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STANDING COMMITTEE ON ENVIRONMENT, CLIMATE CHANGE AND BIODIVERSITY
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Submission Cover Sheet

Inquiry into ACT's heritage arrangements

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Environmental
Defenders Office

Submission on the ACT's heritage arrangements

30 March 2023

About EDO

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

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

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

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

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About Healthy Environment & Justice Program

EDO's ACT Practice falls within EDO's Healthy Environment & Justice Program (**HEJ**). The goal of the HEJ Program is to empower overburdened people and communities to fight for environmental justice.

Acknowledgement of Contributions

EDO wishes to acknowledge with gratitude the assistance provided by many people in the researching, drafting and review of this submission including EDO colleagues, particularly Rachel Walmsley, and our fantastic volunteers Elkanah Reyes and Kimberley Slapp.

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Acknowledgment of funding from ACT Government

We acknowledge and are grateful to the ACT Government for its ongoing funding of the EDO's ACT Practice, without which it would not be possible for the ACT Practice to run.

Acknowledgment of Country

The Environmental Defenders Office recognises the Traditional Owners and Custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledges and customs so that, together, we can protect our environment and cultural heritage through Western law.

A note on language on 'First Nations'

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. In the domestic context, where possible, we have used specific references. Further, when referring to First Nations in the context of a particular Country we have used the term 'Traditional Owners'. More generally, we have chosen to use the term 'First Nations'. We acknowledge that not all Aboriginal and Torres Strait Island Peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

Submitted to:

Standing Committee on Environment, Climate Change and Biodiversity
ACT Legislative Assembly
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Contents

Executive Summary	i
Summary of Recommendations.....	ii
Introduction	1
A - ACT Government’s human rights obligations with respect to First Nations Peoples.....	4
B - Definitions and general concepts.....	7
C - The ACT Heritage Council	8
D - Representative Aboriginal organisations.....	10
E – Heritage agreements.....	15
F – Civil enforcement.....	17
G – Review rights	19

Executive Summary

The Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the ACT's heritage arrangements.

This submission focuses on the provisions of the *Heritage Act 2004* (ACT) (**Heritage Act**) to the extent that they relate to First Nations cultural heritage and identifies opportunities for reform to improve protection for First Nations cultural heritage in the ACT.

The need to improve protection for First Nations cultural heritage was tragically highlighted by the destruction of Juukan Gorge by Rio Tinto in May 2020 and the subsequent findings of the inquiry into that destruction.

In this submission, we have identified 13 opportunities for the ACT Government to consider improvements to the ACT's heritage arrangements that are consistent with human rights law, international best practice, and the ACT Government's *ACT Aboriginal and Torres Strait Islander Agreement 2019-2028*.

These opportunities address the following issues:

- the extent to which the Heritage Act protects intangible cultural heritage;
- address the extent to which the ACT Heritage Council's membership includes First Nations Peoples;
- the extent to which the process for declaring entities as representative Aboriginal organisations (**RAOs**) and provisions regarding consultation with RAOs are consistent with the principles of self-determination and free, prior and informed consent;
- the process for negotiating and consulting with First Nations Peoples in relation to, and the enforcement of, heritage agreements;
- the lack of accessible civil enforcement mechanisms under the Heritage Act for non-compliance with the Act; and
- the ability of people to seek review of registration and cancellation decisions in circumstances where they did not submit a comment within the public consultation period.

If our 13 opportunities are accepted by the ACT Government, we consider it will improve protection of First Nations cultural heritage in the ACT.

Summary of Recommendations

The Environmental Defenders Office is not a First Nations organisation and therefore cannot speak on behalf of First Nations Peoples. Further, due to capacity and funding constraints, we have not consulted with First Nations Peoples in relation to our recommendations. Instead, we outline the following opportunities for the ACT Government to consider improvements to the ACT's heritage arrangements that are consistent with human rights law, international best practice, and the ACT Government's *ACT Aboriginal and Torres Strait Islander Agreement 2019-2028*.

- **Recommendation 1:** Amend the *Heritage Act 2004* to include a definition of First Nations cultural heritage that recognises both tangible and intangible heritage.
- **Recommendation 2:** The ACT Government should ensure that more than one First Nations person is elected to the ACT Heritage Council to represent 'the Aboriginal community'. Alternatively, consider amending the *Heritage Act 2004* to include provisions for the creation of a specialised body to consider, advise and decide on matters involving First Nations cultural heritage.
- **Recommendation 3:** Amend the *Heritage Act 2004* to include clear processes that are consistent with the principle of self-determination for declaring entities as representative Aboriginal organisations.
- **Recommendation 4:** The ACT Government should ensure that public notification of the opportunity to submit an expression of interest to be declared as a representative Aboriginal organisation in a manner that is accessible and culturally appropriate for First Nations Peoples.
- **Recommendation 5:** Include provisions in the *Heritage Act 2004* to allow for remuneration of representative Aboriginal organisations for providing consultation services.
- **Recommendation 6:** Include provisions in the *Heritage Act 2004* to make consultation with representative Aboriginal organisations mandatory for all decisions that relate to their cultural heritage, including applications to carry out archaeological excavation work at or near an Aboriginal place or object, and in relation to development applications referred to the ACT Heritage Council under planning legislation.
- **Recommendation 7:** The ACT Government should take steps to ensure that representative Aboriginal organisations have more agency in decisions that relate to their cultural heritage. This may include, for example, including provisions in the *Heritage Act 2004* that allow representative Aboriginal organisations to explicitly give, or withhold, their consent to proposed decisions under the Act.
- **Recommendation 8:** Amend the *Heritage Act 2004* to provide a process for consultation and negotiation with First Nations in relation to heritage agreements for the conservation of First Nations cultural heritage that is consistent with the principles of free, prior and informed consent, and that includes remuneration for such consultation.
- **Recommendation 9:** Amend the *Heritage Act 2004* to ensure that First Nations Peoples have the right to enforce a heritage agreement for the conservation of First Nations cultural heritage.
- **Recommendation 10:** Amend the *Heritage Act 2004* to include more accessible civil enforcement mechanisms to ensure that non-compliance with the *Heritage Act 2004* is reported and enforced.

