Law Council
OF AUSTRALIA

Office of the President

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The Hon Warren Entsch MP
Chair
Joint Standing Committee on Northern Australia
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: jscna@aph.gov.au

Dear Chair

SUPPLEMENTARY SUBMISSION: INQUIRY INTO THE DESTRUCTION OF 46,000 YEAR OLD CAVES AT THE JUUKAN GORGE IN THE PILBARA REGION OF WESTERN AUSTRALIA

On 2 October 2020, the Law Council of Australia (**the Law Council**) appeared via teleconference before the Joint Standing Committee on Northern Australia (**the Committee**) as part of a public hearing for the inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia (**the Inquiry**).

In the course of its appearance, the Law Council was asked whether it might have further information it wished to provide to assist the Committee in its deliberations, including on examples of best practice and on how cultural heritage legislation might be better aligned with the *Native Title Act 1993* (Cth) (**the Native Title Act**). This supplementary submission addresses that request for further information. It also responds to Senator Dodson's additional Questions on Notice which were relayed to the Law Council on 12 October 2020.

Native Title and Cultural Heritage Alignment

Context

The Native Title Act is one legislative model that flowed from the High Court's decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (**Mabo**) that Aboriginal and Torres Strait Islander people have rights and interests to lands and waters because of their own laws and customs, and that these rights and interests existed before, and were not abolished by, British arrival. The High Court held that the common law, which recognises a variety of interests in land, such as the freehold, leasehold and easement, also recognises native title to land.[1]

[1] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('Mabo'). See also Professor Michael Crommelin, 'Mabo: The Decision and the Debate' (Papers on Parliament No 22, February 1994).

In the opinion of the Law Council, the recognition of native title in 1992 could have precipitated significant developments in the legal apparatus for protecting Aboriginal cultural heritage, but this promise has not been properly realised to date.

The Australian Human Rights Commission (**AHRC**) sketched the link between land, Indigenous culture, native title recognition and Indigenous heritage protection, and the potential for more comprehensive protection of both land rights and heritage rights inherent in this link, in its Native Title Report 2000, including through the following statements:

> *Native title is a legal right comparable to any other interest in land. Native title has its origins in the culture and traditions of Indigenous people. That is what gives the title its content. It follows that Indigenous heritage, as a subset of Indigenous culture, is included in the concept of native title and capable of being protected in the same way that other common law titles to land are protected.*[2]
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> *Moreover, positioning heritage protection with the laws that protect Indigenous title to land better reflects the centrality of land to the vitality and survival of Indigenous heritage and culture.*[3]
>
> *Under the concept of native title it is possible that sacred and significant sites and objects might be protected, not within the historical category of Aboriginal heritage, but as matters valued in contemporary Indigenous culture with current significance to a people whose culture is ongoing. In addition, under native title such protection could be provided, not as an act of beneficence by government, but as a matter of legal right. … The recognition of native title is an opportunity to re-frame the protection of Indigenous heritage within the broader framework of a human right to enjoy one's culture. However, developments within the common law of native title, and amendments to the Native Title Act have placed heritage protection outside this broader frame.*[4]

In its original submission to this Inquiry, the Law Council similarly describes a structural disconnect and a failure to recognise the paradigmatic change precipitated by Mabo through the incorporation of First Nations ownership of lands and waters in cultural heritage protection laws.[5]

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**) was enacted before the recognition of native title. The legislative regimes in the states and territories also predated the Mabo decision, although the original Queensland, Victorian and South Australian statutes have since been replaced and amended respectively, and review and reform processes are currently underway in Western Australia and Queensland.

While the ATSIHP Act was originally 'proposed as a temporary measure, pending the forthcoming introduction of national land rights legislation', more effective federal protection

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[2] Human Rights and Equal Opportunity Commission, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000* (23 February 2001) 123 (see also 117, 118 and 124) <https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/nt-report2000.pdf.
[3] Ibid.
[4] Ibid 117-118.
[5] Law Council of Australia, Submission No 120 to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (21 August 2020) 21 <https://www.lawcouncil.asn.au/publicassets/24891840-2ef3-ea11-9434-005056be13b5/3864%20-%20Juukan%20Caves%20Submission.pdf>.

for Indigenous cultural heritage never eventuated.[6] In 1993, the Native Title Act was developed as an attempt by government to codify the Mabo decision and administer the claims arising from it. However, the procedural rights in the Native Title Act that might help Indigenous people protect their cultural heritage were substantially eroded through amendments in 1998, as well as common law decisions post Mabo. Since then, and despite a number of reviews recognising its shortcomings, the ATSIHP Act has never been properly reformed.

As a consequence, Australia's cultural heritage framework is not properly aligned with its native title framework, and neither the ATSIHP Act nor the Native Title Act adequately protect Indigenous cultural heritage. Nor does cultural heritage protection throughout the country at the state and territory level have appropriate regard to federal mechanisms or minimum standards. This leaves a situation where both the ATSIHP Act and the Native Title Act require review and reform to foster alignment, and particularly to ensure meaningful consultation with, and leadership by, Traditional Owners in decisions affecting their cultural heritage and their lands and waters – including proper rights of refusal and review.

The AHRC's Native Title Report 2000 again gives an illustrative snapshot of this state of misalignment:

> *The bundle of rights approach to native title has meant that contemporary practices of protecting and respecting significant or sacred sites are considered insufficiently connected to the actual practices of the original inhabitants to be included in native title determination. In addition, the amendments to the [Native Title Act] have significantly reduced the protection available to Indigenous heritage and the right of native title holders to participate in decisions about protecting their cultural heritage.*[7]

In *Western Australia v Ward*[8], the High Court majority held that rights and interests protected under the Native Title Act are rights in relation to land and water only, and that in so far as claims to protection of cultural knowledge go beyond denial or control of access to land or waters, they were not rights protected by the Native Title Act.[9] The Australian Law Reform Commission (**ALRC**) has noted that this means that section 223(1) of the Native Title Act (concerning the meaning of native title) has been construed as not extending to recognition of rights to protect cultural knowledge.[10] However, determinations of native title rights and interests under section 225 of the Native Title Act may, for example, comprise rights of access to sacred sites, and for groups to conduct ceremonies on traditional lands.[11] While

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[6] Human Rights and Equal Opportunity Commission, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000* (23 February 2001) 123.
[7] Ibid 118.
[8] (2002) 213 CLR 1 (**Ward HCA**).
[9] Ward HCA [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[10] ALRC, *Connection to Country: Review of the Native Title Act 1993* (Cth), ALRC Report No 126, 262, citing Ward HCA, [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[11] Ibid, citing eg, for NSW, *Phyball on behalf of the Gumbaynggirr People v A-G (NSW)* [2014] FCA 851 (15 August 2014; for Vic: *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932 (27 July 2011); for Qld: *Smith on behalf of the Kullilli People v State of Queensland* [2014] FCA 691 (2 July 2014); for WA: *Watson on behalf of the Nyikina Mangala People v State of Western Australia* (No 6) [2014] FCA 545 (29 May 2014); for SA: *Ah Chee v South Australia* [2014] FCA 1048 (3 October 2014); *Starkey v South Australia* [2011] FCA 456 (9 May 2011); for NT: *Apetyarr v Northern Territory of Australia* [2014] FCA 1088 (14 October 2014).

a number of respondents to the ALRC's review supported the possible inclusion of the protection or exercise of cultural knowledge in the indicative list in a revised section 223(2)(b),[12] the ALRC considered that the question of how cultural knowledge might be protected and any potential rights to its exercise and economic utilisation governed by the Australian legal system would be best addressed by a separate review.[13]

Representation of Traditional Owners

What the Law Council suggests might usefully be taken from the Native Title Act and incorporated into cultural heritage protection is a system of representative bodies with strong knowledge bases and links with Traditional Owners, set up to navigate the legal system on behalf of Traditional Owners. The Native Title Act requires native title holders to establish Prescribed Bodies Corporate (**PBC**), which, when officially registered with the National Native Title Tribunal (**NNTT**), become Registered Native Title Bodies Corporate (**RNTBC**). PBCs manage native title rights and interests on behalf of native title holders and, under the Native Title Act, are required to consult with and obtain consent from Traditional Owners regarding decisions affecting these rights and interests. As the Law Council notes in its original submission, it appears anomalous that the Commonwealth should have established representative bodies to assist native title claimants throughout the country, but allows the continuation of a cultural heritage protection system that does not facilitate, much less require, consultation with such representative bodies and the Traditional Owners they represent.[14] Where a PBC does not already exist, or in jurisdictions where there are few or no successful native title claims (eg Victoria, the Australian Capital Territory), then legislation should allow for the recognition or creation of another body, appropriately representative of Traditional Owners, to fill that role, which is not merely consultative but actually makes decisions about First Nations cultural heritage.

This proposal is underpinned by the principles that decision-making is an act of self-determination for First Nations; that First Nations have a right to participate in decision-making through their chosen representatives and to maintain their own decision-making institutions; that their free, prior and informed consent must be obtained before adopting legislative or administrative measures that may affect them; and that consultation with First Nations is an ongoing process.

Determination of the Traditional Owners of a place or object of cultural heritage must be the primary starting point in ensuring cultural heritage protection. The process for establishing a PBC under the Native Title Act ensures that such bodies, where they exist, satisfy the criteria for a body appropriately representative of Traditional Owners, and are therefore well placed to control management of cultural heritage.

That is, there must be a tiered approach to appointing the body with primary decision-making capacity on cultural heritage, with the order of priority of appointment correlating to representation of the appropriate Traditional Owners.

Victoria is often pointed to as an example of best practice in this area. Aboriginal Victoria, in its submission to this Inquiry, provides the following summary of the Victorian scheme:

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[12] Including the Law Council: Ibid, 263.
[13] Ibid.
[14] Law Council of Australia, Submission No 120 to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (21 August 2020) 24.

> *It is important that the right Traditional Owners are empowered to make informed cultural heritage management decisions. In Victoria, the Victorian Aboriginal Heritage Council (**VAHC**), an expert advisory council comprising 11 Victorian Traditional Owners appointed by the Minister for Aboriginal Affairs, receives applications from Traditional Owner corporations to become Registered Aboriginal Parties (**RAPs**) for their traditional areas. Government plays no role in evaluating RAP applications, it is an entirely Traditional Owner-controlled process. Once a RAP, it is empowered under the AHA to make statutory decisions about their cultural heritage. RAPs are required to be representative of all Traditional Owners within their RAP area, and are required to be a corporation registered under the Commonwealth Corporations (Aboriginal and Torres Strait Islander) Act 2006. Traditional Owners in Victoria also have the ability to apply for native title under the [Native Title] Act. To avoid confusion and duplication of process, the AHA requires that, where a native title holder applies to the VAHC to become a RAP, the VAHC must appoint it for its native title area. This is an exclusive appointment and ousts any prior RAPs which may have existed over that area. …*[15]

However, these bodies are underfunded. If asked to take on further statutory responsibilities, PBCs or their alternative must be appropriately resourced. Rules that allow government departments and agencies to avail themselves of the services of PBCs without providing payment should also be reversed. Even in Victoria, underfunding of RAPS is noted as a shortcoming of a regime that is otherwise seen as a significant improvement on other jurisdictions, though not perfect.[16]

National Reform Process

The Law Council reiterates that in its view, there is currently a pivotal opportunity not only to 'modernise' cultural heritage federal, state and territory legislation, but to actively reform it so that it achieves its beneficial purpose of protecting First Nations culture, both ancient and living, in practice. This is not being achieved under existing legislation – not only in Western Australia, but in most other jurisdictions. For example, New South Wales has no legislative framework requiring Indigenous involvement in decisions regarding Aboriginal cultural heritage, there is no clear path for Aboriginal people to say no to the destruction of their Aboriginal heritage, and (unlike the proponent) no appeal mechanism is available to Aboriginal people regarding decisions taken.

As discussed at the recent hearing, the Law Council considers that national principles should be enshrined in federal legislation as minimum standards, with state and territory legislative reforms to follow. The concept of Commonwealth-legislated minimum standards that states and territories must meet through their own reforms has been previously proposed, although not adopted, with respect to land rights and native title.[17]

More recently, in his interim report regarding the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) (**the Interim Report**), Professor Samuel has

[15] Aboriginal Victoria, Submission No 91 to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (July 2020) 6.
[16] Law Council of Australia, Submission No 120 to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (21 August 2020) 67-68.
[17] Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27(2) *Melbourne University Law Review* 523.

relevantly proposed the development of legally enforceable Commonwealth National Environmental Standards to set clear standards and set the benchmark for the protection of Matters of National Environmental Significance and ultimately improve outcomes for Australia's biodiversity and heritage.[18] Professor Samuel has also proposed that the National Environmental Standards form the basis for a greater devolution of decision making to states and territories under the EPBC Act through the incorporation of National Environmental Standards into bilateral agreements between the Commonwealth and individual state and territory governments. A vital element of the devolved model proposed by Professor Samuel is a transparent assurance framework that provides confidence that National Environmental Standards are being met and includes a mechanism for the Commonwealth to step in when those Standards are not being met and it is in the national interest to do so.[19] The Law Council considers that a similar model (national standards within a broader assurance framework) should be considered for the protection of First Nations cultural heritage protection.

Similarly, the national principles (or minimum standards) legislated by the Commonwealth must be strong, effective and uphold First Nations decision-making and self-determination as core principles. They should be agreed with appropriate First Nations peak bodies and ideally, the Ministerial Indigenous Heritage Roundtable,[20] and enshrined in primary legislation. Once legislated, a process of independent accreditation of state and territory legislation should occur against the principles, again with First Nations representatives central to such decision-making. Once accredited, a state or territory could then pursue a bilateral arrangement whereby a new cultural heritage matter would be generally dealt with under its own legislation.

Need for Ongoing, Reformed Standalone Federal Legislation

Notwithstanding its proposed directions above, the Law Council emphasises that standalone federal legislation must be both retained and reformed to protect First Nations cultural heritage. This should occur whether or not national principles are also adopted in such legislation.

