders to	The Minister may give a prohibition order in relation to an activity that is the subject of a stop activity order if the ACH Council makes a

[115] ACH Bill s176.
[116] ACH Bill s176(3).
[117] ACH Bill s179.
[118] ACH Bill s179(4) and s180.

stop activity (even indefinitely)	recommendation or on the Minister's own initiative.[119] The decision of the Minister is to be made on the grounds of whether or not the Minister is satisfied that the grounds on which the stop activity order was given still exist and what is 'in the interests of the State'.[120] A prohibition order can have an expiration date, but it can also be unlimited.[121]
Remediation order – an order to carry out work to control or mitigate harm; or remediate or restore heritage that has been harmed[122]	ACH Council may recommend to the Minister that a remediation order be given if Council is of the opinion that heritage has been harmed in contravention of the legislation.[123] Minister may give a remediation order to a person if the ACH Council has made a recommendation and the Minister is of the opinion that heritage has been harmed in contravention of the legislation.[124]

Analysis

The addition of stop activity orders, longer term prohibition orders and remediation orders is a positive element of the ACH Bill. However, the decision to give any one of these orders is made by the Minister (on recommendation of the ACH Council). In effect, this leaves the local Aboriginal party in the position of having to request an order initially through the ACH Council and then the Minister. There is no way for the local Aboriginal party to formally apply to get such an order made.

One way to improve this is to provide that where a local Aboriginal party approaches the ACH Council, the Council must make a recommendation to the Minister and then the Minister must make a decision about whether an order is made or not. Then, such a decision by the Minister would be made reviewable by all parties to the SAT. This would also give a sense of equality because, as it stands, only the proponent is able to get review of a stop activity order, prohibition order or a remediation order at the SAT.[125]

[119] ACH Bill s181.
[120] ACH Bill s181(2).
[121] ACH Bill s181(5). There are provisions to extend a prohibition order: s184.
[122] ACH Bill s173.
[123] ACH Bill s186.
[124] ACH Bill s187. The order is to be given to the person that has control over the activity or a landholder or occupier of the land where the activity that harmed the heritage was carried out: s187(2).
[125] ACH Bill s258.

There also needs to be interim steps to enable quick movement in situations where the activity needs to be stopped immediately. We suggest two amendments to the stop activity order procedure:

- Provisions be adopted from the Victorian legislation where '24 hour stop orders' can be issued by an authorised officer or authorised Aboriginal heritage officer (so the Minister does not have to issue it for it to take effect).[126] This 24 hours then gives the local Aboriginal party time to go to the ACH Council.

- An interim step be introduced whereby the ACH Council can make an interim stop activity order and then investigate over 48 hours while making a recommendation to the Minister.

Recommendation 17: If an Aboriginal party makes a request for a stop activity order to the ACH Council, the ACH Council should have to make a recommendation to the Minister and the Minister should then be required to make a decision on whether to impose a stop activity order. Then, such a decision by the Minister would be made reviewable by all parties to the SAT.

Recommendation 18: A provision for 24 hour stop work orders issued by authorised officers (rather than the Minister) should be added.

Recommendation 19: There should be provision for the ACH Council to make an interim stop activity order that can be in place for 48 hours (during which time the ACH Council can make a recommendation to the Minister).

11. Compliance

Proposal

The CEO of the Department may appoint a public service officer as an inspector.[127] The CEO may appoint an Aboriginal person to be an Aboriginal inspector for a whole or specified area of the state.[128] An Aboriginal inspector has the same powers as an inspector.[129] Police officers also have powers of an inspector.[130] Inspectors may carry out an inspection to search for anything controlled, regulated or managed under this legislation, to ascertain whether the legislation or any instrument entered into (like an ACH MP) is being complied with or to inspect records.[131] Inspectors need to take

[126] *Aboriginal Heritage Act 2006* (Vic) s95A.
[127] ACH Bill s203.
[128] ACH Bill s204.
[129] ACH Bill s204.
[130] ACH Bill s207.
[131] ACH Bill s209.

reasonable steps to determine if the place is an Aboriginal place and if there are any restrictions on entry.[132]

Analysis

The addition of Aboriginal inspectors with the same powers as inspectors is a positive element of the ACH Bill. However, we note that there might be a preference for all inspectors to be Aboriginal. Further, we note that in the ACH Bill, the CEO of the Department appoints these inspectors. Pursuant to the Victorian legislation, there is provision for the Minister to consult with local Aboriginal parties about appointment of a person as an 'Aboriginal heritage officer'.[133] We suggest this sort of provision could be usefully added.