- **Recommendation 11:** Amend the *Heritage Act 2004* to give power to the ACT Civil and Administrative Tribunal to determine applications for heritage orders.
- **Recommendation 12:** Amend the *Heritage Act 2004* to remove provisions requiring applicants for heritage orders to pay security for costs and/or compensation for the respondent's loss and damage.
- **Recommendation 13:** Amend the *Heritage Act 2004* to allow interested persons to seek review of registration and cancellation decisions if they had a reasonable excuse for not making comments during the public consultation period.

INQUIRY INTO THE ACT'S HERITAGE ARRANGEMENTS

Submission from the Environmental Defenders Office

Introduction

The Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the ACT's heritage arrangements.

EDO is a non-profit legal organisation that provides legal advice and representation on public interest environmental law matters to people and communities who are at risk of environmental harm, including First Nations Peoples. The Special Rapporteur on Human Rights and the Environment (Special Rapporteur) identifies members of Indigenous Peoples and traditional communities as people who are often at greater risk of experiencing environmental harm.¹ In particular, First Nations Peoples rely on their Countries for their material and cultural existence, but face increasing pressure from government and businesses seeking to exploit their resources, and are often marginalised from decision-making processes and their rights are often ignored or violated.²

This submission focuses on the provisions of the *Heritage Act 2004* (ACT) (**Heritage Act**) to the extent that they relate to First Nations cultural heritage and identifies opportunities for reform to improve protection for First Nations cultural heritage in the ACT.

The need to improve protection for First Nations cultural heritage was tragically highlighted by the destruction of Juukan Gorge by Rio Tinto in May 2020 and the subsequent findings of the inquiry into that destruction (**Juukan Gorge Inquiry**).³ One of the key recommendations from the Juukan Gorge Inquiry was for the Australian Government to legislate a new framework for cultural heritage protection at the national level, which should set out minimum standards for state and territory protections consistent with relevant international law.⁴

Following the Juukan Gorge Inquiry, the Australian Government has initiated a national reform process in relation to First Nations cultural heritage. We understand that the Australian Government is currently working in partnership with the First Nations Heritage Protection Alliance to develop options to reform First Nations cultural heritage protections. As this national law reform process will affect the ACT's heritage arrangements as they relate to First Nations cultural heritage, the ACT Government will need to ensure that its legislation and policies are consistent with any subsequent national law reform in this area.

We also draw the Committee's attention to EDO's recommendations made to the Juukan Gorge Inquiry.⁵ These recommendations address Australia-wide cultural heritage reform and are

¹ Special Rapporteur on Human Rights and the Environment, Annex: *Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) at [41], p 16.

² Ibid, [41](d), p 17.

³ Joint Standing Committee on Northern Australia, *Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report* (2020), Commonwealth of Australia, Canberra; and the *Final Report – A Way Forward* (2021).

⁴ Joint Standing Committee on Northern Australia, *Final Report – A Way Forward* (2021) recommendation 3, [7.77] to [7.84], pp 199-200.

⁵ Environmental Defenders Office, *Submission to the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*, Submission #170 (14 August 2020) available for download at

https://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia_46P/CavesatJuukanGorge/Submissions.

necessarily higher level than the recommendations we have made in this submission to the present inquiry, which address reform to the Heritage Act more specifically. However, we recommend that any amendments to the Heritage Act should be made consistently with EDO's broader recommendations made to the Juukan Gorge Inquiry.

Structure of submission

In **Part A** of this submission, we address the ACT Government's human rights obligations with respect to First Nations Peoples.

Our submission then analyses the Heritage Act and makes recommendations in relation to the following issues:

- **Part B - Definitions and general concepts**, where we address the extent to which the Heritage Act protects intangible cultural heritage;
- **Part C - The ACT Heritage Council**, where we address the extent to which its membership includes First Nations Peoples;
- **Part D - Representative Aboriginal Organisations**, where we address the extent to which the process for declaring entities as representative Aboriginal organisations (**RAOs**) and provisions regarding consultation with RAOs are consistent with the principles of self-determination and free, prior and informed consent;
- **Part E - Heritage agreements**, where we discuss the process for negotiating and consulting with First Nations Peoples, and the enforcement of heritage agreements;
- **Part F - Civil enforcement**, where we discuss the lack of accessible civil enforcement mechanisms under the Heritage Act for non-compliance with the Act; and
- **Part G - Review rights**, where we address the ability of people to seek review of registration and cancellation decisions in circumstances where they did not submit a comment within the public consultation period.

A note on First Laws and Indigenous world views

In making this submission, it is also important to acknowledge that the ACT Government is operating on the unceded lands of First Nations Peoples, and that the present consultation process involves consideration of the Heritage Act and other laws that are part of a Western, settler-colonial legal system. However, First Nations Peoples have lived under their own laws (First Laws) and customs as politically autonomous, self-determining nations within defined territories for millennia as the oldest continuous cultures on earth.⁶ 'First Laws' refers to the laws generated within First Nations Peoples' communities to govern the sacred and reciprocal relationships between human and non-human entities across Australia. These laws go beyond simply recognising the importance of nature; they recognise that First Nations' cultures are an extension of the natural community of a place.⁷

All contemporary law reform processes in Australia must aim to repair and reform the injustices of the past that continue to impact First Nations Peoples today. Recognition of, and adherence to, First Laws should be central to this process.

For this reason, EDO encourages the ACT Government to ensure that it directly engages with First Nations Peoples at all stages of the present consultation process, and during any future consultation on the Heritage Act, to ensure that First Laws and Indigenous world views are

⁶ Professor the Hon Kevin Bell AM QC, 'Aspects of the Changing Face of Indigenous Rights in Australia', paper based on address to the Victoria Criminal Law Conference Law Institute in Melbourne (21 July 2022) 1.

