Environmental Defenders Office

Submission to the Special Rapporteur on the Rights of Indigenous Peoples

4 April 2026

About EDO

The EDO is the largest environmental legal centre in the Australia-Pacific. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 40 years of 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.

Specialist expertise in protecting Country and Cultural Heritage. EDO recognises the integral role of First Nations in environmental justice in Australia. EDO's First Nations Program was established in 2020 to work with and advocate for the rights of First Nations peoples across all EDO's work. In June 2023, the Country and Cultural Heritage Program was incorporated into the First Nations Program, as a dedicated, nation-wide program specifically tailored to provide services to First Nations peoples seeking legal support to protect their culture and Country.

Submitted to:
Dr. Albert K. Barume
Special Rapporteur on the Rights of Indigenous Peoples
By email only: hrc-sr-indigenous@un.org

For further information on this submission, please contact:

Jonathon Captain-Webb
Director, First Nations Program

E: jonathon.captainwebb@edo.org.au

Lauren Ash
Senior Solicitor, Country & Cultural Heritage, First Nations Program
E: lauren.ash@edo.org.au

Acknowledgement of Country

EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past and present, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations Cultural Heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since colonisation.

EDO recognises the right to self-determination of First Nations peoples, including their right to freely determine their own political status and freely pursue their economic, social and cultural development. This extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support and sustain human life are also nurtured, supported and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

Acknowledgement of contributors

We acknowledge the following individuals and organisations who have generously shared their cultural knowledge and expertise, which has informed and guided this submission: Kado Muir, Ngalia elder, Dr Anne Poelina, Roselene Best, Kombumerri and Ngugi Traditional Owner of the Gold Coast and Moreton Bay, the Murray Lower Darling Rivers Indigenous Nations and the Tasmanian Aboriginal Centre.

A note on language

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations. We acknowledge that not all First Nations will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.[1]

[1] For the purposes of this submission, we refer to: *Australia*, officially known as the Commonwealth of Australia, and refer to its governing body under Western Law, as the *Australian Government*; references to *Commonwealth, federal or national legislation, regulation or policies* are references to the laws, regulations and policies of the Australian Government and Australian Parliament; References to a *state or territory*, or *state or territory governments* refers to the jurisdiction of the seven states and territories and their governments that make up Australia; and references to *state or territory legislation, regulation or policy* is a reference to legislation, regulation and policy of Australia's subnational state and territories governments and parliaments; references to *Australian governments* are to the Australian Government and state and territory governments collectively.

Contents

Introduction

Environmental Defenders Office Ltd (**EDO**) welcomes the opportunity to provide a written submission in response to the Special Rapporteur's call for input in preparation for his upcoming country visit to Australia in November 2026.

As we draft this submission, First Nations communities across the Top End of Australia are facing a seemingly unrelenting series of natural disasters involving repeated flooding, extreme heat and tropical cyclones. The Australian Government's National Climate Risk Assessment has recently identified extreme heat as one of the most severe climate risks facing Australia, with disproportionate impacts in the Northern Territory and among Aboriginal and Torres Strait Islander communities.[2]

The reality of climate change faced by First Nations communities across Australia is stark. It compounds ongoing failures of Australian governments to recognise, respect and uphold First Nations peoples' fundamental human rights in respect of their Country, waters and Cultural Heritage. Indeed, since the former Special Rapporteur's visit to Australia in 2017:

- The recommendations of the Special Rapporteur have largely failed to be implemented. The *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**) has not been implemented at legislative, policy or program levels.[3]
- In 2020, Rio Tinto destroyed 46,000+ year old rock shelters at Juukan Gorge, causing immeasurable cultural and spiritual loss and profound grief for the Puutu Kunti Kurrama and Pinikura peoples. Recommendations of the resulting Joint Standing Committee on Northern Australia's Juukan Gorge Inquiry in 2021, intended to prevent a similar disaster in the future, remain largely unaddressed.
- In 2022, the UN Human Rights Committee found that Australia breached the rights of Torres Strait Islanders to enjoy their culture, and to be free from arbitrary interferences with their private life, family, and home, due to inadequate action on climate change.[4]
- In 2023, the Australian Government's proposal to change the Constitution to recognise First Nations peoples by establishing an Aboriginal and Torres Strait Islander Voice to advise Parliament failed at referendum.[5]
- In 2024, the Committee on the Elimination of Racial Discrimination made serious findings against the Australian and Western Australian governments in relation to their handling of Indigenous cultural heritage issues and related legal reforms.[6]

[2] Australian Climate Service, *National Climate Risk Assessment* (2025).
[3] Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, (2017), UN Doc A/HRC/36/46/Add.2, (**2017 Report**). See also James Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Addendum - The situation of indigenous peoples in Australia* (2010), UN Doc A/HRC/15/37Add.4, [74] (**2010 Report**).
[4] For example, by failing to build seawalls or lower emissions. See United Nations Human Rights Committee, *Daniel Billy et al. v. Australia* (2019). See also Australia violated Torres Strait Islanders' rights to enjoy culture and family life, UN Committee finds | OHCHR for more information.
[5] This is despite the Special Rapporteur's recommendations outlined in the 2010 Report, paras 79-81.
[6] See **Annexure 4**, Committee on the Elimination of Racial Discrimination (2024), CERD/EWUAP/112th session/2024/CS/cs/ks, and Dr Hannah McGlade, "UN: WA Aboriginal heritage laws may breach Indigenous people's rights under international law", *National Indigenous Times* (2024).

- In 2025, the Federal Court of Australia found that the common law of negligence is not available to Torres Strait Islander people seeking redress for the devastating impacts of climate change on Ailan Kastom, their cultural traditions and practices.[7]
- In 2025, the rights of First Nations peoples and other members of the Australian community to participate in environmental approval processes were wound back in several Australian jurisdictions.[8]

Role of EDO

EDO is a non-Indigenous community legal centre specialising in public interest environmental law. EDO lawyers have assisted First Nations clients and communities around Australia in their efforts to protect their Country and Cultural Heritage from damage and destruction.

EDO recognises the unceded sovereignty of First Nations peoples and their inherent rights to self-determination and control of their lands and waters, as recognised by international law. Our work is underpinned by an environmental justice and human rights framework. We further recognise that the human rights of First Nations peoples are disproportionately impacted by environmental harm, including climate change.

Out of respect for First Nations self-determination, EDO's recommendations for Western law reform are high-level, so as to support First Nations to protect their Countries and Cultural Heritage as they see fit. In making this submission, EDO cannot and does not speak on behalf of First Nations peoples or groups. The submission is based on our expertise in planning and environmental Western law and experience in seeking to protect First Nations Cultural Heritage through the Western law. Across Australia, we have worked on behalf of First Nations clients who have interacted with Cultural Heritage and water laws in many ways, from litigation and engaging in other state/territory law reform processes, through to broader First Nations-led environmental governance of on-Country projects.

Our observations also recognise that Australia's federal system of government means that the issues impacting First Nations peoples are different and disproportionate across state/territory jurisdictions, and meeting Australian's international legal obligations will require both Australian and state and territory-based reform.

Content of Submission

This submission responds to the following specific issues and thematic areas identified in the Special Rapporteur's call for input, namely:

- Australian legislative and policy frameworks: Context and Gaps
    a) Lack of comprehensive human rights legislation in Australia
    b) Failure to recognise, implement and incorporate UNDRIP and the principle of Free, Prior and Informed Consent (**FPIC**) in Australian laws related to Country, Cultural Heritage and Water

---

[7] *Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796. See also EDO's case note on this decision . The Court found against the submissions put by Torres Strait Islander peoples that Australia owed, and had breached, a duty of care to protect them, their way of life, and the environment from the growing harm and destruction arising from climate change. The case is currently being appealed to the Full Federal Court of Australia: see Kirstie Wellauer, Torres Strait Islanders appeal federal court decision on landmark climate case, *ABC News* (online, 11 November 2025).

[8] See, for example, in Western Australia: Anti-democratic WA bill threatens nature and community rights - Environmental Defenders Office, in the Northern Territory: EDO-Briefing-Note-Territory-Coordinator-Bill-2024.pdf, particularly the removal of merits review rights in relation to water licensing and fracking on page 14, and Queensland's planning law changes to streamline projects or the 2032 Olympics, see Jack McKay, 'Government to introduce bill that will override 15 planning laws for 2032 Olympic venues', *ABC News* (online, 1 May 2025).

- Critical human rights issues facing First Nations in Australia
    c) First Nations' water access and rights
    d) Protection of Cultural Heritage
    e) Climate justice for First Nations peoples.

We recognise and acknowledge that there are other critical and systemic human rights issues facing First Nations peoples. The issues we address in this submission are based on EDO's experience and expertise.

Threshold Recommendations

Recommendation:

Broadly, EDO recommends that:

1. During his upcoming country visit, the Special Rapporteur:
    a) address these critical issues:
        a. lack of comprehensive human rights legislation in Australia
        b. failure to recognise, implement and incorporate UNDRIP and FPIC in Australian laws related to Country, Cultural Heritage and water
        c. lack of water rights and access to water for First Nations
        d. inadequate protection of Cultural Heritage
        e. climate injustice being experienced by First Nations peoples in Australia, including Australia's failure to mitigate climate change and to adequately support First Nations communities to respond to current and future impacts of climate change; and
    b) meet with First Nations individuals and representative organisations on Country to hear directly from them about these critical issues.

2. Following his visit, the Special Rapporteur reiterate recommendations of the previous Special Rapporteur which are yet to be implemented, including that the Australian Government:
    a) introduce (and constitutionally enshrine) a Federal Human Rights Act that incorporates UNDRIP;
    b) develop, in partnership with First Nations, a national strategy to give effect to UNDRIP;
    c) include UNDRIP in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); and
    d) extend protected areas when requested by First Nations and support the joint management of protected areas and the Indigenous rangers programme.

The following submission explains why we consider items 1(a)-(e) to be critical areas for this year's visit and expands on these recommendations in relation to each of them, summarised as follows.

Summary of Recommendations on Critical Issues

Implement legislative protection for human rights

1. The Australian Government should introduce a federal Human Rights Act incorporating UNDRIP and Australia's other international human rights obligations.
2. All Australian state and territories should enact a Human Rights Act.
3. New human rights legislation, and existing human rights legislation should be strengthened to:
    a. fully incorporate UNDRIP;
    b. recognise, legislate for and uphold First Nations' cultural rights;
    c. include a duty to ensure the participation of First Nations peoples in relation to decisions that directly or disproportionately affect their rights;
    d. recognise a right to a healthy environment;
    e. impose a duty on public authorities to act compatibly with human rights and to consider human rights when making decisions;
    f. include a standalone, accessible and enforceable remedy for breach of a right(s); and
    g. impose a duty on private actors to act consistently with human rights.
4. First Nations led organisations should be adequately resourced to advocate for and protect their rights under both new and existing human rights frameworks.

Enshrine UNDRIP in laws related to Country, Cultural Heritage and water

5. Cultural Heritage, environment, planning and water legislation in all Australian jurisdictions should be reformed to:
    a. meaningfully incorporate UNDRIP principles and other international obligations, including the right to self-determination and the principle of Free, Prior and Informed Consent in respect of all decisions that impact on First Nations;
    b. better integrate and protect Indigenous expertise and knowledge, including Indigenous Cultural and Intellectual Property, while retaining First Nations control of that expertise and knowledge;
    c. recognise the interconnection between Country (terrestrial, freshwater and marine), Cultural Heritage and species;
    d. require consideration of Cultural Heritage in all environmental and planning approval processes;
    e. provide greater transparency and improved access to information about how the legislation operates;
    f. strengthen support for the current Indigenous Protected Areas framework to extend protection of Country and facilitate First Nations governance of that scheme; and
    g. improve accountability and access to justice for First Nations by including third-party review rights and enforcement provisions.
6. Self-determined First Nations-led innovations in governance of Country should be prioritised, supported, resourced and encouraged.

Implement measures to support First Nations water justice

7. Legislative and policy frameworks relating to water across Australia, including the *Water Act 2007* (Cth), should be reformed to be consistent with international obligations, including UNDRIP and the *International Convention on the Elimination of All Forms of Racial Discrimination* including to:
    a. recognise and reflect the right to self-determination in all decision-making processes related to water and water resources (including development of water strategies, plans,

allocations and licensing regimes) by centring and resourcing First Nations voices, knowledge and expertise;
   b. recognise and support First Nations water governance including by integrating Indigenous knowledge into water management, adequate resourcing of self-determined First Nations representative water governance bodies and providing access to Western scientific expertise and Indigenous-led community education on water rights and frameworks;
   c. increase First Nations access to, ownership of and control of water resources so that Traditional Owners can achieve their cultural, social and economic aspirations;
   d. guarantee cultural flows (First Nations water allocations) with accountability mechanisms in place; and
   e. provide for open standing provisions for First Nations peoples to be able to hold decision-makers to account in relation to water.
8. Climate change should be a relevant consideration in all government decision-making that relates to the extraction of water from the environment, including through the introduction of a national standard that ensures climate considerations are addressed in all water sharing plans.

Protect Cultural Heritage

9. The recommendations of the Joint Standing Committee on Northern Australia's *A Way Forward* report should be implemented in full.
10. Cultural Heritage, environment, water, native title and planning laws at local, state/territory and Australian Government levels should be comprehensively reviewed to ensure they operate coherently to protect Cultural Heritage.

Support climate justice for First Nations peoples

11. Australian Governments should effectively engage with Indigenous knowledge holders to collaborate and tackle the urgent need for action on climate change and biodiversity loss, and ensure fairness and inclusion in climate initiatives.
12. Australian Governments should recognise, support, prioritise and fund:
   a. Self-determined First Nations-led initiatives to respond to and adapt to climate change;
   b. Self-determined First Nations governance models that are incorporated into environmental management;
   c. Co-designed and co-led environmental disaster preparedness planning to ensure that it is appropriately addressing and incorporating First Nations concerns and objectives;
   d. First Nations-led solutions to the energy and food insecurity and housing crises which are further exacerbated by climate change;
   e. First Nations peoples, communities and organisations access to Western and Indigenous scientific expertise to engage effectively in environment and planning systems; and
   f. First Nations communities to adapt to climate change, including extreme heat, lack of access to water and energy, and broader health impacts.

Australian legislative and policy frameworks: Context and Gaps

1. Inadequate human rights legislation at the Australian and State/Territory levels

Australia has agreed to be bound by obligations to respect, protect and uphold human rights recognised in the:

- International Covenant on Civil and Political Rights (**ICCPR**),
- International Covenant on Economic, Social and Cultural Rights (**ICESCR**),
- International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**),
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**),
- Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**),
- Convention on the Rights of the Child (**CRC**),
- Convention on the Rights of Persons with Disabilities (**CRPD**).

Australia has also endorsed UNDRIP.

While Australia does not have a Federal Human Rights Act, some international human rights have been incorporated in Australian legislation. The *Australian Human Rights Commission Act 1986* (Cth) helps give effect to Australia's obligations under the ICCPR, by empowering the Commission to investigate alleged breaches of those rights but does not directly codify the rights in the ICCPR as enforceable domestic law. Other human rights are protected through anti-discrimination legislation,[9] or through human rights laws in specific states or territories.[10]

Current human rights protection in Australia is therefore piecemeal. There are insufficient mechanisms to address environmental injustices being experienced by First Nations or enable First Nations impacted by environmental harms to seek redress. For example, despite finding that climate change has had devastating impacts on the Ailan Kastom (the cultural traditions and practices of Torres Strait Islanders), the Federal Court of Australia recently found that the Australian common law of negligence offers no means of redress.[11]

These existing mechanisms are inadequate to protect human rights in Australia. EDO strongly recommends that the Australian Government enact human rights legislation, and that all states and territories enact a Human Rights Act where they have not already done so.[12] These laws should include the elements discussed below.

EDO appeared at the most recent Federal Parliamentary Inquiry into Australia's Human Rights Framework and made similar recommendations, particularly as to what such a framework must include (see **Annexure 1**[13] for our submissions to that Inquiry). We continue to press these recommendations.

---

[9] See, e.g., *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 1992* (Cth); *Fair Work Act 2009* (Cth).

[10] Three Australian states and territories currently have human rights Acts: see *Human Rights Act 2004* (ACT), *Charter of Human Rights and Responsibilities Act 2006* (VIC), and *Human Rights Act 2019* (QLD).

[11] *Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796. See also EDO's casenote on this case at Pabai v Commonwealth of Australia. The case is currently being appealed to the Full Federal Court of Australia: Kirstie Wellauer, 'Torres Strait Islanders appeal federal court decision on landmark climate case', *ABC News* (online, 11 November 2025).

[12] See footnote 10 for the jurisdictions that currently have human rights legislation.

[13] Environmental Defenders Office, Submission to Parliamentary Joint Committee on Inquiry into Australia's Human Rights Framework 2023, (2023). The outcome and recommendations made by the Parliamentary Joint Committee on Human Rights in its Inquiry into Australia's Human Rights Framework can be accessed here: Inquiry into Australia's Human Rights Framework.

Rights of First Nations peoples

First Nations peoples possess a special, inherent connection to Australia. Their intrinsic rights from their traditional laws and customs are not dependent on and cannot be limited by Australian Western Law.[14] Native title is one way that First Nations peoples have been able to 'activate' their inherent rights in Australia, but there are significant gaps in the Australian Western legal framework to recognise all rights of Indigenous peoples, including those outlined in UNDRIP.

EDO recommends the incorporation into federal and state and territory human rights legislation of:

- all rights of First Nations peoples recognised under UNDRIP, including the principle of free, prior and informed consent; and
- other human rights contained in treaties such as the ICCPR, including substantive cultural rights for First Nations.[15]

Articles 18, 19 and 32 of UNDRIP protect the right of Indigenous peoples to participate in decisions that affect them and the right of Indigenous peoples to free, prior and informed consent. Consistent with these Articles, any rights relating to First Nations peoples in a federal Human Rights Act, or other legislation, must be co-designed with First Nations peoples, their chosen representative groups, and other First Nations stakeholders.[16] Subject to this consultation, human rights legislation must contain a 'participation duty' to ensure the participation of First Nations peoples in relation to decisions that directly or disproportionately affect their rights. This should include positive practical requirements to enable First Nations' participation.

EDO considers that the rights of First Nations peoples must be reflected as both individually and collectively held and exercisable rights within a federal Human Rights Act, rather than merely an obligation and duty on authorities to uphold those rights.

A Right to a Healthy Environment

The right to a healthy environment recognises that all humans have the right to live in a clean, healthy and sustainable environment. It is important to acknowledge that the foundations of this right come from a number of cultural knowledges and traditions of Indigenous peoples around the world, including First Nations peoples.[17]

The Australian Capital Territory is the only Australian jurisdiction that recognises the right to a healthy environment.[18] It is clear existing laws are not sufficient to protect this right, that is otherwise recognised at international law:[19] Australia is witnessing unacceptable levels of environmental harm, with disproportionate impacts on First Nations communities.

---

[14] See *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3; (2020) 270 CLR 152.

[15] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27. The *Human Rights Act 2019* (Qld) recognises cultural rights generally and specific to First Nations Peoples (ss 27-28). See also Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (Report, May 2024) [9.42].

[16] See the Parliamentary Inquiry regarding the inclusion of First Nations rights in a Federal Human Rights Act: Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (Report, May 2024), [6.110]-[6.130], and recommendation 2 at [9.42] including the recommendation to "consult with Aboriginal and Torres Strait Islander peoples in relation to the framing of Indigenous peoples' right to culture to ensure it adequately captures all applicable rights under international human rights law".

[17] Maria Antonia Tigre, 'Exploring the Bedrock for Earth Jurisprudence' (2021) 22(2) *Rutgers Journal of Law & Religion* 223, 265–270.

[18] *Human Rights Act 2004* (ACT), s 27C; see Environmental Defenders Office, Right to a Healthy Environment in the ACT (Factsheet).

[19] *Obligations of States with respect to Climate Change* (Advisory Opinion) [2025] ICJ Rep 187; General Assembly Resolution on the Right to a Healthy Environment, GA Res 76/300, UN GAOR, 76th sess, 104th plen mtg, Agenda Item 120, UN Doc A/RES/76/300 (28 July 2022).

All state/territory and federal human rights legislation should explicitly recognise the right to a healthy environment in Australia.[20] This right should be defined broadly and consistently with international law, and in consultation with First Nations peoples in order to recognise relationships between their rights to culture, health, self-determination, and a healthy environment, [21] with other concepts including the 'rights of nature'.[22]

A positive duty on public authorities and effective remedies for breaches

To be effective, human rights legislation must also:

- impose an express, positive duty on federal public authorities to act compatibly with human rights, including First Nations rights, and to consider human rights when making decisions; and
- ensure access to effective remedies for breaches of human rights, including an informal complaints mechanism, access to judicial remedies and adequate protections for individuals and communities against adverse costs orders.[23]

Application to private actors

International law imposes a duty on States to protect human rights from harmful interference by businesses and other private actors.[24] Similarly, individuals must be able to access effective remedies against private actors as well as government authorities.[25]

In the environmental context, the UN Human Rights Committee has recognised that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. [26]Thus, in order to safeguard the right to life, the Committee says that States must preserve the environment and protect it from harm, pollution and climate change caused by both public and private actors.[27]

Given the direct impact on First Nations rights of environmental degradation, climate change and unsustainable development, EDO considers it essential that human rights legislation include a duty that private actors act consistently with human rights and include accessible remedies for harmful interference on human rights by private actors.

[20] Environmental Defenders Office, A Healthy Environment is a Human Right (Report, 2022).
[21] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (Report, May 2024) [9.42]: "further consideration be given to the drafting of the right to a healthy environment, including consultation with Aboriginal and Torres Strait Islander peoples on how best to recognise the relationship between the right to a healthy environment and the rights to culture, health and self-determination for Aboriginal and Torres Strait Islander peoples".
[22] Mihnea Tanasescu, 'When a river is a person: From Ecuador to New Zealand, Nature Gets its Day in Court', *The Conversation* (News Article, 19 June 2017); David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017); Elizabeth Macpherson, *The (human) rights of nature: a comparative study of emerging legal rights for rivers and lakes in the United States of America and Mexico* (2021) Duke Environmental Law and Policy Forum (Vol: XXXI), 327.
[23] Recommendation 12 in EDO's Submission to the Inquiry into Australia's Human Rights Framework.
[24] John Knox, *Framework Principles on Human Rights and the Environment,* UN Doc A/HRC/37/59 (24 January 2018) [5], 7-8.
[25] Ibid [5], [28], 13.
[26] UN Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc CCPR/C/GC/36 (3 September 2019) [62], 13.
[27] Ibid.

