PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

A Way Forward

Final report into the destruction of Indigenous heritage sites at Juukan Gorge

Joint Standing Committee on Northern Australia

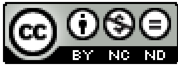
October 2021
CANBERRA

© Commonwealth of Australia

ISBN 978-1-76092-309-9 (Printed Version)

ISBN 978-1-76092-310-5 (HTML Version)

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website: http://creativecommons.org/licenses/by-nc-nd/3.0/au/.

Contents

Foreword ... xi

Members ... xv

Terms of Reference ... xix

Abbreviations ... xxi

List of Recommendations ... xxv

The Report

1 Introduction ... 1

The Puutu Kunti Kurrama and Pinikura peoples ... 3

Terminology ... 3

Conduct of the inquiry ... 4

Interim findings ... 5

The report ... 5

2 Juukan Gorge destruction ... 9

Different perspectives ... 9

PKKP's perspective ... 10

Rio Tinto's perspective ... 11

Mitigation efforts ... 13

Rio Tinto ... 14

The impact of structural and cultural changes in Rio Tinto ... 14

Communication with the PKKP ... 17

Failure to adhere to the spirit of agreements 18

Failure to communicate with the appropriate PKKP representatives. 20

Failure to pass on new information relevant to section 18 consent..... 21

The lead-up to the blast 22

Communication within Rio Tinto.. 23

Failure of Rio Tinto to act on new information highlighting the significance of the caves 23

Failure to escalate information to appropriate higher levels................ 26

PKKP and its representatives 26

Views and assumptions in the lead up to the incident..................................... 26

Assumption that the rockshelters would not be impacted 27

Assumption that Rio Tinto was attempting to remove blasts from the shelter.. 28

Impact of agreements... 29

YMAC... 33

State administrative failures 35

Update on Rio Tinto: Responses to Juukan Gorge and Never Again 36

Other industry responses 38

Committee comment 39

3 Broader Western Australia experience 43

Aboriginal and Torres Strait Islander peoples' experiences 44

Banjima people.. 44

Guruma country 46

Yinhawangka country 50

Murujuga Aboriginal Corporation.. 51

Yindjibarndi country 52

Burden of administration of legislative protections 54

Registration of cultural sites 56

Agreement making 57

Aboriginal and Torres Strait Islander peoples' perspectives 62

Committee comment 64

4 **Western Australian legislation 65**

The Aboriginal Heritage Act 1972 65

History of the Act 65

Reviews of the Act 67

Amendments to the Act 68

Key provisions of the Act 70

Critiques of the Aboriginal Heritage Act 71

Section 18 and its application 74

Criticisms of the ACMC 77

'Watering down the Act': The effect of amendments to AHA 80

Aboriginal Cultural Heritage Bill 2020 81

Consultation and drafting of the Bill 81

Key features of the Bill 82

Critiques by Aboriginal organisations 85

Perspectives from other stakeholders 91

Industry perspectives on the Bill 94

Committee comment 97

5 **State and territory legislative frameworks 101**

New South Wales 101

The National Parks and Wildlife Act 1974 101

Heritage Act 1977 104

Interaction with other legislation 104

Stakeholder perceptions and experiences 106

Victoria 107

Aboriginal Heritage Act 2006 107

Interaction with other legislation 112

Stakeholder perceptions and experiences 112

Queensland 116

Aboriginal Cultural Heritage Act 2003(QLD) and the Torres Strait Islander Cultural Heritage Act 2003(QLD) 116
Human Rights Act 2019 (Qld) 117
Critiques of Queensland legislation 118
Duty of Care Guidelines 120
The ‘last claim standing’ provision 122
South Australia 123
Aboriginal Heritage Act 1988 124
Aboriginal Lands Trust Act 2013 127
Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 128
Maralinga Tjarutja Land Rights Act 1984. 128
Stakeholder perceptions and experiences 129
Tasmania 130
Aboriginal Heritage Act 1975 130
Stakeholder perceptions and experiences 133
Australian Capital Territory 134
Heritage Act 2004 134
Northern Territory 135
The Heritage Act 2011 136
Northern Territory Aboriginal Sacred Sites Act 1989 138
Aboriginal Land Rights Act 1976 142
Stakeholder perceptions and experiences 143
Penalties 145
Legislative exemptions from cultural heritage protections 147
Committee comment 148
6 Commonwealth law and international agreements 149
Commonwealth legislation 149
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 149
Recent trend indicating increase to applications and declarations ... 153