Recommendation 20: The CEO of the Department consult with local Aboriginal parties about appointment of a person as an 'Aboriginal heritage officer'.

12. Offences, penalties, defences and legal proceedings

The general offence provisions are contained in Part 7 (sections 80-89) but there are some other offences throughout the bill.

Offence	Penalty
Serious harm to Aboriginal cultural heritage[134] [Harm is *serious* if it is irreversible or of a high impact or on a wide scale; or to heritage that is in a protected area]	Individual: 5 years imprisonment or fine of $1 million or both (and fine of $50,000 for each day the offence continues) Body corporate: fine of $10 million (and fine of $500,000 for each day the offence continues)
Serious harm to Aboriginal cultural heritage (strict liability – it is irrelevant if the offence happened by accident)[135]	Individual: 4 years imprisonment or fine of $500,000 or both (and fine of $25,000 for each day the offence continues) Body corporate: fine of $5 million (and fine of $250,000 for each day the offence continues).
Material harm to Aboriginal cultural heritage[136]	Individual: fine of $100,000 (and fine of $5,000 for each day the offence continues)

[132] ACH Bill s211.
[133] *Aboriginal Heritage Act 2006* (Vic) s165B.
[134] ACH Bill s83.
[135] ACH Bill s84.
[136] ACH Bill s85.

[Harm is *material* if it is not trivial or negligible]	Body corporate: fine of $1 million (and fine of $50,000 for each day the offence continues)
Harm to Aboriginal cultural heritage[137]	Individual: fine of $25,000 (and fine of $1,250 for each day the offence continues) Body corporate: fine of $250,000 (and fine of $12,500 for each day the offence continues)
Must comply with any conditions of an ACH Permit[138]	Fine of $20 000
Must comply with any conditions imposed on the approval or authorisation of an ACH MP[139]	Fine of $100 000
Must comply with a stop activity order[140]	Fine of $250 000 (and a fine of $12 500 for each day during which the offence continues)
Must comply with a prohibition order[141]	Fine of $250 000 (and a fine of $12 500 for each day during which the offence continues)
The person to whom a prohibition order is given must notify the ACH Council in writing of compliance[142]	Fine of $10 000
Must comply with a remediation order[143]	Fine of $250 000 (and a fine of $12 500 for each day during which the offence continues)
The person to whom a remediation order is given must notify the ACH Council in writing of compliance[144]	Fine of $10 000

[137] ACH Bill s86.
[138] ACH Bill s158(1).
[139] ACH Bill s158(2).
[140] ACH Bill s178(1).
[141] ACH Bill s183(1).
[142] ACH Bill s183(2).
[143] ACH Bill s189(1).
[144] ACH Bill s189(2).

Must display a copy of the order (stop activity, prohibition, remediation) in a prominent place at or near the area the subject of the order[145] A person must not intentionally remove, destroy, damage or deface an order displayed[146]	Fine of $10 000 (and a fine of $500 for each day during which the offence continues) Fine of $10 000
A person must not impersonate an inspector[147]	Fine of $5 000
A person must not contravene a direction given to the person by an inspector[148]	Fine of $10 000
A person must not obstruct an inspector (or a person assisting inspector)[149]	Fine of $20 000
Giving false or misleading information[150]	Fine of $20 000
Confidentiality: a person engaged in performance or functions under this legislation must not disclose or make use of any information except for purposes required under the legislation. (There is also a similar offence for trade processes, financial information and culturally sensitive information)[151]	Fine of $20 000

It is a defence to a charge of an offence if the activity was authorised.[152] It is also a defence to a charge of an offence if it was carried out in accordance with a Part 10 order (stop activity order, prohibition order, remediation order) or after a person has undertaken a due diligence assessment and did not identify any Aboriginal heritage and has taken reasonable steps to ensure that the activity was managed to avoid or minimise the risk of harm.[153]

[145] ACH Bill s199(1).
[146] ACH Bill s199(2).
[147] ACH Bill s208.
[148] ACH Bill s235.
[149] ACH Bill s236.
[150] ACH Bill s275.
[151] ACH Bill s277.
[152] ACH Bill ss87-88.
[153] ACH Bill s89.