It is necessary to retain Commonwealth legislation because:

- the Commonwealth must remain at the forefront of leadership with respect to meeting Australia's international human rights obligations, environmental and cultural heritage treaties and standards. These responsibilities should not be devolved to the states and territories;[21]

- it is unlikely that all state and territory legislation will be reformed to the minimum standards set by the new Commonwealth national principles, which means that Commonwealth legislation must retain a vital role going forward; and

[18] Professor Graeme Samuel AC, *Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2020), Executive Summary and Chapter 1.
[19] Professor Graeme Samuel AC, *Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2020), Executive Summary and Chapter 4.
[20] While there is overlap, the Law Council considers that the national principles would go beyond the *Best Practice Standards for Indigenous Cultural Heritage Management and Legislation* considered by the Roundtable – for example, with respect to decision-making processes, criteria, review requirements. It refers to its original submission which identifies the possible content of such national principles (at 70-71).
[21] See Law Council of Australia, Submission No 120 to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (21 August 2020) 14-19.

- even if state and territory legislation is so reformed, federal legislation will continue to be needed to address legacy approvals. For example, the proposed Aboriginal Cultural Heritage Bill 2020 (WA) will not cure all defects flowing from the existing *Aboriginal Heritage Act 1972* (WA) (**the WA Act**). For example, more than 460 applications have been made under section 18 to impact Aboriginal heritage sites on mining leases over the last ten years, and, up until recent events, all have been approved.[22] These approvals will remain in place should the Western Australian Bill be passed.[23] Commonwealth legislation must provide an essential safeguard under which declarations can be sought to protect Indigenous cultural heritage that has not been properly recognised under the existing Western Australian Act, which is widely acknowledged to be substandard.

It is necessary to reform Commonwealth legislation because:

- as discussed in the Law Council's original submission, the ATSIHP Act is defective on several fronts: the definition is anachronistic; the Minister holds ultimate discretionary power including as to the significance afforded to a place; there is no requirement to consult any First Nations land-owning body such as a PBC; there is no presumption in favour of protection of an area; and few statutory criteria guiding decision-making. In addition to these concerns, the Law Council adds that intangible cultural heritage is not protected as under the Victorian legislation, First Nations bodies hold no place in decision-making under the ATSIHP Act, and there is no right to, eg, merits review for such bodies to challenge decisions made. With respect to the 'consultation' requirement, this only extends to publishing a notice in the Gazette and local newspaper (which may not be read by Traditional Owners who may speak several languages other than English).[24] In contrast, there is a much stronger requirement to consult the relevant state or territory Minister prior to making a declaration.[25] Further, it is incongruous that the Minister entrusted with the protection of First Nations cultural heritage, which is a beneficial piece of legislation aimed at preserving and protecting areas and objects of particular significance to First Nations Australians,[26] is the Minster for the Environment, rather than the Minister for Indigenous Australians. This does not reflect the principle that First Nations people themselves should be making such decisions; and

- due to such factors, the ATSIHP Act has been – unsurprisingly – ineffective. As detailed in the Department's submission, of 541 applications received under the ATSIHP Act since 1984, only 28 declarations have been made (with two long term declarations remaining).[27]

A further contributing issue is that the processes supporting the ATSIHP Act's operation also appear to be flawed. For example, it is possible to make oral, instead of written,

[22] Minister for Environment representing the Minister for Aboriginal Affairs, Response to Question on Notice No 2878 asked in the Legislative Council on 18 March 2020 by Hon Robin Chapple <https://www.parliament.wa.gov.au/parliament/pquest.nsf/a02db76382427ad84825718e0018e9c9/9966d00fe004109a4825852f00217000?OpenDocument>. See also Senator Siewert, Amendment to General Business Notice of Motion No 608 (11 June 2020).
[23] The transitional provisions will deem them to be approved Aboriginal Cultural Heritage management plans.
[24] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 10.
[25] Ibid s 13.
[26] Ibid s 4.
[27] Australian Government, Department of Agriculture, Water and the Environment, Submission No 23 to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (July 2020) 9.

applications for both emergency and longer-term declarations under the ATSIHP Act.[28] However, there does not appear to be a sufficiently clear published procedure by which oral applications are made, including one which ensures clear communication between the Department and the Minister's office regarding such an application. A checklist for evidence is available,[29] which requires substantial written evidence. This checklist confirms that:

- applications can be made orally, but will be recorded in writing by departmental staff; and

- the Minister or Department may need to provide all or part of the information that is provided and/or gathered to other parties for reasons of procedural fairness, as part of a review process and/or in the case of a declaration being made.

However, it is unclear how often this occurs in practice. The Department's evidence to this Inquiry also indicates that there is a usual preference towards encouraging written applications.[30] It further indicates that a key reason for the low success rate of applications made under the Act is that lack of sufficient evidence is brought before the Minister, and that 'Indigenous applicants themselves may not have been able to adequately articulate the significance of the area to the point of the Minister being satisfied that it was significant for the purposes of the Act'.[31] The Departmental or Ministerial role in facilitating an application is not canvassed.

Possible Reform Model

While the Law Council would need to consult further on the details of a precise model for reform, it notes with interest the submission of Aboriginal Victoria to the current inquiry, which sets out some possible key elements of one model that largely aligns with and augments the Law Council's proposals above.[32] This proposes that standalone Commonwealth Aboriginal cultural heritage legislation should:

- establish national accreditation thresholds for State Aboriginal heritage legislation which, if satisfied, means that the Commonwealth will not intervene in Aboriginal cultural heritage matters;

- establish a National Heritage Council (**the Council**) comprised of representatives of Traditional Owner groups from all States and Territories;

- provide the Council with the power to accredit State and Territory Aboriginal heritage legislation in accordance with agreed minimum standards;

[28] See, eg, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 9, 10.
[29] Australian Government, Department of Agriculture, Water and the Environment, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth): Checklist: Information to be submitted at time of application* <https://www.environment.gov.au/system/files/pages/6af7fbb4-fe32-4f42-b602-8e4badc726c8/files/checklist-atsihp-application.pdf>.
[30] Commonwealth of Australia, Committee Hansard, Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*, Friday 7 August 2020, Canberra, 16-17 (Mr Stephen Oxley).
[31] Ibid.
[32] Aboriginal Victoria, Submission No 91 to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (July 2020).

- provide this Council with all of the current functions of the Commonwealth Minister under the ATSIHP Act and specifically the power to make declarations of protection in states and territories without accredited Aboriginal cultural heritage legislation;[33]

- establish a national process for dealing with Aboriginal ancestral remains matters which cross state borders, administered by the Council;

- establish a national Aboriginal intangible heritage agreement process which aligns with Commonwealth intellectual property, patent and copyright legislation administered by this Council; and

- establish a national process for addressing matters relating to the movement of portable Aboriginal heritage under the *Protection of Moveable Cultural Heritage Act 1986* (Cth) administered by this Council.[34]

The Law Council considers that there may be merit in such proposals, noting that Victoria has the most advanced legislative model of First Nations cultural heritage protection available. As such, it may be well placed to offer insights into how an effective national scheme could operate.

Aboriginal Cultural Heritage Bill 2020 (WA)

During the course of providing evidence to the Committee, Law Council representative Mr Greg McIntyre SC, undertook to provide to the Committee a copy of a submission regarding the Aboriginal Cultural Heritage Bill 2020 (WA) (**the Bill**) being prepared on behalf of a group of Pilbara and Western Desert Native Title Bodies.[35] This submission, which has now been finalised and submitted to the Western Australian Government along with the group's additional specific comments on the Bill, is **attached**.

Senator Dodson - Questions on Notice – Agreement Making

Can you share your view further on the impact and consequences of these matters of agreement making?

The Law Council notes that its answers on agreement making below are confined to cultural heritage issues. However, the Committee may wish to seek further submissions in relation to potential reforms regarding the right to negotiate and Indigenous Land Use Agreements under the Native Title Act more generally.

Agreements entered into between mining companies and native title parties typically contain covenants binding native title parties, in return for the monetary consideration promised by the mining company party, to refrain from objecting or commenting upon applications by the mining company for consent under section 18 of the *Aboriginal Heritage Act 1972* (WA). The same clauses usually also prohibit the native title party from seeking a declaration

[33] The Law Council notes, however, that such powers would also need to be available on an ongoing basis with respect to approvals provided under state and territory cultural heritage legislation that were granted prior to any reforms and accreditations taking place.
[34] Aboriginal Victoria, Submission No 91 to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (July 2020) 4-5.
[35] Commonwealth of Australia, Committee Hansard, Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*, Friday 2 October 2020, Canberra, 13 (Mr Greg McIntyre SC).

under the ATSIHP Act seeking intervention by the responsible Commonwealth Minister stopping damage to an area of significance.

Negotiating a native title or heritage agreement with such covenants is not presently prohibited by law, so such clauses are able to be negotiated and are legally binding and enforceable by mining parties against the native title parties. The 'appropriateness' of such clauses is more a moral issue than a legal one. Policy makers and legislators could well take the view that, where there is an imbalance in power between the negotiating parties, it is a legitimate approach in the public interest for laws to be enacted which redress that imbalance by enacting laws which prohibit the more powerful party taking advantage of that power in dealings with the more vulnerable party. That approach is reflected, for example, in provisions in employment law, workers compensation law, consumer law and landlord and tenant law, where the usual principle of freedom of contract is tempered by statutory provisions defining the rights of the more vulnerable party imposing specific prohibitions on the conduct of the more powerful party and standards which must be observed by the more powerful party in arriving at agreements.

In their evidence to this Committee, the PKKP have raised significant concerns about their unequal negotiating position compared to RT and that the Participation Agreement they entered into with RT included unfair restrictions on their legal rights to object and ability to comment publicly on the plans to destroy the Juukan Gorge. In your understanding, are these kinds of restrictions common in agreements between TOs and mining companies?

The six month time limit on negotiation of a native title agreement referred to in the PKKP submissions arises out of section 35 of the Native Title Act, which provides that when at least 6 months have passed since the 'notification day' specified under section 29(4), being the day the Government party has given notice of an intention to do an act, such as grant a mining lease, and no agreement has been reached, any negotiating party may apply to the arbitral body for a determination under section 38 that the 'act must not be done', 'may be done' or 'may be done subject to conditions'. Section 31(1)(b) provides that 'the negotiating parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to:

(i) the doing of the act; or
(ii) the doing of the act subject to conditions to be complied with by any of the parties.'

Burnside, in an Issues Paper entitled 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis'[36] has summarised the origins of good faith negotiations as follows:

> *In a free market system, private contractual relations are rarely regulated; there is a presumption that contracting parties operate at arms' length and act in their own best interests. Absent allegations of unconscionability or fraud, the courts generally will not enquire into the circumstances in which a private contract was created. The concept of a statutory obligation to negotiate capable of enforcement is therefore somewhat unusual. The right to bargain originated in American workplace relations law, with the 1935 National Labor Relations Act making it an unfair labor practice for an employer to refuse to bargain collectively with employees' representatives. The requirement of 'good faith' – a common law concept – was inserted to overcome the problem*

[36] Sarah Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' in AIATSIS Native Title Research Unit, *Land, Rights, Laws: Issues of Native Title*, Vol 4, October 2009 Issue Paper No 3 (**Sarah Burnside, 'Negotiation in Good Faith'**).

presented by those employers who were 'tempted to engage in the forms of collective bargaining without the substance'. The right to bargain and the duty to negotiate in good faith were also included in the former Industrial Relations Act 1988 (Cth) and the new Fair Work Act 2009 (Cth) [citations removed].

The NNTT, acting as the arbitral body under the Native Title Act is only empowered to make a determination if it is satisfied that there has been negotiation in good faith.[37] The Native Title Act[38] places an 'evidential burden' on the party alleging lack of good faith negotiations.[39]

The NNTT, in a series of decisions, has reached conclusions as to what may comprise good faith negotiations, by asking whether, 'viewing the negotiations overall…the negotiation parties [acted] honestly and reasonably'.[40] The NNTT has provided indications (commonly known as the 'Njamal indicia') of what might be termed 'bad faith', such as the adoption of a rigid non-negotiable position, a failure to make counter-proposals, or a tendency to shift position just as an agreement seems within reach. In *Western Australia v Taylor*[41] the following indicia were set out: unreasonable delay in initiating communications in the first instance; failure to make proposals in the first place; the unexplained failure to communicate.

The Federal Court has found that good faith does not require a grantee party to make 'reasonable substantive offers or concessions to reach agreement'.[42]

Further, Burnside, writing in 2009, has noted that[43] –

> *The financial capacity of native title claimants and holders to engage in negotiations is also limited. In the recent Native Title Payments Report, the Government-appointed Working Group noted the 'foundation principle in any significant future act negotiation…that the traditional owners should have available to them advice and representation of a similar quality as the mining company or other proponent'. This goal of a 'level playing field' is currently unachievable by virtue of the significant under-resourcing of Native Title Representative Bodies (NTRBs) and Prescribed Bodies Corporate (PBCs). The Working Group noted that in some cases, proponents are 'left with no practical choice other than to meet the costs of both parties in the negotiations', with these financial contributions constituting 'an important top-up'. It is generally accepted good practice within the mining industry for proponents to fund the negotiation process. In a recent decision, the Tribunal indicated that a grantee party which reneged on a commitment to fund negotiations would not be acting in good faith. Absent an agreement to the contrary, however, good faith negotiation does not require a proponent to fund the negotiating process. The overall concept of reasonableness 'does not require a grantee party to engage*

[37] NTA, s 36(2); *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 (**FMG v Cox**) at [11].
[38] NTA, s 36(2).
[39] *Strategic Minerals Corporation NL/ Allan Kyuna and Ors on behalf of the Woolgar Group/ Queensland* [2003] NNTTA 83 at [7].
[40] *Gulliver Productions Pty Ltd v Western Desert Lands Aboriginal Corporation* (2005) 96 FLR 52 (Deputy President Sumner).
[41] (1996) 134 FLR 211 ('Taylor').
[42] *Strickland & Anor v Western Australia* (1998) 85 FCR 303. Nicholson J held that it was not for the Tribunal to assess the reasonableness of offers made during the negotiations. The Tribunal is, however, 'permitted to have regard to the reasonableness or otherwise of [offers] if it assists in the overall assessment of a party's negotiating behaviour': *Placer (Granny Smith) v Western Australia* (1999) 163 FLR 87 per Deputy President Sumner at [93]-[94].
[43] Sarah Burnside, 'Negotiation in Good Faith', 6.

in altruistic behaviour or to make concessions not warranted by standard commercial practices' [citations removed].