Recommendations

1. The Australian Government should introduce a federal Human Rights Act incorporating UNDRIP and Australia's other international human rights obligations.
2. All Australian states and territories should enact a Human Rights Act.
3. New human rights legislation, and existing human rights legislation should be strengthened to:
    a. fully incorporate UNDRIP;
    b. recognise, legislate for and uphold First Nations cultural rights;
    c. include a duty to ensure the participation of First Nations peoples in relation to decisions that directly or disproportionately affect their rights;
    d. recognise a right to a healthy environment;
    e. impose a duty on public authorities to act compatibly with human rights and to consider human rights when making decisions;
    f. include a standalone, accessible and enforceable remedy for breach of a right(s); and
    g. impose a duty on private actors to act consistently with human rights.
4. First Nations-led organisations should be adequately resourced to advocate for and protect their rights under both new and existing human rights frameworks.

2. Failure to recognise, implement and incorporate UNDRIP and FPIC into Australian law regarding Country, Cultural Heritage and Water

Australia's legal framework at both federal and state/territory levels does not adequately recognise or give effect to the rights of First Nations peoples. This is particularly true of all legislative regimes related to Country (including planning and environmental laws), Cultural Heritage and water. In particular, it falls well short of the standards set out in UNDRIP, including, among other things:

- the right to self-determination (Art 3);
- rights to lands, territories and resources (Arts 25–26);
- the requirement for free, prior and informed consent (FPIC) (Arts 10, 19, 32); and
- the right to participate in decision-making (Art 18).

In particular, UNDRIP mandates that States engage in genuine consultation and cooperation with First Nations peoples and their representative organisations to secure their free, prior, and informed consent (**FPIC**). FPIC reflects the inherent collective right of First Nations peoples to participate in decision-making processes on issues and laws that affect their lives, lands, waters, skies and resources, and to grant or withhold consent where decisions affect them.

FPIC must be obtained before enacting any laws or policies that may impact First Nations peoples, and in particular, before undertaking any activities or processes on their lands and waters.[18] FPIC also requires that First Nations peoples and communities are equipped with:

- access to information that is unfiltered, interpreted into First Nations ways of understanding and framing;
- an understanding of their rights (inherent and recognised in Western law) and how infringements of or impacts on those rights can be managed; and
- authority, autonomy and adequately resourced governance structures to respond.

Despite Australia's endorsement of UNDRIP in 2009 and various attempts by members of parliament to pass legislation to implement UNDRIP,[28] Australia has largely failed to incorporate UNDRIP into Australian law at all levels of government relating to Country, Cultural Heritage and water, including environment and planning legislative regimes. Any implementation of UNDRIP and FPIC in Australia has been piecemeal. Relevant statutes do not require decision-makers to act consistently with UNDRIP, and it has no direct legal force in approvals, planning, or resource management decisions. Outside of the Native Title Act and statutory land rights frameworks, First Nations rights are largely not legally enforceable within decision-making frameworks, often rendering First Nations' roles tokenistic and culturally inappropriate. There is also a lack of mechanisms for meaningful Indigenous participation in decision-making, including First Nations representative organisations.

Australian laws generally position First Nations peoples as stakeholders to be consulted, rather than as decision-makers or rights-holders with authority over Country.[29] Decision-making power remains vested in Ministers and government agencies, with only limited consultation opportunities that are typically required to be 'considered' by decision-makers. There are limited examples of First Nations having:

- co-decision-making or governance authority; and
- legal rights to meaningfully control outcomes on Country.

This approach is inconsistent with the right to self-determination recognised in UNDRIP that requires Indigenous governance and autonomy.

Procedural rather than substantive rights

Consultation in place of consent

A central deficiency in much of Australia's legal framework is the absence of a requirement to obtain Free, Prior and Informed Consent. Some environmental laws make no mention of a requirement to consider First Nations views;[30] many require only that decision-makers:

- consult with or just recognise the interests of First Nations peoples;[31] or
- "have regard to" or "take into account" Indigenous knowledge or cultural values.[32]

These obligations are procedural in nature and do not confer a right to withhold consent. Projects with significant impacts on Country may therefore proceed despite clear opposition from Traditional Owners. Further, consultation typically is for short periods determined by governments or their agencies which do not recognise cultural and First Nations governance practices, such as the collective nature of decision-making. This is fundamentally inconsistent with UNDRIP, which requires consent—not merely consultation—before approving developments affecting Indigenous lands and resources.

While the recognition of native title following *Mabo v Queensland (No 2)* was a significant development, native title does not provide a comprehensive or secure basis for environmental governance. It is limited in scope, vulnerable to extinguishment and does not confer decision-

[28] See, for example, Following the Voice failure, Indigenous politicians are calling for the UN's Declaration on the Rights of Indigenous Peoples to be implemented. What is it and what would it mean?

[29] Dr Anne Poelina notes that "Aboriginal custodians are considered stakeholders rather than decision-makers". See Anne Poelina 'Martuwarra Fitzroy River Catchment– sustainable lifeways and livelihoods' (2026) *Australasian Journal of Water Resources,* 9.

[30] See, for example, *Environmental Planning and Assessment Act 1979* (NSW); *Water Act 2014* (NSW).

[31] See, for example, *Environmental Protection Act 1994* (Qld) s 6; *Water Act 2000* (Qld) s 2(2)(d).

[32] See new *Environment Protection Reform Act 2025* (Cth) s 194E(2)(b), 557 amending the EPBC Act; *Water Act 2007* (Cth) s 3(fa), 21(4)(c)(v).

making authority over environmental approvals. For example, there is no right of veto under the *Native Title Act 1993* (Cth).

Inadequate support for First Nations–led decision-making

Currently, siloed environment, water, Cultural Heritage and planning laws rarely provide for co-governance with First Nations decision-makers, hindering Traditional Owners' implementation of their own innovative governance models that manage and protect their Country (including their heritage).

The Indigenous Protected Area (**IPA**) framework demonstrates First Nations–led governance innovations that contribute to managing Country and protecting heritage. IPAs now make up a large proportion of the National Reserve System (**NRS**), Australia's network of protected areas preserved for future generations, and make a significant contribution to Australia's international environmental obligations regarding protected areas. While IPAs currently do not have a secure legal basis, the support for First Nations management over large tracts of land has had significant benefits for First Nations-led land management. The IPA network should be supported and its scope expanded to better protect Country and facilitate further First Nations governance and decision-making.

Inadequate recognition of Cultural Knowledge and Lore

UNDRIP recognises the right of Indigenous peoples to maintain, control and protect their Cultural Heritage and traditional knowledge. However, Australian laws typically:

- privilege Western scientific knowledge systems;
- do not require equal weighting of First Nations knowledge; and
- rarely embed cultural law and governance into decision-making criteria.

For example, where Cultural Heritage is considered in environmental approvals, it is often treated as a discrete factor rather than as integral to environmental management and is often dealt with through post-approval requirements for Cultural Heritage management plans. Further, it is rare that legislation requiring input from First Nations based on their Indigenous Cultural and Intellectual Property (**ICIP**) is accompanied by recognition and protection of that ICIP.

These issues are demonstrated in the following case studies:

Case study 1: Lack of integration of UNDRIP and FPIC in environmental law

Across jurisdictions, the environmental legal framework is characterised by fragmented and inconsistent recognition of First Nations interests; reliance on procedural consultation mechanisms and absence of enforceable rights aligned with UNDRIP; and a lack of enforceable First Nations rights, rendering them often tokenistic and culturally inappropriate.

The current environmental law framework in Australia reflects a systemic failure to implement a rights-based approach to First Nations governance and authority. At both Commonwealth and state/territory levels, laws continue to:

- prioritise administrative discretion over rights;
- treat First Nations peoples as stakeholders rather than rights-holders; and
- fall short of international human rights standards.

The failed good intentions of the Federal Water Act

The *Water Act 2007* (Cth) provides a clear example of the broader, systemic deficiencies even where there was an intention to provide greater recognition of First Nations interests in water

governance. The Act includes some acknowledgment of Indigenous values and uses of water, particularly in relation to Murray-Darling Basin planning.[33] However, it does **not**:

- recognise First Nations peoples as holders of inherent water rights;
- provide for legally enforceable cultural water entitlements[34]; or
- embed a requirement for FPIC.

First Nations peoples continue to hold a disproportionately small share of water entitlements, and there are no robust mechanisms to redress this imbalance. See more detail on page 21 below.

Australian environmental law largely ignores Cultural Heritage and First Nations rights

Similar issues arise across all environmental, Cultural Heritage, planning and development law frameworks, from the Australian *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) to state and territory laws and local government laws.

The EPBC Act could go significantly further to ensure First Nations-led protection of Country (and Sea Country), including by recognising that Country is inclusive of environment (terrestrial, freshwater and marine), culture and heritage. Currently, there is a general lack of transparency about how the EPBC Act operates in relation to protection of heritage and its interaction with the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSHIP Act**), and a specific lack of transparency as to involvement of Traditional Owners in decision-making about their heritage pursuant to the EPBC Act.

The objects of the EPBC Act should be amended to explicitly recognise and incorporate First Nations connection to and right to protect Country. These rights should be implemented via First Nations led decision-making and accessible enforcement powers. While recent amendments to the EPBC Act have sought to better incorporate First Nations knowledge into decision-making, these changes should be strengthened by clearer roles for First Nations representation in decision-making and measures to ensure that ICIP is appropriately managed and protected.

Recent trends in environmental law have reduced democratic oversight and community rights of participation, particularly in Western Australia, the Northern Territory and Queensland.[35] These changes reduce First Nations people's ability to participate in environmental approval processes in relation to water, major projects and nature.

Substantive reform is required to align Australian environmental law with UNDRIP. Without these reforms, environmental decision-making will continue to exclude First Nations peoples from meaningful participation in decision-making about and control over Country.

---

[33] *Water Act 2007* (Cth), see for example 'Objects' s3(fa): 'to ensure that the use and management of Basin water resources takes into account spiritual, cultural, environmental, social and economic matters relevant to Indigenous people, including in relation to their knowledge, values, uses, traditions and customs;' and 'Purpose of Basin Plan' s20(da): 'the use and management of Basin water resources that takes into account spiritual, cultural, environmental, social and economic matters relevant to Indigenous people'. Further the Murray Darling Basin Authority must 'engage the Indigenous community on the use and management of Basin water resources' (s172(1)(ia)) and there is a requirement to implement an Indigenous water subcommittee to guide the consideration of Indigenous matters relevant to the Basin's water resources (s202(3)(c)).

[34] Committee on Aboriginal and Torres Strait Islander Water Interests, 'Insights Paper: Pathway to enduring recognition of Aboriginal and Torres Strait Islander Peoples water interests in national water reform initiatives' (December 2023) 8. See also Murray Lower Darling Rivers Indigenous Nations (MLDRIN), Northern Basin Aboriginal Nations (NBAN) and North Australian Indigenous Land and Sea Management Alliance (NAILSMA) 2018, "A Multi-Layer Plan for Cultural Flows in Australia: Legal and Policy Design".

[35] See, e.g., in Western Australia: Anti-democratic WA bill threatens nature and community rights - Environmental Defenders Office, in the Northern Territory: EDO-Briefing-Note-Territory-Coordinator-Bill-2024.pdf, particularly the removal of merits review rights in relation to water licensing and fracking on page 14, and Queensland's planning law changes to streamline projects or the 2032 Olympics, see Jack McKay, 'Government to introduce bill that will override 15 planning laws for 2032 Olympic venues', *ABC NEWS* (Web Page, 1 May 2025).

Case study 2: Lack of First Nations representation on water advisory committees in the Northern Territory

Australian governments have failed to ensure First Nations participation and co-decision-making in environmental management legislation, including in relation to water. This is reflected in the lack of First Nations representation on Water Advisory Committees (WACs) in the Northern Territory (NT).

WACs are the NT Government's formal mechanism under the *Water Act 1992* (NT) (**Water Act**) for stakeholder input into water allocation planning.[36] WACs are intended to provide community, scientific, industry and Indigenous perspectives on water management. However, the absence of a statutory requirement to consult with First Nations stakeholders or to involve them in water planning processes at all has resulted in limited First Nations representation. Structural inequalities within the Water Act itself facilitate this lack of representation: the Water Act contains no statutory requirement to appoint a WAC and fails to mandate membership, including Indigenous representation. If a WAC is appointed, the members consist only of such members that the Minister thinks fit.[37]

During the development of the Mataranka Water Allocation Plan, the Mataranka Tindall WAC acknowledged that Traditional Owners consistently raised concerns that they were not being listened to. The WAC themselves also raised concerns about the challenges in understanding the technically complex material provided by the Department.[38] The three Traditional Owners sitting on the WAC ultimately resigned. [39]

The Northern Land Council also identified the NT Government's failure to include Indigenous representation in the water planning processes, submitting that: 'The NLC actively sought a meaningful role in the development of the [Mataranka WAP], and would have preferred to have an opportunity to contribute to developing a strong and robust Plan, rather than having to highlight to the Minister through this public submission process, the major failings of this draft plan'.[40]

The emergence of First Nations led governance bodies

The failure of Australian governments to ensure First Nations communities are part of decision-making processes regarding their traditional lands and waters has led to the establishment of Indigenous-led culturally grounded governance bodies, representing a shift towards self-determined, culturally grounded decision-making systems.

For between 40,000 and 60,000 years, Indigenous communities in Australia managed their land and water resources sustainably. In less than 250 years, Australia has been so degraded by human activity that Country and waters are threatened, native species are facing extinction at one of the highest rates in the world and sustainable water sources are at severe risk of climate change. First

[36] In Australia, water rights are separated from land ownership and are dealt with as water allocations, using a market-based approach where users hold 'entitlements' (long-term shares of water) and receive 'allocations' (actual volume available per year based on water flows and levels).
[37] Water Act s 23(2).
[38] Department of Environment, Parks and Water Security, Mataranka Tindall Water Advisory Committee: Meeting 15 Minutes (28 September 2023) 11.
[39] Department of Environment, Parks and Water Security, 'Mataranka Tindal Water Advisory Committee: Meeting 15 Minutes' (28 September 2023) 11.
[40] Northern Land Council, 'Submission to the Northern Territory Government on Draft Mataranka Water Allocation Plan 2024- for public consultation. Draft Mataranka Implementation Actions 2024 – For public consultation, Draft Mataranka Background Report 2024 – For public consultation' (3 June 2024) 6.

Nations-led governance bodies have emerged in response to pressures from extractive industries, inadequate consultation with First Nations communities and the marginalisation of Indigenous knowledge in environmental governance.[41] These bodies draw attention to the environmental and cultural harm being caused, advocate for the right to manage their land and waters and amplify First Nations voices, both within Australia and internationally, calling for First Nations water justice.

We provide examples of such bodies below.

Case study 3: Self-determined First Nations governance bodies

The **Martuwarra Fitzroy River Council** in Western Australia was established in 2018 by Traditional Owners from the Fitzroy River catchment in the Kimberly region, following the Fitzroy River Declaration in 2016. The Fitzroy River Declaration reflected the Traditional Owners' commitment to working with their communities to care for Country, as required by their customs, and to apply their knowledge and understanding of the Kimberley to prevent further degradation and to reverse the damage which has already occurred. Following the Fitzroy River Declaration in 2016, Traditional Owners from the Fitzroy River catchment established the Martawarra Fitzroy River Council (MFRC). Since its inception, the MFRC has actively participated in caring for Country, including promoting its work and seeking support, both financial and in-kind, to further its aims. The MFRC advocates with governments at all levels, including internationally where possible, for land and water reform, as a knowledge broker (connecting Indigenous knowledge with First Law and science), and as a governance body seeking co-design and co-decision-making on effective, rehabilitative land use, water planning and adaptive management.[42] See www.martuwarra.org

The **Ropa Woda Governance Council** in the Northern Territory was established in 2025 by Traditional Owners from the Roper River catchment in the Northern Territory, following a gathering of 13 First Nations clan groups at which the Ropa Woda Governance Council Declaration was made. The Council was formed in response to large-scale water extraction licenses granted without consent, expansion of fracking and agricultural development on traditional lands, and a lack of Indigenous decision-making on projects that impact traditional lands and waters. The Council has called for legal protection of cultural and environmental values as well as their formal inclusion in all water decision-making.

The **Murray Lower Darling Rivers Indigenous Nations (MLDRIN)** is a confederation of Indigenous Nations and Traditional Owners in the Southern Murray Darling Basin. MLDRIN advocates for First Nations' water rights and justice at the direction of its member Nations. MLDRIN is the only self-determined Aboriginal community-controlled water justice confederation of Nations in the Murray Darling Basin. MLDRIN was established in 1998.[43] In 2007, MLDRIN delegates developed the Echuca Declaration, a groundbreaking statement that asserts the inherent rights of Rivers and the Traditional Owners as custodians. The Echuca Declaration also formalised the concept of Cultural Flows: water entitlements that are legally and beneficially owned and managed by

[41] Phil Duncan, "Nothing about us, without us": call for deeper Indigenous involvement in water catchment management' (24 August 2020).
[42] Moreno, M, Connor, JD, Tedmanson, D., & Sinclair, K., Poelina, A., 2025. Social, economic, cultural and environmental impact of Martuwarra Fitzroy River Council (MFRC) initiatives, Qualitative Report 1, prepared for Martuwarra Fitzroy River Council. University of South Australia, Adelaide, SA.
[43] MLDRIN's history is described on the MLDRIN website.

First Nations for a range of cultural, social, environmental and economic purposes. MLDRIN commissioned a seminal report outlining a plan for Cultural Flows.[44] See https://mldrin.org/

These bodies represent a movement towards First Nations-led governance in environmental management and a clear shift from consultation to authority, through calls for co-governance or full decision-making powers.

Case study 4: Tjiwarl Palyakuwa Yampa Ngula Agreement: a model of strengthened First Nations water governance

The Tjiwarl people are the traditional owners and holders of native title over land in the northern Goldfields region of Western Australia. Historic mining, infrastructure, and specifically, high-volume water extraction from the extensive bore field and channel on Tjiwarl Country for several decades led to cumulative cultural, spiritual and environmental damage to the Tjiwarl people and their Country. These impacts included the disruption of Tjukurrpa (Dreaming) sites, damage to sacred sites, and depletion of water resources.

In response, and as part of settlement of their native title claim in 2023, the Tjiwarl people sought to have greater oversight and governance of water on their Country. They negotiated an agreement with the Western Australian government to recognise their spiritual relationship to water, the importance of access to water resources and the need for Tjiwarl input into the management of water on Tjiwarl Country. The agreement provides:

- for a study to determine yields and supply, and a plan to be developed, in relation to the water resources available on Tjiwarl Country, opportunities for allocation to Tjiwarl people and set environmental and cultural water outcomes,
- a process for the Tjiwarl Aboriginal Corporation to seek information relating to water licences and permits,
- Tjiwarl people with an opportunity for earlier engagement with licence applicants and involvement in the grant process than is presently available under the *Native Title Act 1993* (Cth),
- for a Water Working Group, a joint body between Tjiwarl Aboriginal Corporation and the WA Government, to oversee and implement the commitments and processes made with respect to water in Tjiwarl Country,[45] and
- for Tjiwarl people to have a say over all water licensing on Tjiwarl Country, including who can access, take, and use water.

In the absence of reform of legislative frameworks for water management and allocation at both the Commonwealth and State level, this type of agreement offers a potential model for First Nations involvement in water governance and genuine FPIC in relation to water that reflects the cultural and socio-economic significance of water to First Nations peoples. The Agreement recognises the interconnection between all living entities, elements and forces that comprise Tjiwarl Country, including waters.

EDO is also aware of similar arrangements in Western Australia such as the Yamatji Nation Southern Regional Agreement regarding Strategic Aboriginal Water Reserves providing for use or trade of water by Yamatji Southern Regional Corporation and the Nganhurra Thanardi Garrbu Aboriginal Corporation RNTBC's campaign to protect the cultural value of freshwater on

[44] MLDRIN commissioned this report together with the former Northern Basin Aboriginal Nations, and the North Australian Indigenous Land and Sea Management Alliance, developed by and for First Nations and written by academics at the University of Melbourne in 2018: A Multi-Layer Plan for Cultural Flows in Australia: Legal and Policy Design.

[45] See, for more information, Microsoft Word - Tjiwarl ILUA Sch 1 - Agreement Area - FINAL.docx

the Exmouth Peninsula. We also note that the Western Australian Environment Protection Agency is investigating the environmental and cultural impacts of current and future water abstraction in the West Pilbara,[46] based on concerns by the Yindjibarndi people about the health of the Millstream aquifer and their deep cultural and spiritual connection to it.

Recommendations

5. Cultural Heritage, environment, planning and water legislation in all Australian jurisdictions should be reformed to:
   a. meaningfully incorporate UNDRIP principles and other international obligations, including the right to self-determination and the principle of Free, Prior and Informed Consent in respect of all decisions that impact on First Nations,
   b. better integrate and protect Indigenous expertise and knowledge, including Indigenous Cultural and Intellectual Property, while retaining First Nations control of that expertise and knowledge,
   c. recognise the interconnection between Country (terrestrial, freshwater and marine), Cultural Heritage and species,
   d. require consideration of Cultural Heritage in all environmental and planning approval processes,
   e. provide greater transparency and improved access to information about how the legislation operates,
   f. strengthen support for the current Indigenous Protected Areas framework to extend protection of Country and facilitate First Nations governance of that scheme,
   g. improve accountability and access to justice for First Nations by including third-party review rights and enforcement provisions.
6. Self-determined First Nations-led innovations in governance of Country should be prioritised, supported, resourced and encouraged.

Critical Human Rights Issues

This section highlights three critical human rights issues for First Nations peoples in Australia. EDO regularly hears from First Nations peoples and communities about these critical issues. While we will discuss each topic separately, we acknowledge that this distinction does not necessarily reflect First Nations perspectives. For example, from a First Nations perspective, water justice and climate justice are necessarily intertwined as climate change impacts on water availability and flows, while water flows impact on Cultural Heritage and climate change impacts on Cultural Heritage and Country more broadly.[47] However, as discussed above, these issues are largely regulated separately, without incorporating UNDRIP and other human rights instruments, and without recognising the inherent rights of First Nations peoples and their holistic understanding of Country and Culture.

3. First Nations water access and rights

The importance of water

First Nations water access and rights in Australia is a complex issue that sits at the intersection of culture, law, human rights and social justice. First Nations communities hold a deep cultural, customary and spiritual connection to water (both surface water and groundwater), a relationship

[46] Minister for Environment (WA), 'Minister requests EPA advice on water future for the Pilbara | Western Australian Government'(Media Statement, 16, October 2025).
[47] Anne Poelina, 'Martuwarra Fitzroy River Catchment– sustainable lifeways and livelihoods', (2016) *Australasian Journal of Water Resources*, DOI: 10.1080/13241583.2026.2644027.

that can be distinguished from the paradigm of water ownership and extraction that has emerged from industrialisation.[48] The ebb and flow of water is deeply embedded in cultural knowledge and establishes the rhythms of First Nations economic and social interactions.[49]

This spiritual significance extends to conferring rights, responsibilities, and obligations in accordance with customary laws, traditions and protocols. These include to protect, conserve and maintain the environment and ecosystems to ensure the sustainability of the whole environment.[50] From traditional laws and customs, First Nations peoples have inherent rights to water that are currently unrecognised in Australian law. Despite this profound relationship, First Nations communities in Australia continue to face substantial inequalities in access to their land and with it, safe water, ownership and control over water resources, denying First Nations a safe living environment and safe potable water.