Prosecution for an offence can only be commenced by the CEO (or a person authorised by the CEO).[154]

Analysis

a) Offences and penalties

The proposed financial penalties for harm are significantly higher than those seen in other cultural heritage legislation across Australia and this is to be commended.

However, the financial penalty for not complying with an ACH Permit or ACH Management Plan are comparatively low ($20,000 and $100,000 respectively). We suggest these latter penalties should be raised significantly or there could be an incentive for a proponent to validly get a permit or negotiate a management plan with an intention to breach its terms to achieve certain outcomes. If there was a concern that relatively minor breaches of permits or management plans should not incur such a large penalty there could be two tiers: minor and serious breaches of permits or management plans.

Recommendation 21: The penalties for breach of an ACH Permit and ACH MP should be significantly increased.

We also note that as the ACH Bill is drafted, money received from offences will go to the State. Article 28 of the *UN Declaration on the Rights of Indigenous Peoples* states:

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

In this context, consideration should be given to how fines for particular offences may be distributed to the local Aboriginal parties that have been impacted.

Recommendation 22: Consideration should be given to how fines for particular offences may be distributed to the local Aboriginal parties that have been impacted.

b) Defences

EDO is concerned about the defence in relation to a person who 'did not identify Aboriginal heritage'. This state of knowledge requirement is a concern and relates back to our broader concerns about the lack of transparency and rigour in how decisions are made about what is 'minimal impact'.

[154] ACH Bill s240.

We note that in these circumstances the person must have also undertaken a due diligence assessment and taken all reasonable steps to ensure that the activity avoided or minimised harm, but we are of the view that there should be an offence provision for where it was reckless. For example, if the due diligence assessment was undertaken but found to be inadequate, or there were obviously better ways to avoid or minimise the harm that was done, it is not clear if that could still be an offence under the ACH Bill.

This could be readily fixed by:

- adding a requirement to that defence that the harm to the heritage was not reckless; and
- adding a separate offence for an act or omission where the person was reckless as to whether the act or omission was likely to harm Aboriginal cultural heritage.[155]

Recommendation 23: Amendments should be made to the defence that a person 'did not identify Aboriginal heritage' that require that the harm to the heritage was not reckless. A separate offence for an act or omission where the person was reckless as to whether the act or omission was likely to harm Aboriginal cultural heritage should also be added.

c) Legal proceedings

It is of concern that the decision to prosecute is solely in the hands of the CEO and that, therefore, Aboriginal people have no legal redress for breaches of the Act. Indeed, Aboriginal parties who have agreed to an ACH MP cannot take any action to enforce that Plan. The ACH Bill is no improvement on the current AH Act in this respect – local Aboriginal parties will only be able to request that the CEO prosecute.

A recent example of this issue has arisen in Western Australia with respect to sacred sites of the Malarngowem peoples.[156] A mining company applied for a section 18 consent pursuant to the AH Act 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'.[157] As noted by the Kimberley Land Council (**KLC**): 'The destruction of the area is causing significant distress for the Traditional Owners, the Malarngowem people….'[158] 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

[155] Such as that seen in the Victorian legislation: *Aboriginal Heritage Act 2006* (Vic) s27(3)(b).
[156] Kimberley Land Council, 'Destruction of sacred sites in the East Kimberley' https://www.klc.org.au/east-kimberley
[157] Ibid.
[158] Ibid.

back and watch their cultural sites being destroyed when the Government, who is supposed to protect our cultural heritage, has the power to act'.[159]

Aboriginal people must be able to seek redress for breaches relating to destruction of heritage. The right to just and fair redress is a key element of FPIC. A form of third-party civil enforcement (including the ability to seek an injunction) must be made available. This could be similar to that which is in the *Environment Protection Biodiversity Conservation Act 1999* (Cth).[160] Such a form of civil enforcement could be sought in the SAT. At a minimum, there should be an opportunity for Aboriginal people impacted by heritage destruction to review a decision of a CEO not to prosecute for destruction of heritage (or to review a deemed refusal after a certain amount of time), or, and preferably, the Aboriginal party should be entitled to prosecute themselves without reliance on the State.