Burnside, has said[44] –

> *Although native title parties have alleged a lack of good faith in nearly 30 cases, in only four instances has the Tribunal found that a grantee or government party has not acted in good faith. Further, having found that good faith negotiation and other procedural requirements have been complied with, the Tribunal has only once made a determination that a future act must not be done. It must be noted that the Tribunal is restricted by the evidence presented to it and, crucially, by the terms of the Native Title Act. The Native Title Act was premised on the continued ability of industry to access and utilise land subject to claims; the paucity of decisions in favour of native title parties reflects the Act's focus on speed and the facilitation of development.*

In a 2017 case the Federal Court in *Charles, on behalf of Mount Jowlaenga Polygon #2 v Sheffield Resources Limited*[45] confirmed that the obligation to negotiate in good faith continues to apply to voluntary negotiations that occur after an application for arbitral determination has been made.[46]

The criteria for making an arbitral body determination are set out in section 39 of the Native Title Act, as follows:

> *(1) In making its determination, the arbitral body must take into account the following:*
>
> *(a) the effect of the act on:*
>
> *(i) the enjoyment by the native title parties of their registered native title rights and interests; and*
>
> *(ii) the way of life, culture and traditions of any of those parties; and*
>
> *(iii) the development of the social, cultural and economic structures of any of those parties; and*
>
> *(iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and*
>
> *(v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;*
>
> *(b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;*

[44] Ibid, 5.
[45] [2017] FCAFC 218.
[46] Castledine Gregory Law and Mediation, 'Federal Court extends good faith obligations in Native Title negotiations' (undated).

(c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;

(e) any public interest in the doing of the act;

(f) any other matter that the arbitral body considers relevant.

Existing non-native title interests etc.

(2) In determining the effect of the act as mentioned in paragraph (1)(a), the arbitral body must take into account the nature and extent of:

(a) existing non-native title rights and interests in relation to the land or waters concerned; and

(b) existing use of the land or waters concerned by persons other than the native title parties.

Laws protecting sites of significance etc. not affected

(3) Taking into account the effect of the act on areas or sites mentioned in subparagraph (1)(a)(v) does not affect the operation of any law of the Commonwealth, a State or Territory for the preservation or protection of those areas or sites.

The statistics identified by Burnside indicate that interests other than native title interests are given significant weight by the Tribunal.

The conclusion to be drawn is that, while the 6-month period in the Native Title Act for negotiation before an arbitral decision may be triggered is a pressure on native title parties, the factors giving effect to the inequality in negotiating power between the native title parties and grantee parties go beyond that and permeate into the arbitral decision-making process.

Can you share your views on the legality and appropriateness of these kinds of restrictions?

Claim-wide/project-wide agreements

Claim-wide or project-wide agreements are not inherently disadvantageous to native title parties, by comparison with tenement-by-tenement agreements. In fact, claim-wide or project-wide agreements provide for a greater possibility of more substantive financial and social benefits to be negotiated and to set appropriate standards of protection of heritage and processes for avoidance of harm to heritage, based on building a respectful relationship between the parties to such agreements, which would be more difficult to achieve with tenement-by-tenement agreements.

Consistently with the object of 'protection of native title' (which includes, as an interest in protecting Aboriginal cultural heritage) in section 3 of the Native Title Act and the objects of Commonwealth, state and territory heritage protection legislation, what needs to be prohibited, by an amendment to the Native Title Act, in claim-wide or project-wide agreements are 'no objection' clauses consenting to the grant of mining tenements which apply universally to all acts within a claim area or within a project area 'as if they were a

single act',[47] regardless of their impact upon Aboriginal cultural heritage. The right of native title parties to take all reasonable steps to protect their cultural heritage by all lawful means available to them under Commonwealth, state and territory law should be declared by the Native Title Act to be preserved and incapable of being a matter which has been or can be curtailed by agreement.

Do you have recommendations for reform that would specifically address these aspects of agreement making that led to such devastating consequences in this case?

The Law Council recommends that the right of native title parties to take all reasonable steps to protect their cultural heritage by all lawful means available to them under Commonwealth, state and territory law should be declared by an amendment to the Native Title Act and that right should be declared to be preserved and incapable of being a matter which has been or can be curtailed by agreement.

Senator Dodson - Questions on Notice – Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Can you elaborate on the current barriers, including resource barriers, that have prevented the proactive protection of Indigenous heritage sites through National Heritage listing?

As preliminary point, it should be noted that the National Heritage List was created to recognise and protection places with outstanding value to Australia as a whole. The complete list of criteria as set out in the Environment Protection and Biodiversity Conservation Regulations 2000 (Cth) (**the EPBC Regulations**) are set out below and clearly articulate the high standard that is required for inclusion on the National Heritage List.

According to the Department of Agriculture, Water and the Environment:

- Australia has 20 properties on the World Heritage List, of which five are recognised for their Indigenous cultural values; and
- there are 117 places on the National Heritage List. Of these, 19 are listed for their Indigenous values alone.[48]

The Law Council does not advocate for a change to the standard that is applied for a place to be capable of inclusion on the National Heritage List. But that does explain one barrier that has prevented Indigenous heritage sites from being included. The time and financial and human resources involved in engaging in the nomination process (which is set out later in this supplementary submission) are considerable

For prescribed bodies corporate (**PBCs**) and other representative groups representing Indigenous traditional owners, precious, scarce funding often needs to be focused on high risk/high return areas. Using the EPBC Act to proactively protect Indigenous cultural

[47] Section 42A(2), which modifies the application of Part 2, Division 3 of the Native Title Act relating to future acts.

[48] In addition, seven places are listed for Indigenous/historic values, eight for Indigenous/natural values, and three for Indigenous/natural/historic values: Australian Government, Department of Agriculture, Water and the Environment, Submission No 23 to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (July 2020) 9.

heritage values using the rigorous heritage listing process is unlikely to regarded as an efficient use of funding.

Another potential barrier is the lack of a general understanding that the EPBC Act is capable of protecting places of Indigenous cultural heritage and heritage values and that protection of sites is administered only at a state and territory level.

Further barriers are discussed below with respect to the nomination and listing process, as well as relevant criteria under the EPBC Act.

As an immediate measure to improve protection under the EPBC Act, you've recommended a large-scale assessment of Indigenous sites that could qualify for National Heritage. Can you elaborate on what specific steps would be needed to achieve this?

Given the work that is required to identify and assess sites for potential inclusion on the National Heritage List, a new approach is needed under which governments work hand in hand with First Nations peak bodies, PBCs and representative groups strategically to identify and assess First Nations heritage with a view to identifying those sites that potentially meet the criteria for inclusion on the National Heritage List and ensuring that they are put forward for consideration by the Australian Heritage Council.

While not perfect (see our comments in response to the final question below), existing State and Territory heritage lists could be audited to identify potential sites. Aboriginal heritage bodies under state heritage legislation (where those bodies exist), such as Registered Aboriginal Parties under the Victorian Aboriginal Heritage Act, could also be consulted about sites that could meet the criteria for listing.

First Nations bodies – peak and local – may require dedicated additional resourcing towards this objective. Careful consideration would also be needed to ensure that the process of site identification, information sharing and listing addresses First Nations concerns regarding sacred or secret cultural heritage.

Are there other changes you would recommend to the current nomination and listing process under the EPBC Act to ensure more effective protection of Indigenous heritage sites?

The current nomination and listing process involves:

- the Minister may determine a heritage theme to be given priority during the assessment (section 324);
- public nominations are invited, and a minimum of 40 days will be allowed for nominations to be submitted (section 324J);
- all nominations are referred to the Australian Heritage Council (**AHC**) within 30 business days after the end of the nomination period (section 324J);
- the Minister may reject nominations which are vexation etc, or which do not contain sufficient information (section 324JA(4));
- the AHRC provides the Minister with a proposed priority assessment list of nominations within 40 business days (sections 324JB, 324JC and 324JD);

- the Minister may make changes and publishes the final priority list within 20 business days. The Minister may remove or add nominated places during this time (section 324JE);

- the AHC invites public comment on each nominated place in the finalised priority assessment list, with a minimum of 30 business days allowed for comments to be submitted (324JG); the Council provides assessments on nominated places at the conclusion of the assessment period (sections 324JH and 324JI);

- the Minister generally makes a decision within 90 business days (section 324JJ); and

- the Minister may include the place or part of the place and its values in the National Heritage List (section 324 JJ(1)(a)).

As is clear, one of the key roles of the AHC is to assess places for the National Heritage List (and the Commonwealth Heritage List), as well as nominating places for inclusion in these lists. The AHC is made up of the Chair, six other members and up to two associate members. At least two members must be Indigenous persons with substantial experience or expertise in Indigenous heritage.[49] The AHC must 'take all practical steps' to identify Indigenous people who have 'rights or interests' in place when the AHC considers a place might have an Indigenous heritage value, and to give them at least 20 business days to comment in writing whether the place should be included.[50] If it is satisfied that there is a body that can appropriately represent those Indigenous persons, it may provide the information to that body.

The Law Council also notes that a Guide for Indigenous communities regarding nominating places to the National Heritage List (**the Guide**) has been produced and is on the Department's website, which appears to be a positive step.[51] The Guide addresses each of the criterion for nomination and listing and explains how that criterion can be met in the context of an Indigenous cultural heritage site. The Guide also notes that there are other ways of protecting Indigenous cultural heritage and provides information on state and territory legislation and regulatory agencies.

The Law Council makes the following comments about the nomination and listing process under the EPBC Act, while highlighting that the Committee should seek and obtain the views of First Nations peoples themselves on these issues:

- while that there may be processes of which the Law Council is unaware, it is unclear whether or how the Department or the AHRC proactively engages with First Nations peak bodies, PBCs or other local groups representing traditional owners to ensure that they are well informed about, and can actively participate in the nomination and listing process, beyond publishing the above Guide;

- it is unclear how notices published by the Minister are communicated to persons whose first language is not English, or who experience digital or literacy barriers. Some First Nations peoples, particularly in remote areas, may fall into this category. Further, nomination processes rely on written and online communication;

[49] Department of Agriculture, Water and the Environment, 'About the Heritage Council'.
[50] EPBC Act, ss 324JH, 341JG.
[51] Department of Environment and Energy (now Department of Agriculture, Water and the Environment), *Nominating places to the National Heritage List: A Guide for Indigenous communities.*

- given (as noted) that scarce resources are available to the above groups, there is a risk that both groups and individuals are unable to prioritise such nominations, or provide supporting information within required timeframes or the level of detail required, effectively. This may result in their applications being rejected or their views inadequately taken on board.

    - In this context, it is noted that the Guide states that nominations must include a detailed comparative analysis against similar places elsewhere in Australia, and that it is insufficient to simply state that the nominated place is special.[52] However, First Nations communities may a) not be well placed to assess a site comparatively in this way and b) may feel that it is inappropriate to comment on other places which are outside their country;

- The Indigenous Advisory Committee established under the EPBC Act does not have a role in this process. In this context, Professor Samuel has recently commented that its role is 'a broad advisory function and is not linked to specific decisions made'.[53]

Attention should be given to how these barriers may impede Indigenous places of national cultural significance being successfully listed, and processes adjusted to better accommodate participants. While the heritage listing process was not considered in detail in the Interim Report for the review of the EPBC Act, the Law Council notes that Chapter 2 of the Interim Report contains some specific commentary and recommendations in relation to the incorporation of Indigenous knowledge and views into the regulatory processes in the EPBC Act. In particular, Professor Samuel recommended the drafting of a National Environment Standard for best-practice Indigenous engagement to 'ensure that Indigenous Australians that speak for Country have had the proper opportunity to do so, and for their views to be explicitly considered in decisions'.[54] The Law Council understands that the final report to be issued by Professor Samuel at the end of October 2020 will contain a form of draft Standard and this Standard and other recommendations in the final report may provide additional ideas for reform in this area.

The Law Council further notes that for section 324D of the Act, sub-regulation 10.01A(2) of the EPBC Regulations list the National Heritage criteria (with respect to natural heritage values, Indigenous heritage values and historic heritage values) for a place as any or all of the following:

(a) the place has outstanding heritage value to the nation because of the place's importance in the course, or pattern, of Australia's natural or cultural history;

(b) the place has outstanding heritage value to the nation because of the place's possession of uncommon, rare or endangered aspects of Australia's natural or cultural history;

(c) the place has outstanding heritage value to the nation because of the place's potential to yield information that will contribute to an understanding of Australia's natural or cultural history;

[52] Guide, <https://www.environment.gov.au/system/files/pages/824056e4-b75c-43b2-b325-3149ccc745f8/files/nhl-nominating-places-guide.pdf>.
[53] Professor Graeme Samuel AC, *Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2020), 31.
[54] Professor Graeme Samuel AC, *Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2020), 36.

(d) the place has outstanding heritage value to the nation because of the place's importance in demonstrating the principal characteristics of:

(i) a class of Australia's natural or cultural places; or

(ii) a class of Australia's natural or cultural environments;

(e) the place has outstanding heritage value to the nation because of the place's importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;

(f) the place has outstanding heritage value to the nation because of the place's importance in demonstrating a high degree of creative or technical achievement at a particular period;

(g) the place has outstanding heritage value to the nation because of the place's strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;

(h) the place has outstanding heritage value to the nation because of the place's special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history;

(i) the place has outstanding heritage value to the nation because of the place's importance as part of indigenous tradition.