Water, land and culture

The Australian legal system governing access to water rights is essentially premised on the concept of 'aqua nullius' – that is, that water on and beneath First Nations' ancestral lands 'belonged to no one'.[51] This resulted in the exclusion of Indigenous communities from their traditional waters when their lands were commandeered by the British sovereign. That exclusion has never been adequately recognised or addressed.

The concept of 'aqua nullius', and the statutory separation of water from land under Australian law, has enabled Australian, state and territory governments to ignore First Nations peoples' connection to water and water rights and favour extraction for industries such as agriculture and mining. Even where native title has accorded some limited recognition, Traditional Owners rarely have their rights to use, access and control water recognised by Western law. Further, the right to negotiate under the *Native Title Act 1993* (Cth)'s future act regime in relation to water licences only entails a right to comment.

Various First Nations groups that EDO works with are concerned about the health of their rivers, and the impact of declining flows on important food sources, and cultural uses and sites, for reasons including climate change. For example, in the Northern Territory, Mataranka Springs, of great significance to First Nations peoples, has been threatened by agricultural and horticultural operations taking water from the Tindall Limestone Aquifer, with the cultural value of water being ignored.[52] Also in the Northern Territory, Central Australian native title holders recently argued for groundwater dependent cultural values to be considered in water licensing decisions in relation to Singleton Station in the High Court of Australia (see **Case Study 7** below).[53]

Jurisdictional complexities in water regulation

The jurisdiction-based legal framework for managing and protecting water exacerbates the inconsistent regulation and protection of this finite resource across the country. In addition to federal legislation, individual states and territories have their own water legislation to license, regulate and protect water. To coordinate consistency, the Australian Government negotiated the

[48] Tony McAvoy, 'Water - Fluid Perceptions' (2006) 1(2) *Transforming Cultures eJournal* 97, 97-98.
[49] For more information about the cultural value of water, see, e.g.,: Ngapa Kunangkup (Living water) - Aboriginal cultural values of groundwater in the La Grange sub-basin.
[50] North Australian Indigenous Land and Sea Management Alliance, *The Mary River Statement* (28 January 2020January2020).
[51] See, e.g., Marshall, Virginia, Overturning Aqua Nullius: Pathways to National Law Reform (10 April2017).
[52] See Save our springs - Environment Centre NT, and Legal action launched to protect the iconic Mataranka Springs and Roper River ecosystems - Environmental Defenders Office.
[53] See High Court to hear first Aboriginal groundwater rights case - Central Land Council and Native title holders take appeal over one of Australia's largest groundwater licences to High Court - ABC News.

National Water Initiative (**NWI**) – a non-binding agreement with all states and territories that was introduced in 2004. The NWI includes a commitment to recognise the water access and management needs of First Nations peoples in water access and planning frameworks.[54] However, progress against the NWI's commitments in relation to First Nations water access has been slow and objectives have not been fully achieved, with most jurisdictions having "routinely failed to identify and provide for Indigenous cultural values and objectives in water plans."[55]

The NWI was recently renewed through the negotiation of a draft new National Water Agreement (**NWA**) with strengthened provisions for water rights for Indigenous communities.[56] The NWA more appropriately centres First Nations voices in water decision-making and provides a blueprint for states and territories to reform out-dated water legislation. However, this agreement has not yet been signed by individual states and territories.

Drinking water

Although the right to water is a basic human right, safe drinking water is not protected nation-wide. Again, there is a jurisdiction-based approach to the protection of drinking water. Some states like Victoria and South Australia have stand-alone legislation providing for safe drinking water, while others such as the Northern Territory and Western Australia have no protections or appropriate regulations. The Australian Drinking Water Guidelines (**ADWG**)[57] provide a helpful standard for the assessment of the quality of drinking water in Australia, but it is non-binding.

Water reform is needed across Australia, to centre First Nations voices, acknowledge First Nations cultural connection to water, achieve equitable access and ownership of water, and ensure the human right to water is upheld.[58] The case studies below demonstrate the wide-reaching issues faced by First Nations communities across Australia in relation to water.

Case Study 5: Lack of safe drinking water in remote Northern Territory communities

Residents in remote communities in the NT are suffering serious health issues and are denied the basic human right to access safe drinking water as a result of the NT Government's failure to implement a statutory framework for the provision of safe drinking water.[59] In 2024, drinking water in each of 72 remote communities in the NT contained levels of contaminants which exceeded the ADWG in some way.[60] The former NT Government committed to a standalone Safe Drinking Water Act. We understand this Act was drafted by the Department of Health but the current Government has confirmed they are not committed to implementing safe drinking water legislation.[61]

Alpurrurulam is a remote community in the Barkly region, home to almost 400 Alyawarre people. Residents of Alpurrurulam have been feeling the effects of the toxic drinking water since the 1990s. Since 2009, Power and Water have consistently reported that the drinking water in

[54] Commonwealth Department of Climate Change, Energy, the Environment and Water, Intergovernmental Agreement on a National Water Initiative (NWI), 2004, cl 25(ix).
[55] Productivity Commission, Australian Government, *National Water Reform 2020: Productivity Commission Inquiry Report* (Final report No 96, 28 May 2021) 122.
[56] See Objectives 3, 3A and 4.
[57] The Australian Drinking Water Guidelines are published by the National Health and Medical Research Council under the *National Health and Medical Research Council Act 1992* (Cth) and available here: Australian Drinking Water Guidelines | NHMRC.
[58] Objective 1 of the NWA addresses the issue of potable water: Objective 1 requires: (a) Safe and secure supply of sufficient water quality and quantity to sustain communities, culture, natural environments and economic prosperity … (to meet) Aboriginal and Torres Strait Islander peoples' water interests and values.
[59] Water Services of Australia and Central Land Council, 'The Struggle for Good Quality Drinking Water in Alpurrurulam' (November 2022) (**Alpurrurulam Drinking Water Report**).
[60] Power and Water, 'Annual Drinking Water Quality Report 2024' (undated) p.160-161 <Annual Drinking Water Quality Report 2024>.
[61] Northern Territory, Parliamentary Debates, Legislative Assembly, 12 February 2025, 829-830.

Alpurrurulam contains levels of fluoride, chloride, hardness and total dissolved solids which significantly exceed the ADWG.[62] Elevated levels of fluoride can have detrimental effects on the brain development of children and in 2024, the Chief Health Officer declared the drinking water in Alpurrurulam unsuitable for children 12 years and under and pregnant women.[63]

Without a statutory framework for safe drinking water, there is no requirement for the NT Government to provide the residents of Alpurrurulam with safe drinking water.[64] Instead, the community and the Central Land Council have been working tirelessly to fund the essential service themselves since 2012.[65] The community has located an alternative safe water source and estimates the cost of developing necessary infrastructure at over $5 million. However, the NT Government has repeatedly refused to progress the project because it is not regarded as a 'high priority'.[66] In the absence of support from the NT Government, the Central Land Council has secured $8 million from the National Indigenous Australians Agency to complete work to protect the residents from the toxic drinking water.[67]

[62] Alpurrurulam Drinking Water Report, 6; Power and Water Corporation, '2009 Indigenous Communities of the Northern Territory Drinking Water Quality Annual Report' (undated), 45 .
[63] Power and Water, 'Annual Drinking Water Quality Report 2024' (undated) p. 51 <Annual Drinking Water Quality Report 2024>. In 2024, the levels of fluoride in the drinking water at Alpurrurulam exceeded the ADWG levels by 0.2 mg/L, the chloride levels in the communities drinking water exceeded the AWDG maximum guidelines by 0.5 mg/L, the level of hardness in the drinking water exceeded the ADWG maximum levels by 300 mg/L and the total dissolved solids in the communities drinking water exceeded the ADWG levels by 300 mg/L (p. 164).
[64] This is despite the Office of the Commissioner for Human Rights General Comment No. 15: The Right to Water (Articles 11 and 12 of the Covenant), [3].
[65] Alpurrurulam Drinking Water Report, 7.
[66] Alpurrurulam Drinking Water Report, 7.
[67] Indigenous Essential Services Pty Ltd, 'Annual Report 2024-25' (30 September 2025) 16.https://www.powerwater.com.au/__data/assets/pdf_file/0032/428549/2025-Indigenous-Essential-Services-Annual-Report.pdf.

Case Study 6: Inadequate consultation and recognition of First Nations water rights and interests in the southern Murray Darling Basin

The *Water Act 2007* (Cth) regulates ground and surface water resources across the Murray Darling Basin. The *Basin Plan 2012* (Cth) contains the detailed water management rules for this Basin.[68] The Basin Plan is intended to ensure that water in the Murray Darling Basin is managed sustainably for future generations.

The Basin Plan spans five States and Territories. Each jurisdiction makes its own laws to manage Basin water resources and is required to prepare "Water Resource Plans" (**WRPs**) to set local rules for managing Basin water resources. WRPs must be accredited by the Commonwealth Water Minister. Before accrediting a WRP, the Minister must be satisfied that it is consistent with the Basin Plan.

When it comes to First Nations rights and interests, the Water Act and Basin Plan merely require Basin States to consult with "relevant Indigenous organisations" when preparing WRPs, in order to "have regard to" the "Indigenous values" and "Indigenous uses" of water resources, and a handful of other specific matters.

The process of preparing and accrediting WRPs has taken many years. In NSW, once the NSW Government submitted proposed WRPs to the Commonwealth for accreditation, the Commonwealth engaged MLDRIN (described in **Case study 3** above) (and some others) to assess whether the WRPs satisfied Basin Plan requirements relating to Indigenous values and uses.

MLDRIN sought input directly from Traditional Owner representatives and prepared detailed assessment reports. The reports raised a range of issues (see example report here), for example:

- Failure of consultations to meet minimum standards
- Lack of resourcing and support for community members to participate
- Compressed timeframes and rushed delivery of consultation
- Failure to explain the purpose and scope of the consultation
- Failure to collect views about important matters.

The NSW Government did not engage in additional First Nations consultations to address the issues raised. Ultimately, the Commonwealth Water Minister accredited the WRPs.

In 2023, represented by EDO, MLDRIN brought legal proceedings against the Murray Darling Basin Authority[69] and the Commonwealth Water Minister about one of the NSW WRPs. MLDRIN argued the WRP was legally invalid because of shortfalls with the First Nations consultations. Ultimately, the Court did not determine the consultation issues because the WRP was found to be invalid for other reasons.

The Basin Plan is now undergoing a 10-yearly statutory review. It is concerning that, instead of proposing to bolster provisions to improve First Nations water rights and interests, the Authority has proposed *weakening* WRP requirements. If this happens, the already inadequate requirements relating to First Nations interests will be further diminished.

The above issues highlight the struggle First Nations face across the Basin to ensure that even the most basic of consultation requirements are satisfied. This sits against a backdrop of grossly inadequate governance and legal frameworks that fail to require FPIC and lack practical measures to improve First Nations water rights and to provide for and protect cultural flows.[70]

Case Study 7: Water mining and licensing at Singleton Station and Burrigan/Springbrook

Water mining in Australia refers to the extraction of groundwater for commercial purposes, often for agriculture or bottled water production. There are many examples where water mining operations are unsustainable and inadequately regulated. The examples below highlight key tensions in Australian water law between economic development, environmental protection, and Indigenous rights.

Singleton Station[71]

Located on Kaytetye Country, south of Tennant Creek in the arid zone of Central Australia, the Singleton Station groundwater licence is one of the largest in Australia. Granted in 2021 to Fortune Agribusiness, it allows extraction of up to 40,000 megalitres of groundwater per year, over 30 years, to support a large-scale intensive horticulture project growing melons and avocados primarily for export.

Native title holders of Singleton Station have been challenging the grant of this licence for five years. Mpwerempwer Aboriginal Corporation, represented by the Central Land Council, argued that the licence risks lowering groundwater levels and potentially damaging groundwater dependent cultural values, springs, soaks and sacred sites. After losing their challenge in the NT Supreme Court and appeal in the NT Court of Appeal, native title holders took their case to the High Court of Australia in an historic appeal heard in February 2026.

Burrigan/Springbrook

Groundwater is being extracted from aquifers in and around World Heritage-listed Gondwana Rainforests at Springbrook National Park in Queensland. The rainforest ecosystems of this area are highly dependent on groundwater and vulnerable to impacts from climate change reducing the availability of rainfall and cloud cover to recharge aquifers. There are many water mines surrounding the World Heritage area, often with no cap on water take and no fees required for the water extracted. Extracting millions of litres of groundwater for bottling threatens local biodiversity and endangered species. EDO and First Nations leader Roselene Best, Kombumerri and Ngugi Traditional Owner of the Gold Coast and Moreton Bay, are engaging with the Queensland Government regarding its review of the Gold Coast Water Plan to:

- advocate for the end of unsustainable groundwater extraction, for cultural and environmental flows to be considered, and for improved regulation, monitoring and transparency where extraction affects groundwater dependent ecosystems and water-dependent cultural values;
- advocate for acknowledgement of First Nations access to, and interests in, water resources of the Water Plan area, including water allocations for Traditional Owners and to seek to close the gap in First Nations water control and ownership; and
- raise concerns with the Queensland Government about the lack of consultation and FPIC with Traditional Owners of the Gold Coast in relation to water resources and groundwater extraction at Burrigan/Springbrook, and related cultural outcomes, despite this engagement being required by the *Human Rights Act 2019* (Qld).

[68] These rules include the maximum volumes of water that can be taken each year from the Basin.
[69] The Murray Darling Basin Authority (MDBA) is an agency of the Australian Government.
[70] The *Water Act 2007* (Cth), which regulates the Murray-Darling Basin under Commonwealth law, does not include any legislative obligations to provide for cultural flows.
[71] Central Land Council, 'High Court to Hear First Aboriginal Groundwater Rights Case'.

The above cases highlight the limitations of Australia's existing native title legal framework in protection of First Nations water rights. They also demonstrate the need for stronger, enforceable water plans, improved regulation of groundwater impacts and scientific understanding of aquifers, and greater recognition of Indigenous water rights in governance and decision-making.

Recommendations

7. Legislative and policy frameworks relating to water across Australia, including the *Water Act 2007* (Cth), should be reformed to be consistent with international obligations, including UNDRIP and the International Convention on the Elimination of All Forms of Racial Discrimination including to:
    a. recognise and reflect the right to self-determination in all decision-making processes related to water and water resources (including development of water strategies, plans, allocations and licensing regimes) by centring and resourcing First Nations voices, knowledge and expertise,
    b. recognise and support First Nations water governance including by integrating Indigenous knowledge into water management, adequate resourcing of self-determined First Nations representative water governance bodies and providing access to Western scientific expertise and Indigenous-led community education on water rights and frameworks,
    c. increase First Nations access to, ownership of and control of water resources so that Traditional Owners can achieve their cultural, social and economic aspirations,
    d. guarantee cultural flows (First Nations water allocations) with accountability mechanisms in place,[72] and
    e. provide for open standing provisions for First Nations peoples to be able to hold decision-makers to account in relation to water.
8. Climate change should be a relevant consideration in all government decision-making that relates to the extraction of water from the environment including through the introduction of a national standard that ensures climate considerations are addressed in all water sharing plans.

4. Protection of Cultural Heritage

First Nations Cultural Heritage has not been adequately recognised, respected or protected by Australia's Western laws. The right to the protection of Cultural Heritage is intrinsically tied to other human rights, such as rights to culture, the maintenance of a distinctive Indigenous identity, self-determination, rights to land and territory and spiritual and religious beliefs and to the principle of equality and non-discrimination. This failure to protect First Nations Cultural Heritage is in clear breach of international law obligations, including the rights to culture, non-discrimination and equality which are fundamental to UNDRIP, ICCPR, ICESCR And ICERD.

Legislation relating to Aboriginal and Torres Strait Islander heritage in Australia includes:[73]

State/Territory:	**Federal:**
• *Aboriginal Heritage Act 1972* (WA) • *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Northern Territory Aboriginal Sacred Sites Act 1989* (NT); *Heritage Act 2011* (NT)	• *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)

[72] Anne Poelina, 'Martuwarra Fitzroy River Catchment– sustainable lifeways and livelihoods' (2026) *Australasian Journal of Water Resources* 9.

[73] See a summary on page 29 of Heritage Chairs of Australia and New Zealand, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation* (September 2020) 29.

• *Aboriginal Heritage Act 1988* (SA) • *Aboriginal Cultural Heritage Act 2003* (QLD); *Torres Strait Islander Cultural Heritage Act 2003* (QLD) • *National Parks and Wildlife Act 1974* (NSW); *Aboriginal Languages Act 2017* (NSW) • *Heritage Act 2004* (ACT) • *Aboriginal Heritage Act 2006* (VIC) • *Aboriginal Heritage Act 1975* (TAS) • *Heritage Act 2004* (ACT)	• *Environment Protection and Biodiversity Conservation Act 1999* (Cth) • *Protection of Movable Cultural Heritage Act 1986* (Cth) • *Underwater Cultural Heritage Act 2018* (Cth) • *Native Title Act 1993* (Cth)

Inadequate legislative protections

As the Joint Standing Committee on Northern Australia (**Standing Committee**) recognised in the Juukan Gorge Inquiry (see **Case Study 8** below):

- "the legislative frameworks that govern the protection of Indigenous heritage are complex, comprising state, territory and Commonwealth laws and international treaties",[74] and
- "there are serious deficiencies across Australia's Aboriginal and Torres Strait Islander cultural heritage legislative framework, in all state and territories and the Commonwealth",[75] but
- rather than protect cultural heritage, "legislation designed to protect cultural heritage has, in many cases, directly contributed to damage and destruction."[76]

Since the Juukan Gorge Inquiry, some states and territories have updated their cultural heritage legislation, but largely in ways that *reduce* protection of Cultural Heritage or insufficiently respond to the recommendations of the Inquiry. For example, Queensland's Cultural Heritage laws have been under review for at least a decade, with no reforms made to strengthen heritage protection, while NSW lacks standalone Cultural Heritage legislation despite years of review and calls for reform. The NT Government amended the *Northern Territory Sacred Sites Act 1989* to weaken the protection of sacred sites in 2025, despite strong opposition from First Nations communities and representative bodies throughout the Territory. [77] We also refer to **Case Study 9** below for an overview of inadequate Cultural Heritage protection in Tasmania.

The Inquiry also found serious failings in the Australian *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**), which have not been addressed. Under that Act, First Nations peoples can ask the Minister for Environment to make declarations as a 'last resort' to protect significant Aboriginal areas from destruction or degradation. However, applications for declarations are very rarely successful, take years to be resolved, and pose a high burden of proof on First Nations peoples to prove 'significance' and to disclose sensitive, confidential information. Declarations can be challenged by proponents and are generally ineffective at providing comprehensive, long-term protection of Cultural Heritage. The Act also focuses on particular

[74] Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*, (2021) 2.
[75] Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*, (2021) xi.
[76] Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*, (2021) xii.
[77] For more information, see Northern Land Council, *'Submission to the Northern Territory Government Minister for Lands, Planning, and the Environment on the Northern Territory Aboriginal Sacred Sites Legislation Amendment Bill 2025* (4 April 2025) <https://www.nlc.org.au/submission-on-the-northern-territory-aboriginal-sacred-sites-legislation-amendment-bill-2025> and 'Changes to the Aboriginal Heritage Act 1988', Government of South Australia Attorney-General's Department (2025) <https://www.agd.sa.gov.au/aboriginal-affairs-and-reconciliation/aboriginal-heritage/changes-to-the-aboriginal-heritage-act>.https://irp.cdn-website.com/98b48721/files/uploaded/250404_NLC_Submissions_-_Bill_to_Amend_Northern_Territory_Sacred_Sites_Act_2025%28653130.8%29.pdfhttps://parliament.nt.gov.au/committees/list/legislative-scrutiny-committee/23-2025/submissions/Submission-No.-21-Environmental-Defenders-Office.pdfhttps://www.agd.sa.gov.au/aboriginal-affairs-and-reconciliation/aboriginal-heritage/changes-to-the-aboriginal-heritage-act

"culturally significant sites" or "places" (e.g. a cave) and ignores broader cultural harm, including to intangible Cultural Heritage and cultural landscapes.[78]

Cultural Heritage legislation across jurisdictions is generally directed to the regulation of destruction of heritage, with limited to no role for relevant First Nations decision-makers to protect sites. Cultural Heritage legislation continues to provide limited requirements for consultation with First Nations on decisions concerning sites and objects of significance, with state entities typically having the ultimate authority to make decisions concerning Aboriginal Heritage.[79]

Inconsistent legislative protections

There is major divergence across the different jurisdictions that make implementation difficult and confusing and ignore that Country and Culture is not divided by state borders. There are different definitions of 'cultural heritage' and different protection regimes, and no guidance from federal legislation about how to integrate the relevant laws. For example, while all state and territory planning laws must be consistent with Commonwealth environmental law, there is no equivalent provision in relation to Cultural Heritage.

Lack of understanding of Cultural Heritage

Existing legislative frameworks do not adequately encompass "the complexity of Indigenous heritage which is living and evolving and is connected not just through historical artefacts, but through songlines, storylines, landscapes and waters."[80] By focusing on sites or artefacts, legislative frameworks fail to conceptualise the living tradition and its broad interconnection with the land, and the personal and spiritual obligation to landscape and species occupying it, based on direct kinship responsibilities, underpinned by traditional laws, customs, and spirituality, that mean that culture and cultural rights cannot be disconnected from the environment.

These issues are highlighted below in respect of Western Australian and Tasmanian Cultural Heritage laws.

[78] See further detail about issues with the Australian cultural heritage legislation in our submission to the Juukan Gorge Inquiry: Environmental Defenders Office, *Submission to the Inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia* (14 August 2020), (**Annexure 2**).

[79] See the Special Rapporteur's comments on these issues in 2010 at: James Anaya, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Addendum - The situation of indigenous peoples in Australia (2010), UN Doc A/HRC/15/37Add.4, [74].

[80] Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*, (2021).

Case Study 8: Ongoing failures of Cultural Heritage protection in Western Australia

Juukan Gorge and Inquiry

The failures of Australia's Cultural Heritage laws were significantly highlighted in the destruction of 46,000+ year old rock shelters at Juukan Gorge, by Rio Tinto on 24 May 2020, that were culturally, ethnographically, and archaeologically significant. This caused immeasurable cultural and spiritual loss, as well as profound grief for the Traditional Owners of the area, the Puutu Kunti Kurrama and Pinikura peoples. Rio Tinto possessed a section 18 permit approved in 2013 under the *Aboriginal Heritage Act 1972* (WA) (**AHA WA**) to disturb the site. Traditional Owners had expressed concern about the site and were unaware that the destruction was imminent.