Recommendation 24: Third party civil enforcement provisions should be added such that Aboriginal people can enforce breaches of the legislation. At a minimum, there should be an opportunity for Aboriginal people impacted by heritage destruction to take enforcement action if the CEO decides not to prosecute for destruction of heritage.

13. Formulation of Guidelines

Proposal

The ACH Council *may* prepare guidelines about consultation, identification of knowledge holders, carrying out of due diligence and factors to be considered in determining if a site is of State significance.[161] The ACH Council is to give public notice that guidelines are being prepared and there will be an opportunity to make submissions.[162] The ACH Council is to consider the submissions and may modify the proposed guidelines as it sees fit.[163] The Minister may approve guidelines with or without modifications 'as the Minister thinks fit'.[164]

Analysis

These Guidelines are vital to how the ACH Bill will operate. In many respects, it would have been preferable to have these as part of the ACH Bill. However, at a minimum, the production of these guidelines must be made mandatory ('must' rather than 'may') as they are central to many elements of the ACH Bill, in particular, minimal impact activities.

[159] Ibid.
[160] EPBC Act s475(1)(b).
[161] ACH Bill s267.
[162] ACH Bill s268.
[163] ACH Bill s268(4).
[164] ACH Bill s269.

Without them, there are no due diligence requirements for those activities and therefore, no investigation at all of whether an activity will impact Aboriginal cultural heritage (with flow on consequences for enforcement) and no formal requirement or acknowledgement of the need to at least consult Aboriginal people. Further, we submit that the ACH Bill be amended to require that these guidelines must be produced within 6 months of the commencement of the ACH Bill and that activities reliant on them must not be carried out before they are produced.

The ACH Council will consult and seek and receive submissions about the guidelines. However, the Minister then has an ultimate decision that they can exercise as the Minister thinks fit. This would seem to undermine the submission process. At a minimum, the ACH Council should make a recommendation and the Minister should, prior to making a decision, give any reasons for a modification they propose and that there should be consultation and submissions should be received on that modified proposal.

We also note that neither the ACH Council nor the Minister must consider any particular criteria in formulating these guidelines. We submit that, at a minimum, the Minister must consider the objects of the Act in s8 and the relevant statutory provisions that will give effect to the guidelines.

Recommendation 25: Section 267 be amended such that the ACH Council 'must' prepare guidelines within 6 months of the commencement of the ACH Bill. At a minimum, the consultation and due diligence guidelines must be produced prior to consultation or due diligence assessments taking place.

Recommendation 26: Section 268(4) and s269 be amended to add a requirement that in preparing and approving the guidelines the ACH Council and the Minister must consider the objects of the Act in s8 and the relevant statutory provisions that will give effect to the guidelines.

14. Review by State Administrative Tribunal

Proposal

As noted above, there will be an opportunity for Aboriginal people to apply for review of a decision by the Minister in relation to an ACH MP. We note that specific provisions have been made for the hearing (or part thereof) to be heard in private and to specify the persons who may be present at the hearing.[165]

Analysis

[165] ACH Bill s258.

We note that the review body is the traditional merits review body in WA, the SAT. We support merits review opportunities for Aboriginal people, but recommend that the WA Government should consider models for review bodies that give effect to Aboriginal people's sovereignty and right to self-determination in respect of their culture.

At a minimum, we recommend that the ACH Bill explicitly require that at least one SAT member hearing any matter under the cultural heritage legislation is Aboriginal.

Recommendation 27: Consideration be given to models of merits review where Aboriginal bodies can be the review body for decisions.

Recommendation 28: The ACH Bill explicitly require that at least one SAT member hearing any matter under the cultural heritage legislation is Aboriginal.