⁷ Nicole Redvers et al, 'Indigenous Natural and First Law in Planetary Health' (2020) 11(2) *Challenges* 29, 1-3.

incorporated. Consultation with First Nations Peoples should be specifically tailored towards First Nations Peoples to ensure that the consultation process is accessible and culturally appropriate. In some circumstances, it may be appropriate for such consultation to take place in person on Country, allowing First Nations Peoples to provide their views to the ACT Government orally. Consistent with Recommendation #5, we consider First Nations Peoples should be compensated for their time, energy and expertise when consulted during all law reform inquiries.

It is also important to acknowledge that EDO is not a First Nations organisation and therefore cannot speak on behalf of First Nations Peoples. In addition, we have not consulted with First Nations People in relation to our recommendations due to capacity and funding constraints.

Consequently, throughout these submissions we have identified opportunities for the ACT Government to consider improvements to the ACT's heritage arrangements that are consistent with the law and international best practice. We encourage the ACT Government to ensure that any reforms to the Heritage Act that relate to First Nations cultural heritage are developed in consultation with First Nations Peoples.

A - ACT Government's human rights obligations with respect to First Nations Peoples

Obligations under the *Human Rights Act 2004*

The ACT Government owes particular obligations to First Nations under the *Human Rights Act 2004* (ACT) (**Human Rights Act**).

The ACT Government's obligations with respect to First Nations Peoples arise primarily from s 27 of the Human Rights Act, which protects:

- the right of all people in the ACT to enjoy culture, religion and/or language; and
- the distinct cultural rights of First Nations Peoples in the ACT to maintain, control, protect and develop their cultural heritage and distinctive spiritual practices, observances, beliefs and teachings, languages and knowledge, and kinship ties, and to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

The primary source of s 27 is the *United Nations Declaration of the Rights of Indigenous Peoples* (**UNDRIP**), art 25 and 31. UNDRIP was endorsed by Australia in 2009. Although it is non-binding, Australia has accepted it as a framework for better recognising and protecting the rights of First Nations. Section 27 of the Human Rights Act is also derived from art 27 of the International Covenant on Civil and Political Rights (**ICCPR**), which Australia has also ratified.⁸

Section 27 should also be read together with s 8 of the Human Rights Act, which recognises that everyone has the right to recognition as a person before the law and the right to enjoy their rights without distinction or discrimination, and that everyone is equal before the law and is entitled to equal protection of the law without discrimination. Section 8 is derived from art 2(1) of the ICCPR.⁹

Obligations under ACT Government policies

The ACT Government also owes obligations to First Nations Peoples under ACT Government policies, which include:

- the *ACT Aboriginal and Torres Strait Islander 2019-2028 Agreement*, pursuant to which the ACT Government has agreed to deliver a number of outcomes aimed at improving quality of life for First Nations Peoples;
- the *ACT Reconciliation Action Plan*, which contains the ACT Government's reconciliation initiatives;
- the ACT Government's *Implementation Plan for the National Agreement on Closing the Gap*.

Obligations under international human rights law

As noted earlier in the Introduction to this submission, the Special Rapporteur identifies members of Indigenous Peoples and traditional communities as people who are often at greater risk of environmental harm.¹⁰ As a result, States owe particular obligations under international human

⁸ Article 27 of the ICCPR provides that ethnic, religious or linguistic minorities should not be denied the right to enjoy their own culture, to profess and practice their own religion, or to use their own language.

⁹ Article 2(1) of the ICCPR provides that each State party must respect and ensure the rights of all individuals within its territory and subject to its jurisdiction, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹⁰ Special Rapporteur on Human Rights and the Environment, Annex: *Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) at [41], p 16

rights law to protect First Nations' right to enjoy a healthy environment. These obligations are derived from a number of international human rights treaties including the ICCPR, and are as follows:

- to prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a healthy environment, which includes an obligation to protect against environmental harm that results from or contributes to discrimination, to provide for equal access to environmental benefits and to ensure that their actions relating to the environment do not themselves discriminate;¹¹
- to take additional measures to protect the rights of those who are most vulnerable to, or at a particular risk from, environmental harm, taking into account their needs, risks and capacities, which includes an obligation to ensure that laws and policies take into account the ways that some parts of the population are more susceptible to environmental harm, and the barriers some face to exercising their human rights related to the environment;¹²
- to ensure that they comply with their obligations to First Nations Peoples and members of traditional communities, including by recognising and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used, consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources, respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources, and ensuring that it fairly and equitably shares the benefits from activities relating to their lands, territories or resources with First Nations Peoples.¹³

As the Human Rights Act incorporates rights enshrined in the ICCPR, these obligations extend to the ACT Government.

Key principles relevant to this submission

Self-determination

The *ACT Aboriginal and Torres Strait Islander Agreement 2019-2028* recognises that First Nations Peoples have the right to self-determination, which the Agreement describes as an '*ongoing process of choice to ensure that Aboriginal and Torres Strait Islander communities are able to meet their social, cultural and economic needs*'.¹⁴ The Agreement further states that self-determination includes First Nations Peoples having the ability and resources to provide their own solutions, acknowledging that First Nations leadership is central to the process of ensuring the long-term emotional and physical wellbeing of First Nations communities.¹⁵

¹¹ Special Rapporteur on Human Rights and the Environment, *Annex: Framework principles on human rights and the environment*, UN Doc A/HRC/37/59 (24 January 2018) at [7], p 7 (Framework Principle 3). The sources for Principle 3 include ICCPR art 2(1) and 26, ICESCR art 2(2), and ICERD, art 2 and 5: UN Office of the High Commissioner for Human Rights, *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) p 3.

¹² *Ibid*, [40]-[42], pp 16-18 (Framework Principle 14). The sources for Principle 14 include ICCPR art 27, ICESCR art 15, ICERD, and UNDRIP art 20(2) and 32(3).