Sub-regulation 10.01A(3) states that for the purposes of 10.01A(2), the ***cultural*** aspect of a criterion means the Indigenous cultural aspect, the non-Indigenous cultural aspect, or both.

However, only sub-regulation 10.01A(2)(i), the last listed criterion, specifically refers to Indigenous cultural heritage. The Law Council considers that it deserves greater prominence and emphasis. Moreover, the definition should be updated and improved to reflect Indigenous cultural heritage as a living and thriving entity rather than one which is simply defined by 'tradition'.

In summary, while the Law Council maintains its view that separate, standalone federal legislation is needed to respond to Indigenous cultural heritage (or significant reforms to the ATSIHP Act), it suggests that:

- current nomination and listing processes be reviewed to ensure that they are effective – that is, Indigenous persons are well-informed and able to make successful nominations under National Heritage listings. The final report on the review of the EPBC Act to be released at the end of October 2020 may provide further guidance in this regard;
- greater resources be made available to appropriate Indigenous representative groups to ensure that they are in a position to apply for National Heritage listing in practice, and to inform and engage Indigenous communities in this process; and
- amending the National Heritage criteria under the Regulations to give appropriate prominence and meaning to Indigenous cultural heritage.

Are there also steps that could be taken at a State and Territory level to improve the identification and registration of Indigenous heritage sites, such as on state registers of culturally and historically significant sites? How does this protection compare with protection of National Heritage listing?

The Law Council's submission noted that current practices under state and territory with respect to the identification and registration of Indigenous heritage sites often fall short. For example, with respect to the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act (NSW)**), it noted that while the Minister has the power to declare a place of specific significance with respect to Aboriginal culture,[55] this is infrequent. The New South Wales (**NSW**) Aboriginal Land Council has noted that despite hundreds of thousands of Aboriginal sites across NSW, only about 100 Aboriginal places are formally protected under these provisions.[56]

It is also aware that while there is provision in the existing WA Act for declaring protected areas, this has been little used.[57] Anecdotally, the Law Council understands that there may only be two declared protected areas under those provisions in WA.

The current Victorian example was put to the Law Council as one strong existing example which may inform broader reform in this area, as discussed in its primary submission.[58] This occurs under a system of automatic protection for Aboriginal cultural heritage. In this context Aboriginal Victoria has noted that:

> *Any Aboriginal cultural heritage systems applying blanket protection and harm offences requires secure and comprehensive information databases with controlled access. A key provision in the* [Victorian legislation] *is its establishment of a register, the purposes of which are specified and include acting as a repository for all information about Aboriginal cultural heritage. The Register holds all information about known Aboriginal heritage places, objects, ancestral remains and intangible Aboriginal heritage. It is open for particular categories of people and for particular purposes only but otherwise closed without RAP or Council permission. There is an offence relating to misuse of information.*
>
> *The Register is backed up by state of the art GIS and mapping programs, with information digitally available online through a user interface… Heritage Advisors acting for proponents of activities are the primary users of the Register, from which they can access information about known heritage to inform the preparation of CHMPs. Information is also important for land use planning and more strategic heritage management decisions.*[59]

In addition to the above, the Law Council also notes that at the federal level, there are 78 (and 12 proposed new) Indigenous Protected Areas.[60] The number and spread of areas could be also increased with more resources and an integration with State and Territory Indigenous heritage protection processes. As noted in an earlier review of the EPBC Act,

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[55] NPW Act (NSW), s 84.
[56] NSW Aboriginal Land Council, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*, Submission to the Joint Standing Committee on Northern Australia, 20 July 2020.
[57] WA Act, ss 19-26.
[58] Law Council of Australia, *Inquiry into* the *destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*, Submission to the Joint Standing Committee on Northern Australia, 67.
[59] Aboriginal Victoria, Submission No 91 to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (July 2020) 14.
[60] Department of Agriculture, Water and the Environment, 'Indigenous Protected Areas'.

there is no statutory base for the identification or protection of Indigenous Protected Areas, except as a possible elevation to National Heritage listing.[61] This discussion identifies the current confusing interaction between Commonwealth, State and Territory legislation and processes dealing with environmental, heritage protection and native title.

Contact

The Law Council thanks the Committee for the opportunity to lodge this supplementary submission. Please contact Ms Leonie Campbell, Deputy Director of Policy, on (02) 6246 3711 or at leonie.campbell@lawcouncil.asn.au, or Ms Alex Kershaw, Policy Lawyer, on (02) 6246 3708 or at alex.kershaw@lawcouncil.asn.au, in the first instance, should you require further information or clarification.

Yours sincerely

Pauline Wright
President

[61] Australian Government Department of the Environment, Water, Heritage and the Arts, *Independent Review of the Environment Protection Biodiversity Conservation Act 1999* (2009), Ch 17.

Attachment

Aboriginal Cultural Heritage Bill 2020 – A Summary & Commentary

Introduction

1. The Aboriginal Cultural Heritage Bill 2020 (WA) creates a multitude of new and improved processes, compared to the *Aboriginal Heritage Act 1972* (WA) ("AHA WA"). It picks up a significant number of concepts not previously in the AHA WA, some of which bear some similarity to those existing in other State legislation –

   - Aboriginal cultural heritage is defined as including tangible and intangible elements important to Aboriginal people of the State and spiritual, historic, scientific and aesthetic perspectives (cl 10)

   - Local Aboriginal cultural heritage services ("LACHS") (cl 30-45)

   - Protection of remains (cl 49)

   - Secret/sacred object protection, including possession and control to the Aboriginal owner (cl 56)

   - Protected areas of outstanding significance (cl 63)

   - A definition of harm, which excludes an expression of opinion disrespecting Aboriginal cultural heritage, and imports qualifications on the concepts of harm: 'serious harm' being harm which is irreversible, high impact, wide scale or to a protected area, and 'material harm', being harm which is not trivial or negligible (cl 80-83)

   - Penalties for harm, including imprisonment for individuals and fines up to $1m for corporations

   - Defences to harm, including due diligence assessments and reasonable steps to avoid harm (cl 87)

   - Management of activities which may harm and principles of co-operation and mutual advantage (cl 90)

   - Due diligence assessments (cl 93)

   - Notification and consultation in relation to Aboriginal parties (cl 97)

   - Minimal impact activities (cl 104)

   - Low impact activity permits (cl 105)

- Management Plans in relation to medium to high impact activities (cl 122) which may be agreed and approved and may incorporate native title agreement provisions (cl 124) and be approved (cl 130, 144) or authorised by the Minister, if not agreed (cl 147)

- A Definition of informed consent for the purposes of agreement to a Management Plan (cl 130)

- Aboriginal Cultural Material determined to be of State significance (cl 153)

- A Directory of heritage (cl 162)

- Stop activity orders (cl 176)

- Prohibition orders (cl 182)

- Remediation Orders (cl 186)

- Aboriginal Inspectors (cl 204)

- SAT Review procedures for parties affected by Ministerial decisions, including Aboriginal parties to Management Plans (cl 258).

The Bill effectively replaces the single offence provision in s 17 of the AHA WA which has one defence of lack of knowledge (s 62) with a three layered distinction as to harm which is serious, which is material or which is not material and several layers of defences: exempt activities, authorisation, due diligence assessments, reasonable steps to avoid or minimise and minimal impact confirmations. It replaces the single consent to uses provision in s 18 of the AHA WA, based on a recommendation as to the importance and significance of a site and 'the general interest of the community' with permits for Low impact activities, and Management Plans for medium or high impact activities authorised by the Minister, subject to being satisfied as to avoidance or minimisation of risk of harm to ACH and the interests of the State.

2. While the Bill makes many improvements upon the current legislation, its implementation will require significant increased resources both within the responsible Department and It needs to be clarified by the Government where the resources are coming from for the LACHS to be established and perform the onerous statutory functions imposed upon them by the ACH Bill.

Beneficial legislation

3. In *Robert Tickner v. Robert Bropho*[1] Black CJ said of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth):

> 29. The Act is clear in its purposes, broad in its application and powerful in the provision it makes for the achievement of its purposes.

[1] [1993] FCA 306; (1993) 114 ALR 409; (1993) 40 FCR 183.

30. The long title of the Act is: "An Act to preserve and protect places, areas and objects of particular significance to Aboriginals, and for related purposes." The purposes of the Act are spelt out in s. 4. They are:

> "...the preservation and protection from injury of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition."

…

38. … an Act described in the then Minister's second reading speech (H of R Deb. 9.5.84 p 2133) as **beneficial legislation**, remedying social disadvantage of Aboriginals and Islanders, and of having the effect, by preserving and protecting an ancient culture from destructive processes and of enriching the heritage of all Australians, an Act described in the then Minister's second reading speech (H of R Deb. 9.5.84 p 2133) as beneficial legislation, remedying social disadvantage of Aboriginals and Islanders, and of having the effect, by preserving and protecting an ancient culture from destructive processes and of enriching the heritage of all Australians, … (emphasis added)

4. The apparent intent of the ACH Bill is that is to be similarly regarded as 'beneficial legislation'. Identifying a beneficial or remedial purpose of legislation invokes, as a statutory interpretation tool, the principle that legislation with a beneficial or remedial purpose will be construed according to that purpose, giving the legislation a 'fair, large and liberal' interpretation, rather than one which is 'literal or technical'.[2] That tool is most effective as a means of statutory interpretation where provisions are ambiguous or have more than one open construction.

5. The beneficial intent of the ACH Bill is reflected in the objects at cl 8 which, in particular at cl 8(1)(c), cites as an object –

> to manage activities that may harm Aboriginal cultural heritage so as to achieve clarity, confidence and certainty in providing balanced and beneficial outcomes for Aboriginal people and the wider Western Australian community; …

6. It is reinforced by clause 46, which sets out principles relating to the custodianship, ownership, possession and control of Aboriginal cultural heritage, including, at sub-clause (f), that –

> it is important for Aboriginal people and the wider community that Aboriginal cultural heritage is protected and preserved.

7. Further to that, the Bill also adopts, in sub-clause 91(d), the principle that –

> where possible, in utilising land for the maximum benefit of the people of Western Australia, that valuing Aboriginal cultural heritage should be prioritised in managing activities that may harm that cultural heritage.

Aboriginal cultural heritage defined

8. 'Aboriginal cultural heritage' ("ACH") is defined in clause 10 of the Bill in broad terms, as follows -

> *Aboriginal cultural heritage* means the tangible and intangible elements that are important to the Aboriginal people of the State, recognised through social, spiritual, historical, scientific or aesthetic

[2] *W v City of Perth* (1997) 191 CLR 1, 12 per Brennan CJ and McHugh J, 39 per Gummow J; See also AB v Western Australia (2011) 244 CLR 390, [24].

perspectives (including contemporary perspectives), as part of their traditional and living cultural heritage and includes —
(a) an area that is composed of or contains tangible elements of that cultural heritage (an ***Aboriginal place***);
(b) an object that is a tangible element of that cultural heritage (***Aboriginal object***);
(c) a group of areas (a ***cultural landscape***) interconnected through tangible or intangible elements of that cultural heritage;
(d) any bodily remains of a deceased Aboriginal person (***Aboriginal ancestral remains***), other than remains that —
(i) are buried in a cemetery where non-Aboriginal persons are also buried; or
(ii) have been dealt with or are to be dealt with under a law of the State relating to the burial of the bodies of deceased persons.

9. The AHA WA did not use the term 'Aboriginal cultural heritage'. It used the term 'Aboriginal cultural material', which it defined in s 4 to mean 'an object of Aboriginal origin that has been declared to be so classified under section 40'. Section 40 allows for that classification to be made by the Governor upon recommendation by the Aboriginal Cultural Material Committee ("ACMC") that an object or class of objects of Aboriginal origin is –

(a) of sacred, ritual or ceremonial importance;

(b) of anthropological, archaeological, ethnographical or other special national or local interest; or

(c) of outstanding aesthetic value,

10. That provision of the AHA WA has not been used to any great extent, probably because section 6 of the AHA WA declares that –

this Act applies to all objects, whether natural or artificial and irrespective of where found or situated in the State, which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which are or were used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people past or present.

11. The AHA WA also declares, in s 5, that it applies to –

(a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;

(b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;

(c) any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;

(d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.

12. The ACH Bill, in proposing the definition of ACH which it does, is adding a description of what might be included within the concept of culture, including the possibility of intangible elements, adopting a broader notion of place than exists under the AHA WA including the notion of a group of places and extends protection to ancestral remains.

13. However, the only apparent application of the concept of intangible heritage in the operative provisions of the Bill is in relation to protecting an area of outstanding significance (cl 63(b)) including a group of areas which may be connected by an intangible link to form a cultural landscape (cl 10(1)(c)). By way of contrast the *Aboriginal Heritage Act 2006* (Vic) ("AHA Vic") sections 79A to 79L sets out a process for registration of Aboriginal intangible heritage, offences for using intangible heritage for commercial purposes and Aboriginal intangible heritage agreements and their registration. 'Intangible heritage' is defined in the AHA Vic, s 79B as follows –

> (1) For the purposes of this Act, Aboriginal intangible heritage means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.
>
> (2) Aboriginal intangible heritage also includes any intellectual creation or innovation based on or derived from anything referred to in subsection (1)

Aboriginal Cultural Heritage Council ("ACH Council")

14. The ACH Council is effectively a replacement body for the Aboriginal Cultural Material Committee under the AHA WA.

15. The membership of the ACH Council is likely to have more Aboriginal members than the ACMC. The ACH Bill cl 17 provides that –

> (1) The ACH Council is to consist of —
> (a) a chairperson, who is an Aboriginal person, appointed by the Minister…
>
> (3) The Minister is to ensure that —
> …
> (b) as far as practicable, preference is given to appointing Aboriginal people as members of the ACH Council…

16. That contrasts with the AHA WA ACMC membership, constituted as follows:

> **28. Aboriginal Cultural Material Committee**
>
> (2) The membership of the Committee consists of —
>
> (a) appointed members…; and
>
> (b) ex-officio members.
>
> (3) Of the appointed members, one shall be a person recognised as having specialised experience in the field of anthropology as related to the Aboriginal inhabitants of Australia and shall be appointed by the Minister after consultation with the persons responsible for the study of anthropology at such of the establishments of tertiary education situate in the State as the Minister thinks fit.
>
> (4) Subject to subsection (3), the appointed members shall be selected from amongst persons, whether or not of Aboriginal descent, having special knowledge, experience or responsibility which in the opinion of the Minister will assist the Committee in relation to the recognition and evaluation of the cultural significance of matters coming before the Committee, and shall be appointed by the Minister from a panel of names submitted for the purposes of this Act by the Registrar.
>
> (5) The Minister shall appoint the Chairman of the Committee from amongst the members of the Committee,

29. Ex-officio members

The following persons, namely —

(a) the person appointed Director of the Museum;

(b) the person immediately responsible to a Minister of the Crown for the administration of Aboriginal affairs and the support of traditional Aboriginal culture;

(c) an authorised land officer within the meaning of the *Land Administration Act 1997* for the time being nominated for the purposes of this section by the Minister to whom the administration of that Act is for the time being committed by the Governor,

are members of the Committee by virtue of their office referred to in paragraph (a) or (b) or nomination referred to in paragraph (c), as the case requires, and while either of those offices is vacant the person acting in that office is thereby constituted a member while so acting.