Time lags and delays in making declarations 154
Judicial review mechanisms 157
Stakeholder perceptions of ATSIHP 157
Environment Protection and Biodiversity Conservation Act 1999 159
Gaps in the EPBC Act 160
Recommendations to amend the EPBC Act 161
2020 review of the EPBC Act 161
Stakeholder perceptions 163
Native Title Act 1993 164
Prescribed Body Corporates 169
Stakeholder perspectives 172
Protection of Movable Cultural Heritage Act 1986 173
Underwater Cultural Heritage Act 2018 174
International conventions and declarations 175
UN Declaration on the Rights of Indigenous People 175
Free, Prior and Informed Consent 178
Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) 181
Convention concerning the Protection of the World Cultural and Natural Heritage (1972) 182
Australia ICOMOS Charter for Places of Cultural Significance (1979) 182
UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003) 183
Other significant instruments 184
7 A pathway forward 185
Findings 186
1–Need for an overarching Commonwealth legislative framework 186
Establishing a definition, and the primacy, of cultural heritage 187
Mapping cultural heritage sites 191
Identification of traditional owner groups 192

Free, Prior and Informed Consent ... 193
Ban on 'gag clauses' ... 194
A National Aboriginal and Torres Strait Islander Heritage Council ... 195
Review mechanisms ... 196
Compliance, enforcement and penalties ... 197
New legislative framework ... 198
Review of the Native Title Act ... 200
2–Heritage standards ... 202
National standards for cultural heritage plans ... 203
Truth telling and reconciliation ... 204
3–Economic benefits ... 206
Additional Comments from Senator Smith and Mr Christensen MP ... 211
Additional Comments from Senator Thorpe ... 217
Appendix A. List of submissions ... 265
Appendix B. List of public hearings and witnesses ... 275
Appendix C. Interim report recommendations ... 289
Appendix D. Chronology of events ... 293
Appendix E. Map of PKKP lands ... 305
Appendix F. Timeline of cultural heritage laws ... 307
Appendix G. ATSIHP Act case law ... 311
Sacred Country (2020) ... 315

List of Tables

Table 5.1 Criminal penalties for causing harm to cultural heritage ... 146

List of Textboxes

Box 5.1 Case study: Calga Aboriginal cultural landscape ... 104
Box 5.2 Case study: Sacred trees of the Dhab Warrung ... 108
Box 5.3 Case study: The sacred mound springs of the Arabana people ... 124

Box 5.4 Case study: Lake Torrens 127

Box 5.5 Case study: Takayna 131

Box 5.6 Case Study: McArthur River 136

Box 6.1 Case Study: Junction Waterhole 150

Box 6.2 Case study: Butterfly Cave 152

Box 6.3 Case study: Gomeroi lands and Shenhua mine 155

Box 6.4 Case study: Magazine Hill 165

Box 6.5 Timber Creek 168

Box 6.6 Case study: Warragamba Dam 177

Box 6.7 Case study: Kakadu walkway 182

Foreword

Aboriginal and Torres Strait Islander cultural heritage, both tangible and intangible, is a key part of Australia's history. Loss of cultural heritage diminishes the heritage of our nation and deeply wounds the Aboriginal and Torres Strait Islander peoples for whom this heritage is sacred.

Across the Australian landscape are thousands of sites of cultural important to Aboriginal and Torres Strait Islander peoples. Just as other nations protect cultural sites of significance—the Colosseum, the Parthenon, the Great Pyramid of Giza—Australia must also protect its sites. These international sites date back thousands of years, but many Aboriginal and Torres Strait Islander heritage sites are tens of thousands of years old. It is inconceivable that Australia has not developed proper protections for such sites, and action must be a matter of national priority.

Rio Tinto's destruction of the 46,000+ year old Juukan Gorge rock shelters on 24 May 2020 caused immeasurable cultural and spiritual loss, as well as profound grief for the Puutu Kunti Kurrama and Pinikura peoples (PKKP). Rio Tinto's actions were inexcusable and an afront, not only to the PKKP but to all Australians. The company's actions demonstrated the profound lack of care for Aboriginal and Torres Strait Islander heritage in this country. But perhaps the tragedy may at least be a catalyst for change.

The destruction of Juukan Gorge was the result of Rio Tinto's failures, but the events also highlighted the inadequate protection afforded by the Western Australian *Aboriginal Heritage Act 1972.* Throughout the course of the inquiry, it became apparent that there are serious deficiencies across Australia's Aboriginal and Torres Strait Islander cultural heritage legislative framework, in all state and territories and the Commonwealth.