¹³ *Ibid*, p 18 (Framework Principle 15). The sources for Principle 15 include UNDRIP, ICCPR art 27, and ICESCR art 15.

¹⁴ *ACT Aboriginal and Torres Strait Islander Agreement 2019-2028*, p 1.

¹⁵ *Ibid*.

Free, prior and informed consent

As noted above, the sources for s 27 of the Human Rights Act include UNDRIP and art 27 of the ICCPR which require, among other things, States to consult with First Nations Peoples to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them, or approving any measures that may affect their lands, territories or other resources.¹⁶ As the Human Rights Act incorporates this right, this obligation extends to the ACT Government.

The Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent, endorsed by the UN Permanent Forum on Indigenous Issues, made findings and recommendations on the defining qualities of free, prior and informed consent. These include:

- **Free:** decision-making should not be undermined by coercion, intimidation or manipulation;
- **Prior:** consent should be sought sufficiently in advance of any authorisation or commencement of activities and that respect is shown for time requirements of Indigenous consultation consensus processes;
- **Informed:** information should be provided, in a form that is accessible and understandable, regarding the nature, size, pace, reversibility and scope of the project; the reasons for or purpose of the project; the duration of the project; the locality affected; the preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks and equitable benefit sharing in a context that respects the precautionary principle, the personnel likely to be involved in the execution of the project; and
- **Consent:** the consent process should involve consultation and participation. Indigenous Peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The process may include the option of withholding consent.¹⁷

We also draw the Committee's attention to EDO's supplementary submission to the Juukan Gorge Inquiry, in which we set out EDO's views on how free, prior and informed consent may be implemented in practice.¹⁸ In this submission to the present inquiry, we have recommended that the Heritage Act is amended to incorporate the principle of free, prior and informed consent (see Recommendations 6, 7 and 8). If the ACT Government decides to accept these recommendations, it may consider EDO's supplementary submission to the Juukan Gorge Inquiry for our views on how free, prior and informed consent may be implemented.

¹⁶ UNDRIP, art 19 and 32(2).

¹⁷ *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Doc E/C.19/2005/3 (17-19 January 2005, adopted 17 February 2005) pp 12-13, summarised in Justice Brian Preston, 'The adequacy of the law in satisfying society's expectations for major projects' (2015) 32 *Environment and Planning Law Journal* 182 at 190.

¹⁸ Environmental Defenders Office Ltd, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia: Answers to Questions on Notice and Supplementary Submissions*, Submission #107.1 (1 April 2021), pp 8-10 available for download at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia_46P/CavesatJuukanGorge/Submissions.

B - Definitions and general concepts

Recommendation 1: Amend the *Heritage Act 2004* to include a definition of First Nations cultural heritage that recognises both tangible and intangible heritage.

The Juukan Gorge Inquiry recommended that, in developing minimum standards for state and territory legislation, consideration should be given to including a definition of cultural heritage that recognises both tangible and intangible heritage.¹⁹

The Heritage Act offers protection to Aboriginal objects and Aboriginal places, which are defined in s 9(1) to mean objects and places associated with Aboriginal people because of Aboriginal tradition. ‘Aboriginal tradition’ is defined in s 9(2) as meaning ‘the customs, rituals, institutions, beliefs or general way of life of Aboriginal people’, which as noted by the Juukan Gorge Inquiry,²⁰ implies that the Heritage Act can apply to intangible heritage. However, this is not explicit.

We strongly recommend that the Heritage Act is updated to include a definition of First Nations cultural heritage that explicitly recognises both tangible and intangible heritage. This could be achieved by updating the definition of ‘Aboriginal tradition’ in s 9(2).

As an example of a jurisdiction that explicitly includes such a definition, the *Aboriginal Heritage Act 2006* (Vic) (**Victoria Heritage Act**) provides that the main purposes of this Act include ‘to provide for the protection of Aboriginal cultural heritage **and Aboriginal intangible heritage** in Victoria’ (emphasis added).²¹ The Victoria Heritage Act makes provision for the protection of both Aboriginal intangible heritage and Aboriginal cultural heritage, which are defined separately. Aboriginal intangible heritage is defined in s 79B of the Victoria Heritage Act as meaning ‘*any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public*’, and includes ‘*any intellectual creation or innovation based on or derived from*’ these matters.

However, the definition should be developed by, and/or in consultation with, First Nations Peoples rather than solely by the ACT Government and non-Indigenous parliamentary drafters.

¹⁹ Joint Standing Committee on Northern Australia, *Final Report – A Way Forward* (2021) recommendation 3, [7.80], p 199.

²⁰ *Ibid*, [5.116], p 135.

²¹ *Aboriginal Heritage Act 2006* (Vic), s 1(a).

C - The ACT Heritage Council

Recommendation 2: The ACT Government should ensure that more than one First Nations person is elected to the ACT Heritage Council to represent ‘the Aboriginal community’. Alternatively, consider amending the *Heritage Act 2004* to include provisions for the creation of a specialised body to consider, advise and decide on matters involving First Nations cultural heritage.

The Juukan Gorge Inquiry recommended that, in developing minimum standards for state and territory legislation, consideration should be given to including decision-making processes that ensure traditional owners and native title holders have primary decision-making power in relation to their cultural heritage.²² Although we acknowledge that the Ngunnawal People have lodged a native title claim over the ACT and parts of NSW, we note that there is currently no native title determination in relation to land in the ACT. However, we consider that the Inquiry’s recommendation can extend to all First Nations Peoples – that is, First Nations Peoples should have the ability to make decisions about their cultural heritage, consistent with the principle of self-determination. We consider that this includes ensuring that the membership of decision-making bodies with responsibility for making decisions about First Nations cultural heritage includes First Nations Peoples.