17. The functions of the ACH Council are also described in clause 18(1) in a way which places more emphasis upon the involvement of Aboriginal people. They include -

b) to promote the role of Aboriginal people in —
(i) the recognition, protection and preservation of 18 Aboriginal cultural heritage; and
(ii) the management of activities that may harm Aboriginal cultural heritage; and
(iii) the administration of this Act; …

Local Aboriginal cultural heritage services ("LACHS")

18. The ACH Bill creates in the form of LACHS a type of entity which does not exist under the AHA WA. They are conceptually similar to Recognised Aboriginal Representative Bodies provided for under the *Aboriginal Heritage Act 1988* (SA) ("AHA SA") as follows:

19B—Recognised Aboriginal Representative Bodies

(1) For the purposes of this Act, the ***Recognised Aboriginal Representative Body*** for—

(a) a specified area; or

(b) a specified Aboriginal site or sites; or

(c) a specified Aboriginal object or objects; or

(d) specified Aboriginal remains,

is to be determined in accordance with this Part.

(2) Anangu Pitjantjatjara Yankunytjatjara will be taken to be the Recognised Aboriginal Representative Body in respect of the lands (within the meaning of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981*).

(3) Maralinga Tjarutja will be taken to be the Recognised Aboriginal Representative Body in respect of the lands (within the meaning of the *Maralinga Tjarutja Land Rights Act 1984*).

(4) Subject to this Part, a registered native title body corporate (within the meaning of the *Native Title Act 1993* of the Commonwealth) will be taken to be appointed as the Recognised Aboriginal Representative Body in respect of the area that is the subject of the relevant native title determination under that Act (including, to avoid doubt, areas within that area in which native title has been extinguished or suppressed).

(5) However, an appointment under subsection (4) will only have effect if the appointment is approved by the Committee (and, to avoid doubt, the Committee may refuse to approve an appointment for any reason the Committee thinks fit).

(6) If the Committee refuses to approve an appointment under subsection (4), that subsection will be taken to no longer apply in respect of the area that is the subject of the relevant native title determination.

(7) A registered native title body corporate that would, but for this subsection, be taken to be appointed as the Recognised Aboriginal Representative Body in respect of a particular area may, by notice given in a manner and form determined by the Committee, elect not to be the Recognised Aboriginal Representative Body in respect of the area, a specified part of the area or a specified Aboriginal site, object or remains within the area.

19. The South Australian model more strongly gravitates towards bodies existing under the *Native Title Act 1993* (Cth) ("NTA"), but retains an approval process for the Aboriginal Heritage Committee, which is a body equivalent to the ACH Council under the ACH Bill: see AHA SA s 7 and 8.

By way of comparison, the *Aboriginal Heritage Act 2006* (Vic) (as amended in 2016), at s 148, uses the model of a registered Aboriginal party with the following functions—

(a) to act as a primary source of advice and knowledge for the Minister, Secretary and Council on matters relating to Aboriginal places located in or Aboriginal objects originating from the area for which the party is registered;

(b) to advise the Minister regarding, and to negotiate, the return of Aboriginal cultural heritage that relates to the area for which the party is registered;

(c) to consider and advise on applications for cultural heritage permits;

(d) to evaluate and approve or refuse to approve cultural heritage management plans that relate to the area for which the party is registered;

(e) to enter into cultural heritage agreements;

(f) to apply for interim and ongoing protection declarations;

(fa) to provide general advice regarding Aboriginal cultural heritage relating to the area for which the party is registered;

(fb) to perform functions under this Act in relation to cultural heritage management plans, cultural heritage permits, cultural heritage agreements, preliminary Aboriginal heritage tests, Aboriginal cultural heritage land management agreements and Aboriginal intangible heritage agreements;

(fc) to perform functions under this Act in relation to cultural heritage permits, including the granting of permits;

(fd) to advise the Minister administering the **Planning and Environment Act 1987** on proposed amendments to planning schemes which may affect the protection, management or conservation of places or objects of Aboriginal cultural heritage significance;

(fe) to report to the Council annually on the performance of its functions under this Act, including any fees and charges paid to or imposed by the party in respect of the year;

(ff) to nominate information about Aboriginal cultural heritage to be restricted information on the Register;

(g) to carry out any other functions conferred on registered Aboriginal parties by or under this Act.

20. The Victorian model also provides (at s 132) for an Aboriginal Heritage Council with the following functions –

(aa) to be the central coordinating body responsible for the overseeing, monitoring, managing, reporting and returning of Aboriginal ancestral remains in Victoria;

(a) to advise the Minister in relation to the protection of Aboriginal cultural heritage in Victoria, including advising the Minister about—

(i) the cultural heritage significance of any Aboriginal ancestral remains or Aboriginal place or object;

(ii) measures for the effective protection and management of Aboriginal cultural heritage in Victoria, including the management of culturally sensitive information relating to that heritage;

(iii) measures to promote the role of Aboriginal people in the protection and management of Aboriginal cultural heritage and in the administration of this Act;

(iv) the standards of knowledge, experience, conduct and practice required of persons engaged in research into Aboriginal cultural heritage;

(v) the training and appointment of authorised officers under this Act;

(vi) any other matters referred to the Council by the Minister;

(b) at the Minister's request, to advise and make recommendations to the Minister on the exercise of his or her powers under this Act, including advising the Minister about—

(i) the application of interim or ongoing protection declarations;

(ii) a proposal by the Minister to require a cultural heritage management plan to be prepared;

(iii) whether a cultural heritage audit is necessary;

(iv) whether the compulsory acquisition of land is appropriate in any particular case;

(v) any other matter relating to the exercise of his or her powers under this Act that the Minister requests the Council to consider;

(c) to advise the Secretary—

(i) on measures to establish appropriate standards and guidelines for the payment to registered Aboriginal parties of fees for doing anything referred to in section 60;

(ii) at the Secretary's request, on the exercise of his or her powers under this Act in relation to cultural heritage permits, cultural heritage management plans and cultural heritage agreements.

(2) The Council has the following additional functions—

(a) to receive and determine applications for the registration of Aboriginal parties under Part 10;

(b) to consider for approval proposed cultural heritage management plans for which the Secretary is the sponsor, in the circumstances set out in section 66;

(c) to promote public awareness and understanding of Aboriginal cultural heritage in Victoria;

(ca) to report to the Minister annually on the performance of its functions, including a summary of any reports received by the Council from registered Aboriginal parties;

(cb) to advise the Minister administering the **Planning and Environment Act 1987** on proposed amendments to planning schemes which may affect the protection, management or conservation of places or objects of Aboriginal cultural heritage significance;

(cc) to oversee and monitor the system of reporting and returning Aboriginal ancestral remains and secret or sacred objects;

(cd) to advise the Secretary on cultural heritage permits and cultural heritage management plans related to Aboriginal ancestral remains in areas without a registered Aboriginal party;

(ce) to perform functions under this Act in relation to cultural heritage permits, including the granting of permits;

(cf) to manage the Aboriginal Cultural Heritage Fund;

(cg) to provide advice regarding Aboriginal cultural heritage, including to the Minister and the Secretary;

(ch) to manage, oversee and supervise the operations of registered Aboriginal parties;

(ci) to promote and facilitate research into the Aboriginal cultural heritage of Victoria;

(cj) to nominate information about Aboriginal ancestral remains, Aboriginal secret or sacred objects and Aboriginal places and objects to be restricted information on the Register;

(ck) to publish policy guidelines consistent with the functions of the Council;

(cl) to report to the Minister every 5 years on the state of Victoria's Aboriginal cultural heritage;

(d) to carry out any other functions conferred on the Council under this Act.

21. As can be seen from the description of their respective functions, the Victorian legislation gives the registered Aboriginal parties the deliberative functions which the Western Australian ACH Bill gives to a State wide Aboriginal Heritage Council and the Victorian Aboriginal Heritage Council is more of an overview body. The Victorian legislation results in a greater devolution of power to local Aboriginal decision- makers than the Western Australian ACH Bill.

22. The ACH Council is directed by the Bill to appoint a LACHS for different areas of the State, but one LACHS may serve more than one area (cl 31(1) and (2)).

23. The functions of a LACHS are:

(a) to facilitate consultation with native title parties and other knowledge holders who have relevant knowledge of Aboriginal cultural heritage in the area;
(b) to make, or to facilitate the making of, agreements about the management of Aboriginal cultural heritage in the area;
(c) to give effect to agreements about the management of Aboriginal cultural heritage that apply in respect of the area, whether or not the local ACH service is a party to the agreement;
(d) to provide evidence to the ACH Council of Aboriginal cultural heritage in the area and the importance of that heritage;
(e) to make submissions, and to provide information, to the ACH Council about proposals for activities to be carried out in the area and the management of those activities so as to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage;
(f) to assist in improving the accuracy of the ACH Directory by providing accurate evidence and data about Aboriginal cultural heritage in the area;
(g) to consult with other local ACH services, native title parties and knowledge holders who are not native title parties about Aboriginal cultural heritage that extends beyond the geographic boundaries of the area;
(h) 1 to undertake, either directly or indirectly, on-ground identification, maintenance and conservation of Aboriginal cultural heritage in the area;
(i) to report to the ACH Council about matters related to the performance of the functions of the local ACH service as required by the regulations;
(j) other functions, if any, that are prescribed (cl 32).

24. Those qualified to be appointed are:

(a) a native title party for the area;
(b) a CATSI Act corporation —
(i) that represents the Aboriginal community in the area; or
(ii) the majority of the members of which are knowledge holders for the area;
(c) a Corporations Act corporation —
(i) that represents the Aboriginal community in the area; or
(ii) the majority of the members of which are knowledge holders for the area;
(d) a native title representative body for the area.

25. A LACHS, in order to be appointed, must have the following qualities:

(a) has comprehensive knowledge of the local Aboriginal community in the area; and
(b) has the endorsement of any native title party, or parties, for the area or part of the area; and
(c) has sufficient support of the local Aboriginal community in the area to ensure that all the persons to be consulted are consulted as required; and
(d) has the necessary skills to promote negotiations between people who propose to carry out activities in the area and knowledge holders for the area where it is proposed that the activities will be carried out; and
(e) is impartial; and
(f) has sufficient skills and resources to undertake the functions of a local ACH service; and
(g) has in place a reasonable fee structure for the fees to be charged in connection with the carrying out of the functions of a local ACH service; and
(h) satisfies other requirements, if any, that are prescribed.

26. The appointment of a LACHS is for as long as the corporation remains registered under the CATSI Act or *Corporations Act 2001* (Cth) or the appointment is cancelled under s 37(2) (cl 36). The ACH Council may cancel the appointment on request by the LACHS or suspend or cancel it if the Council or Minister are no longer satisfied that it meets the requirements for appointment (cl 37(2)) and may amend the area of the LACHS on request or of its own initiative after giving notice and receiving submissions (cl 38). Objections may be made to the Minister about these decisions by the ACH Council and the Minister, after considering the information provided to the ACH Council and any further information, may confirm the ACH Council decision or make another decision (cl 40).

27. A LACHS is entitled to charge a fee for services in accordance with its fee structure, as indicated at the time of applying to be appointed or any variation approved by the ACH Council, but may not charge a fee for services to the Department or ACH Council (clauses 41-2). The Bill does not indicate where the fee for services is to come from or how a LACHS is otherwise to be resourced. Discussions with the Department have suggested the possibility that the State may provide some start-up funding for a LACHS. Otherwise it has been suggested that there is an expectation that a LACHS will need to negotiate with proponents to reach agreement on a fee for service to carry out the agreement related functions associated with each particular proposal which may affect ACH in the area for which the LACHS is responsible. Those functions, however, represent only some of the statutory functions of a LACHS, as outlined above. Unless the State financially resources the balance of the functions of LACHS, then the system proposed by the Bill is likely to be ineffective and will comprise a hollow appearance of shifting of the Aboriginal cultural protection process to engagement of local Aboriginal knowledge holders but that not occurring in reality because the LACHS will not have the capacity to perform its functions.

Aboriginal ancestral remains

28. The ACH Bill, clause 49(1) introduces the concept that –

> An Aboriginal person, group or community that has, in accordance with Aboriginal tradition, rights, interests and responsibilities in respect of an area in which Aboriginal ancestral remains are located, or are reasonably believed to have originated from, is a custodian of the ancestral remains and is entitled to possession and control of those remains.

29. It creates a duty (subject to fines for non-compliance with the duty) of 'individuals' or 'organisations' in possession of Aboriginal ancestral remains to give notice of that to the ACH Council (cl 50) and for organisations to return them to custodians entitled to them and notify the ACH Council of that (clause 51). The duty of individuals (clause 52) and the Coroner (clause 53) is to return the remains to the ACH Council and the Council then has power to return them to custodians (clause 54). It is not clear why the duties are differentiated in that way.