The destruction led to an extensive and comprehensive federal Parliamentary Inquiry and two reports, with interim recommendations in *Never Again* and final recommendations in *A Way Forward*. The Inquiry highlighted longstanding concerns about inadequate protection of Cultural Heritage legislation in Western Australia, the centre of Australia's mining boom, finding that the failure of WA's Cultural Heritage laws has resulted in "widespread destruction of tangible and intangible Cultural Heritage assets with Aboriginal and Torres Strait Islander people being left without assistance in dealing with developers."[81]

The destruction of Juukan Gorge is a significant, but not isolated, example of the destruction of Cultural Heritage in WA.[82] Other notable examples include the removal of rock art on the Burrup Peninsula/Murujuga to make way for a fertiliser factory, despite the globally accepted Burra Charter,[83] and the flooding of sacred sites at Harding Dam (Lake Poongkaliyarra) that submerged numerous sacred sites and ceremonial places, largely without First Nations consultation.[84]

Such destruction persists despite Australia being a signatory to UNDRIP. Close to six years after the Juukan Gorge disaster, the recommendations of the Inquiry are yet to be implemented by Australian governments. For more information, see EDO's submission to the inquiry into the Juukan Gorge disaster at (**Annexure 2**[85]) and the recommendations of the *A Way Forward* report (**Annexure 3**[86]).

UNCERD referral

In 2021, EDO assisted five First Nation leaders (Clayton Lewis, Dr Hannah McGlade, Kado Muir, Slim Parker, and Dr Anne Poelina) to make a formal request for a United Nations Committee to review Western Australia's draft proposed Cultural Heritage Bill, arguing the Bill was incompatible with Australia's international obligations on racial discrimination.[87] The matter was referred to the United Nations Committee on the Elimination of Racial Discrimination (**CERD**).[88]

In April 2024, the CERD made serious findings against the Australian and Western Australian governments in relation to their handling of Indigenous Cultural Heritage issues and related legal reforms and went so far as to say the behaviours appear to constitute a breach of the *International Convention on the Elimination of All Forms of Racial Discrimination* (**ICERD**).[89]

The CERD wrote to Australia's UN Representative in Geneva saying the Committee had found the Australian and Western Australian governments had:

- Failed to seek Free, Prior and Informed Consent from Indigenous peoples in relation to changes to Indigenous Cultural Heritage legislation;

- Failed to adequately protect Indigenous Cultural Heritage; and
- Potentially breached the ICERD (see the CERD's letter to Australia in **Annexure 4**[90]).

The Australian Government has not yet responded to the CERD's findings.[91]

Stalled reform of the WA Aboriginal Heritage Act

In 2023, the WA Government passed strengthened Cultural Heritage reforms. When the *Aboriginal Cultural Heritage Bill 2021* was introduced, the Government acknowledged that:

- the AHA WA "is now outdated and does not meet the expectations of Aboriginal people or the broader community. It has changed little in the past 49 years, most clearly demonstrated by the devastating loss of the 46 000-year-old Juukan Gorge rock shelters",[92] and
- a review of the AHA WA had clearly established the need for better protection, for Aboriginal people to be given a voice and for greater efficiencies and certainty for all parties.[93]

Yet despite these statements, the reforms were repealed after only five weeks following intense political pressure on the eve of the failed Voice Referendum. The flawed 1972 Act was reinstated, with some amendment.

Case Study 9: Delays in Cultural Heritage reform in Tasmania

Tasmanian Aboriginal Cultural Heritage legislation

The *Aboriginal Heritage Act 1975* (Tas) (the **Tas AHA**) has been criticised for being "woefully outdated" and "shamefully disrespectful" of Tasmanian Aboriginal people.[94] A 2021 review of the legislation identified that Tasmania has the worst Aboriginal Cultural Heritage laws in Australia.[95] The serious deficiencies in the existing legislation are outlined in EDO submissions dated May 2022 and August 2022 and February 2024.

Delayed reforms

Tasmanian Aboriginal people have been calling for stronger protections for their cultural heritage for decades.[96] The Minister for Aboriginal Affairs committed to release an exposure

[81] Parliament of Australia, *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge*, (2021), [3.2].
[82] See, for example: 'Bittersweet' victory for traditional owners after mining damage to East Kimberley burial site - ABC News; reports on the destruction of sites at the Solomon Hub Mine in Yindjibarndi Country (e.g. https://www.sbs.com.au/nitv/article/mining-giant-accused-of-destroying-more-than-a-hundred-cultural-sites) and the destruction of sites by Dominion Mining at Yakabindie in 1991.
[83] Benjamin Smith, Joakim Goldhahn, and Paul S.C. Tacon. 'Murujuga's rock art is being destroyed - where is the outrage?' *The Conversation* (online, 16 May 2023) .
[84] *ABC News*, 'WA Rules Out Further Protections for Aboriginal Heritage Sites' (online, 4 June 2020).
[85] Environmental Defenders Officer, 'Submissions to the Inquiry into Juukan Gorge Destruction 2008' (2020).
[86] Parliament of Australia, Recommendations from the Joint Standing Committee of Northern Australia's *A Way Forward* Report regarding Juukan Gorge 2021 (2021), pages xxv to xxix.
[87] Clayton Lewis, Dr Hannah McGlade, Kado Muir, Slim Parker, and Dr Anne Poelina (2021), "Initial complaint lodged with the United Nations Committee on the Elimination of Racial Discrimination (CERD)".
[88] Clayton Lewis, Dr Hannah McGlade, Kado Muir, Slim Parker, and Dr Anne Poelina (2021), "Initial complaint lodged with the United Nations Committee on the Elimination of Racial Discrimination (CERD)".
[89] See **Annexure 4** and Callan Morse, 'UN: WA Aboriginal Heritage Laws May Breach Indigenous Peoples' Rights under International Law' *National Indigenous Times* (online, 28 May 2024).
[90] Committee on the Elimination of Racial Discrimination, Letter to Australia 2024 regarding Western Australia's draft proposed cultural heritage bill (2024).
[91] Environmental Defenders Office, 'UN Committee Finds Australian and WA Governments Potentially Breached Racial Discrimination Convention' (Webpage, 28 May 2024) .
[92] Western Australia, Parliamentary Debates, Legislative Assembly, 'Aboriginal Cultural Heritage Bill 2021' (17 November 2021) 5562d–5566a.
[93] Ibid, discussing the outcomes of the 2017 review of the AHA WA.
[94] Matthew Groom, 'Relics Act shamefully disrespectful', *The Mercury* (online, 25 June 2016).
[95] Tasmanian Government, *Review of the Aboriginal Heritage Act 1975* (Review Report, March 2021).
[96] For example, Jo Lauder, 'Saving the Franklin River', *ABC News* (online, 3 May 2023).

draft Bill in 2024. In September 2025, an independent member of parliament tabled a motion, passed unanimously, highlighting the continued delay.[97] Speaking to the motion, the Minister said that the Government was "not asking Tasmanian Aboriginal people to respond to our draft, we are asking them to help us shape the process itself."[98] A draft bill was released on 30 March 2026.

Inadequate consultation with Tasmanian Aboriginal people

The Tasmanian Government has repeatedly stated its intention to discuss the reforms with Tasmanian Aboriginal people throughout the drafting process.[99] Australia's international obligations require states to allow and encourage Indigenous peoples' participation in the design and implementation of laws and policies that affect them, including those related to cultural heritage.[100]

Despite this, the Tasmanian Government's consultation with Aboriginal people has been flawed and inadequate. Consultation has not been inclusive of all Tasmanian Aboriginal people. The Tasmanian Aboriginal Centre (**TAC**), established in the 1970s to represent the Tasmanian Aboriginal community, was shut out of discussions.[101] TAC was provided with the draft Bill one day prior to its public release. TAC has called for proper consultation with Aboriginal people before the new legislation is finalised.[102]

Recommendations

9. The recommendations of the Joint Standing Committee on Northern Australia's *A Way Forward* report should be implemented in full (see **Annexure 3**).[103]
10. Cultural Heritage, environment, water, native title and planning laws at local, state/territory and Australian Government levels should be comprehensively reviewed to ensure they operate coherently to protect Cultural Heritage.

[97] David Killick, 'Half-century-old Aboriginal heritage laws to be revamped', *The Mercury* (online, 25 September 2025).
[98] Tasmania, *Parliamentary Debates*, House of Assembly, 24 September 2025, 49 (Bridget Archer, Minister for Aboriginal Affairs).
[99] For example, Tasmanian Government, *Update on the new Aboriginal Cultural Heritage Protection Act* (2023).
[100] Committee on Economic, Social and Cultural Rights, *General Comment No.21: Right of Everyone to Take Part in Cultural Life (Art 151(a) of the International Covenant on Economic, Social and Cultural Rights (Article 27 of the United Nations Declaration on the Rights of Indigenous Peoples)*, 43rd sess, UN Doc E/C.12/GC/21 (12 December 2009) [55(e)].
[101] David Killick, 'Shut out of new heritage laws', *The Mercury* (Hobart, 16 March 2026) 4.
[102] Ibid. See also: Tom Allen Mornington, 'Poor state of affairs', *The Mercury* (16 March 2026) 21.
[103] This includes legislative reform being consistent with: Heritage Chairs of Australia and New Zealand, *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia and the Best Practice Standards in Indigenous cultural heritage management and legislation* (2020).

5. Climate justice for First Nations peoples

First Nations communities are already experiencing climate impacts

First Nations peoples across Australia are disproportionately affected by the impacts of climate change. Climate change is intensifying colonial injustices and disrupting cultural and spiritual connections to Country that are central to health and well-being, and disrupted by environmental degradation.[104] This environmental degradation is both a contributing cause of climate change (e.g. degradation caused by the extraction of fossil fuels) and a consequence of worsening climate change – with impacts on Country, water flows and access, and Cultural Heritage. Many Aboriginal and Torres Strait Islander communities are located in remote areas which are especially vulnerable to the impacts of climate change. First Nations peoples in Australia are therefore disproportionately experiencing the negative consequences of climate change, compounding pre-existing and ongoing racial, social and economic inequality.

This issue is particularly apparent in the Northern Territory (**NT**), where Aboriginal and Torres Strait Islander peoples represent 26.3% of the population – the highest population percentage of all Australian States and Territories.[105] Nearly half of the NT's 1,349,129 square kilometres is Aboriginal land. Seventy per cent of Aboriginal people living in the NT live in remote areas.[106]

The north of Australia is increasingly treated as a "sacrifice zone", exploited by extractive industries for profit to the detriment of its incredibly biodiverse and ecologically important natural environment – including some of the world's largest intact tropical savanna woodlands and last free-flowing rivers. As noted at the outset of this submission, the impacts of climate change are real and present in the north of Australia, and only predicted to worsen.[107] For example, the Northern Territory is experiencing increasingly extreme weather conditions, with five disasters declared in a single wet season so far this year.[108] Climate change impacts on the health and wellbeing of Traditional Owners and heightens the health risk of many already suffering with multiple diseases.[109]

Social impacts are already being felt. For example, for First Nations peoples living in remote communities in the NT, social housing dwellings are not fit for purpose,[110] often lacking cooling infrastructure and not built to withstand floods or cyclones or to facilitate suitable living arrangements. Many households experience frequent power outages. This means that extreme heat and natural disasters have a severe impact on those communities (especially elderly people, young children and people with disabilities or medical conditions). These issues are highlighted in **Case Study 10**, while **Case Study 11** illustrates the stark inequities experienced by First Nations peoples living in remote communities in emergency evacuations instigated by climate events.

---

[104] Healthy Environments and Lives (HEAL) Network & Centre for Research Excellence in Strengthening Systems for Indigenous Health Care Equity (CRE-STRIDE), *'Climate change and Aboriginal and Torres Strait Islander health: Discussion paper'* (Report, November 2021).
[105] In the Northern Territory 61,000 people identified as Aboriginal and/or Torres Strait Islander in the 2021 Census of Population and Housing. Australian Bureau of Statistics, *'Northern Territory: Aboriginal and Torres Strait Islander population summary'* (1 July 2022).
[106] NT Health, *'Aboriginal and Torres Strait Islander health'*, (Webpage, undated).
[107] As Australia's NCRA made clear, northern Australia is set to bear the brunt of climate change impacts, with a prevalence of natural disasters and loss of biodiversity. The NCRA predicts, at +3.0°C of global warming, a 423% increase in heat-related deaths in Darwin: Australian Climate Service, *'National Climate Risk Assessment'* (2025).
[108] Kirsty Howey, *The Guardian* 'Five disasters in a single wet season show the climate crisis is here and now in the Northern Territory' (online, 20 March 2026).
[109] Anne Poelina 'Martuwarra Fitzroy River Catchment– sustainable lifeways and livelihoods' (2026) *Australasian Journal of Water Resources*, citing 'Impacts on Health in Remote Indigenous Communities in Australia' (2022) 32(3) *International Journal of Environmental Health Research* 487, 487–502.
[110] Simon Quilty and Norman Frank Jupurrula, 'Learning from First Nations people 'key to combating climate change'', *Insight+* (online, 3 October 2023).

Australia's National Climate Risk Assessment (**NCRA**)[111] affirms these experiences and identifies that climate change poses risks to, and undermines the rights of, First Nations in the following areas:

- self-determination and ability and right to freely pursue their economic, social and cultural development, due to disproportionate experiences of the effects of climate change.
- land, sea and Country (natural environments, biodiversity, ecosystems) through the changing climate, increased extreme weather events and rising warming waters that impact biodiversity, cultural sites, communities and settlements.
- cultural knowledges, practices, values and sites due to climate impacts on Country and through action on climate change.
- health, wellbeing and identity, including increased prevalence and acuity of mental and physical health conditions from Country being sick, and displacement from Country due to extreme weather.
- water and food security, integral to the quality, longevity and cultural way of life for First Nations peoples so the disruption of waterways and related infrastructure from climate events have harmful, far-reaching and long-term effects.
- remote and rural communities, which are exposed to increased risks as climate hazards and events increase interruptions to water, energy, medical and telecommunication infrastructure and reduce food and water security through diminished road, air and water access.

Despite the current and worsening risks of climate change to First Nations peoples in Australia, and court challenges to fossil fuel projects brought by First Nations groups, Australian governments continue to approve and support the expansion of fossil fuel projects. Despite the current and worsening risks of climate change to First Nations peoples in Australia, Australian governments continue to approve and support the expansion of fossil fuel projects. Indeed, Australia is consistently ranked as one of the largest producers of fossil fuels in the world and its ongoing production of fossil fuels is a disproportionate contributor to the climate impacts faced by First Nations peoples in Australia (and across the globe). As at 2024, Australia was the second largest fossil fuel emitter by exports in the world – ahead of the United States and all Organization of the Petroleum Exporting Countries states including states such as Saudi Arabia, and only behind Russia in exported emissions.[112]

Other examples of climate justice issues facing First Nations peoples are highlighted below:

Case Study 10: Heat exposure in Central Australia

The Central Australia region is made up of the main township of Mparntwe (Alice Springs), and remote communities separated by long distances. Aboriginal people make up 80% of the population outside of Mparntwe.[113] In the 100 days between 1 December 2024 and 10 March 2025, the average maximum temperature in Mparntwe was 39.6°C (103.28°F) with every second day over 40°C (104°F), far exceeding predictions that Mparntwe would experience 29 days above 40°C by 2030.[114]

Houses in the NT are built to a lower energy rating than anywhere else in Australia. Building codes applying in the region fail to consider the need for both heating and cooling and there is no requirement to obtain a building permit to construct houses in most Indigenous

[111] Australian Climate Service, '*National Climate Risk Assessment*' (Report, 2025).
[112] Australian Human Rights Institute, '*Australia's Fossil Fuel Exports: Escalating Climate Destruction*' (Report, 2024).
[113] National Indigenous Australians Agency, 'A Better, Safer Future of Central Australia' (webpage) (accessed on 24 March 2026).
[114] Arid Lands Environment Centre, '"This heat is just too much" – Calls intensify for climate action as extreme record temperatures bake Central Australia for 100 days' (online, 10 March 2025); Bureau of Meteorology, 'Alice Springs, Northern Territory Daily Weather Observations' between December 2025 – February 2026 (Webpage) accessed on 24 March 2026; Northern Territory Government, 'Climate Change in the Northern Territory – State of the science and climate change impacts' (Report, September 2020) 40.

communities outside Mparntwe.[115] The impacts of extreme heat in the region are intensified by overcrowding, malfunctioning air conditioning units, lack of proper ventilation in houses, lack of shade structures, and an absence of public water taps or fountains in communities.[116] Remote communities in the NT are also among the world's most energy insecure as a result of a dependence on prepaid electricity schemes which regularly cause disconnections.[117] Temperatures over 40°C also increase the rates of disconnections and residents are often left without power, meaning that food may be thrown away and residents are unable to store refrigerated medication safely.[118]

Extreme heat also poses significant risks to human health such as dehydration, heat exhaustion, heat stroke and increased risks to mental health.[119] Extreme heat has also been linked to respiratory diseases, cardiovascular diseases, renal problems, diabetes and poor perinatal outcomes, all of which are disproportionately higher in First Nations communities.[120] First Nations peoples in the region are disproportionately disadvantaged by the impacts of extreme heat as a result of inadequate infrastructure, energy insecurity and increased risks to health impacts associated with extreme heat.[121]

Case Study 11: Floods in Northern Australia

The flooding throughout Northern Australia currently is demonstrating stark racial injustices in disaster management frameworks.

The Big Rivers region in the Top End of Northern Australia[122] is flooding and, as we write this submission, communities are bracing themselves as Tropical Cyclone Narelle approaches.[123]

The regional town of Katherine, the traditional meeting place between Jawoyn, Wardaman and Dagoman Country, and nearby Aboriginal communities of Miyali Brumby/Kalano, Binjari, Rockhole, Jodetluk/Gorge camp and Geyulkgan Ngurro/Walpiri camp, have experienced the worst flood in 28 years, with many residents displaced to emergency shelters.[124] Surrounding communities Jilkminggan and Wugularr/Beswick have been severely inundated and many residents forced to evacuate.[125]

---

[115] Northern Territory Government, 'Building control areas' (Webpage) accessed 25 March 2026; HealthHabitat, 'NEWS: NT refuses to adopt new 7 Star Energy Efficiency standards for homes' (2 September 2022); Supriya, M, et al, 'Why are solar microgrids not the norm in Central Australia? Exploring local perception on solar energy and health' (2025) 486 *Journal of Cleaner Production.*

[116] M Bhatta et al, 'Exploring adaptive capacity to arid heat in remote First Nations communities in Central Australia' (2026) *Scientific Reports* at 21.

[117] Central Land Council, 'Climate Change is Driving up the cost of remote community power bills' (Webpage) accessed on 24 March 2026; Simon Quilty and Norman Frank Jupurrurla, 'How Climate Change Is Turning Remote Indigenous Houses into Dangerous Hot Boxes' *The Conversation* (online, 17 June 2022).

[118] Central Land Council, 'Climate Change is Driving up the cost of remote community power bills' (Webpage) accessed on 24 March 2026.

[119] Climate Council, 'Breakneck Speed: Summer of Climate Whiplash' (17 March 2026) 30.

[120] Mathew, S, 'Environmental health injustice and culturally appropriate opportunities in remote Australia' (22 October 2023) *Journal of Climate Change and Health,* 1.

[121] Central, Northern, Tiwi and Anindilyakwa Land Council, 'Submission to Australian Senate Environment and Communications Legislation Committee – Inquiry into Environment Protection Reform Bill 2025 and six related Bills' (19 November 2025) 15.

[122] Approximately 200km south of Darwin, the Big Rivers region stretches from the West Australian border east to the Gulf of Carpentaria and south towards the town of Katherine, the traditional meeting place between Jawoyn, Wardaman and Dagoman Country. 57.8% of the Big Rivers region's population identify as Aboriginal and 1 in 3 speak an Aboriginal language at home. See: Northern Territory Government, 'Big Rivers', *Local Decision Making* (Web Page).

[123] 'Katherine residents brace for second major flood in two weeks as Severe Tropical Cyclone Narelle approaches NT', *Australian Broadcasting Corporation* (online, 20 March 2026).

[124] James Elton and Jason Walls, 'Katherine locals survey damage from major flooding as volunteer 'army' rallies to help', *Australian Broadcasting Corporation* (online, 9 March 2026).

[125] Grace Atta and Gemma Ferguson, 'Heavy rainfall continues to threaten Katherine's flood recovery as rivers swell in Beswick, Daly River', *Australian Broadcasting Corporation* (online, 10 March 2026; Gemma Ferguson, 'When will schools and shops reopen? How Katherine and surrounds will move through flood recovery', *Australian Broadcasting Corporation* (online, 20 March 2026).

The community of Naiuyu/Daly River has experienced the worst floods on record.[126] The entire community is under roof height floodwaters, and residents have been evacuated for the second time this year (following major flooding at the start of February).[127] Nganmarriyanga/ Palumpa,[128] has been severely flooded and residents evacuated.

Inequitable Disaster Recovery Funding Arrangements

Disaster Recovery Funding Arrangements (**DRFA**) were activated on Sunday 8 March 2026 for residents within the Katherine Town Council area, funded by the Territory and Federal governments, entitling all residents to immediate payment of $611 per adult and $309 per child, capped at $1,537 per family. Despite being significantly affected, a different approach appears to have been taken with respect to flood impacted Aboriginal communities, who were not included in the initial DRFA arrangements. On 10 March 2026, the North Australian Aboriginal Justice Agency (**NAAJA**) wrote to the Territory and Federal governments raising this issue, amongst others.

On 12 March 2026, the government expanded the DRFA to include residents of Naiuyu, Nganmarriyanga, Jilkminggan and Wugularr. Yet, until 19 March 2026, it was not clear how residents of Jilkminggan and Wugularr could receive the payments. When Jilkminggan residents sought to claim their DRFA payment, they were told they were only entitled to receive 25% of the DRFA amount ($152.75), and would receive the remainder of their payment when they returned to their community.[129] The government announced the same staggered approach for residents of Nganmarriyanga and Naiuyu.[130] The government has simply indicated that Wugularr residents are being supported by Services Australia and can claim relief payments in Katherine.[131]

This means that Aboriginal people from those communities, forced to evacuate their homes, do not have access to the same financial support as residents of Katherine. While some food and bedding have been provided in emergency centres, evacuees may well need the DRFA payment now, to purchase food and personal items and to travel home, when they are able.

Food security and cultural safety in emergency management planning

Disruption to supply lines caused by the floods was particularly acute for Aboriginal people living in remote areas. Near Naiuyu, residents from the Aboriginal homelands of Emu Point, Merrepen, Nemerluk, Woodyculpidia and Uminyuluk voiced concerns about food shortages and there were reports that on 8 March 2026, the local shop in Emu Point ran out of food.[132] Emergency announcements were largely delivered online and in English, presenting accessibility issues for people who do not speak English (or do not speak it as a first language) and for people living in remote areas with poor internet connectivity.

---

[126] Naiuyu/Daly River is located south of Darwin, in the Victoria Daly region of the Northern Territory.

[127] Courtney Barrett Peters, 'Daly River evacuee's heartbreak at seeing community flooded for second time this year', *Australian Broadcasting Corporation* (online, 18 March 2026).

[128] Nganmarriyanga/Palumpa is 138km south-west of Naiuyu and in the Top End region of the Northern Territory.