The membership of the ACT Heritage Council is required to include at least one public representative who, in the Minister’s opinion, adequately represents ‘the Aboriginal community’.²³ We presume the Minister would not appoint a person in this role unless they identify as a First Nations person, although this is not explicit in the Heritage Act.

As a result of this provision, it is possible for the ACT Heritage Council to be formed with only one First Nations member to represent the ‘Aboriginal community’. Indeed, before the ACT Heritage Council was dissolved by the Minister, we understand that only one person on the Council was elected to represent the Aboriginal community.

Under the Heritage Act, the ACT Heritage Council has discretionary powers to make decisions that may impact First Nations Peoples from different communities and language groups, including decisions in relation to the registration,²⁴ and cancellation of registration,²⁵ of Aboriginal places and objects on the ACT Heritage Register, and decisions on making guidelines in relation to the conservation of Aboriginal places and objects.²⁶ These decisions may impact people from different communities to those represented on the ACT Heritage Council, and in the absence of representation on the Council, the views and interests of First Nations Peoples and communities who are not represented may not be adequately reflected in Council decisions. In light of this, the possibility that only one First Nations person is elected to represent ‘the Aboriginal community’ is potentially problematic.

We acknowledge that four organisations, who we understand represent different First Nations communities in the ACT, are recognised as representative Aboriginal organisations (**RAOs**) under the Heritage Act, and that the Heritage Act allows for consultation with RAOs in some circumstances, which may address any issues with lack of representation on the ACT Heritage

²² Joint Standing Committee on Northern Australia, *Final Report – A Way Forward* (2021) recommendation 3, [7.80], p 199.

²³ *Heritage Act 2004* (ACT) s 17(3)(b).

²⁴ *Ibid*, ss 32 and 40.

²⁵ *Ibid*, s 49.

²⁶ *Ibid*, s 25.

Council. However, as we address later in **Part D** of this submission, consultation with RAOs is not mandatory for all decisions under the Heritage Act, meaning that the views and interests of RAOs may not always be reflected in all ACT Heritage Council decisions. In addition, ultimate decision-making power on the protection of Aboriginal places and objects rests with the ACT Heritage Council, and not with RAOs.

For these reasons, we recommend that the ACT Government considers ensuring that more than one First Nations person is elected to the ACT Heritage Council to represent ‘the Aboriginal community’. Alternatively, the ACT Government should consider including provisions in the Heritage Act to create a specialised body to consider, advise and decide on matters involving First Nations cultural heritage. The design of such a body should be consulted upon, and developed by, First Nations Peoples rather than solely by the ACT Government and non-Indigenous parliamentary drafters.

D - Representative Aboriginal Organisations

Membership of representative Aboriginal organisations

Recommendation 3: Amend the *Heritage Act 2004* to include clear processes that are consistent with the principle of self-determination for declaring entities as representative Aboriginal organisations.

The Juukan Gorge Inquiry recommended that, in developing minimum standards for state and territory legislation, consideration should be given to including clear processes for identifying the appropriate people to speak for cultural heritage that are based on the principle of self-determination and recognising native title or land rights statutory representative bodies (where they exist).²⁷

RAOs are entities declared by the Minister under s 14 of the Heritage Act.²⁸ The Minister may declare an entity to be an RAO only if satisfied that the entity satisfies particular criteria.²⁹ The Minister also has the power to determine the criteria for deciding whether an entity should be declared as an RAO.³⁰ Before determining these criteria, the Heritage Act requires the Minister to consult with ‘*Aboriginal people whom the Minister is satisfied have a traditional affiliation with land*’ and the ACT Heritage Council.³¹

We consider that this raises the following issues:

- No criteria have been determined by the Minister, meaning that the power to declare an entity as an RAO is currently left entirely to the discretion of the Minister, who may not be a First Nations person. For example, the ACT’s current RAOs were declared in 2006 by John Hargreaves MLA, who did not identify as Indigenous.³²
- In determining criteria, the Minister is required to consult with ‘*Aboriginal people whom the Minister is satisfied have a traditional affiliation with land*’. The decision on whether a person has a traditional affiliation with land is again left to the Minister, who may not be a First Nations Person.

The above issues demonstrate that current arrangements under the Heritage Act for declaring RAOs are inconsistent with the principle of self-determination, which requires First Nations Peoples to have the ability and resources to make decisions about, and provide their own solutions for, matters that concern them.³³

We encourage the ACT Government to consider whether current processes are appropriate, and recommend that it consider amending the Heritage Act 2004 to ensure the Act includes clear processes for declaring RAOs that are consistent with the principle of self-determination. Any proposed processes must be consulted on, and developed by, First Nations Peoples rather than solely by the ACT Government and non-Indigenous parliamentary drafters.

²⁷ Joint Standing Committee on Northern Australia, *Final Report – A Way Forward* (2021) recommendation 3, [7.80], p 199.

²⁸ *Heritage Act 2004* (ACT) s 14(8).

²⁹ *Ibid*, s 14(9).

³⁰ *Ibid*, s 14(3).

³¹ *Ibid*, s 14(2).

³² *Heritage (Representative Aboriginal Organisations) Declaration 2006 (No 1)* (ACT).

³³ *Ibid*.

We also encourage the Minister to consider determining the criteria for deciding whether an entity should be declared as an RAO as soon as possible, noting that the Heritage Act has been in force for almost 20 years, and yet no criteria have been determined to date.

Recommendation 4: The ACT Government should ensure that public notification of the opportunity to submit an expression of interest to be declared as a representative Aboriginal organisation in a manner that is accessible and culturally appropriate for First Nations Peoples.