15. Relationship between current *Aboriginal Heritage Act 1972* (WA) (AH Act) and ACH Bill

There will be a transitional period in which the current AH Act will continue to operate. As noted in the ACH Bill 'Overview' document,[166] and also stated at the public consultation session, this will be for at least one year. After that, the current AH Act will be repealed.[167]

Even after repeal, current section 18 approvals will continue to have effect.[168] This does not apply to s18 approvals that are 'no longer in force'.[169] A s18 approval is no longer in force if the consent has expired; the use by the owner of the land has been completed; the owner of the land no longer exists or cannot be identified; or the owner of the land has voluntarily surrendered the s18.[170] The Minister may make a decision that a s18 consent is no longer in force.[171] A section 18 consent is taken to be an ACH MP that has been approved by the ACH Council in certain circumstances including as a defence to an offence of carrying out an activity that harmed Aboriginal cultural heritage (ie. it was authorised).[172] A protected area order under the previous AH Act also remains in force as if it were a protected area order made under the new legislation.[173]

The Aboriginal Cultural Materials Committee (**ACMC**) will be abolished after the transition period.[174] In terms of unfinished business, the Minister has the power to do any act that the

[166] DPLH, 'Overview' https://www.dplh.wa.gov.au/getmedia/9dbb101f-8cb8-406f-8453-84b89fbc5530/AH-ACHB-overview
[167] ACH Bill ss281-282.
[168] ACH Bill s284.
[169] ACH Bill s284(2).
[170] ACH Bill s285.
[171] ACH Bill s285(3).
[172] ACH Bill s287.
[173] ACH Bill s289.
[174] ACH Bill s291.

Minister considers necessary or expedient to do.[175] Anything commenced to be done by the ACMC before the repeal, may be continued by the ACH Council to the extent that it is within their powers.[176]

During the transition period section 18 applications can still be made to the ACMC. However, any s18 approval given will only remain in force for 5 years or a shorter period that is specified.[177]

Analysis

a) Current section 18 approvals

We are concerned that s18 approvals will continue to have effect. There is nothing in the AH Act that deals with amending, cancelling or revoking s18 approvals. We note that there may be concerns about the legality of cancellation/revocation of s18s and potential compensation requirements and the paucity of the AH Act makes these issues difficult. We do note that given s18 approvals are, in effect, a defence to an activity that would otherwise be an offence (pursuant to s17 AH Act), they do not appear to be a 'right'. However, we acknowledge that there will be proponents that have relied on s18s and then acted on that representation in ways which, if it was cancelled/revoked, would be to their detriment.

We suspect that some proponents will welcome formalised transitional provisions of current s18s as they will be concerned about proceeding on the basis of section 18 approvals after the Juukan Gorge incident. In this context, we suggest that provisions for transition from s18 to the new system be included in the ACH Bill and then a policy position be adopted to encourage (and make it possible for) s18 holders to transition across. This may even include incentives for proponents to surrender their s18s.

Recommendation 29: Provisions for transition from current s18 approvals to the new system be included in the ACH Bill and then a policy position be adopted to encourage (and make it possible for) s18 holders to transition across voluntarily. This may even include incentives for proponents to surrender their s18s.

b) Section 18s in the transition period

We submit that there should be an effective moratorium on section 18s and they should not be granted during the transition period. We acknowledge that setting up the ACH Council and the Local ACH Services will take time but are of the view that, in the meantime, an alternative transition arrangement could be made available that requires

[175] ACH Bill s292.
[176] ACH Bill s293.
[177] ACH Bill s299.

the ACMC start implementing a modified version of Part 8 of the ACH Bill such that there would be formalised negotiations between the proponent and Aboriginal parties and the resulting agreements would be scrutinised by the ACMC until the ACH Council was formed. This will be particularly important if the transition period starts to stretch significantly beyond one year.

Alternatively, we suggest that any s18 granted in the transition period be granted with a condition that it be transitioned onto the provisions of the ACH Bill within 6 months of the end of the transition period. This would, in effect, make any s18 granted during the transition period temporary and granted just as an interim measure.

Recommendation 30: There should be a moratorium on new section 18s. During the transition period the Aboriginal Cultural Materials Committee should start implementing a modified version of Part 8 of the ACH Bill. Alternatively, any s18 granted in the transition period should be granted with a condition that it be transitioned onto the provisions of the ACH Bill within 6 months of the end of the transition period.