30. The ACH Bill makes it an offence to disturb or remove or disturb Aboriginal remains (cl 55(1), but Aboriginal persons dealing with them in accordance with Aboriginal tradition are excepted from that provision (cl 55(2)).

Secret or sacred objects

31. The ACH Bill, in Part 5, Division 3, also has provisions relating to the return of 'secret or sacred' objects to a 'custodian and rightful owner' of the object entitled to its 'possession and control' (cl 57(1)). It is a stated principle of the ACH Bill that –

> secret or sacred objects should, where practicable, be under the custodianship, ownership, possession and control of Aboriginal people (cl 46(d)).

32. The provisions in this Division are an improvement upon sections 41 to 48 of the AHA WA, which require a person with custody or control of an object 'of a kind classified as Aboriginal cultural material' to give notice of it to the Minister, produce it to the Minister, if required by the Minister, , who may retain it. Under the AHA WA objects classified as Aboriginal cultural material may not be sold, except by an Aboriginal person acting in a manner sanctioned by Aboriginal custom or provided it has been offered for sale to the Minister. The Minister can choose to purchase the object at an agreed price or one set upon application to the Local Court. There is little evidence of those provisions being used.

33. The definition in the AHA Bill of 'secret or sacred object' is 'an object that is secret or sacred to Aboriginal people in accordance with Aboriginal tradition',[3] there is no description of what makes an object secret or sacred and no specification of the criteria by which an object is to be judged to fit into that category or specification of who is to decide whether an object fits into that category.

34. The Bill is apparently intended to only vest custody in Aboriginal people of a sub-category of objects which form part of the ACH described in clause 10(b) as an 'Aboriginal object'.

35. In terms of Aboriginal self-determination, it could be said that the provisions in the Division should apply to all objects forming part of ACH and not be limited to so-called 'sacred or secret objects'.

36. If Part V Division 4 is to apply to a sub-group of Aboriginal objects it needs to include a procedure for determining which Aboriginal objects fit into that category. The present structure of the Bill suggests that the ACH Council should manage that procedure. The functions of the ACH Council include –

> to promote the role of Aboriginal people in —
> (i) the recognition, protection and preservation of Aboriginal cultural heritage; [4]

37. That, plus the likely culturally sensitive nature of the task of determining which objects fit into the sub-category, suggests delegation of that task[5] to 'knowledge holders',[6] i.e. –

> (a) for an area, means an Aboriginal person who, in accordance with Aboriginal tradition —
> (i) holds particular knowledge about the Aboriginal cultural heritage of the area; or
> (ii) has rights, interests and responsibilities in respect of Aboriginal places located in, or Aboriginal objects located in or reasonably believed to have originated from, the area;
> (b) for Aboriginal cultural heritage, means an Aboriginal person who, in accordance with Aboriginal tradition —
> (i) holds particular knowledge about the Aboriginal cultural heritage; and
> (ii) has rights, interests and responsibilities for the Aboriginal cultural heritage.

38. The ACH Bill includes a duty, with criminal penalties for its breach, not to sell or remove from the State or conceal secret or sacred objects (cl 61).

Exclusions from duty to return?

39. The duty to return secret sacred objects, falls on 'a person' (cl 58) and 'a prescribed public authority' (cl 59), which distinguishes it from the duty to return Ancestral remains, which applies to 'an organisation or individual' (cl 50). The *Interpretation Act 1984* (WA), s 8 provides that ***'person*** or any word or expression descriptive of a person includes a public body, company, or association or body of persons, corporate or unincorporate'. It follows that the use of the word person is comprehensive of an organisation and a public authority.

40. The reason for the distinction appears to be revealed in the definition of 'organisation' in cl 47 as meaning –

> any person other than the following —

[3] Clause 9.
[4] Clause 18(1)(b).
[5] The delegation could be pursuant to the power to delegate to a committee in cl 20(1)(c); unless the 'committee' referred to in that provision is interpreted as limited to a sub-group of the ACH Council.
[6] As defined in cl 9.

(a) an individual;
(b) the WA Museum.

41. The effect is that the WA Museum has no obligation to return Ancestral remains in its possession. The DHLP advise that no statutory obligation has been placed on the Museum to return remains because they have in place a policy of return of remains.

42. A similar effect may have been intended in clause 56, in relation to return of 'secret or sacred objects', by defining *prescribed public authority* as meaning –

any public authority other than the following —
(a) the WA Museum;
(b) a university listed in the *Public Sector Management Act 1994* Schedule 1.

43. However, the WA Museum and universities are arguably obliged to return such objects by clause 58, which applies to 'a person' and so, in accordance with the *Interpretation Act 1984* (WA), includes public bodies such as the WA Museum and universities.

Protected areas

44. A declaration of an area as a 'protected area' is declared to be for the purpose of providing 'a higher level of protection' to ACH.

45. There are number of limitations in the ACH Bill upon ACL achieving 'protected area' status:

- 'Protected areas' can only exist in relation to areas of 'outstanding significance' (cl 63-64);
- 'Outstanding significance' is defined as meaning –

  (a) that the cultural heritage is of outstanding significance to Aboriginal people including to an individual, community or group; and
  (b) that the significance is recognised through social, spiritual, historical, scientific or aesthetic perspectives (including contemporary perspectives).
- Only a knowledge holder is empowered to make an application for an area to be declared as a 'protected area' (cl 65(1));
- An application must not include any area to which an ACH permit relates, without the agreement of the permit holder to exclude that area from the permit area (cl 65(3));
- An application must not include any area to which an ACH management plan relates, without the agreement of the parties to the ACH management plan to exclude that area from the permit area (cl 65(4));
- The ACH Council is obliged to consider the ACH and it significance 'to the knowledge holders for the cultural heritage' (cl 69(1)(c)), but, if it forms a preliminary view that an area is of outstanding significance to the knowledge holders (cl 69(2)) and should be declared a protected area is obliged to give notice to and receive submissions from any person it considers has an interest in the area (cl 70) and retains an unfettered and undirected discretion as to weighing of those submissions and to form a view that an area should not be declared a protected area (cl 71(1));
- The Minister has an unfettered and undirected power to reverse or confirm the view of the ACH Council that an area should not be declared a protected area (cl 71(3) and (4));
- The Minister is the ultimate arbiter of what comprises a 'protected area', after taking into account a recommendation of the ACH Council that an area be declared a protected area (clauses 72(2) and 74(2)(a)) and 'the interests of the State' (cl 71(2)(b)).

46. It appears that 'protected areas' are likely to include only areas in which nobody but knowledge holders have any interest and which they can demonstrate are outstanding from the point of view of the State.

47. Further, the Bill only protects 'cultural landscapes' from harm within 'protected areas' (cl 80(d)).

48. The only effect of an area being declared as a 'protected area' is that the area may –

> be made subject to conditions relating to any of the following —
> (a) the management of the area;
> (b) access to the area;
> (c) any other matters, if any, that are prescribed.[7]

49. Whether an area being declared a 'protected area' will achieve the purpose of 'a higher level of protection' is in part dependent upon how the Minister exercises the unfettered and undirected discretion the Minister has to place conditions upon the areas declared. Part 6 would come closer to its declared purpose if it set out mandatory relevant considerations related to how the ACH might be protected for the Minister to take into account in exercising his discretion whether or not to make the declaration and the conditions to place on the area.

50. The significance of a protected area is that harm to such areas cannot be the subject of 'authorised', 'medium impact', 'minimal impact', 'low impact' or 'medium to high impact' activities, as discussed below in relation to the defences to crimes or offences of harm.

Harming offences

51. The ACH Bill protects from harm, by creating offences which attract penalties –

- *Aboriginal places*, being areas containing tangible elements of cultural heritage (clauses 9 and 10(1)(a)); and
- *Aboriginal objects*, being tangible elements of cultural heritage (clauses 9 and 10(1)(b)); but
- only protects 'cultural landscapes' from harm within 'protected areas' (cl 80(d)); and
- does not protect ACH from an act comprising the expression of

  > an opinion or belief, that —
  > (i) demonstrates disrespect for the importance of Aboriginal cultural heritage to Aboriginal people; or
  > (ii) diminishes or otherwise affects the value of Aboriginal cultural heritage to Aboriginal people;
  > Or
- otherwise protect any intangible elements of ACH.

52. The Bill (reasonably, but perhaps unnecessarily) excludes from the possibility of causing harm an Aboriginal person acting in accordance with Aboriginal tradition (cl 81(2)).

53. The Bill creates a hierarchy of harm and penalties:

- *Harm*, which comprises an offence and attracts a fine for an individual up to $25,000 and for a body corporate up to $250,000, with daily penalties for continuing offences (cl 86);
- *Material harm*, being harm which is neither trivial nor negligible (cl 82(2)), which comprises an offence and attracts a fine for an individual up to $100,000 and for a body corporate up to $1,000,000, with daily penalties for continuing offences (cl 85);

[7] Clause 74(4).

- *Serious harm*, which comprises a crime and attracts, for an individual, imprisonment for up to 4 years or a fine up to $500,000, or both and for a body corporate up to $5,000,000, with daily penalties for continuing offences (cl 85) being harm which is –

> (a) irreversible or of a high impact or on a wide scale; or
> (b) to Aboriginal cultural heritage that is —
> (i) a protected area; or
> (ii) within a protected area.[8]

54. It is somewhat surprising that a penalty attaches to harm which is not material or serious and thus is in the category of being 'trivial or negligible'. However, there is no indication of the standard by which that description is to be applied. It must be assumed that it is to be applied by a Court in accordance with an objective test. Given that ACH is defined in cl 10(1) as elements which 'are important to Aboriginal people' it would be expected that the objective test would be applied by attributing to the ordinary reasonable Aboriginal person of a not overly sensitive disposition and by that standard reaching a conclusion as to whether harm has occurred.[9] There may be a good policy reason for sanctioning even trivial or negligible harm which has occurred by reason of activity which, though it has caused such limited harm, has not fallen into the arena of being sanctioned by array of defences available under the Bill which provide a means of avoiding any penalty. It penalises those who do not seek to avail themselves of the protections which the Bill provides those who harm ACH. It also penalises a failure to provide advance notice of ACH harm to those who may be concerned about such harm.

Defences

55. Accident, as defined in *The Criminal Code* S 23B(2) is excluded as a defence to the crime of serious harm (cl 84(2)).

56. The Bill provides for specific defences –

(1) Authorisation under Part 8 (cl 87):

- Authorisation to carry out an 'exempt activity', not in a protected area (cl 100)
- Authorisation to carry out a 'minimal impact activity', not in a protected area, following a due diligence assessment and having taken reasonable steps to minimise risk of harm (clauses 101 and 104)
- Authorisation to carry out a 'low impact activity', not in a protected area, in accordance with an ACH permit or an approved or authorised ACH management plan (clauses 102, 105 to 121)
- Authorisation to carry out a 'medium to high impact activity', not in a protected area, in accordance with an ACH permit or an approved or authorised ACH management plan (clauses 103, 122 to 155)

(2) In accordance with -

- Protected area order (cl 88(a)); or
- Regulations applicable to a protected area (cl 88(b)).

[8] Clause 82(1).

[9] See a similar approach to determining whether racial vilification has occurred under s 18C of the *Racial Discrimination Act 1975* (Cth): *Prior v Queensland University of Technology & Ors* [2016] FCCA 285 [46]-[49]; *Prior v Wood* [2017] FCA 193.

(3) Acts in accordance with a stop activity order, prohibition order or remediation order under Part 10 of the Bill (cl 89(a)); or
(4) Acts following a due diligence assessment that does not identify the ACH and taking all reasonable steps to avoid or minimise harm (cl 89(b)); or
(5) Acts in accordance with the *Coroners Act 1996* determining Aboriginal ancestral remains (cl 89(c); or
(6) Acts in accordance with the *Emergency Management Act 2005* dealing with an emergency (cl 89(d); or
(7) Prescribed persons carrying out prescribed acts.

Managing activities

57. The ACH Bill, at Part 8, under heading of 'Managing activities that may cause harm to Aboriginal heritage' provides for –

- Due diligence assessments (Div 2)
- Notification of Aboriginal parties (Div 3)
- Authority to harm (Div 4)
- Minimal impact activities (Div 5)
- ACH permits (Div 6)
- ACH Management plans (Div 7)

58. The Bill sets out principles of cooperation and mutual advantage relating to activities that may harm ACH and, in particular, at cl 91(d) suggests that –

> where possible, in utilising land for the maximum benefit of the people of Western Australia, that valuing Aboriginal cultural heritage should be prioritised in managing activities that may harm that cultural heritage.

59. It reflects the tension between economic 'beneficial use' of land the harm it can cause to cultural heritage and does not identify how one can take precedence over another.

60. Clause 92 sets out procedural requirements of the consultation which is prescribed as a prelude to ACH harming activities.

Due diligence assessments

61. Due diligence assessments are a process for classifying levels of harm of ACH: minimal, low or medium to high (cl 93(b)) and identifying who the Bill requires to be notified (cl 93(c)). A Code apparently will be established as to how to do the assessments (cl 95). A previous agreement may be enough to answer the question whether ACH may be harmed (cl 96 and 93(a)).

Notification and consultation

62. In relation to low or medium to high impact activity a proponent must notify each local ACH service for the area or, in the absence of a local ACH service, each native title party and knowledge holder who is not a native title party for the area or, in their absence, the Native Title Representative Body for the area (cl 97).

Parties to ACH management plan

63. The parties to an ACH Management plan are each local ACH service for the area or, in the absence of a local ACH service, each native title party and knowledge holder who is not a native title party for the area or, in their absence, the Native Title Representative Body for the area (cl 98).