Under the Heritage Act, the Minister must invite expressions of interest from entities willing to be declared as a RAO.³⁴ An invitation issued by the Minister is a disallowable instrument that must be published on the ACT Legislation Register.³⁵ However, the Heritage Act also requires the Minister to give ‘additional’ public notice of this invitation.³⁶ ‘Public notice’ means a notice on an ACT Government website or a daily newspaper circulating in the ACT.³⁷

We have not been able to find any information on the ACT Government’s website detailing how the ACT Government invites expressions of interest from entities willing to be declared as a RAO. In the absence of this information, it is not possible for us to comment on the methods that are utilised by the ACT Government. However, we encourage the ACT Government to ensure that when it notifies the public of the opportunity to submit an expression of interest, it does so in a manner that is accessible and culturally appropriate for First Nations Peoples, to enable First Nations Peoples and communities to participate in the declaration decision-making process and to have their voices heard.

Consultation with representative Aboriginal organisations

Recommendation 5: Include provisions in the *Heritage Act 2004* to allow for remuneration of representative Aboriginal organisations for providing consultation services.

Consultation takes up time and resources, which may already be limited. In addition, First Nations Peoples may experience consultation fatigue from being frequently consulted to provide input on a variety of government programs and policies, including under the Heritage Act. However, there are no provisions for RAOs to be remunerated under the Heritage Act. This is specifically stated in the *Heritage (Representative Aboriginal Organisations) Declaration 2006 (No 1)*.³⁸ This means that RAOs may be providing consultation services without remuneration, which we consider is inappropriate considering the significant amount of time RAOs may spend providing consultation services on a wide range of government programs and initiatives. For this reason, we recommend that the ACT Government ensures that RAOs are appropriately remunerated for their work, or that RAOs receive adequate funding to provide these services. One option to achieve this would be to include provisions in the Heritage Act for RAOs to be remunerated.

³⁴ *Heritage Act 2004* (ACT) s 14(5).

³⁵ *Ibid*, s 14(4).

³⁶ *Ibid*, s 14(7).

³⁷ *Legislation Act 2001* (ACT), Part 1.

³⁸ *Heritage (Representative Aboriginal Organisations) Declaration 2006 (No 1)* (ACT), s 4.

Recommendation 6: Consider including provisions in the *Heritage Act 2004* to make consultation with representative Aboriginal organisations mandatory for all decisions that relate to their cultural heritage, including applications to carry out archaeological excavation work at or near an Aboriginal place or object, and in relation to development applications referred to the ACT Heritage Council under planning legislation.

Under the Heritage Act, RAOs must be consulted in relation to the following matters:

- draft heritage guidelines if the guidelines relate to an Aboriginal place or object;³⁹
- the provisional registration of an Aboriginal place or object;⁴⁰
- proposals to cancel the registration of an Aboriginal place or object;⁴¹
- assessing heritage significance of reported Aboriginal places and objects,⁴² being Aboriginal places and objects that are discovered and reported to the ACT Heritage Council;⁴³
- a proposed decision by the Minister to declare a place as a repository for Aboriginal objects;⁴⁴
- a proposed decision by the ACT Heritage Council to declare that particular information about the location or nature of an Aboriginal place or object is restricted information;⁴⁵
- advising the Conservator of Flora and Fauna (**the Conservator**) about the effect of a tree damaging activity or tree management plan proposed under the *Tree Protection Act 2005* (ACT).⁴⁶

As can be seen from this list, the Heritage Act ensures that RAOs are consulted in relation to a wide range of matters, of which we are very supportive. However, there is currently no requirement for consultation with RAOs in relation to the following matters:

- applications to carry out archaeological excavation work at or near an Aboriginal place or object;⁴⁷
- development applications that are referred to the ACT Heritage Council for advice pursuant to the *Planning and Development Act 2007* (ACT) (**P&D Act**),⁴⁸ or under the *Planning Bill 2022* (ACT) (**Planning Bill**) when enacted;⁴⁹
- the negotiation of a heritage agreement between the Minister and the owner of the place or object the subject of the agreement (lack of consultation with First Nations Peoples in heritage agreements is discussed further in **Part E** below).

We further note that, although the ACT Heritage Council is required to provide advice to the ACT Planning and Land Authority (or Territory Planning Authority under the Planning Bill) about the effect of the development on the heritage significance of a registered place or object or a nominated place or object that is likely to have heritage significance, there is no requirement for

³⁹ Heritage Act 2004 (ACT) s 26(5).

⁴⁰ Ibid, s 31.

⁴¹ Ibid, s 45.

⁴² Ibid, s 53.

⁴³ Ibid, ss 51-52.

⁴⁴ Ibid, s 53B.

⁴⁵ Ibid, s 54.

⁴⁶ Ibid, s 61B.

⁴⁷ Ibid, s 61E.

⁴⁸ *Planning and Development Act 2007* (ACT) ss 148(1) and 149; *Planning and Development Regulation 2008* (ACT) r 26(1)(f); *Heritage Act 2004* (ACT) ss 58 to 61.

⁴⁹ *Planning Bill 2022* (ACT) s 168(1)(a); draft *Planning (General) Regulation 2022* (ACT) rr 27(d) and 28(1)(f).

the Council to advise on the effect of the development on places or objects that are not registered or nominated to be registered.⁵⁰

In addition, although it is the usual practice of proponents in the ACT to engage cultural heritage consultants who engage with RAOs and provide a heritage survey to the proponent to accompany its development application, there are no provisions in the P&D Act, or the Planning Bill,⁵¹ that require development applications to be accompanied by a heritage survey. Instead, consultation with RAOs and the preparation of site heritage surveys occur outside the planning system and therefore outside the oversight of the ACT Government.

The ACT Government should consider including provisions in the Heritage Act to make consultation with RAOs mandatory for all decisions that relate to their cultural heritage, including applications to carry out archaeological excavation work at or near an Aboriginal place or object, development applications referred to the ACT Heritage Council under planning legislation, and heritage agreements.

In addition, in our submission to the ACT Government on the Planning Bill of 17 June 2022, we submitted that the Planning Bill should include provisions requiring decision-makers to consult with RAOs for key planning decisions including development applications, and should incorporate the principle of free, prior and informed consent.⁵² The Committee may consider this submission relevant to the present inquiry.