[129] James Elton, 'Remote residents concerned about withheld flood relief payments as Cyclone Narelle looms', *Australian Broadcasting Corporation* (online, 19 March 2026).

[130] 'Disaster assistance payments have been expanded in the Northern Territory. Here's what you need to know' *Australian Broadcasting Corporation* (online, 12 March 2026).

[131] SecureNT,' *Flooding – Katherine region*' (Web Page, Northern Territory Government, 23 March 2026).

[132] Dehran Young: Member for Daly (Facebook, 8 March 2026, 11.28am), Residents in Emu Point have... - Dheran Young: Member for Daly | Facebook; Dehran Young: Member for Daly (Facebook, 9 March 2026, 7.52pm), Residents in Woodyculpidiya homelands have… - Dheran Young; Member for Daly | Facebook.

The Northern Land Council has called on all levels of government to listen to Aboriginal voices in the development and roll-out of disaster management in the Northern Territory, stating that emergency management plans must consider the cultural and remote needs of community members so that relief is delivered in an effective and safe way.[133]

Human rights for First Nations peoples cannot be realised without climate justice

First Nations have been fighting for climate justice through the Australian courts for many years.[134] Under the "future act" provisions of the *Native Title Act 1993* (Cth) the Gomeroi people have challenged the proposed Narrabri Gas Project in northern New South Wales, including on the basis of the Project's environmental impact. The case has resulted in judicial precedent establishing that the National Native Title Tribunal (**NNTT**) must take into account environmental and climate considerations when evaluating the "public interest" of fossil fuel projects.[135] However, despite acknowledgement of the Project's contribution to global warming, and its significant adverse impacts on Gomeroi way of life, culture and traditions, the NNTT concluded these considerations are outweighed by the Project's "net public benefit". As such, the NNTT has determined that the Project can proceed.[136]

Since that decision, the International Court of Justice (**ICJ**) Advisory Opinion on the Obligations of States with Respect to Climate Change has emphasised that indigenous peoples may be more severely impacted by the impacts of climate change, concluding that the enjoyment of human rights by such groups is at risk of being affected by the adverse effects of climate change.[137]

The Advisory Opinion is unequivocal in its advice that States, including Australia, have "a duty to prevent significant harm to the environment by acting with due diligence and to use all means at their disposal to prevent activities carried out within their jurisdiction or control from causing significant harm to the climate system and other parts of the environment, in accordance with their common but differentiated responsibilities and respective capabilities."[138] The ICJ further advised that "States have obligations under international human rights law to respect and ensure the effective enjoyment of human rights by taking necessary measures to protect the climate system and other parts of the environment."[139]

Given the ICJ's articulation of customary international and treaty law obligations as they relate to climate change and human rights, it is likely that Australia's ongoing production and expansion of fossil fuels amounts to a breach of Australia's current international legal obligations including under customary international law, the *United Nations Framework on Climate Change* (**UNFCC**),[140] the Paris Agreement and international human rights law.

Australia's response to the ICJ's Advisory Opinion, including the necessary transition from fossil fuels as required by international law, as well as processes to mitigate and adapt to climate

[133] Northern Land Council, *'Remote Territorians Left Behind in Natural Disaster Response'* (Media Release, 17 March 2026).
[134] See for example: *Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796 (footnote 7 above) and *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 (and EDO's case note about this decision). See further Nona, F et al 2025, *Indigenous-led Rights-based Approaches to Climate Litigation*, Discussion Paper Lowitja Institute, Melbourne (June 2025).
[135] See *Gomeroi People v Santos NSW Pty Ltd and Santos NSW (Narrabri Gas) Pty Ltd* [2024] FCAFC 26.
[136] The NNTT determined that the relevant "future acts" could proceed, on certain conditions in: *Santos NSW Pty Ltd and Another v Gomeroi People and Another* [2025] NNTTA 12 (19 May 2025). An appeal of the NNTT's determination to the Full Federal Court of Australia was heard on 6 March 2026. Judgment was reserved.
[137] Obligations of States with respect to Climate Change (Advisory Opinion) [2025] ICJ Rep 187, 131.
[138] Ibid, [457B(a)].
[139] Ibid, [457E].
[140] *United Nations Framework Convention on Climate Change,* opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

change, must be co-designed with First Nations peoples, informed by First Nations traditional scientific knowledge and grounded on FPIC principles. The Advisory Opinion underscores the experience of First Nations communities documented in this submission: climate justice cannot be achieved unless and until the human rights of First Nations Australians are adequately recognised and protected under Australian law, including by incorporating UNDRIP.

Recommendations

11. Australian Governments should effectively engage with Indigenous knowledge holders to collaborate and tackle the urgent need for action on climate change and biodiversity loss, and ensure fairness and inclusion in climate initiatives.[141]
12. Australian Governments should recognise, support, prioritise and fund:
    a. Self-determined First Nations-led initiatives to respond to and adapt to climate change
    b. Self-determined First Nations governance models that are incorporated into environmental management
    c. Co-designed and co-led environmental disaster preparedness planning to ensure that it is appropriately addressing and incorporating First Nations concerns and objectives
    d. First Nations led solutions to the energy and food insecurity and housing crisis which are further exacerbated by climate change[142]
    e. First Nations peoples, communities and organisations access to Western and Indigenous scientific expertise to engage effectively in environment and planning systems[143]
    f. First Nations communities to adapt to climate change, including extreme heat, lack of access to water and energy, and broader health impacts.

Conclusion

The EDO thanks the Special Rapporteur for considering the issues highlighted in this submission. The themes and issues canvassed are urgent, critical and necessarily intertwined, and will require a holistic response to prevent ongoing breaches of Australia's international legal obligations towards First Nations Australians.

As observed in the Introduction, these submissions are drawn from EDO's experience working on behalf of First Nations clients and communities within the Western legal framework and seek to elevate issues raised by them. We urge the Special Rapporteur to engage directly with First Nations individuals and organisations during his visit, and to visit various jurisdictions, including the Top End.

EDO would be happy to facilitate any meetings with our clients and stakeholders during the visit. We would also welcome the opportunity to meet with the Special Rapporteur to expand further on this submission.

Thank you for the opportunity to make this submission.
Please do not hesitate to contact our office should you have further enquiries.

[141] Anne Poelina, 'Martuwarra Fitzroy River Catchment – Sustainable Lifeways and Livelihoods' (2026) Australasian Journal of Water Resources at 9.
[142] For example, infrastructure development in First Nations communities to appropriately mitigate the impacts of climate change, including climate resilient housing, community renewable energy projects and community farming projects.
[143] In our experience, lack of information and scientific expertise is a significant barrier to First Nations' engagement with environment and planning systems.

ANNEXURES

Annexure 1 - EDO Submission to Parliamentary Joint Committee on Inquiry into Australia's Human Rights Framework (23 June 2023)

Annexure 2 - EDO Submission to the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia (14 August 2020)

Annexure 3 - Parliament of Australia, Recommendations from the Joint Standing Committee of Northern Australia's *A Way Forward* Report regarding Juukan Gorge (2021), pages xxv to xxix

Annexure 4 - Committee on the Elimination of Racial Discrimination, Letter to Australia regarding Western Australia's draft proposed cultural heritage bill (26 April 2024)

Submission to Parliamentary Joint Committee on Inquiry into Australia's Human Rights Framework

23 June 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.

www.edo.org.au

Submitted to:

Parliamentary Joint Committee on Human Rights
PO Box 6100,
Parliament House
Canberra ACT 2600

Submitted online and by email: human.rights@aph.gov.au

For further information on this submission, please contact:

Melanie Montalban
Managing Lawyer, ACT
T: (02) 6230 6627
E: melanie.montalban@edo.org.au

Acknowledgement of Country

The EDO recognises and pays respect to the First Nations Peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the Land.

A Note on Language

We acknowledge there is a legacy of writing about First Nations Peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term 'First Nations Peoples'. We acknowledge that not all First Nations Peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

The role of EDO

EDO is a non-Indigenous community legal centre that works alongside First Nations Peoples around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction.

EDO has and continues to work with First Nations clients who have interacted with Western laws, including litigation and engaging in Western law reform processes.

Out of respect for First Nations self-determination, EDO has provided high-level key recommendations for Western law reform to empower First Nations to protect their Countries and cultural heritage. These high-level recommendations comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

CONTENTS

ATTACHMENTS

- **Attachment 1** – *A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (August 2022)
- **Attachment 2** – Submission from EDO to the ACT Legislative Assembly in the *Inquiry into Petition 32-21 (No Rights Without Remedy)* (April 2022)
- **Attachment 3** – Submission from EDO to the ACT Government on its investigation into including the right to a healthy environment in the ACT's *Human Rights Act 2004* (August 2022)
- **Attachment 4** – *Global Warning Report: The Threat to Climate Defenders in Australia* (December 2021)
- **Attachment 5** – Submission from EDO to the UN Special Rapporteur on toxics and human rights (May 2023)
- **Attachment 6** – Wilderness Society, *Who holds the power? Community rights in environmental decision-making* (2022)

EXECUTIVE SUMMARY

The Environmental Defenders Office Ltd (**EDO**) welcomes the opportunity to contribute to the Parliamentary Joint Committee's *Inquiry into Australia's Human Rights Framework* (**Inquiry**).

EDO notes that the timing of the Inquiry is particularly pertinent given recent resolutions in the United Nations Human Rights Council (**HRC**) and United Nations General Assembly (**UNGA**) that recognised access to a clean, healthy and sustainable environment (**right to a healthy environment**) as an universal human right.[1] As Australia voted in favour of the UNGA resolution, EDO considers the Inquiry is a significant opportunity for Australia to implement its commitment to the international community by enacting a federal Charter or Act of Human Rights and Freedoms (**Charter**) that enshrines the right to a healthy environment in law.

The EDO is the largest environmental legal centre in the Australia-Pacific. EDO is dedicated to protecting the climate, communities, and environment by providing access to justice, running litigation, and leading law reform advocacy. As an accredited community legal service and non-government, not-for-profit organisation, EDO uses the law to protect and defend Australia's wildlife, people, and places.

Our work is underpinned by an environmental justice and human rights framework. EDO recognises that the human rights of certain people and communities are disproportionately impacted by environmental harm, including the impacts of climate change. This guides EDO to focus on empowering overburdened people and communities to fight for environmental justice.

In this submission, EDO responds to the following terms of reference for the Inquiry:

- developments since 2010 in Australian human rights laws (both at the Commonwealth and State and Territory levels) and relevant case law;
- whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include;
- whether existing mechanisms to protect human rights in the federal context are adequate and if improvements should be made;
- the role of the Australian Human Rights Commission (**Commission**);
- the process of how federal institutions engage with human rights, including requirements for statements of compatibility; and
- the effectiveness of existing human rights Acts/Charters in protecting human rights in the Australian Capital Territory (**ACT**), Victoria and Queensland, including relevant caselaw, and relevant work done in other states and territories.

Please note that this submission does not respond to the following terms of reference:

- the scope and effectiveness of Australia's 2010 *Human Rights Framework* and the *National Human Rights Action Plan*;

[1] United Nations Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 48/13, UN Doc A/HRC/48/13 (18 October 2021); United Nations General Assembly, *The Human Right to a Clean, Healthy, and Sustainable Environment*, UN Doc. A/RES/76/300 (28 July 2022).

- whether the Framework should be re-established, as well as the components of the Framework, and any improvements that should be made; or
- the remit of the Parliamentary Joint Committee on Human Rights.

In this submission, we make **14 recommendations** in response to the terms of reference.

SUMMARY OF RECOMMENDATIONS

EDO recommends the following:

1. The Australian Government should enact a federal Charter or Act of Human Rights and Freedoms (**Charter**).
2. The Australian Government should ratify the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (**Aarhus Convention**).
3. The Charter should include the right to a clean, healthy and sustainable environment (the **right to a healthy environment**), which should be defined broadly, consistent with international law.
4. The Australian Government should not strictly delineate between human rights and the rights of nature in the Charter or in any explanatory memorandum, guidelines or policies.
5. The Charter should enshrine the environmental procedural rights that are protected under the Aarhus Convention, in addition to the participation duty of public authorities proposed by the Australian Human Rights Commission (**Commission**).
6. The Charter should enshrine all rights protected under the international human rights treaties ratified by Australia.
7. The Charter should include the cultural rights of First Nations Peoples proposed by the Commission. In addition, the Charter should enshrine all rights protected under the *Universal Declaration of the Rights of Indigenous Peoples* (**UNDRIP**). Alternatively, the Australian Government should enact legislation to give domestic effect to UNDRIP. Any provision relating to the rights of First Nations Peoples must be developed in culturally appropriate consultation with First Nations Peoples.
8. The Charter should include rights to protect environmental human rights defenders, in particular the right to a safe and enabling environment so that they are able to act free from threat, restriction and insecurity in Article 9(1) of the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* (**Escazú Agreement**), and other relevant protest rights in Article 9(2) of the Escazú Agreement.
9. The Charter should include a positive duty on public authorities as proposed by the Commission.
10. The Charter should explicitly state that, consistent with international law, the positive duty on public authorities extends to a duty to ensure that private actors act

consistently with the human rights contained in the Charter. The Charter should also impose a duty on businesses and other private actors to act consistently with human rights, and should include accessible remedies for harmful interference on human rights by private actors.

11. The Charter should include a participation duty as proposed by the Commission, however this duty should require public authorities to ensure the effective participation of all people who are most at risk of experiencing environmental harm in addition to First Nations Peoples, children, and people with disability, such as women, people who are financially disadvantaged, older people, people from a racial, ethnic or other minority, people displaced by natural disasters, culturally and racially marginalised communities, and LGBTIQA+ communities.
12. The Charter should ensure access to effective remedies for breaches of human rights including an informal complaints mechanism, access to judicial remedies, and adequate protections for individuals against adverse costs orders, as proposed by the Commission.
13. The Charter should establish a rapid response mechanism to protect environmental human rights defenders exercising their rights in conformity with the Charter's provisions from penalisation, persecution, harassment, or any other form of retaliation for their involvement, similar to the mandate of the Special Rapporteur on environmental defenders under the Aarhus Convention. At a minimum, the Charter must enable expedited access to effective remedies for environmental human rights defenders in urgent matters.
14. The role of the Commission should be expanded to include consideration of environmental human rights, including by exercising five key functions:
    a. advocate for a strong definition of a right to a healthy environment in state and Commonwealth human rights legislation;
    b. promote and increase awareness of the interrelationship between human rights protection and protection of the environment;
    c. conduct research into the interrelationship between human rights protection and the protection of the environment in Australia;
    d. monitor and scrutinise Australia's performance in relation to its human rights commitments within the context of addressing environmental protection;
    e. investigate and conciliate human rights complaints made within the context of the interrelationship between human rights and the triple planetary crises of climate change, biodiversity loss and a toxic environment.

In support of our recommendations, we **attach** the following:

- **Attachment 1 –** ***A Healthy Environment is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia*** (August 2022) which describes the importance of the human right to a clean, healthy and sustainable environment (the 'right to a healthy environment') and calls on all levels of Australian government to enshrine the right to a healthy environment in Australian law;
- **Attachment 2 – Submission from EDO to the ACT Legislative Assembly in the *Inquiry into Petition 32-21 (No Rights Without Remedy)*** (April 2022) which supports the proposal to amend the ACT's *Human Rights Act 2004* to introduce an informal and accessible human rights complaint mechanism, and which makes 13 recommendations to improve access to justice for human rights matters in the ACT;
- **Attachment 3 – Submission from EDO to the ACT Government on its investigation into including the right to a healthy environment in the ACT's *Human Rights Act 2004*** (August 2022), which strongly recommends that the ACT Government includes the right to a healthy environment in the ACT's *Human Rights Act 2004*, and which makes 17 recommendations to ensure that, if the right to a healthy environment is included in the Act, it is appropriately defined and can be effectively implemented in the ACT;
- **Attachment 4 –** ***Global Warning Report: The Threat to Climate Defenders in Australia*** (December 2021), which documents the importance of climate activism in Australia, maps the systemic repression faced by climate activists across the country, and examines the unregulated political influence of the fossil fuel industry driving that repression. It makes recommendations for Australian law to protect these rights.
- **Attachment 5 – Submission from EDO to the UN Special Rapporteur on toxics and human rights** (May 2023) which investigates the implications for human rights of environmentally sound management and disposal of hazardous substances and wastes, highlights how Australian law does not protect human rights to be free of toxic pollutants, and identifies changes that must be made at a national and subnational level to protect these rights.
- **Attachment 6 – Wilderness Society,** ***Who holds the power? Community rights in environmental decision-making*** (2022), which includes EDO's analysis of federal, state and territory environmental protection and planning legislation to assess how well these provide for the three core environmental community rights established by the Rio Declaration, and the Aarhus Convention and reveals that environmental community rights are not adequately protected across the country.

1 – DEVELOPMENTS SINCE 2010 IN AUSTRALIAN HUMAN RIGHTS LAWS AND RELEVANT CASE LAW

In this section, we address some key developments in human rights law in Australia as it relates to the environment.

Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors

In respect of litigation, we draw the Parliamentary Joint Committee's attention to the decision of the Queensland Land Court in *Waratah Coal v Youth Verdict & Ors* (**Waratah Coal decision**)[2], which in summary accepted the intrinsic connection between the enjoyment of human rights and the health of the environment, notwithstanding that there is no there is no standalone right to a healthy environment in Queensland.

In this case, EDO acted for Youth Verdict and the Bimblebox Alliance in opposition to a proposed coal mine in the Galilee Basin, Queensland. On behalf of our clients, EDO argued coal from the mine would impact the human rights of First Nations Peoples by contributing to dangerous climate change. This case was the first time an Australian coal mine was challenged on human rights grounds. This case was also the first time an Australian court heard evidence against a coal mine on Country and according to First Nations protocols. When considering its human rights obligations under Queensland's human rights laws,[3] the Queensland Land Court found that the proposed coal mine would unreasonably and unjustifiably limit several human rights including the right to life, rights of First Nations Peoples, rights of children, and the right to property and privacy due to both climate change and localised impacts.[4]

Although this decision was not binding on the regulators of mining licences and environmental authorities, the coal mine was ultimately rejected after the decision-makers accepted the Queensland Land Court's recommendation. This case is a key acknowledgement that in future, public authorities must consider the impact of climate change on relevant human rights protected under Queensland's human rights legislation when making environmental decisions.

Daniel Billy and Ors v Australia (Torres Strait Islanders Petition)

We also draw the Parliamentary Committee's attention to the recent decision of *Daniel Billy and Ors v Australia (Torres Strait Islanders Petition)* made by the UN Human Rights Committee,[5] which monitors the implementation of the *International Covenant on Civil and Political Rights* (**ICCPR**) by State parties including Australia.

In this matter, the UN Human Rights Committee considered a complaint lodged by a group of Torres Strait Islander People, Australian nationals, and six of their children against Australia for its failure to adapt to climate change by, amongst other things, upgrading seawalls on the islands and reducing GHG emissions. The complainants argued that changes in weather patterns from climate change, including severe flooding from tidal waves, have direct harmful consequences on their livelihood, their cultures and traditional way of life. The complainants argued the Australian government had violated a number of their rights under the ICCPR including the right to life (Art 6).

---

[2] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21 ('*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)*').
[3] *Human Rights Act 2019* (Qld) ss 59-60 ('Qld HRA').
[4] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* at [44], [1655], [1703].
[5] CCPR/C/135/D/3624/2019.

The Committee found that there had been no breach of the complainants' right to life because in the time that it would take to realise the risk to the complainants' life, estimated to be around 10 to 15 years, it was possible that Australia could intervene with affirmative measures. In making this finding, the Committee took into account evidence that Australia is taking adaptive measures to reduce vulnerabilities and build resilience to climate change harms. However, the Committee found that Australia had breached the complainants' other human rights under the ICCPR (the right to privacy and home (Art 17) and the right to culture (Art 27)) because of its delay in constructing seawalls.

Although this was an international human rights decision, it is relevant to the Parliamentary Committee's inquiry because it is instructive of how the Human Rights Committee may determine Australia's human rights obligations with respect to climate change. The decision also highlights that there are currently no effective domestic remedies in Australia for breaches of the ICCPR.

Commitment to incorporate the right to a healthy environment into the ACT's *Human Rights Act 2004*

In relation to legislative developments, we note that the ACT Government has committed to legislate a standalone right to a healthy environment by incorporating it into the *Human Rights Act 2004* (ACT) (**ACT HRA**) during the second half of 2023.[6] This is an important development in human rights protection in Australia. EDO notes that this commitment follows a significant period of advocacy by the EDO in the ACT for the inclusion of the right in the ACT HRA. Should the ACT Government fulfil this commitment, this would mark the first jurisdiction in Australia to incorporate the standalone right expressly in legislation.

As we explain further in this submission, the right to a healthy environment is increasingly recognised under international law,[7] and we advocate for the right to be included in a federal Charter.

Increasing repression of environmental defenders in Australia

Our report *Global Warning Report: The Threat to Climate Defenders in Australia* (**Attachment 4**) documents the importance of climate activism in Australia, maps the ongoing and worsening systemic repression faced by climate activists across the country, and examines the unregulated political influence of the fossil fuel industry driving that repression. This report makes recommendations for Australian law to protect the rights of climate activists, including recommending the introduction of federal human rights legislation and enshrinement of the rights to freedom of association and freedom of peaceful assembly.

Since the publication of this report in 2021, consistent with global trends, Australia has seen an increasing crackdown on climate protesters, with anti-protestor legislation now being implemented by multiple states and territories across Australia. The most prominent developments include amendments in NSW to the *Roads Act 1993* (NSW) and the *Crimes Act 1900*

[6] Minister for Human Rights, Legislative Assembly for the Australia Capital Territory, *Your Say Report – Right to a Healthy Environment – Report on What We Heard* (Report, November 2022) 3.

[7] See UN Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 48/13, UN Doc A/HRC/48/13 (18 October 2021) and UN General Assembly, *The Human Right to a Clean, Healthy, and Sustainable Environment*, UN Doc. A/RES/76/300 (28 July 2022); see also *Stockholm Declaration on the Human Environment: Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14 and Corr.1 (16 June 1972).

(NSW) (collectively, the **NSW Protest Laws**),[8] and in South Australia amendments to the *Summary Offences Act 1953* (SA).[9] EDO recently represented 'Knitting Nannas' Dominique Jacobs and Helen Kvelde in a constitutional challenge to aspects of the NSW Protest Laws. Judgment is currently reserved before the Supreme Court of NSW.

EDO has also witnessed an increase in proactive policing of climate activists across all Australian states and territories including, for example, police raids, seizure of devices, pre-emptive checks, and onerous bail conditions, which are increasingly utilised as mechanisms for disrupting and isolating the environmental movement.[10]

EDO is deeply alarmed by this repression and the implications for human rights of climate advocates. This must be ameliorated by enacting a federal Charter, which must include the elements we recommend in the next section of this submission.