Authority to harm

64. The various circumstances in which a person may be authorised to harm ACH by exempt or low, medium or high impact activities are outlined above when discussing the defences to harming offences. Those authorisations apply in relation to an ***exempt activity*** that is defined in cl 90 as –

> a) construction or renovation of a residential building or ancillary building on a lot that is less than 1 100m2 in accordance with the *Planning and Development Act 2005*;
> (b) development of a prescribed type carried out in accordance with the *Planning and Development Act 2005*;
> (c) a subdivision of not more than 5 lots in accordance with the *Planning and Development Act 2005*;
> (d) travelling on an existing road or track;
> (e) taking photographs for a recreational purpose;
> (f) recreational activities carried out on or in public waters or on a public place;
> (g) clearing of native vegetation in accordance with a clearing permit granted and in force under the *Environmental Protection Act 1986* Part V Division 2;
> (h) burning that is done —
> (i) for fire prevention or control purposes or other fire management works on Crown land; and
> (ii) by the FES Commissioner as defined in the *Fire and Emergency Services Act 1998* section 3;
> (i) reploughing or reclearing an established fire-break;
> (j) any other prescribed activity;

65. The most concerning exempt activities are recreational activities, which could include a broad range of activities which could have a substantial harmful effect on ACH and clearing vegetation, which could impact things such as trees with high cultural significance.

66. The concepts of 'low', 'medium', 'high' and 'minimal' impact activities are not defined in cl 91. The definitions repeat the words they purport to define and so are to be given their ordinary dictionary meanings, but limit their application to activities involving '**ground disturbance** that is prescribed'. That limitation renders irrelevant the definition of ACL as including intangible elements. It also leaves obscure, at least until regulations are promulgated, what levels of harm are to be the subject of a permit or to be the subject of a management plan.

67. The exemptions and authorisations to harm ACL under the Bill do little more than create compartmentalised categories of the process which exists under the AHA WA s 18 for consent to be given to the excavation, damage destruction, concealment or alteration of an Aboriginal site.

68. In addition, a proponent can obtain a letter of advice from the CEO of the Department responsible for administering the Act that an activity is a minimal impact activity (cl 104). It reflects the authority which the public service, rather than knowledge holders will have under this Bill to determine what ACL will survive land use in the State. The letter of advice "may be used in evidence in proceedings for an offence under Part 7 Division 2" (cl 104(4)). The Bill does not identify a CEO's letter of advice as a complete defence to a prosecution for causing harm. Perhaps it will serve as a plea in mitigation when a prosecution proceeds for causing harm which is 'trivial or negligible'.

ACH permits

69. When a proponent intends to carry out a low impact activity notice must be given to the parties identified in clause 97 (see [46] above), who then have an opportunity to state their views on the impact of the activity on ACH within a prescribed period (cl 105). The proponent may use a previous agreement as a substitute for that notice and presumably for the expression of views on the impact of the activity on ACH (cl 106).

70. At the end of the prescribed period for submissions the proponent applies to the ACH Council for the permit, including any submissions received (cl 107). The ACH Council gives notice of the application and

> any Aboriginal person may s submit to the ACH Council, within a prescribed period, a statement about their views on the impact of the proposed activity on Aboriginal cultural heritage. (cl 108)

71. The ACH Council then assesses the application and has power to grant the permit if all procedural steps have been taken and –

> there are reasonable steps in place for the activity to be carried out so as to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage by the activity (cl 112(c)).

72. In other words, a permit will be granted to impact the ACH provided the ACH Council is of the view that will have a low impact in terms of ground disturbance and something has been done to minimise harm.

73. A permit's 2 year term (cl 113) may be extended, following a similar procedure to the original grant (clauses 114-116) and may be transferred provided the ACH Council is advised (cl 117), without any power to decline to permit the transfer, despite the fact that the identity of the original applicant was an essential part of permit granted (cl 112(a)). However, it is consistent with a general deficiency in the Bill that there is no vetting of the applicant to determine prospects of compliance with the legislation or its principles.

74. In recognition of the circumstances which applied in relation to the s 18 consent granted to Ri Tinto Iron Ore to destroy the Juukan Caves in the Pilbara, it is proposed in clause 118(1) that there be a condition on ACH permits requiring notification of 'new information' –

> a) that identifies Aboriginal cultural heritage in the area to which the permit relates that was not identified at the time the permit was granted; or
> (b) about the significance of Aboriginal cultural heritage in the area to which the permit relates that was identified at the time the permit was granted.

75. Paragraph (b) caters for the extraordinary situation which apparently obtained in relation to the Juukan Gorge caves where the Archaeologist who had conducted excavation work on the cave had identified and was aware of the significance of the site at the time the s 18 consent was recommended by the ACMC[10] and granted by the Minister, but that information was apparently not conveyed to the ACMC or Minister.

76. If the provision is to be fully protective of areas it should have added to it a sub-paragraph (c) requiring notification of new information about the **significance** of Aboriginal cultural heritage in the area to which the permit relates that was **not** identified at the time the permit was granted.

[10] See http:www.abc.net.au/news/2020-06-06/rio-tinto-knew-6-yeqars-ago-about-46000yo-rock-caves-it-blasted/12319334.

77. This same set of words used in cl 118 is used in relation to 'new information' in cl 123(1)(c) relating to Management Plans and cl 176(1)(b)(ii)(II) relating to 'stop activity orders', which will be discussed further below. The same additional sub-paragraph should be added to those provisions as well.

78. The effect under clause 118 of notification of 'new information' is that the ACH Council may amend a condition of a permit to avoid or minimise the risk of harm to the ACH. If a similar provision had been in existence in the AHA WA it would not have been sufficient to avoid the destruction of the Juukan caves.

79. It is an offence for a person not to comply with the conditions of an ACH permit, with a penalty of $20,000 (cl 158(1).

80. The power of the ACH Council to revoke conditions on an ACH permit (cl 118(6)) may be exercised at the ACH Council's initiative or that of the permit holder (cl 118(7)). However, there is no process for a local ACH service, native title party, 'knowledge holder' of cultural heritage or native title representative body to initiate a consideration by the ACH Council of revocation of permit conditions. Similarly, if the ACH Council is exercising suspension, cancellation or refusal powers or the Minister is considering objections to the same, there is no role for interested Aboriginal parties to participate in that process (clauses 120-121.)

81. There is no process in Part 8 Div 6 for Aboriginal parties notified of an application for an ACH permit to challenge, in the SAT or elsewhere, a decision to grant an ACH permit or relating to the conditions attached to a permit. So, they will be forced to go to the Supreme Court, as they now have to do, in order to challenge section 18 decisions under the current *Aboriginal Heritage Act 1972* (WA).

ACH management plans

82. An ACH management plan ("ACHMP") is said to be required as the pre-requisite to causing harm by medium to high impact activity (cl 122(1)). In other words, it another form of licence or consent to harm ACH.

83. The ACHMP has to include a process to be followed if 'new information' is identified (cl 123(c)). The provision has the same two categories of new information as in cl 118(1) and requires a third category of new information about the significance of ACH which was not known at the time of the establishment of the ACHMP. The Bill does not prescribe a specific consequence of identifying new information.

84. An ACHMP is obliged by cl 123(1) to –

> (d) set out the methods by which the activity is to be managed so as to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage; and
> (e) set out the extent to which harm is authorised to be caused to Aboriginal cultural heritage; and
> (f) set out any conditions to be complied with before, during and after the activity is carried out; and
> (g) specify the period for which the plan is to have effect; and
> (h) include or set out other matters, if any, that are prescribed.

85. The ACH Bill (at cl 124) makes Indigenous Land Use Agreements capable of being incorporated into an ACH Management Plan, probably to satisfy the requirement that an ACH Management Plan sets out methods of harm minimisation and any agreed harm authorisation (see cl 123(1)(d) and (e)). The Bill does not have any effect on the validity or effect of Indigenous Land Use Agreements which mining companies have entered into which cover the native title claim areas of the various native title groups in the Pilbara. Those agreements are registered, valid and binding pursuant to the operation of the Native Title Act 1993 (Cth).

86. A proponent intending to carry out an activity in accordance with an ACHMP (being a medium to high impact activity) much consult with each local ACH service for the area or, in the absence of a local ACH service, each native title party and knowledge holder who is not a native title party for the area or, in their absence, the Native Title Representative Body for the area (clauses 125(1) and 97(3)). "Consultation is to be carried out within a reasonable time and in accordance with the consultation guidelines": cl 125(2). The proponent can substitute consultation which has occurred in accordance with a native title or heritage agreement (cl 126).

87. A proponent is obliged to use "best endeavours" to reach agreement on an ACHMP (cl 127(1)(b)) within a prescribed period (cl 127(2)). An ACHMP can been approved, if agreed, or authorised, if not agreed. Clause 130 sets out circumstances in which consent to an ACHMP is not informed consent and requires the application for approval to provide evidence that each Aboriginal party has given informed consent (cl 131(2)(c)). The ACH Council has power to refuse to consider an application not made in accordance with the Act (clause 133). So, if there is no evidence of informed consent there is a discretion not to consider the application for approval. The ACH Council's discretion to consider an approval application is focussed primarily on provision of the information prescribed in cl 131(2) related to the process of consultation and obtaining consent.

88. The timing of the decision-making of the ACH Council is controlled by prescription (cl 134(2) and (3)) and a power of Ministerial direction and over-ride, upon application by the proponent, if the Council does not make a decision within the period prescribed (cl 135(4)-(6)).

89. The decision to approve or refuse to approve an ACHMP (in accordance with cl 134(1) is based upon an obligation for the ACH Council to be:

> satisfied that —
> (a) the activity to which the plan relates is an activity that may harm Aboriginal cultural heritage; and
> (b) the heritage is not of State significance; and
> (c) there has been consultation with each person to be consulted about the activity; and
> (d) each Aboriginal party has given informed consent to the plan; and
> (e) in relation to the other matters, if any, that are prescribed (cl 135)

90. The ACH Council is to decide whether heritage is of State significance in accordance with guidelines it is to issue about factors to be considered (cl 151) and after giving public notice that it may be to local ACH services, native title parties, knowledge holders, landholders, public authorities and others with an interest in the area (cl 153) and considering submissions and the nature of the ACH and its significance to the State (cl 154).

91. It is an offence for a person not to comply with the conditions of an ACHMP permit, with a penalty of $100,000 (cl 158(2).

92. Both the applicant and an Aboriginal party may object to the Minister concerning a refusal to approve, or to suspend or cancel (pursuant to cl 137), an ACHMP by the ACH Council. The Bill does

not set out any grounds for the ACH Council to suspend or cancel an ACHMP, but the Minister's power in response to an objection to confirm the ACH Council's decision or make 'another decision' is to be made on the basis of his satisfaction as to the matters in clause 135 which the ACH Council was obliged to be satisfied about and 'what is in the interests of the State' (cl 139(6)). This echoes the criterion of 'interest of the community' which the Minister presently takes into account in granting AHA WA s 18 consent to a use likely to breach s 17 of the AHA WA.

93. An ACHMP may be recommended by the ACH Council for authorisation by the Minister where, following the proponent having used 'best endeavours to reach agreement with the Aboriginal parties (cl 127(1)(b)) the proponent has not been able to reach agreement with the Aboriginal party and the negotiation period has expired (cl 140(1)). To be authorised there is no pre-requisite that the heritage is not of 'State significance' (as in cl 135(b)) and, in place of 'informed consent' of Aboriginal parties (in cl 135(d)) the Council only needs to be satisfied –

> that there are reasonable steps in place for the activity to be carried out so as to avoid, or minimise, the risk of harm to Aboriginal cultural heritage by the activity (cl 146(1)(c).

94. The Minister's power to authorise an ACHMP is to be based on satisfaction as to the matters set out in clause 146(1) (cl 147(2)(a)), together with 'what is in the interests of the State' (cl 147(2)(b)) and is otherwise unfettered as to whether or not to authorise the recommended ACHMP, or another ACHMP (cl 147(1)). The Minister may also suspend or cancel an authorised ACHMP if no longer satisfied as to the matters set out in clause 146(1) (cl 149(2)).

95. An amended ACHMP may also be authorised, as if it was a new ACHMP, if the parties do not agree on the amendments or the ACH has been determined to be of State significance (cl 150), except that the application does not need to include information about consultation between the parties (cl 150(3), 140(2)(d) and (e) and 146(1)(b)).

ACH Directory

96. There is to be an ACH Directory of information of permits, ACHMPs, strop orders, prohibition orders, remediation orders, Aboriginal parties and those consulted and notified in relation to ACHMPs, knowledge holders for areas or ACH, ACH of the State and historical and other information relevant to ACH (clauses 163-4).

97. The ACH Council is obliged to ensure that the Directory is accurate (cl 165(1)). However, the Directory information is not obliged to be up-to-date, comprehensive or accurate (cl 165(3)).

98. Information about ACH on the Directory must be available to Aboriginal people with traditional rights, interests or responsibilities in relation to it (cl 167) and is available to the public to inform the public about protected areas and ACHMPs (cl 169), inform persons proposing activities which may harm ACH (cl 170) and for the purposes of research into ACH (cl 171).

Stop activity order

99. A 60 day (cl 176(3)) stop activity order may be given by the Minister to the person who has control of an activity (cl 176(2)) –

(i) harming ACH;
(ii) involving an imminent risk of harm to ACH; or
(iii) which will be carried out imminently and will involve a risk of harm to, ACH (cl 176(1)(a);

provided it is not authorised or is authorised under an ACH permit or ACHMP but new information has emerged –

> (I) that identifies Aboriginal cultural heritage that was not identified at the time the permit was granted or the plan was approved or authorised; or
> (II) about the significance of Aboriginal cultural heritage that was identified at the time the permit was granted or the plan was approved or authorised.

100. This is a provision catering for the circumstances relating to the Juukan Gorge caves destruction which needs to go further and add another sub-paragraph –

> (III) about the significance of Aboriginal cultural heritage that was **not** identified at the time the permit was granted or the plan was approved or authorised

101. The stop activity order may prohibit a specified activity being carried out in a specified way or for a specified period (cl 177(b)).

102. The ACH Council is obliged to consider, while the stop activity order is in force, whether the ACH requires the protection of a protection order and whether or not to recommend that to the Minister cl 179(1). It is to give notice of that consideration and the period the order is proposed to be in force to persons in control of the activity, the local ACH service or native title party and knowledge holders or NTRB and provide an opportunity for submissions (cl 180).