The destruction of the Juukan Caves awakened national and international awareness to the loss of the ancient presence of human beings on this continent. This has implications for governments, the makers of law, who must take seriously the public awareness of international developments like the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Shareholders, nationally and internationally, have also become attuned to the behavioural standards of corporations and their relationships with the Aboriginal and Torres Strait Islander peoples. Lawmakers and corporations alike must consider the relevance of UNDRIP to the social, cultural and economic realities of Aboriginal and Torres Strait Islander peoples and review their relationships in light of these realities.

Aboriginal and Torres Strait Islander peoples from across the nation reported to the Committee their perspectives on the inadequacy of cultural heritage legislation. It became apparent to the Committee that legislation designed to protect cultural heritage has, in many cases, directly contributed to damage and destruction.

The Committee was heartened by those in the resources industry who responded to the destruction of the heritage sites at Juukan Gorge by proactively reassessing their agreements with traditional owners and proposing processes to address inequities in these agreements. The Committee calls on those within the industry working to improve the respect shown to Aboriginal and Torres Strait Islander peoples to also demand change across their industry as a whole.

It is time for the legislative frameworks in all Australian jurisdictions to be modernised to bring meaningful protections for Aboriginal and Torres Strait Islander cultural heritage to ensure that nothing like Juukan Gorge ever happens again.

Aboriginal and Torres Strait Islander peoples are not opposed to mining and acknowledge the economic benefits it brings to the nation. They do, however, want the rights afforded to them by UNDRIP to be a reality in Australia. Legislative change must be based on the UNDRIP principles of Free Prior and Informed consent. Such changes will bring deserved protections to Aboriginal and Torres Strait Islander peoples' cultural heritage and ensure that the world's oldest living culture continues to thrive.

I would like to conclude once again with some words of thanks. Many people have contributed to this inquiry, including traditional owners, Indigenous organisations, companies, governments, lawyers, academics and members of the public who were outraged by the incident and wished to

have their voices heard. I would particularly like to thank the PKKP who, despite their grief, have embraced the inquiry and assisted with its work. Thanks also goes to Rio Tinto which, perhaps in contrition for its error, has been forthcoming with evidence—not always to its advantage. I would like to think that Juukan Gorge marks a turning point for that company and the mining industry as a whole. I would also like to thank my Committee colleagues for their attentive and constructive contributions to a difficult inquiry undertaken under challenging circumstances. And last, but not least, I would like to thank the staff of the secretariat for their sterling work. They have been outstanding.

Hon Warren Entsch MP
Chair
15 October 2021

Members

Members

Chair

Hon Warren Entsch MP	Leichhardt, QLD

Deputy Chair

Senator Anthony Chisholm	ALP, QLD

Members

Senator the Hon Matthew Canavan (from 18 June 2020)	NATS, QLD
Mr George Christensen MP	Dawson, QLD
Senator Patrick Dodson	ALP, WA
Senator Sam McMahon (from 22 July 2019 to 18 June 2020)	CLP, NT
Senator Rachel Siewert (from 12 June 2020 to 19 February 2021; from 20 February to 2 March 2021; 3 March to 9 March 2021; from 10 March to 19 March 2021; from 20 March to 19 April 2021; from 11 May to 18 May 2021; 19 May to 28 May 2021; from 29 May to 8 June 2021; from 9 June to 17 June 2021 from 19 June to 21 June 2021)	Australian Greens, WA
Senator Dean Smith	LP, WA
Hon Warren Snowdon MP	Lingiari, NT

Mr Phillip Thompson OAM MP Herbert, QLD

Senator Lidia Thorpe Australian Greens, VIC
(19 February to 20 February 2021; 2 March to 3 March 2021; from 9March to 10 March 2021; from 19 March to 20 March 2021; from 19 April to 11 May 2021; from 18 May to 19 May 2021; from 28 May to 29 May 2021; from 8 June to 9 June 2021; from 17 June to 19 June 2021; from 21 June 2021)

Ms Anika Wells MP Lilley, QLD

Committee Secretariat

Jenny Adams, Committee Secretary

Bill Pender, Inquiry Secretary

Siobhán Leyne, Inquiry Secretary

Kate Harkins, Senior Researcher

Stephen Sherlock, Senior Researcher

Adam Walker, Researcher

Ben Russell, Researcher

Sarah Brasser, Office Manager

The Committee notes with thanks the research and analysis provided by Terri Janke and Co Pty Ltd on the national and international legislative frameworks governing Aboriginal and Torres Strait Islander cultural heritage protection.