Recommendation 7: The ACT Government should take steps to ensure that representative Aboriginal organisations have more agency in decisions that relate to their cultural heritage. This may include, for example, including provisions in the *Heritage Act 2004* that allow representative Aboriginal organisations to explicitly give, or withhold, their consent to proposed decisions under the Act.

As noted earlier in these submissions, the ACT Government has obligations under human rights law to consult with First Nations before approving measures that may affect their Country, which includes an obligation to obtain their **free, prior and informed consent**.

The Juukan Gorge Inquiry recommended that, in developing minimum standards for state and territory legislation, consideration should be given towards including decision-making processes that ensure traditional owners and native title holders have primary decision-making power in relation to their cultural heritage, and that traditional owners should have the ability to withhold consent to the destruction of cultural heritage.⁵³

Under the Heritage Act, the power to make decisions that relate to First Nations cultural heritage ultimately rests with the ACT Heritage Council, and not with RAOs. This appears to be inconsistent with the principle of self-determination, and the principle of free, prior and informed consent. It is also currently not clear how much weight the opinions of RAOs are afforded when the ACT Heritage Council makes decisions about cultural heritage, or what occurs if the Council proposes

⁵⁰ *Heritage Act 2004* (ACT) s 60.

⁵¹ *Planning Bill 2022* (ACT) s 164(2).

⁵² Environmental Defenders Office, *Submission on the Planning Bill 2022* (17 June 2022), Recommendation 22, pp 32-34, available online at <https://www.edo.org.au/wp-content/uploads/2022/06/220617-EDO-Submission-on-the-ACTs-Planning-Bill-2022-1.pdf>.

⁵³ Joint Standing Committee on Northern Australia, *Final Report – A Way Forward* (2021) recommendation 3, [7.80], p 199.

to make a decision that is inconsistent with a RAO's opinion, which are other issues that indicate that the Heritage Act may be inconsistent with the principle of self-determination.

In circumstances where RAOs do not have decision-making power, the Heritage Act may be inconsistent with the principle of self-determination. For this reason, we encourage the ACT Government to consider taking steps to ensure that RAOs have more agency in decisions relating to their cultural heritage. One way that this could be achieved is to introduce provisions in the Heritage Act that allow RAOs to explicitly give, or withhold, their consent to proposed decisions under the Act.

E – Heritage agreements

Negotiation of heritage agreements

Recommendation 8: Amend the *Heritage Act 2004* to provide a process for consultation and negotiation with First Nations in relation to heritage agreements for the conservation of First Nations cultural heritage that is consistent with the principles of free, prior and informed consent, and that includes remuneration for such consultation.

The Juukan Gorge Inquiry recommended that, in developing minimum standards for state and territory legislation, consideration should be given to including a process for the negotiation of cultural heritage management plans that reflect the principles of free, prior and informed consent as set out in UNDRIP.⁵⁴

Under the Heritage Act, the Minister may enter into a heritage agreement with a person in relation to the conservation of the heritage significance of a place or object, whether or not it is registered.⁵⁵ However, an agreement may only be made in accordance with advice from the ACT Heritage Council, and only with the owner of the place or object or, if the owner consents, someone else.⁵⁶

The word ‘owner’ is not defined in the Heritage Act and it is unclear whether it can include traditional owners or custodians. We expect that this is unlikely.

It is possible that the subject of a heritage agreement could be the conservation of First Nations cultural heritage. However, as the Heritage Act is currently drafted, there are no provisions requiring consultation and negotiation with First Nations – including RAOs – before entering into a heritage agreement, even if the place or object is an Aboriginal place or object or is otherwise connected to First Nations cultural heritage. In the absence of such provisions, it is not clear whether First Nations Peoples are included in negotiations for the development of heritage agreements. In the absence of being included, it is not clear how First Nations Peoples can provide, or withhold, their free, prior and informed consent in relation to matters that may affect their Country.

We recommend that the ACT Government considers amending the Heritage Act to provide a process for consultation and negotiation with First Nations in relation to heritage agreements for the conservation of First Nations cultural heritage that is consistent with the principles of free, prior and informed consent. Consistent with recommendation #5, the ACT Government should also ensure that such a process for consultation and negotiation with First Nations includes appropriate remuneration of First Nations Peoples, or that First Nations Peoples and organisations who are consulted receive adequate funding to provide these services.

⁵⁴ Joint Standing Committee on Northern Australia, *Final Report – A Way Forward* (2021) recommendation 3, [7.80], p 200.

⁵⁵ *Heritage Act 2004* (ACT) s 99(1) and (3).

⁵⁶ *Ibid*, s 99(2).

Enforcement of heritage agreements

Recommendation 9: Amend the *Heritage Act 2004* to ensure that First Nations People have the right to enforce a heritage agreement for the conservation of First Nations cultural heritage.

Under the Heritage Act, a party to a heritage agreement may apply to the Supreme Court for an enforcement order to give effect to the agreement if someone contravenes the agreement, or there are reasonable grounds for believing that someone may contravene the agreement.⁵⁷

In circumstances where heritage agreements are to be made between the Minister and the ‘owner’ of the land, and where the ‘owner’ may not be a First Nations person, it is possible that the parties to a heritage agreement will not include First Nations Peoples.

For heritage agreements in relation to the conservation of First Nations cultural heritage, it is critical for First Nations People to have the right to seek enforcement of the heritage agreement if it has been, or may be, contravened, even if they are not a party to the agreement.

We therefore recommend that the ACT Government considers amending the Heritage Act to ensure that First Nations People have the right to enforce a heritage agreement for the conservation of First Nations cultural heritage.

⁵⁷ Ibid, s 104(1).

F – Civil enforcement

Recommendation 10: Amend the *Heritage Act 2004* to include more accessible civil enforcement mechanisms to ensure that non-compliance with the *Heritage Act 2004* is reported and enforced.