Prohibition order

103. The Minister may give a prohibition order upon the ACH Council's recommendation or the Minister's initiative in relation to an activity that is the subject of a stop activity order on the grounds that the grounds for the stop activity order still exist and 'what is in the interests of the State' (cl 181). The 'interests of the State' are undefined and allow the government of the day to take into account a wide variety of political and economic considerations which may be inconsistent with protection of ACH.

104. The Minister may extend a prohibition order after giving notice of a proposal to do so and providing an opportunity for submissions (clauses 184-5).

105. If the Minister proposes to amend or cancel a prohibition order after giving notice and receiving submissions (clauses 197-8).

Remediation order

106. The ACH Council may recommend and the Minister may make a remediation order and give it to the person in control of the activity which caused harm (clauses 186-8. Compliance is enforced by fines (cl 189). The Minister may authorise another person to carry out the remediation directed and may recover the cost of the remediation from the person to whom the remediation order was given (cl 190(2).

Securing compliance

107. Extensive provisions and processes in Part 11 of the Bill are devoted to securing compliance with the legislation, including Inspectors with powers to stop vehicles, secure records, seize things, forensically examine things, entry warrants, directions by inspectors and reasonably necessary use of force.

108. The ACH Bill, at clause 204, provides that inspectors with compliance enforcement powers may include Aboriginal inspectors for specified areas appointed by the CEO. This is an innovation in Western Australia. The Bill does not include any requirement for specific knowledge or qualifications other than that the person appointed is 'an Aboriginal person'.

109. In Victoria there is a provision for Aboriginal heritage officers (s 165A) whose functions are more specifically described as including –

> (a) monitoring compliance of cultural heritage management plans, cultural heritage permits and Aboriginal cultural heritage land management agreements; and
>
> (b) issuing and delivering 24-hour stop orders under Part 6.

110. In South Australia Inspectors have compliance functions for particular areas, but the legislation does not specifically mention that they may be Aboriginal. Indeed, at s 15 of the *Aboriginal Heritage Act 1988* (SA) it is provided that –

> (3) The traditional owners of an Aboriginal site or object may inform the Minister, by notice in writing, that they object to an inspector named in the notice exercising powers under this Act in relation to the site or object, and, in that event, the inspector must not exercise those powers in relation to the site or object.

111. That tends to suggest that South Australian Inspectors are more likely than not to be persons who are not Aboriginal persons. However, it also indicates involvement of local Aboriginal people in the appointment process, which is something which should be added to the ACH Bill.

Legal proceedings

112. Part 12 deals with powers to commence legal proceedings for offences, liability of employees, officers of a body corporate and partners in a partnership. And evidentiary provisions.

Review by State Administrative Tribunal ("SAT")

113. Part 12 sets out the decisions under the legislation which may be the subject of a merits review by the SAT. The only right of merits review which an Aboriginal person concerned about ACH protection has is as a party to an ACHMP.

CONCLUSIONS

A. Offences and defences

The Bill effectively replaces the single offence provision in s 17 of the AHA WA relating to any alteration of a site or object, which has one defence of lack of knowledge (s 62) with a three-layered distinction as to harm which is –

- Serious;
- Material; or
- not material

to -

(a) an Aboriginal place;
(b) an Aboriginal object;
(c) Aboriginal ancestral remains; or
(d) Cultural landscape in a declared protected area

and several layers of defences (with a specific exclusion of accident as a defence to serious harm (cl 84(2)) comprising:

- exempt activities;
- authorisation;
- due diligence assessments and reasonable steps to avoid or minimise risk of harm; and
- minimal impact confirmations.

It replaces the single consent to uses provision in s 18 of the AHA WA, based on an ACMC recommendation as to the importance and significance of a site and 'the general interest of the community' with –

- permits for Low impact activities; and
- Management Plans for medium or high impact activities authorised by the Minister, subject to being satisfied as to avoidance or minimisation of risk of harm to ACH and the interests of the State.

B. *Encouragement of management plans*:

The exclusion of the defence of accident in relation to serious harm provides an incentive to mining companies and property developers to engage in due diligence assessments where there is a possibility that their activities may cause serious harm to ACH. If they are risk averse they may take the precautionary approach to avoiding prosecution for accidentally causing harm and seek to develop an agreed and approved or authorised ACH management plan applicable to all significant activity in which they engage.

The likelihood that an Aboriginal party will agree to a management plan when the subject matter of a management plan necessarily involves a 'medium to high impact activity that may harm' ACH (cl 122(1)) and the management plan is to 'set out the extent to which harm is authorised to be caused to' ACH (CL 123(e)). It would be surprising if any Aboriginal party would contemplate agreeing to harm ACH, particularly the degree of harm likely to arise from a 'medium to high impact activity'. So, the most frequent management plans are likely to be those authorised by the Minister without the consent of Aboriginal parties.

C. Agreements stopping complaints about ACH harm:

The ACH Council approval process in relation to ACH management plans and the recording of information about plans on the ACH Directory may go some way towards eliminating the capacity of mining companies and developers to negotiate agreements, in the course of agreeing on a management plan, of obliging Aboriginal parties not to publicly reveal concerns about impending harm to ACH to relevant authorities. That is, unless confidentiality obligations in relation to harm to ACH are still able to be included in agreements with Aboriginal parties under the cloak of 'details of commercial arrangements between a proponent and an Aboriginal party' which an ACH

management plan is not required to set out (cl 123(2)). The approval of an ACH management plan and information concerning it on the ACH Directory, even if it incorporates a 'native title agreement or previous heritage agreement' (as permitted under cl 124), does not eliminate (and no other provision in the ACH Bill eliminates) the effect of existing clauses in such agreements which bind native title parties not to reveal information concerning potential harm to ACH or otherwise take action to protect ACH. The inclusion of such clauses in heritage agreements and Indigenous Land Use Agreements entered into and/or registered pursuant to negotiate processes arising under the NTA are not susceptible to being interfered with by State legislation and the effect of such clauses could only be invalidated by the Commonwealth Parliament passing legislation invalidating or prohibiting the enforcement of such contractual prohibitions. That is because it is beyond the Constitutional power of the States to enact legislation affecting the field of matters related to native title which has been covered by the Commonwealth Parliament by enacting the NTA and providing for rights to negotiate in relation to matters including Aboriginal heritage, thus invoking s 109 of the *Constitution* which would invalidate any State legislation trespassing into that field.

D. *Stop activity orders*

A stop activity order ("SAO") is a significant addition to the tools available to protect ACH, which is not available under the AHA WA. It is similar in operation to an emergency declaration under section 9 of the Commonwealth ATSIHP Act. An SAO may last 60 days (twice as long as an emergency declaration under the ATSIHP Act) and may be give rise to a prohibition order of fixed or unlimited duration (cl 182(d)). The discretions the ACH Council has to recommend, and the Minister has to make, a protection order are based on harm or risk of harm to ACH (cl 176(1), 179(3), 181(2)). However, the Minister is also empowered to take into account 'what is in the interests of the State' (cl.181(2)(b)). So, whether or not a protection order is made is open to be determined on similar criteria to those applied in making a s18 decision under the AHA WA, i.e., taking into account the commercial interests of the State.

The SAO provisions take into account a circumstance similar to that in the Juukan caves situation, allowing for a SAO where an activity has been authorised or approved but–

(a) new information has identified ACH not identified at the time of the authorisation or approval (cl 176(b)(ii)(I); or
(b) new information has emerged 'about the significance of Aboriginal cultural heritage that was identified at the time the permit was granted or the plan was approved or authorised' (cl. 176(b)(ii)(II)).

The second of those categories describes the exact situation in relation to the Juukan Caves where information was identified by an Archaeological study conducted, for the information of Rio Tinto Iron Ore, about the significance of ACH material at the time the s 18 AHA WA consent was given, but that information about the significance of the material did not emerge into the public arena or come to the attention of the State until after the consent to destroy the site was given. It is likely that it is intended by the Government that the Bill also cover the situation where the **significance** of the ACH was not identified by anyone at the time of the grant of a permit or approval or authorisation of a management plan. If that is the case, that intent would be made clearer by changing the wording of cl 176(b)(ii)(II) to say –

> about the significance of Aboriginal cultural material that was **Aboriginal cultural material** identified at the time the permit was granted or the plan was approved or authorised.

Alternatively, a third alternative could be added in the following terms –

> about the significance of Aboriginal cultural material that was **not** identified at the time the permit was granted or the plan was approved or authorised.

E. *LACHS*

The provision for a LACHS for various areas of the State is to be welcomed as a mechanism for consultation with local Aboriginal knowledge holders which does not exist under the AHA WA.

A LACHS under the Bill has not had delegated to it any decision-making powers, as has been provided for under equivalent Aboriginal heritage legislation in Victoria. LACHS functions are limited to facilitation consultation with native title parties and knowledge holders and agreements on an ACH Management Plan and an advisory role to the ACH Council.

The advisory and information gathering functions imposed upon a LACHS by the Bill (cl 32(d)-(i)) creates obligations, for which the Bill prohibits the LACHS charging the Government (cl 41(3)). It appears to be assumed that the LACHS may charge fees to proponents for facilitating consultation leading to agreements about management plans and giving effect to agreements, which fees will be controlled by the ACH Council (cl 42). How a LACHS is to fund its other functions is not identified in the Bill. Advice from the responsible Minister and Department is that funding for some functions of LACHS will be budgeted for by the State and that it will also seek a contribution from the Commonwealth with respect to Commonwealth native title corporations.

F. *Protected areas*

The declaration of Protection areas appears to be likely to have the same level of limited utility in protecting ACH which it has occupied under the AHA WA. Declarations of Protected areas are reserved to areas of 'outstanding significance' where there is no permit or management plan. The possibility of a protection order under the AHA WA was not sufficient to save the Juukan caves.

Cultural landscape protection is also limited to areas which have been declared to be a Protected area, so the introduction of a concept of cultural landscape into ACH protection is likely to be of limited significance in protecting ACH.

G. *Return of ACH*

The Bill introduces obligations to return Aboriginal ancestral remains and 'secret or sacred objects' to Aboriginal persons with traditional entitlements to them which do not exist under the AHA WA. The Bill stops short of obliging return of objects which are not 'secret or sacred'. The attempt to exclude the WA Museum and universities from this obligation may arguably be ineffective, as the Bill is currently drafted.

Summary of recommendations

- The Western Australian ACH Bill should replicate the *Aboriginal Heritage Act 2006* (Vic) model of Registered Aboriginal Parties which results in a greater devolution of functions and power to local Aboriginal decision- makers in protecting ACH than the WA ACH Bill.

- It needs to be clarified by the Government where the resources are coming from for the LACHS to be established and perform the onerous statutory functions imposed upon them by the ACH Bill.

- Given that the concepts of 'low', 'medium', 'high' and 'minimal' impact activities are not defined, other than to limit their application to activities involving 'ground disturbance', that limitation renders irrelevant the definition of ACL as including intangible elements and results in no apparent application of the concept of 'intangible heritage' in the operative provisions of the Bill, the Bill should adopt provisions similar to those in the *Aboriginal Heritage Act 2006* (Vic) sections 79A to 79L , which set out a process for registration of Aboriginal intangible heritage, offences for using intangible heritage for commercial purposes, Aboriginal intangible heritage agreements and their registration.

- If Part 6 of the Bill is to achieve its declared purpose of 'a higher level of protection' of ACH by declaring 'protected areas', the Minister's unfettered and undirected discretion to place conditions upon the areas declared as protected areas should be qualified by mandatory relevant considerations related to how the ACH might be protected for the Minister to take into account in exercising his discretion whether or not to make the declaration of a protected area and the conditions to place on the area.

- If there is to be a penalty attached to conduct resulting in harm to ACH which is not material or serious and thus is in the category of being 'trivial or negligible', a standard needs to be prescribed by which the concept of harm *simpliciter* is to be applied.

- If the provisions in relation to 'new information' in cl 118(1)(b), relating to permits, in cl 123(1)(c) relating to Management Plans and in cl 176(1)(b)(ii)(II) relating to 'stop activity orders', are to be fully protective of areas then they should be re-worded to say -

  > about the significance of Aboriginal cultural material that was **Aboriginal cultural material** identified at the time the permit was granted or the plan was approved or authorised.

  Alternatively, an additional sub-paragraph should be added in the following terms –

  > about the significance of Aboriginal cultural material that was **not** identified at the time the permit was granted or the plan was approved or authorised.

- they should have added to them a sub-paragraph (c), requiring notification of new information about the **significance** of Aboriginal cultural heritage in the area to which the permit relates that was **not** identified at the time the permit was granted, management plan was approved or authorised or stop activity order was made.

- There should be a process in Part 8 Div 6 for Aboriginal parties notified of an application for an ACH permit to challenge, in the SAT or elsewhere, a decision to grant an ACH permit or relating to the conditions attached to a permit, avoiding the need for them to go to the Supreme Court, as they now have to do, in order to challenge section 18 decisions under the current *Aboriginal Heritage Act 1972* (WA).

- Given that the Minister's power to authorise an ACHMP is to be based on satisfaction as to the matters set out in clause 146(1) (cl 147(2)(a)), together with 'what is in the interests of the State' (cl 147(2)(b)) and is otherwise unfettered as to whether or not to authorise the

recommended ACHMP, or 'another' ACHMP (cl 147(1)), the Minister's discretion should be qualified by mandatory relevant criteria by which to authorise 'another' ACHMP.

- Local Aboriginal people should be involved in the selection of local Aboriginal people as inspectors in local areas and only local Aboriginal people should be eligible for appointment.

- Merits review in the SAT upon the application of Aboriginal knowledge holders should be extended to all discretionary decisions by the Minister and ACH Council.

- If 'secret or sacred objects' are to be adequately protected, then the Bill needs to description what makes an object secret or sacred and specify the criteria by which an object is to be judged to fit into that category and who is to decide whether an object fits into that category.