[8] *Road Amendment (Major Bridges and Tunnels) Regulation 2022* (NSW), *Roads and Crimes Legislation Amendment Act 2022* (NSW) and *Crimes Act 1900* (NSW).
[9] *Summary Offences (Obstruction of Public Places) Bill 2023* (SA).
[10] See for example 'Extinction Rebellion protesters have 'onerous' bail conditions revoked by Sydney court', *SBS News* (online, 25 October 2019) available at <https://www.sbs.com.au/news/article/extinction-rebellion-protesters-have-onerous-bail-conditions-revoked-by-sydney-court/8na7evqe8>; Paul Gregoire, 'Bail and Remand Are Being Weaponised to Stamp Out Climate Activism', Sydney Criminal Lawyers (online 20 July 2022) available at <https://www.sydneycriminallawyers.com.au/blog/bail-and-remand-are-being-weaponised-to-stamp-out-climate-activism/>; Jesse Noakes, 'WA police raid journalists', *The Saturday Paper* (online, 13 May 2023) available at https://www.thesaturdaypaper.com.au/news/environment/2023/05/13/wa-police-raid-journalists#hrd.

2 – WHETHER THE AUSTRALIAN PARLIAMENT SHOULD ENACT A FEDERAL HUMAN RIGHTS ACT AND, IF SO, WHAT ELEMENTS IT SHOULD INCLUDE

EDO strongly recommends that the Australian Parliament enact a Charter or federal human rights Act (**Recommendation #1**). We recommend that any such Charter should include the elements discussed below.

The right to a healthy environment

EDO strongly recommends that any Charter include the right to a healthy environment (**Recommendation #3**), for the reasons set out in our report *A Healthy Environment is a Human Right* (**Attachment 1**).

In a landmark resolution on 28 July 2022, the UN General Assembly reaffirmed recognition of the human right to a clean, healthy and sustainable environment,[11] after this right was explicitly recognised by the UN Human Rights Council in October 2021.[12] The resolution passed with an overwhelming majority, with Australia voting in favour along with another 160 UN Member States. The result is that the right to a healthy environment is now universally recognised as a human right that is important for the enjoyment of other human rights.

Noting that Australia voted in favour of recognising the right to a healthy environment, EDO considers that Australia can implement its commitment to the international community at home by legislating a Charter and including the right to a healthy environment in such a Charter.

Our report *A Healthy Environment is a Human Right* discusses the meaning of the right to a healthy environment in international law (Section 1), its status in Australian law (Section 2), and presents arguments in favour of recognising the right to a healthy environment in Australian law in all levels of government (Sections 3 and 4). In our report, we recommend that the Australian government take the following steps to enshrine the right to a healthy environment in Australian law:

1. **Recommendation 1:** The Australian Government supports recognition of the human right to a clean, healthy and sustainable environment (the 'right to a healthy environment') in international law, including by supporting and ratifying any international treaty mechanisms that includes the right.
2. **Recommendation 2:** Legislate the right to a healthy environment in an Australian Charter of Human Rights and Freedoms.
3. **Recommendation 3:** Legislate the right to a healthy environment in new and existing state and territory human rights legislation.
4. **Recommendation 4:** If the Australian Government does not introduce an Australian Charter of Human Rights and Freedoms, legislate a duty into the *Public Governance, Performance and Accountability Act 2013* (Cth) for Commonwealth officials to act consistently with the right to a healthy environment and make it a mandatory

[11] UN General Assembly, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300 (28 July 2022).
[12] UN HRC, *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 48/13, UN Doc. A/HRC/48/13 (18 October 2021).

consideration when exercising their functions under federal legislation that affects the environment and human health, in particular human rights and environmental legislation.

Definition of the right to a healthy environment

We note that the Commission has proposed that a Charter includes the right to a healthy environment, which it has defined as follows:

> *(1) Every person has the right to an environment that does not produce adverse health consequences in the following respects:*
>
> > *(a) Every person has the right not to be subject to unlawful pollution of air, water and soil.*
> >
> > *(b) Every person has the right to access safe and uncontaminated water, and nutritionally safe food.*
> >
> > *(c) No unjustified retrogressive measures should be taken with regard to this right.*
> >
> > *(d) No one should be subject to discrimination regarding the realisation of this right.*

While EDO endorses the Commission's proposal to include the right to a healthy environment in a federal Charter, EDO considers that the definition proposed by the Commission is overly restrictive. In particular, EDO disagrees with the inclusion of 'unlawful' pollution of air, water and soil, which implies that lawful pollution is permissible even if it produces adverse health consequences. In our view, this contradicts the Commission's proposed definition of the right to a healthy environment as the right to an environment that does not produce adverse health consequences. EDO's views in relation to the negative impacts of 'lawful' pollution on human rights in Australia is set out in our recent submission to the UN Special Rapporteur on toxics (**Attachment 5**).

Consistent with our recommendations to the ACT Government (**Attachment 3**), the right to a healthy environment should be defined broadly.

The right to a healthy environment should not be limited to an exhaustive list of substantive elements (such as the right to clean air, clean water, or safe food) and/or procedural elements. That is because interpretation of the right will evolve as our understanding of State obligations under international human rights law in relation to the environment evolves, noting that human rights treaties are considered living instruments that must evolve over time and be interpreted in light of present conditions.[13]

Our submission to the ACT Government includes further suggestions on how the right to a healthy environment could be defined (see recommendations 3 and 4, pages 16-21). In particular, **we recommend that the right to a healthy environment is defined to include the right to a 'clean', healthy' and 'sustainable' environment, consistent with the General Assembly's resolution**. Our submission contains further guidance on how these terms are interpreted in practice by UN Member States.

[13] See e.g regional human rights courts and expressing this view in: *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A), European Court of Human Rights (23 March 1995); Inter-American Court of Human Rights, *Advisory opinion on the interpretation of the American Declaration of the Rights and Duties of Man*, Advisory Opinion OC-10/89 (14 July 1989); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights (31 August 2001.

Our submission to the ACT Government also addresses how the right to a healthy environment could be implemented in practice throughout the submission. This discussion may be useful when considering including the right to a healthy environment in a federal Charter.

The rights of nature

In addition, we note that there is commentary on environmental rights that suggests that nature and natural phenomena such as rivers, lakes and trees share the right to exist and that the rights of nature should be protected in the same way as the rights of humans.[14] This concept is known as the 'rights of nature', through which the environment or its features are afforded legal personality, allowing the natural world to exist, thrive and evolve as an independent entity.

The rights of nature have emerged from a global movement that is growing and developing rapidly.[15] As this movement evolves, it is becoming increasingly clear that rights of nature are closely intertwined with human rights including the right to a healthy environment, the right to culture, and the right to clean water.[16]

If the Australian Parliament enacts a federal Charter, it will need to ensure that Australian human rights law develops and evolves consistently with international law. We recommend the Australian Parliament does not strictly delineate between human rights and the rights of nature in the Charter or in any explanatory memorandum, guidelines or policies (**Recommendation #4**). Strict separation of the rights would be inconsistent with the global movement on the rights of nature. It may also be inconsistent with the views and cultural rights of First Nations Peoples, who tend to view the environment in a holistic way and not compartmentalised into separate components of nature (air, land, water, biodiversity) and humans.

All rights protected under the international human rights treaties ratified by Australia

All human rights are interconnected and are therefore indivisible. It will not be possible for Australia to realise human rights unless all human rights are recognised and protected under Australian law.

This includes all political, civil, economic, cultural, and social rights contained in the *International Covenant on Civil and Political Rights* (**ICCPR**) and *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**),[17] as well as other rights including the rights of women, children and people living with disability enshrined in the seven international human rights treaties ratified by Australia.

---

[14] Mihnea Tanasescu, 'When a river is a person: From Ecuador to New Zealand, Nature Gets its Day in Court', *The Conversation* (News Article, 19 June 2017); David R Boyd, *The Rights of Nature: A Legal Revolution That Could Save the World* (ECW Press, 2017); Elizabeth Macpherson, *The (human) rights of nature: a comparative study of emerging legal rights for rivers and lakes in the United States of America and Mexico* (2021) Duke Environmental Law and Policy Forum (Vol: XXXI) 327.

[15] Alessandro Pelizzon et al, 'Yoongoorrookoo: The Emergence of Ancestral Personhood' (2021) 30(3) *Griffith Law Review* 505, 505; Joshua Gellers, 'Earth System Law and the Legal Status of Non-Humans in the Anthropocene' (2021) *7 Earth System Governance*, 2

[16] For example, the Special Rapporteur's thematic reports for a healthy biosphere and clean water refer to the rights of nature as good practice in achieving the right to a healthy environment: A healthy biosphere and the right to a healthy environment, UN Doc A/75/161 (15 July 2020) at [80] and Human rights and the global water crisis: water pollution, water scarcity and water-related disasters, UN Doc A/HRC/46/28 (19 January 2021) at [85].

[17] *International Covenant on Civil and Political Rights*, opened for signature on 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR) and *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS (entered into force 3 January 1976) (ICESCR).

Rights of First Nations Peoples

The rights of First Nations Peoples are recognised under the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**),[18] in addition to other human rights treaties such as the ICCPR.

The Special Rapporteur on human rights and the environment has identified 16 Framework Principles on Human Rights and the Environment (**Framework Principles**),[19] which are outlined on page 11 of our report (**Attachment 1**). The Framework Principles are 16 basic obligations of States under international human rights law as they relate to the enjoyment of a clean, healthy and sustainable environment. The Framework Principles do not establish new legal obligations. Rather, they are derived from obligations that States already have under international human rights treaties and other sources of international law.[20]

Framework Principles 3, 14 and 15 are particularly important with respect to First Nations in Australia, which we discuss at pages 27 to 29 of our report. The specific rights of First Nations Peoples in relation to a healthy environment are outlined in Framework Principle 15. Framework Principle 15 of the Special Rapporteur's Framework Principles is that States have obligations to indigenous peoples and members of traditional communities, including to:[21]

- recognise and protect their rights to the lands, territories and resources that they have traditionally owned, occupied or used;
- consult 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;
- respect and protect their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources; and
- ensure that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.

The obligations in Framework Principle 15 arise out of international human rights sources including UNDRIP and art 27 of the ICCPR.[22]

In its position paper, the Commission has proposed that any Charter include substantive cultural rights for First Nations Peoples.[23] We understand that this proposed right implements Article 27 of the ICCPR, and that the Commission has adopted its drafting from section 28 of Queensland's

[18] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49 (2 October 2007, adopted 13 September 2007).
[19] John H Knox, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, UN Doc. A/HRC/37/59 (24 January 2018).
[20] Ibid, 3 [8]; see *Selected Sources for Framework Principles on Human Rights and the Environment* (February 2018) accessible at <https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/ListSourcesFrameworkPrinciples.pdf>.
[21] Ibid, Principle 15, pp 18-20.
[22] *Selected Sources for Framework Principles on Human Rights and the Environment*, Principle 15, pp 30-32.
[23] Australian Human Rights Commission, 'Chapter 5: What rights and fundamental freedoms should be protected in a Human Rights Act?', *Free and Equal: A Human Rights Act for Australia* (Position Paper, December 2022) p 114.

Human Rights Act 2019. EDO is supportive of the Commission's proposal to include these rights and is supportive of the Commission's drafting of this right.

The Commission's proposed 'participation duty' also aims to ensure the participation of First Nations Peoples in relation to decisions that directly or disproportionately affect their rights (in addition to other people in society who require special protection under human rights, namely children and persons with disability).[24] The Commission's proposed participation duty draws on international human rights law standards and common law procedural fairness principles.[25] In relation to First Nations Peoples, the duty will include positive requirements to enable participation of First Nations Peoples based on Articles 18 and 19 of UNDRIP.[26] These rights protect the right of Indigenous Peoples to participate in decisions that affect them and the right of Indigenous Peoples to free, prior and informed consent respectively.

EDO is very supportive of a Charter that imposes a duty on public authorities to uphold these collective consultation principles. As discussed further below in this submission, EDO recommends that the Charter include the participation duty proposed by the Commission, however this duty should require public authorities to ensure the effective participation of all people who are most at risk of experiencing environmental harm in addition to First Nations Peoples, children, and people with disability (**Recommendation #11**).

Further, EDO considers that the rights of First Nations Peoples must be reflected as individually held and exercisable rights within the Charter, rather than merely an obligation and duty on authorities to uphold those rights. In addition, although the Commission proposes that the participation duty will include positive requirements based on Articles 18 and 19 of UNDRIP, it is not clear whether the Commission proposes that such requirements are included in the text of the proposed legislation or merely in guidelines that must be followed in interpretation of the legislation. EDO considers that the collective rights of First Nations Peoples must be expressly included in any Charter.

EDO therefore **recommends that the Charter should incorporate all rights contained under UNDRIP, including the principle of free, prior and informed consent**. Alternatively, the Australian Government should enact legislation to give domestic effect to UNDRIP. Consistent with Articles 18 and 19 of UNDRIP, any rights relating to First Nations Peoples in the Charter should be developed with proper consultation and participation from First Nations Peoples, representative groups, and other First Nations stakeholders (**Recommendation #7**).

In making this recommendation, it is important to note that the EDO 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 any external First Nations Peoples in relation to our recommendations. We instead make this recommendation based on our interpretation of human rights law and international best practice.

As an example of a jurisdiction with legislation that gives effect to UNDRIP, the Parliamentary Committee may consider Canada's *United Nations Declaration on the Rights of Indigenous Peoples Act* which entered into force in 2021.

---

[24] Australian Human Rights Commission, 'Chapter 7: Procedural Duties', *Free and Equal: A Human Rights Act for Australia* (Position Paper, December 2022) pp 161-241.
[25] Ibid, p 182.
[26] Ibid, p 183.

All procedural rights protected under the Aarhus Convention

The Aarhus Convention protects rights that are essential to achieving the three procedural elements of the right to a healthy environment: the right to access information, right to participate in decision-making, and access to justice. If the Australian Parliament enacts a Charter that includes the right to a healthy environment, it will be essential to also include rights protected under the Aarhus Convention to ensure the right to a healthy environment can be implemented in practice.

In partnership with the Wilderness Society, EDO recently conducted an analysis of federal, state and territory environmental and planning laws to examine the extent to which those laws protect the three core environmental community rights established by Principle 10 of the 1992 Rio Declaration on Environment and Development and further elaborated in the Aarhus Convention. The findings showed that the rights are not comprehensively or consistently enshrined in national, state or territory legislation.

In relation to better recognising these critical rights in environmental decision-making, EDO recommends that the Australian government ratify the Aarhus Convention which is open for global ratification (**Recommendation #2**). We note that this recommendation is consistent with Recommendation 1 of our report *A Healthy Environment is a Human Right* (**Attachment 1**).

As noted above, the Commission's position paper proposes including a 'participation duty', which would be a binding duty on public authorities to ensure the participation of First Nations Peoples, children, and persons with disability in relation to decisions that directly or disproportionately affect their rights.[27] This duty would also include a non-binding requirement for proponents of legislation to facilitate participation during the law-making process and to reflect what participation measures were undertaken in statements of compatibility. The Commission's proposed participation duty draws on international human rights law standards and common law procedural fairness principles.[28]

EDO is supportive of the Commission's proposal and recommends that a Charter should include the proposed participation duty, however we consider that the participation duty should extend to ensure the effective participation of all people who are most at risk of experiencing environmental harm, in addition to First Nations Peoples, children, and people with disability (**Recommendation #11**). The Special Rapporteur on human rights and the environment has identified women, people who are financially disadvantaged, older people, people from a racial, ethnic or other minority, and people displaced by natural disasters as people who may be particularly vulnerable to environmental harm.[29] EDO also considers that culturally and racially marginalised communities and LGBTIQA+ communities may require additional protections from environmental harm.

We also maintain that any Charter should protect the broader participatory rights of all people. We consider that this could be achieved by ratifying the Aarhus Convention (**Recommendation #2**) and legislating each of the procedural rights contained in the Aarhus Convention as separate and distinct rights in the Charter (in addition to the 'participation duty') (**Recommendation #5**).

[27] Ibid, pp 161-241.
[28] Ibid, p 182.
[29] John H Knox, Special Rapporteur on Human Rights and the Environment, *Framework principles on human rights and the environment*, UN Doc. A/HRC/37/59 (24 January 2018) [41] p 17.

Rights to protect environmental human rights defenders

EDO strongly recommends that any Charter include rights to protect environmental human rights defenders. It is essential for such protections to be enshrined in law, particularly in light of recent developments in some parts of Australia, including NSW and South Australia, to enact legislation that restricts the ability of Australians to engage in peaceful protest, and the increase in proactive policing of climate activists.

This could be achieved by adopting our recommendation that any Charter includes the rights enshrined in Article 9 of the *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* (**Escazú Agreement**), which provides the following (emphasis added):

> *1. Each Party shall **guarantee a safe and enabling environment** for persons, groups and organisations that promote and defend human rights in environmental matters, so that they are able **to act free from threat, restriction and insecurity**.*
>
> *2. Each Party shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their **right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights**, taking into account its international obligations in the field of human rights, its constitutional principles and the basic concepts of its legal system.*
>
> *3. Each Party shall also take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement.*

In particular, we recommend that any Charter should include rights to protect environmental human rights defenders, in particular the right to a safe and enabling environment so that they are able to act free from threat, restriction and insecurity in Article 9(1) of the 'Escazú Agreement' and other relevant protest rights in Article 9(2) of the Escazú Agreement.

In relation to Article 9(2), we note that these rights appear to reflect the ICCPR rights to freedom of expression (Article 19), the right of peaceful assembly (Article 21), and the right to freedom of association (Article 22), however Article 9(2) protects a broader range of participatory rights which we consider is necessary to adequately protect environmental human rights defenders.

A positive duty on federal public authorities

EDO endorses the Commission's proposal for a Charter to impose a positive duty on federal public authorities to act compatibly with the human rights expressed in the Charter and to consider human rights when making decisions.[30] We recommend that the Charter includes the Commission's proposed positive duty (**Recommendation #9**).

Application of the Charter to private actors

Under international law, States' obligations to protect human rights includes an obligation to protect against harmful interference on human rights by businesses and other private actors.[31]

[30] Australian Human Rights Commission, 'Chapter 6: Positive Duty', *Free and Equal: A Human Rights Act for Australia* (Position Paper, December 2022) pp 139-161.
[31] John Knox, *Framework Principles on Human Rights and the Environment*, UN Doc A/HRC/37/59 (24 January 2018) [5], pp 7-8.

Similarly, individuals must be able to access effective remedies against private actors as well as government authorities.[32] In the environmental context, recognising that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life, the UN Human Rights Committee has declared that in order to fulfil their obligation to respect and ensure the right to life, States must preserve the environment and protect it against harm, pollution and climate change caused by both public and private actors.[33]

EDO therefore recommends that the Charter should explicitly state that, consistent with international law, the positive duty on public authorities extends to a duty to ensure that private actors act consistently with the human rights contained in the Charter. The Charter should also impose a duty on businesses and other private actors to act consistently with human rights, and should include accessible remedies for harmful interference on human rights by private actors (**Recommendation #10**).

This recommendation is consistent with Pillars I-III of the United Nations Guiding Principles on Business and Human Rights.[34] The Australian Government states that it has supported the UN Guiding Principles on Business and Human Rights since their inception in 2011 and made a pledge to implement the Guidelines in the 2016 Universal Periodic Review.[35]

[32] Ibid, [28] p 13.
[33] UN Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, UN Doc CCPR/C/GC/36 (3 September 2019) [62] p 13.
[34] John Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises – Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex (United Nations Guiding Principles on Business and Human Rights) (**UNGPs**).
[35] Attorney-General's Department, 'Annex 2: Australia's Voluntary Commitments – Second cycle UPR 2015 - Status of Implementation', *National Report of Australia - Universal Periodic Review 2021* (2021) item 10, available at https://www.ag.gov.au/sites/default/files/2020-12/annex-2-upr-2021.pdf, p 6.

3 – WHETHER EXISTING MECHANISMS TO PROTECT HUMAN RIGHTS IN THE FEDERAL CONTEXT ARE ADEQUATE AND IF IMPROVEMENTS SHOULD BE MADE

In our report *A Healthy Environment is a Human Right* (**Attachment 1**), we argue that existing mechanisms in the federal context are not adequate and that improvements are required (see p 37). Improvements could be made by accepting EDO's recommendations to the present Inquiry.

Access to effective remedies

Further improvements can be made by ensuring that the Charter promotes access to justice by ensuring that all people have access to effective remedies, including an informal complaints mechanism and access to judicial remedies.

In its position paper, the Commission advocates for the inclusion of an independent cause of action for a breach of human rights committed by a public authority, and that people must have access to a range of remedies for a breach.[36] The Commission proposes including an accessible complaints process whereby a person can make a complaint to the Commission.[37] If conciliation through the Commission fails or is inappropriate, or if the matter is urgent, the Commission proposes that people would have the right to initiate proceedings in the Federal Court or the Federal Circuit and Family Court.[38] The Commission proposes that people could pursue a direct cause of action under the federal Human Rights Act, and that ordinary judicial review could be pursued as an alternative, or in addition to, this direct cause of action.[39] The available remedies should replicate the remedies available under the federal discrimination law regime which includes monetary damages, amongst other remedies.[40] People could also rely on the rights under the Human Rights Act in other legal proceedings.[41] Finally, the Commission's framework notes that an additional means of enhancing access to justice is to include protections against adverse cost orders.

EDO is very supportive of the Commission's proposal and recommends that any Charter promotes access to effective remedies as proposed by the Commission (**Recommendation #12**). However, for clarity and as recommended earlier, EDO considers that each of these remedy mechanisms described above must be applicable against private actors (**Recommendation #10**).

Rapid response mechanism

EDO considers that the Charter should also incorporate additional measures to ensure that environmental human rights defenders who exercise their rights in conformity with the Charter's provisions have access to effective remedies in urgent matters they experience, or are at imminent threat of, penalisation, persecution, harassment, or other forms of retaliation for their involvement.

EDO recommends establishing a rapid response mechanism within the Charter (**Recommendation #13).** Taking guidance from the rapid response mechanism established under

[36] Australian Human Rights Commission, 'Chapter 11: Cause of action, complaints and remedies', *Free and Equal: A Human Rights Act for Australia* (Position Paper, December 2022) pp 267-290.
[37] Ibid, 272.
[38] Ibid, 273.
[39] Ibid, 274.
[40] Ibid, 272.
[41] Ibid, 273.

the Aarhus Convention, EDO considers that this rapid response mechanism could be implemented as follows:

1. Establish an independent office (either externally or as an independent office within the Commission) of a Human Rights Defender Commissioner ('**HRD Commissioner**'). The HRD Commissioner could function in a similar way to the position of the Special Rapporteur on environmental defenders under the Aarhus Convention. The HRD Commissioner's role would be to take measures to protect any person exercising their rights in conformity with the Charter's provision from penalisation, persecution, harassment, or other forms of retaliation for their involvement.