Under the Heritage Act, any person can apply to the ACT Supreme Court for a heritage order, but only with the Court's leave.⁵⁸ The Court will grant leave only if satisfied that the person first asked the ACT Heritage Council to apply to the Court for a heritage order and the Council failed to do so within a reasonable time, and it is in the public interest that the proceedings be brought.⁵⁹

No other enforcement options are available to third parties, which may include First Nations People. For example, people cannot bring an application for a heritage order in the ACT Civil and Administrative Tribunal (**ACAT**) and cannot make complaints to the ACT Heritage Council. There are therefore limited avenues for seeking redress for contraventions of the Heritage Act. In addition, the ACT Supreme Court is not an accessible forum for everyone in the ACT, due to the need for legal representation and the expenses of Court proceedings. The result is that people in the ACT have limited rights to access justice for contravention of the Heritage Act.

In addition, while certain people authorised under the Heritage Act have the power to engage in enforcement activities,⁶⁰ the Heritage Act lacks provisions for ongoing monitoring of compliance with matters including heritage directions, repair damage directions, or heritage agreements.

In the absence of an accessible civil enforcement mechanism, there is a risk that contraventions of the Heritage Act will not be identified and appropriately enforced.

We recommend that the Heritage Act could be amended to include a more accessible civil enforcement mechanism to ensure that non-compliance with the Act is reported and enforced. We suggest the ACT Government could consider introducing a complaints mechanism, whereby people could submit complaints about non-compliance with the Heritage Act to the ACT Heritage Council, which could then consider investigating the complaint and taking enforcement action if appropriate.

Recommendation 11: Amend the *Heritage Act 2004* to give power to the ACT Civil and Administrative Tribunal to determine applications for heritage orders.

As noted above, the ACT Supreme Court is not an accessible forum for seeking heritage orders. The result is that many people may elect not to apply to the Court for a heritage order due to the significant financial and other barriers involved in bringing legal proceedings in the Supreme Court. For this reason, we suggest the ACT Government considers whether a more accessible forum like the ACAT is more appropriate to determine applications for heritage orders. If so, we also recommend that the ACT Government ensures that ACAT is afforded adequate resourcing and receives training of its staff to deal with heritage orders.

⁵⁸ *Heritage Act 2004* (ACT) s 68(1)(b).

⁵⁹ *Ibid*, s 68(2).

⁶⁰ *Ibid*, Part 14.

Recommendation 12: Amend the *Heritage Act 2004* to remove provisions requiring applicants for heritage orders to pay security for costs and/or compensation for the respondent's loss and damage.

The Heritage Act provides that the Supreme Court may order an applicant for a heritage order to give security for the payment of costs that may be awarded against them if their application is subsequently dismissed.⁶¹

In addition, where the Supreme Court is satisfied that the respondent to an application has not contravened the Heritage Act and has suffered loss or damage because of the application, the Court may order the applicant to pay the respondent compensation for the loss or damage.⁶² The Court may also order the applicant to give an undertaking about the payment of any amount of compensation that may be awarded against them.⁶³

These provisions create significant financial risks for people applying to the Court for a heritage order, and are extremely prohibitive. The risk of the Court making an order to give security for costs, or an undertaking about the payment of compensation, is so prohibitive that many applicants will simply elect not to pursue an application for a heritage order.

For this reason, we recommend the ACT Government considers amending the *Heritage Act 2004* to remove these provisions. Alternatively, the ACT Government may consider amending these provisions to provide strict limitations on the Court's power to make such orders, for example by including exceptions where the applicant is a First Nations Person seeking to protect their cultural heritage.

⁶¹ Ibid, s 72(a).

⁶² Ibid, s 73.

⁶³ Ibid, s 72(b).

G – Review rights

Recommendation 13: Amend the *Heritage Act 2004* to allow interested persons to seek review of registration and cancellation decisions if they had a reasonable excuse for not making comments during the public consultation period.

The Heritage Act permits review by ACAT of reviewable decisions, which are set out in Schedule 1, column 3 of the Heritage Act.⁶⁴ An application for review may be brought by an ‘interested person’,⁶⁵ which are defined in s 13 of the Heritage Act.

We note that the definition of ‘interested person’ under the Heritage Act permits a wide range of people to apply to ACAT for review of a reviewable decisions, and we are generally supportive of the extent to which the Heritage Act provides for ACAT review rights.

However, for decisions about registration,⁶⁶ or cancellation of registration,⁶⁷ people can seek review of such decisions only if they made comments in writing to the ACT Heritage Council before the end of the public consultation period for the decision.⁶⁸ This may exclude people whose rights and interests are genuinely affected by a decision – including First Nations Peoples – from seeking review of a decision merely because they did not participate in the public consultation process. This is restrictive, particularly if the person was genuinely not aware of the public consultation process, or if they did not have adequate time and resources to submit a comment before the end of the consultation period.

We recommend that the ACT Government considers amending the Heritage Act to include a more flexible approach that allows interested persons to seek review of registration and cancellation decisions if they had a reasonable excuse for not making comments during the public consultation period. We note that this approach would be consistent with the provisions of the P&D Act and the Planning Bill, which permit third parties to seek ACAT review of certain decisions about development proposals if they had a reasonable excuse for not making a representation about the proposal.⁶⁹

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⁶⁴ *Heritage Act 2004* (ACT) s 111.

⁶⁵ *Ibid*, s 114.

⁶⁶ *Ibid*, s 40.

⁶⁷ *Ibid*, s 49.

⁶⁸ *Ibid*, s 13(1)(g) and (h).

⁶⁹ *Planning and Development Act 2007* (ACT) Schedule 1, item 4, 6 and 12; *Planning Bill 2022* (ACT) Schedule 6, Part 6.2, item 2, 6 and 8. However, for clarity, we would not support the introduction of the ‘material detriment’ test from planning legislation in the Heritage Act, as this test is prohibitive and is not easily understood by some members of the ACT community and is not appropriate for legislation concerning First Nations cultural heritage.