2. Affected persons or other stakeholders, including groups and organisations, should be able to apply to the HRD Commissioner for urgent assistance in relation to the harm they are, or are at risk of, experiencing. The HRD Commissioner could take various measures in response to an application including, for example, commencing an urgent investigation, making public statements, and/or making representations to the Government including ministers, statutory authorities and decision-makers. The HRD Commissioner could also intervene in proceedings involving human rights issues when appropriate.

3. The HRD Commissioner's role should be complementary to the procedures of the Commission and its complaint investigation and conciliation functions, operating in a similar way to the Special Rapporteur and the Compliance Committee under the Aarhus Convention. The HRD Commissioner could interact with the Commission in the following ways:

    a. The HRD Commissioner would keep the Commission informed of their work.

    b. Depending on the severity or systemic nature of the human rights violations they are responding to, the HRD Commissioner could refer a matter to the Commission for urgent resolution via its complaint mechanism.

    c. During any referred complaint or in relation to another complaint relevant to the HRD Commissioner's functions, the Commission could seek the advice of the HRD Commissioner in relation to any rights, including participatory rights of the human rights defenders in question.

At a minimum, the Charter must enable expedited access to effective remedies for environmental human rights defenders in urgent matters. It is imperative that:

1. The Charter ensures environmental human rights defenders' urgent access to judicial remedies to seek relief for matters where, exercising their rights in conformity with the Charter's provisions, they are experiencing, or are at imminent threat of, penalisation, persecution, harassment, or any other form of retaliation for their involvement.

2. The Commission's human rights complaint mechanism includes a means to expediate urgent complaints, either by successful application of a party to a complaint before the Commission or on referral by the HRD Commissioner.

4 – THE ROLE OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

It is EDO's view that the Commission can play an important role in the protection and promotion of human rights, particularly in relation to ensuring environmental and climate justice in Australia.

The UN General Assembly's 2021 resolution to reaffirm recognition of the right to healthy environment calls upon States, international organisations, business enterprises, and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.[42] As Australia's national human rights institution, the Commission is a key relevant stakeholder that must steps to address the General Assembly's call to action.

In addition, the UN Human Rights Council's 2022 resolution on the role of national human rights institutions welcomed the critical contributions of such institutions in monitoring, reporting and advising governments and other stakeholders on climate action that is based on human rights.[43] The resolution highlights the important role that national human rights institutions play in assisting States to adopt effective frameworks to protect the human rights of all individuals without discrimination, and the particularly vulnerable situations of Indigenous Peoples to the impacts of climate change.

As Australia's only national independent statutory organisation tasked with promoting human rights in Australia and internationally, the Commission has a significant role to play in seeking to mitigate the effects of the triple planetary crises of climate change, biodiversity loss and toxic environments, on the enjoyment of human rights in both Australia and internationally.

EDO **recommends that the Commission's role should be expanded to include consideration of environmental human rights** (**Recommendation #14**). This could be achieved by expanding its role to include five key functions, which are consistent with the Commission's functions set out in the *Australian Human Rights Commission Act 1986* (Cth):[44]

1. Advocate for a strong definition of a right to a healthy environment in state and Commonwealth human rights legislation. The Commission's functions include reporting on the actions Australia must take to comply with the provisions of any relevant international instrument.[45] We consider that this includes the recent HRC and UNGA resolutions recognising the right to a healthy environment.[46] As submitted earlier, EDO considers that it is necessary to incorporate the stronger and broader definition of the right to a healthy environment recognised in those resolutions. EDO notes that state legislation will not be enough to incorporate the stronger version of the right, given key pieces of environmental legislation such as the *Environment Protection Biodiversity Conservation Act 1999* (Cth), pursuant to which important environmental approvals are made, are legislated at a Commonwealth level.

[42] UN General Assembly, *The human right to a clean, healthy and sustainable environment*, UN Doc. A/RES/76/300 (28 July 2022).
[43] UN Human Rights Council, *National human rights institutions*, 51st Session, UN Doc. A/HRC/51/L.16/Rev.1 (5 October 2022).
[44] *Australian Human Rights Commission Act 1986* (Cth), Part II.
[45] Ibid, s 11(1)(k).
[46] United Nations Human Rights Council, *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 48/13, UN Doc A/HRC/48/13 (18 October 2021); United Nations General Assembly, *The Human Right to a Clean, Healthy, and Sustainable Environment*, UN Doc. A/RES/76/300 (28 July 2022).

2. Promote and increase awareness of the interrelationship between human rights protection and protection of the environment. The Commission's functions include promoting an understanding and acceptance, and the public discussion, of human rights in Australia,[47] and undertaking educational programs and other programs for the purpose of promoting human rights.[48] EDO considers that environmental concerns should form a larger part of the Commission's focus given the significant long-term threat it poses to the enjoyment of human rights in Australia.

3. Conduct research into the interrelationship between human rights protection and the protection of the environment in Australia. The Commission's functions include undertaking research for the purpose of promoting human rights.[49] As Australia's national human rights institution, research and publications produced by the Commission examining this interrelationship will carry significant weight both in Australia and internationally. This will assist in furthering understanding amongst policymakers and the public that protecting the environment and addressing the triple planetary crises that Australia faces are human rights issues and challenges.

4. Monitor and scrutinise Australia's performance in relation to its human rights commitments within the context of addressing environmental protection. The Commission's functions include examining enactments, or proposed enactments, to ascertain whether they are inconsistent with or contrary to any human right.[50] This could include assessing pieces of important climate or environmental legislation against Australia's international human rights obligations, to determine whether Australia's current climate and environmental legislation and policies are consistent with these obligations.

5. Investigate and conciliate human rights complaints made within the context of the interrelationship between human rights and the triple planetary crises. The Commission's functions include to inquire into any act or practice that may be inconsistent with or contrary to any human right, and, by conciliation, to effect a settlement of the matters that gave rise to the Inquiry.[51]

[47] *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(g).
[48] Ibid, s 11(1)(h).
[49] Ibid.
[50] Ibid, s 11(1)(e).
[51] Ibid, s 11(1)(f).

5 – THE PROCESS OF HOW FEDERAL INSTITUTIONS ENGAGE WITH HUMAN RIGHTS

EDO briefly addresses the role of federal institutions engaging with human rights in our report *A Healthy Environment is a Human Right* (**Attachment 1**) (see pages 17 & 37).

As discussed earlier in this submission, we consider that it is essential to impose a positive duty on federal public authorities to engage with human rights. For this reason, we endorse the Commission's proposal for a Charter to impose a positive duty on federal public authorities to act compatibly with the human rights expressed in the Charter and to consider human rights when making decisions (**Recommendation #9**).[52]

In addition, recommendation 4 of our report *A Healthy Environment is a Human Right* (**Attachment 1**) suggests that if it is not possible for the Australian government to enact a federal Charter, an alternative suggestion may be to legislate a duty into the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) for Commonwealth officials to act consistently with the right to a healthy environment and make it a mandatory consideration when exercising their functions under federal legislation that affects the environment and human health, in particular human rights and environmental legislation.

Consistent with this recommendation, if the Australian Parliament is not minded to enact a federal Charter, an alternative solution may be to legislate a positive duty on federal public authorities in the PGPA Act in relation to all human rights.

[52] Australian Human Rights Commission, 'Chapter 6: Positive Duty', *Free and Equal: A Human Rights Act for Australia* (Position Paper, December 2022) 139-161.

6 – THE EFFECTIVENESS OF EXISTING HUMAN RIGHTS ACTS/CHARTERS IN PROTECTING HUMAN RIGHTS IN THE ACT, VICTORIA AND QUEENSLAND

In our report *A Healthy Environment is a Human Right* (**Attachment 1**), we address the effectiveness of existing human rights legislation in the ACT, Victoria, and Queensland (see pages 17-18, 24 and 37).

In relation to the ACT in particular, EDO recently prepared two submissions to the ACT Government that both address the effectiveness of the *Human Rights Act 2004* and make recommendations for improvement. One submission advocates for the inclusion of an accessible complaints mechanism and for other amendments to improve access to justice for human rights matters in the ACT (**Attachment 2**), and the other advocates for the inclusion of the right to a healthy environment (**Attachment 3**).

In response to these inquiries, the ACT Government has committed to introducing both an accessible complaints mechanism to the ACT Human Rights Commission and the substantive right to a healthy environment in the *Human Rights Act 2004* (ACT).

For further information about anything raised in this submission or in relation to our recommendations, please contact melanie.montalban@edo.org.au or (02) 6230 6627.

Environmental Defenders Office

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

14 August 2020

About EDO

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

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

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

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

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

www.edo.org.au

Submitted to:

Committee Secretary

Joint Standing Committee on Northern Australia
Sent via email only: jscna@aph.gov.au

For further information on this submission, please contact:

Lauren Butterly (Perth) or Revel Pointon (Brisbane)

[Lauren.Butterly@edo.org.au] [Revel.Pointon@edo.org.au]

Foreword Statement

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

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

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

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

A Note on Language

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

Executive Summary

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

We provide submissions on the following terms of reference:

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

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

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

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

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

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

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

<u>Key Recommendations:</u>

Australia's international obligations to protect cultural heritage

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

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

> **Recommendation 2**: Whilst acknowledging that the coronavirus led to some understandable delays (and that the situation must continue to be carefully monitored), high priority must be given to the *Aboriginal Heritage Act 1972* (WA) (**AHA**) reforms.
>
> **Recommendation 3**: All section 18 approvals under the AHA need to be reassessed under the reformed WA heritage laws.
>
> **Recommendation 4**: The WA cultural heritage law reforms must provide statutory entrenchment of decision making about heritage by First Nations in relation to both significance of heritage and protection of heritage.
>
> **Recommendation 5**: The WA cultural heritage law reforms must provide for merits appeal rights for First Nations in relation to decisions that impact their heritage. Further, merits appeal provisions must be reviewed across the Australian jurisdictions.

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

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

The effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions (TOR g) and how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites (TOR h)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Other related matters (TOR j)

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

Table of contents

1. Australia's international obligations to protect cultural heritage

(a) Overview

The right to the protection of cultural heritage[2] is intrinsically tied to other human rights, such as rights to culture, the maintenance of a distinctive Indigenous identity, self-determination, rights to land and territory and spiritual and religious beliefs and to the principle of equality and non-discrimination. Under international law, States cannot intentionally destroy the culture of Indigenous peoples, including sacred sites. States cannot destroy (or permit the destruction) of indigenous cultural heritage where it threatens the integrity of Indigenous culture or puts at risk cultural survival and cultural identity (and clearly, this will be the case for most, if not all, sacred sites). States must also provide avenues for Indigenous peoples to protect their rights to cultural heritage (including restitution of control and ownership of these sites) and to provide adequate redress where their rights are violated.

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

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

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

Status of UNDRIP

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

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

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

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

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

Specific Rights

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

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

Article 11

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

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

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

Article 12

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

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

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

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

Article 25

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

Article 31

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

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

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

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

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

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

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redressfor:
   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.

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

…

What the prohibition on the destruction of Indigenous culture means for Australia in practice was explained by the UN Human Rights Committee (HRC) in *Angela Poma Poma v. Peru.* While States, like Australia, have the sovereign right to develop, that right is burdened where it puts at risk the cultural survival[6] or cultural identity of Indigenous peoples, which the destruction of sacred sites does. Australia's economic development must be balanced against the right to culture and only measures that will have limited impact on Indigenous culture should be permitted. In *Angela Poma Poma v. Peru* the HRC said:

> [A] State may legitimately take steps to promote its economic development. Nevertheless, … economic development may not undermine the rights [to culture] protected by article 27 [of the International Covenant on Civil and Political Rights]. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. …[M]easures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.[7]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[11] Para 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The *Aboriginal Heritage Act 1972* (WA) (**AHA**) has not been substantially amended since 1972. As has been noted, '[i]t was drafted at a time when there was no consultation with Indigenous peoples, and based on a Eurocentric, anthropologically grounded 'museum mentality' that failed to understand that Indigenous heritage is living'.[20] It is widely acknowledged that the legislation requires major reform and the current WA Aboriginal Affairs Minister, the Hon Ben Wyatt MLA, stated at the beginning of the contemporary reform process in March 2018 that the AHA 'is out-of-date, inefficient and ineffective'.[21] In this context, we note the current reform process that has been delayed due to the intra-state travel restrictions that were in place in WA to protect First Nations communities. We understand the need for the delay but now look forward to seeing the draft bill released for public consultation in the very near future. Proper consultation must take place with First Nations and this takes time, but the Rio Tinto example demonstrates the risks in not making amendments to this legislation a priority.

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

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

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

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

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

(a) Recent history of AHA Act

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

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

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

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

- The meaning of "site" is narrower than "place";

[22] Western Australia, Parliamentary Debates, Legislative Council, 14 May 2020, 2703b-2703b (Hon Robin Chapple and Hon Stephen Dawson (representing the Minister for Aboriginal Affairs)).
[23] Ibid.
[24] Ibid.
[25] [2015] WASC 108 (*Robinson*).
[26] For a more detailed assessment of this case see: Lauren Butterly, 'Update on Aboriginal heritage in the West: Successful judicial review application and debate surrounding legislative reform' (2015) 30(4-5) *Australian Environment Review* 104.

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

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

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

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

[27] Ibid 104. Also see *Robinson* [75].
[28] *Robinson* [88] and [98].
[29] Western Australia, Legislative Council, *Parliamentary Debates*, 21 April 2015, 2375b-2376.
[30] WA Department of Planning, Lands and Heritage, *Notice of assessment of Aboriginal heritage places by the Aboriginal Cultural Material Committee (ACMC)* <https://www.dplh.wa.gov.au/getmedia/670574a8-c835-4a80-910a-0e562f051222/AH-Previous-acmc-reassessment-decisions>
[31] Ibid.
[32] Ibid.

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

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

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

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

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

---

[33] *Aboriginal Heritage Act 1972* (WA) s28(4).
[34] On this point, also see *Robinson* [123].
[35] *Robinson* [140]. Also see: Lauren Butterly, 'Update on Aboriginal heritage in the West: Successful judicial review application and debate surrounding legislative reform' (2015) 30(4-5) *Australian Environment Review* 104, 106.
[36] *Aboriginal Heritage Act 1972* (WA) s39.
[37] Western Australian Government, 'Aboriginal site preservation', *Information on how to report an Aboriginal site or damage to a site* (Web page) < https://www.dplh.wa.gov.au/information-and-services/aboriginal-heritage/aboriginal-site-preservation>.
[38] *Aboriginal Heritage Act 1972* (WA) s39(2).

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

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

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

(c) Appeal mechanisms

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

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

[39] *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) s19F.
[40] Ibid s22.
[41] Ibid ss33-35.
[42] Ibid s18(5).
[43] Ibid s 30.

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

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

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

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

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

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

[44] Northern Territory Environment Protection Authority, McArthur River Mine Overburden Management Project McArthur River Mining Pty Ltd (Assessment Report 86, July 2018), pp 63-64 and pp 133-134, 135-136, 151-154
[45] 2018 Draft Aboriginal Heritage Bill (NSW), Clause 52. See: https://www.environment.nsw.gov.au/research-and-publications/publications-search/draft-aboriginal-cultural-heritage-bill-2018
[46] EDO NSW, *Submission on the Draft Aboriginal Cultural Heritage Bill 2018* (2018) EDO NSW, 'Submission on the Draft Aboriginal Cultural Heritage Bill 2018' (April 2018) https://www.edo.org.au/wp-content/uploads/2020/01/180413_ACH_Bill_2018_-_EDO_NSW_submission_-_FINAL.pdf p. 39. Further, EDO submitted: 'There should be equitable merit appeal rights for relevant Aboriginal people in relation to ACH [Aboriginal Cultural Heritage] Management Plans, or no merit appeal rights for developers. If both sides (or neither side) can appeal the decision, the playing field is levelled and the decision-maker can focus on the merits of the decision and not the likelihood of having to defend that decision in Court.'
[47] Gerry Bates (with contributions from Justine Bell-James, Lauren Butterly, Amy McInerney and Gerry Nagtzaam), *Environmental Law in Australia* (LexisNexis, 10th Edn, 2019) 543.
[48] Ibid 573.
[49] (1993) 40 FCR 183, 211.

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

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

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

> The ATSIHP Act has proven to be problematic:
>
> > The ATSIHP Act has not proven to be an effective means of protecting traditional areas and objects. Few declarations have been made: 93 per cent of approximately 320 valid applications received since the Act commenced in 1984 have not resulted in declarations. Also Federal Court decisions overturned two of the five long term declarations that have been made for areas. Australian Government Department of the Environment, Water, Heritage and the Arts, 80 p. 4

[50] ATSIHP Act, s13(4).

[51] For some commentary on s 7 ATSIHP Act ('This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act') see: EDO, 'Ministerial declarations and protection of areas under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984' (2020) (Cth)' https://www.edo.org.au/publication/ministerial-declarations-and-protection-of-areas-under-the-aboriginal-and-torres-strait-islander-heritage-protection-act-1984-cth

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

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

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

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

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

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

4. The effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions (TOR g) and how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites (TOR h)

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

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

[53] Ibid 750.

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

State/Territory statutes are in an 'era of reform'.[55] Currently, WA[56] and NSW[57] are in the process of reforming their legislation and Tasmania[58] has a review underway. All these jurisdictions have completely outdated legislation that was enacted in the 1970s.[59] NSW does not have a standalone Aboriginal heritage statute, but the reform process has led to the release of a draft bill that would be a standalone statute. Tasmania, NSW and WA have been through multiple rounds of reviews and reform processes prior to their current attempts and the contemporary NSW reform process appears to have paused.[60]

Aboriginal heritage laws in Victoria, Queensland and the ACT have all been significantly reformed in the 2000s. Queensland is currently going through a further reform process.[61] SA and NT both have contemporary legislation enacted in the late 1980s.[62] The SA legislation had some reforms in 2016[63] and the NT Government commissioned a review into their legislation that reported in 2016[64] (but there does not appear to be an active reform process in that regard).

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

[55] Gerry Bates et al, *Environmental Law in Australia* (LexisNexis, 10th Edn, 2019) 543.
[56] WA Department of Planning, Lands and Heritage, Review of the *Aboriginal Heritage Act 1972*, commenced 2018. For more information: https://www.dplh.wa.gov.au/aha-review
[57] NSW Government, Heritage NSW, *Aboriginal Cultural Heritage Legislation and Reform.* For more information see: https://www.heritage.nsw.gov.au/protecting-our-heritage/legislation/ach-legislation-and-reform/
[58] Tasmanian Government, Statutory Review of the Aboriginal Heritage Act 1975, commenced 2019. For more information see: https://www.aboriginalheritage.tas.gov.au/items-of-interest/statutory-review-of-the-aboriginal-heritage-act-1975.
[59] The Tasmanian Heritage Minister recognised the then-titled "Aboriginal Relics Act 1975" was 'woefully inadequate' in 2017: Matthew Groom (then Heritage Minister), 'Talking Point: Relics Act shamefully disrespectful' (25 June 2016) <https://www.themercury.com.au/news/opinion/talking-point-relics-act-shamefully-disrespectful/news-story/0651f8d4e5d167ff8552f806b4829331>.
[60] For an example of a critique of one of the previous rounds of reform in WA see: Ambelin Kwaymullina, Blaze Kwaymullina and Lauren Butterly, 'Opportunity Lost: Changes to Aboriginal Heritage Law in Western Australia' (2015) 8(16) *Indigenous Law Bulletin* 24. A brief synopsis of the NSW reform process will be provided in the final section of this part below. For Tasmania, there was a round of consultation undertaken in 2006, and then there were minor amendments made in 2017: *Aboriginal Relics Amendment Act 2017* (Tas). The Second Reading Speech to the *Aboriginal Relics Amendment Act 2017* (Tas) identified that these amendments were an 'interim step' to address immediate areas of concern and that there would be future consultation about the legislation.
[61] Queensland Government Department of Aboriginal and Torres Strait Islander Partnerships, Review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003,* commenced 2019, see more information here: https://www.datsip.qld.gov.au/programs-initiatives/review-cultural-heritage-acts. Page 6 of this Consultation Paper provides a helpful summary of the various amendments provided to the Queensland cultural heritage laws since the 1960s.
[62] Although the current *Northern Territory Aboriginal Sacred Sites Act 1989* in the Northern Territory replaced the previous *Aboriginal Sacred Sites Act 1978* (NT).
[63] *Aboriginal Heritage (Miscellaneous) Amendment Act* 2016 (SA).
[64] NT Government, *Sacred Sites Processes and Outcomes Review PwC's Indigenous Consulting* <https://dlghcd.nt.gov.au/__data/assets/pdf_file/0004/297148/sacred-sites-review.pdf>. Noting the review was only of the *Aboriginal Sacred Sites Act 1989* (NT), not the *Heritage Act 2011* (NT) which also provides some protection for Aboriginal archaeological objects and places. The *Heritage Conservation Act 1991* (NT) was replaced by the *Heritage Act 2011* (NT) after a process of reform between 2008 and 2012.
[65] Gerry Bates et al, *Environmental Law in Australia* (LexisNexis, 10th Edn, 2019) 544.

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

a) First Nations must be primary decision makers

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

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

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

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

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

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

---

[66] Victorian Aboriginal Heritage Council, *Taking Control of Our Heritage: Discussion Paper on Legislative Reform of the Aboriginal Heritage Act 2006* (VIC), (June 2020), available online here: https://www.aboriginalheritagecouncil.vic.gov.au/taking-control-our-heritage; See also the various submissions made to the Queensland Government Department of Aboriginal and Torres Strait Islander Partnerships, Consultation Paper - Review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003,* 2019, online here: https://www.datsip.qld.gov.au/programs-initiatives/review-cultural-heritage-acts.

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

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

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

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

> The CMNHP's [the Martuwarra Council's *Conservation Management Plan for the National Heritage Listed Fitzroy River Estate*] first position statement is that 'the concept of living water is central to sustaining heritage values.' 'Living Water' is an Aboriginal English term. Living Water is alive and often associated with a spiritual ancestor. For example, the Martuwarra has four different manifestations of the Rainbow Serpent from source to sea, which are recognised by the national heritage [EPBC] listing (Commonwealth Government 2011).
>
> It is important to note that Living Waters are part of interconnected *systems*: of society, ecology, First Law, song lines and trading routes etc. Living waters are connected underground and throughout the cultural landscape i.e. physically/materially and metaphysically/spiritually connected. The Mary River Statement declares, 'Land, water and peoples and inextricably connected'(Delegates of the Mary River Water Forum 2009).
>
> People must follow the correct protocols to maintain relationships with Living Waters.
>
> Consequently:
>
> - Natural and cultural care are interlinked (CMNHP position statement 2)
> - Human and environmental wellbeing are linked to heritage
> - Heritage around Living Waters requires active management to maintain reciprocal relationships
> - Martuwarra flows are intrinsic to traditional and environmental uses and values (CMNHP position statement 6) therefore changes to flow may impact heritage

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

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

[69] [2015] WASC 108 [25].

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[78] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Article 2.
[79] Victorian Ombudsman, Investigation into the planning and delivery of the Western Highway duplication project (July 2020), available here: https://assets.ombudsman.vic.gov.au/assets/Reports/Parliamentary-Reports/Investigation-into-the-planning-and-delivery-of-the-Western-Highway-duplicationproject.pdf?mtime=20200730083530.
[80] McGrath, P.F and Lee, E. 2016 The fate of Indigenous place-based heritage in the era of native title in McGrath, P.F. (Ed.) The Right to Protect Sites: Indigenous Heritage Management in the Era of Native Title. AIATSIS Research Publications, p 134.

including the power of proponents to appeal to the Minister for an Authority Certificate to be issued, the fact that in operation, the system can result in significant pressure being placed on custodians to provide their agreement, or in some cases, assertions about the incorrect identification of custodians of sacred sites by proponents, as has been identified in respect of the controversial McArthur River Mine Overburden Management Project[81] which is located in the remote Gulf of Carpentaria region in the NT.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The Martuwarra Council sees cultural heritage considerations as landscape scale and involving many interconnected factors. However, water and land use planning are not well integrated. Furthermore, cumulative impacts of proposed developments need to be considered. We note that clause 4 of the Environmental Protection Amendment Bill 2020 (WA) that is currently before Parliament would insert a section that states: '(1B) A reference in this Act to the effect of a proposal on the environment includes a reference to the cumulative effect of impacts of the proposal on the environment'. In the context of the EPBC Act, we note that the Interim EPBC Review stated that 'with limited exceptions…, the cumulative impacts of decisions on the landscape are not well considered. This is a key shortcoming of the Act'.
>
> From our perspective, this shortcoming particularly impacts heritage. Heritage of cultural landscapes can be supported by robust assessment of cumulative and catchment scale impacts…. Where water is concerned, heritage conservation requires environmental conservation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[82] For a more detailed explanation see: https://www.edo.org.au/2018/03/09/4wd-tracks-in-takayna-the-tarkine/
[83] http://epbcnotices.environment.gov.au/_portal/modal-form-template-path/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?id=cecda64b-6793-e711-aec9-005056ba00a7&entityformid=c2c88dfd-64a4-49bf-84fb-49edb9186137&languagecode=1033

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

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

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

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

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

[84] *Scientific Inquiry into Hydraulic Fracturing* of Onshore Unconventional Reservoirs, Final Report (2018) https://frackinginquiry.nt.gov.au/.
[85] Ibid, recommendation 11.1, see pp 279-281.
[86] It is included in the Petroleum (Environment) Regulations 2016 (NT) rather than the Sacred Sites Act
[87] See recommendation 16 of the NTEPA's Assessment Report 86 for this project https://ntepa.nt.gov.au/__data/assets/pdf_file/0004/553081/mrm_overburden_assessment_report.pdf. This was subsequently integrated as a condition of the Variation of Authorisation issued under the NT's Mining Management Act 2001 dated 18/8/2019.
[88] Department of Aboriginal and Torres Strait Islander Partnerships, *Cultural Heritage Duty of Care Guidelines Review*, Issues Paper, (2017) 4, https://www.datsip.qld.gov.au/resources/datsima/people-communities/cultural-heritage/issues-paper.pdf

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

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

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

Regulation of environmental and natural resources impacts and cultural heritage

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

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

[89] *Aboriginal Heritage Act 1979* (SA), s 9.
[90] *Aboriginal Heritage Act 1979* (SA), s 9(10).
[91] Murray Lower Darling Rivers Indigenous Nations, *Submission to the Productivity Commission Murray Darling Basin Plan, Five-Year Assessment*, 27 April 2018, online here: https://www.pc.gov.au/ data/assets/pdf file/0006/227634/sub072-basin-plan.pdf
[92] Ibid, p. 2.
[93] ABC News*, Water NSW argues against more environmental assessments around Warragamba Dam wall,* 5 August 2020, https://www.abc.net.au/news/2020-08-05/water-nsw-amends-warragamba-dam-wall-proposal/12527164; Wollondilly Advertiser, *Indigenous groups say the state government is not fulfilling a promise to comprehensively investigate*

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

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

Native title laws, agreements and cultural heritage

The EDO does not provide advice in relation to native title law. However, it is important to note the complex relationship between native title and cultural heritage laws. As identified by Associate Professor Kate Galloway: 'One of the challenges for Traditional Owners is that the law situates their interests in culturally significant sites in between native title processes and cultural heritage.'[97] It is notable that the AHA does not make reference to native title (which is perhaps not a surprise given it was enacted in 1972), yet the interaction between cultural heritage and native title appears to impact the day-to-day efficacy of cultural heritage laws.

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

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

[94] Ibid.

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

[96] Ibid, p. 79.

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

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

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

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

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

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

In Queensland, the State is empowered to take reactive action to punish non-compliance with the obligations not to unlawfully harm or possess Aboriginal or Torres Strait Islander cultural heritage and with the cultural heritage duty of care.[102] While the State does have proactive powers to give a stop order to prevent potentially harmful or adverse activities from being carried out, such orders have only been issued seven times since the introduction of the Cultural Heritage Acts in 2003.[103] Suffice to say it is highly likely that cultural heritage has been illegally damaged in Queensland more than seven times since 2003. The Queensland Land Court has power to grant injunctive relief to prevent cultural heritage from being damaged or destroyed, however we understand injunctive relief has only been granted on one occasion. First Nations people need to otherwise rely on the

[98] https://www.klc.org.au/east-kimberley
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] *Aboriginal Cultural Heritage Act 2003* (Qld) ss 23, 24, 26.
[103] Mark E. O'Neill, 'A Completely New Approach" to Indigenous Cultural Heritage: Evaluating the Queensland Aboriginal Cultural Heritage Act' (2018) 9(1) *The International Indigenous Policy Journal* 1, 11.

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

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

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

Further, financial penalties for desecration or destruction should be significantly increased. The Bootu Creek Case[110] was the first successful prosecution for the desecration of a sacred site in the NT,[111] under which the operator of the Bootu Creek mine near Tennant Creek in the NT was fined $120,000 and $30,000 for the desecration of a sacred site and contravening the conditions of an Authority Certificate respectively. While this was an important landmark case, such penalties for offences are unlikely to be a significant enough deterrent for wrongdoing and do not sufficiently recognise the cultural importance of sacred sites. Of course, it should also be acknowledged that financial penalties alone are not sufficient to rectify the damage that is caused, both to the site itself and to custodians, by the desecration/destruction of sites.

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

---

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

[105] *Aboriginal Cultural Heritage Act* 2003 (Qld)*, s*ection 3(2).

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

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

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

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

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

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

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

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

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

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

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

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

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

[112] NT Government, *Sacred Sites Processes and Outcomes Review PwC's Indigenous Consulting* <https://dlghcd.nt.gov.au/__data/assets/pdf_file/0004/297148/sacred-sites-review.pdf>.
[113] *Northern Territory Sacred Sites Act 1989* (NT), s 10(a).
[114] *Northern Territory Sacred Sites Act 1989* (NT), s 22(1)(b).
[115] *Heritage Act 2011* (NT), s 75(d).

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

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

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

h) Need to prioritise reform processes

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

As one example, we note the lengthy delays in the NSW process. The contemporary reform process in NSW began in 2011 with the NSW Government establishing a working party to oversee the process of reforming Aboriginal cultural heritage legislation.[118] This working party produced draft recommendations and a discussion paper in 2013.[119] That same year, the NSW Government released a response to the recommendations and consultations were held.[120] There was then a long break in the formal processes from a public perspective. In September 2017, the NSW Government then released a related proposed new legal framework for Aboriginal cultural heritage for consultation.[121] In February 2018, the NSW Government released the draft Aboriginal

[116] Department of Aboriginal and Torres Strait Islander Partnerships, *Cultural Heritage Duty of Care Guidelines Review: Submission Analysis Revised'* (2017), 8.
[117] For example, see Submission No 14, Queensland South Native Title Services, *Economics and Governance Committee on the Revenue and Other Legislation Amendment Bill 2018*.
[118] NSW Government, *Reforming the Aboriginal Cultural Heritage System in NSW: Draft recommendations to the NSW Government: A Discussion Paper* (2013) page v <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Aboriginal-cultural-heritage/reforming-aboriginal-cultural-heritage-system-draft-recommendations-to-NSW-government-20130139.pdf>.
[119] Ibid.
[120] NSW Office of Environment and Heritage, *Reforming the Aboriginal Cultural Heritage System in NSW* (Publication, October 2013) https://www.environment.nsw.gov.au/research-and-publications/publications-search/reforming-the-aboriginal-cultural-heritage-system-in-nsw.
[121] NSW Office of Environment and Heritage, *A proposed new legal framework: Aboriginal cultural heritage in New South Wales*, (Publication Framework 2018) https://www.environment.nsw.gov.au/research-and-publications/publications-search/a-proposed-new-legal-framework-aboriginal-cultural-heritage-in-nsw.

Cultural Heritage Bill.[122] There was then public consultation on the draft bill and submissions were received. The NSW Government provided a summary of submissions report in December 2018.[123] As at August 2020, the relevant NSW Government website states that: 'The NSW government is currently reviewing the draft Bill to see how it can be improved and is committed to further public consultation.'[124] This demonstrates a significant delay and indicates that priority must be given to ensuring the reform processes continue to move forward.

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

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

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

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

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

[122] NSW Government, *Draft NSW Aboriginal Cultural Heritage Bill* (2018) https://www.environment.nsw.gov.au/research-and-publications/publications-search/draft-aboriginal-cultural-heritage-bill-2018
[123] Office of Environment and Heritage, *Aboriginal Cultural Heritage in NSW* (Summary of submissions report, September 2018) https://www.heritage.nsw.gov.au/assets/Uploads/files/ACH-reforms-Summary-of-Submissions-Report-2018.PDF.
[124] NSW Government, *Aboriginal Cultural Heritage Legislation and Reform*, (Web Page) < https://www.heritage.nsw.gov.au/protecting-our-heritage/legislation/ach-legislation-and-reform/>.

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

Further, the Interim EPBC Report noted:

> The ATSIHP Act does not align with the development assessment and approval processes of the EPBC Act. Cultural heritage matters are not required to be broadly or specifically considered by the Commonwealth in conjunction with assessment and approval processes under Part 9 of the Act. Interventions through the ATSIHP Act occur after the development assessment and approval process has been completed.
>
> Contributions to the Review have highlighted the importance of considering cultural heritage issues early in a development assessment process, rather than Traditional Owners relying on a last minute ATSIHP Act intervention. The misalignment of the operation of the EPBC Act and the ATSIHP Act promotes uncertainty for Traditional Owners, the community and for proponents.[126]

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

> The national level settings for Indigenous cultural heritage protection need comprehensive review. This should explicitly consider the role of the EPBC Act in providing protections. It should also consider how comprehensive national level protections are given effect, including how they interact with the development assessment and approval process of the Act.[127]

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

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

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

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

[125] Graeme Samuel, *Interim Report of the Independent Review of the EPBC Act* (June 2020) 30.
[126] Ibid 33-34.
[127] Ibid 30. Also see 38.
[128] Ibid 33.

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

> Under the EPBC Act, if an action will cause a significant impact to the West Kimberley National Heritage Place then it will be deemed a controlled action and will have to go through an assessment process.
>
> - However, it remains unclear to us which potential impacts will be deemed 'significant', and whether or not the Act will effectively protect heritage in practice.
> - Furthermore, there is insufficient guidance for proponents on how to work constructively with Traditional Owners on heritage protection, and on what stage to engage.
> - There is concern that assessments of heritage impact will be referred back to the WA state government under the bilateral agreement process.
>
> The effectiveness of heritage protection under the EPBC Act is still largely untested in relation to the Martuwarra's water. To the best of our knowledge, the West Kimberley national heritage listing has not prevented any potentially destructive activity from going ahead. So far, no proponents have asked the Council for advice. National heritage does not appear to be taken particularly seriously in the WA government's various water and economic develop plans (notwithstanding that these plans are still in development. The current government's "no dams" commitment is also a positive move).
>
> The Council is seeking to be proactively involved in managing the Heritage Listing

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

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

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

[129] Ibid 36.

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

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

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

6. Other related matters (TOR j)

(a) Opportunity for First Nations-led innovation

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

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

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

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

List of Recommendations

Recommendation 1

7.13 The Committee recommends that, at a matter of urgency, the Australian Parliament amend the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Environmental Protection and Biodiversity Conservation Act 1999* to make the Minister for Indigenous Australians responsible for all Aboriginal and Torres Strait Islander Cultural Heritage matters. As an interim measure, the Australian Government should take action to prohibit clauses in agreements that prevent traditional owners from seeking protection through Commonwealth legislation.

7.14 Administrative responsibility for all Aboriginal and Torres Strait Islander heritage matters should be transferred to the relevant portfolio agencies reporting to the Minister for Indigenous Australians.

Recommendation 2

7.30 The Committee recommends that the Australian Government ratify the *Convention for the Safeguarding of the Intangible Cultural Heritage 2003.*

Recommendation 3

7.77 The Committee recommends that the Australian Government legislate a new framework for cultural heritage protection at the national level.

7.78 The legislation should be developed through a process of co-design with Aboriginal and Torres Strait Islander peoples

7.79 This new legislation should set out the minimum standards for state and territory heritage protections consistent with relevant international law

(including the United Nations Declaration on the Rights of Indigenous People UNDRIP) and the *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia.*

7.80 These minimum standards would be developed as part of a co-design process but consideration should be given to the inclusion of the following:

- a definition of cultural heritage recognising both tangible and intangible heritage
- a process by which cultural heritage sites will be mapped, which includes a record of past destruction of cultural heritage sites (with adequate safeguards to protect secret information and ensure traditional owner control of their information on any database)
- clear processes for identifying the appropriate people to speak for cultural heritage that are based on principles of self-determination and recognise native title or land rights statutory representative bodies where they exist
- decision making processes that ensure traditional owners and native title holders have primary decision making power in relation to their cultural heritage
- a requirement that site surveys involving traditional owners are conducted on country at the beginning of any decision making process
- an ability for traditional owners to withhold consent to the destruction of cultural heritage
- a process for the negotiation of cultural heritage management plans which reflect the principles of free, prior and informed consent as set out in the UNDRIP
- mechanisms for traditional owners to seek review or appeal of decisions
- adequate compliance, enforcement and transparency mechanisms
- adequate penalties for destructive activities, which include the need to provide culturally appropriate remedy to traditional owners

- the provision of adequate buffer zones around cultural heritage sites
- a right of timely access by Aboriginal and Torres Strait Islander peoples to protected cultural heritage sites
- a process by which decisions can be reconsidered if significant new information about cultural heritage comes to light.

7.81 The Commonwealth should retain the ability to extend protection to and/or override decisions made under inadequate state or territory protections that would destroy sites that are contrary to Aboriginal and Torres Strait Islander peoples consent.

7.82 Traditional owners should be able to effectively enforce Commonwealth protections through civil action.

7.83 The legislation should prohibit the use of clauses in agreements that prevent traditional owners from seeking protection through Commonwealth legislation.

7.84 The Minister for Indigenous Australians should be the responsible Minister under the legislation.

Recommendation 4

7.89 The Committee recommends that the Australian Government review the *Native Title Act 1993* with the aim of addressing inequalities in the negotiating position of Aboriginal and Torres Strait Islander peoples in the context of the future act regime. This review should address:

- the current operation of the future act regime and other relevant parts of the Act including s31 (right to negotiate), s66B (replacement of the applicant) and Part 6 (the operation of the NNTT)
- developing standards for the negotiation of agreements that require proponents to adhere to the principle of Free, Prior and Informed Consent as set out in the UN Convention of the Rights of Indigenous People (UNDRIP)
- 'gag clauses' and clauses restricting Aboriginal and Torres Strait Islander peoples access to Commonwealth heritage protections should be prohibited

- making explicit the authority and responsibilities of PBCs and Representative bodies in relation to cultural heritage.

Recommendation 5

7.97 The Committee recommends that the Australian Government endorse and commit to implementing *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia.*

Recommendation 6

7.109 The Committee recommends that the Australian Government develops a model for a cultural heritage truth telling process that may be followed by all Australians–individuals, governments and companies–as a part of any process to engage with Aboriginal and Torres Strait Islander peoples and their cultural heritage.

Recommendation 7

7.120 The Committee recommends that the Australian Government establish an independent fund to administer funding for prescribed body corporates (PBCs) under the Native Title Act 1999.

7.121 Revenue for this fund should come from all Australian governments and proponents negotiating with PBCs.

7.122 Alongside an increase in funding for PBCs, the Committee is of the view that there needs to be greater transparency and accountability in PBC proceedings within communities. Like all statutory bodies, PBCs are required corporate reporting responsibilities like conducting directors' meetings, AGMs and special general meetings. However, the Committee heard concerning reports that some PBCs are not transparent in their decision-making with respect to their local community resulting in decisions being taken to allow the destruction of cultural heritage sites, against the wishes of community members. (See Box 6.5: Magazine hill case study.)

7.123 Therefore, the Committee considers that PBCs should, as part of funding agreements, be required to demonstrate transparency and accountability in their decision-making processes with respect to their local community.

7.124 In the context of the issue of transparency, the Committee notes that mining companies have publicly reported on outcomes of reviews of currently-held

section 18 permits, and the high-level results of reviews of agreements with traditional owners undertaken since the interim report, as well as on their engagement with traditional owners more generally. The Committee considers this to be an appropriate practice provided there is agreement between the companies and traditional owners about the release of such information.

Recommendation 8

7.125 The Committee recommends that the Australian Government increase the transparency and accountability requirements on Prescribed Body Corporates (PBCs) and Native Title Representative Bodies under the Native Title Act 1999 to require that they demonstrate adequate consultation with, and consideration of, local community views prior to agreeing to the destruction/alteration of any cultural heritage sites.

PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND
www.ohchr.org • E-MAIL: ohchr-registry@un.org- ohchr-cerd@un.org

REFERENCE: CERD/EWUAP/112th session/2024/CS/cs/ks

26 April 2024

Excellency,

I write to you in relation to the Committee's letter of 29 August 2022 and to inform you that it has considered additional information received under its early warning and urgent action procedure relating to developments on aboriginal cultural heritage legislation in Western Australia and its impact on the human rights of Aboriginal peoples.

The Committee welcomes the repeal of Western Australian Aboriginal Cultural Heritage Act of 2021 on 15 November 2023. However, according to the information before the Committee, the Western Australian Government took the decision to reinstate, with some amendments, the former Aboriginal Heritage Act of 1972, without consultation with, or consent by, Aboriginal Peoples.

According to the information received:

- Landowners can again apply under section 18 of the Act of 1972 for consent to use the land for a purpose that is likely to damage or alter Aboriginal cultural heritage, and that such consent is ultimately being assessed and granted by the Minister for Aboriginal Affairs who has full discretion to decide whether to allow the detrimental impact of significant cultural heritage;
- Since the commencement of the amended 1972 Act on 15 November 2023, 13 landowners have been given consent with conditions under section 18 to use the land for a purpose that is likely to damage or alter Aboriginal cultural heritage, one of those landowners being Rio Tinto, the company that destroyed 46,000-year-old heritage sites at Juukan Gorge;
- Another mining company, Equinox Resources, has also applied for a section 18 consent for the Hamersley Iron Ore Project without first consulting with Traditional Owners, who are concerned it will impact two significant heritage sites;

Her Excellency Ms. Amanda Gorely
Permanent Representative of Australia
to the United Nations Office
Geneva
Email: un.geneva@dfat.gov.au

- There is a new obligation on landholders with a section 18 consent to notify the Minister for Aboriginal Affairs of any 'new information about an Aboriginal site on the land the subject of the consent', and in the event of new information being provided, the Minister may confirm, amend, or revoke and re-issue the consent, having regard to the 'general interest of the community';
- There is a right for both landowners and a native title party to apply to the State Administrative Tribunal for review of decisions made under section 18. However, the amended 1972 Act gives the Premier rights to intervene and 'call in' an application which is considered to raise issues of 'State or regional importance', i.e. the Premier will determine the application, removing the right to be heard by the Tribunal. The Premier has a broad discretion in making a decision to approve applications that might damage and destruct Aboriginal cultural heritage sites under this new provision;
- A section 18 consent is taken to have been given to the owner of lands within the Marandoo area, thereby reinstating the effect of the Aboriginal Heritage (Marandoo) Act 1992 which was repealed in 2023. As a result, the landowner, Rio Tinto, is again given permission to damage and destroy Aboriginal cultural heritage within the Marandoo area, which is of high concern given allegations that Rio Tinto allowed hundreds of Aboriginal cultural artefacts from the area to be thrown away at a rubbish dump in the 1990s, which the Traditional Owners were not informed about for decades;
- In the past, the Act of 1972 did not prevent the damage and destruction of sacred sites and other cultural heritage of Aboriginal peoples, such as the Juukan Gorge rock shelters;
- None of the 463 mining-related applications made since 2010 under the Act of 1972 were rejected.

The Committee is deeply concerned about the allegations of lack of consultation and the failure to seek free, prior and informed consent of Aboriginal peoples for the restoration on 15 November 2023 of the Aboriginal Heritage Act of 1972 and that the current legislative framework in Western Australia does not adequately protect the cultural heritage of Aboriginal peoples.

Therefore, the Committee is concerned that the allegations received may amount to a breach of the State party's obligations enshrined in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and in this regard recalls its previous concluding observations in which it recommended the State party to ensure that the principle of free, prior and informed consent is incorporated into pertinent legislation and fully implemented in practice as well as to respect and apply the principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (CERD/C/AUS/CO/18-20, para. 22).

The Committee further recalls its General Recommendation No. 23 (1997) on the rights of indigenous peoples, in which it calls upon States parties to ensure that no decisions directly relating to the rights and interests of Indigenous Peoples are taken without their informed consent.

UNITED NATIONS
HUMAN RIGHTS
TREATY BODIES

On that basis the Committee insists that the landowners cease and desist all operations that have negative implications for the cultural heritage rights of Indigenous peoples as indicated in this and previous communications from the Committee on this issue and that all consents to landowners given under the post 15 November 2023 legislative framework are duly reviewed or revoked in light of the State party's obligations under ICERD and other international human rights obligations and standards.

Recalling also its previous letter of 29 August 2022, the Committee encourages the State party to consider engaging with the United Nations Expert Mechanism on the Rights of Indigenous Peoples, which is mandated by the Human Rights Council (resolution A/HRC/RES/33/25, paragraph 2) to provide States with technical advice regarding the development of domestic legislation and policies relating to the rights of indigenous peoples and to facilitate dialogue between States and indigenous peoples.

Finally, the Committee requests the State party to submit as a matter of urgency its 21st to 22nd combined periodic report overdue since 30 October 2020 and to include information on the measures adopted to review the legislative framework and to adequately protect the rights and cultural heritage of Aboriginal peoples.

Allow me, Excellency, to reiterate the wish of the Committee to continue to engage in a constructive dialogue with the Government of Australia, with a view to ensuring the effective implementation of the Convention.

Yours sincerely,

Michal Balcerzak
Chair
Committee on the Elimination of Racial Discrimination