Terms of Reference

Inquiry into the destruction of Indigenous heritage sites at Juukan Gorge

The Joint Standing Committee on Northern Australia to inquire into and report on, by 9 December 2020:

The destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia with particular reference to:

a. the operation of the Aboriginal Heritage Act 1972 (WA) and approvals provided under the Act;

b. the consultation that Rio Tinto engaged in prior to the destruction of the caves with Indigenous peoples;

c. the sequence of events and decision-making process undertaken by Rio Tinto that led to the destruction;

d. the loss or damage to the Traditional Owners, Puutu, Kunti Kurrama and Pinikura people, from the destruction of the site;

e. the heritage and preservation work that has been conducted at the site;

f. the interaction, of state indigenous heritage regulations with Commonwealth laws;

g. the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;

h. how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;

i. opportunities to improve indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999; and

j. any other related matters.

Abbreviations

AAA	Australian Archaeological Association
AAPA	Aboriginal Areas Protection Authority
ACH	Aboriginal Cultural Heritage
ACHA	Aboriginal Cultural Heritage Act 2003
ACHAC	Aboriginal Cultural Heritage Advisory Committee
ACHMP	Aboriginal Cultural Heritage Management Plan
ACMC	Aboriginal Cultural Material Committee
ACT	Australian Capital Territory
ADJR	Administrative Decisions (Judicial Review) Act
AHA	Aboriginal Heritage Act 1972 (WA)
AHC	Aboriginal Heritage Council
AHIMS	Aboriginal Heritage Impact Management System
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
AHIP	Aboriginal Heritage Impact Permit
AP	Anangu Pitjantjatjara
ALRA	Aboriginal Land Rights Act 1976 (Cth)
AMEC	Association of Mining and Exploration Company
ASWA	Anthropological Society of WA
ATSIHP Act	Aboriginal and Torres Strait Islander Heritage Protection Act 1984
BIA	Binding Initial Agreement

BNTAC	Banjima Native Title Aboriginal Corporation
CABAH	Australian Research Council Centre of Excellence for Australian Biodiversity and Heritage
CHMP	Cultural Heritage Management Plan
CLC	Central Land Council
CME	Chamber of Minerals and Energy of Western Australia
CRM	Cultural Resources Management
CSP	Communities and Social Performance
Cth	Commonwealth
CWPA	Claim Wide Participation Agreement
CYLC	Cape York Land Council
DAA	Department of Aboriginal Affairs (WA)
DAWE	Department of Agriculture, Water and the Environment
DPLH	Department of Planning, Land and Heritage (WA)
EDO	Environmental Defenders Office
EPA Act	Environmental Planning and Assessment Act
EPBC Act	Environment Protection and Biodiversity Conservation Act 1999
FMG	Fortescue Metals Group
FPIC	Free, prior and informed consent
GAHA	Gundungurra Aboriginal Heritage Association
HA	Heritage Act (ACT)
HCOANZ	Heritage Chairs of Australia and New Zealand
HISF	Heritage Information Site Form
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICOMOS	International Council on Monuments and Sites
ILALC	Illawarra Local Aboriginal Land Council
ILUA	Indigenous Land Use Agreement
KAC	Karijini Aboriginal Corporation

KGH	Kimberley Granite Holdings Pty Ltd
KGP	Karratha Gas Plant
KLC	Kimberley Land Council
LACHS	Local Aboriginal Cultural Heritage Service
LCA	Law Council of Australia
LIC	Local Implementation Committee
MAC	Murujuga Aboriginal Corporation
MCA	Minerals Council of Australia
NNAC	Nuga Nuga Aboriginal Corporation
NNTC	National Native Title Council
NNTT	National Native Title Tribunal
NPW	National Parks and Wildlife Act 1974
NCR	New Century Resources
NSW	New South Wales
NSWALC	New South Wales Aboriginal Land Council
NT	Northern Territory
NTA	Native Title Act 1993
NTASSA	Northern Territory Aboriginal Sacred Sites Act 1989
NTRB	Native Title Representative Body
NTU	Northern Territory University
PA	Preliminary Advice
PBC	Prescribed Bodies Corporate
PKKP	Puutu Kunti Kurrama and Pinikura peoples
PKKPAC	PKKP Aboriginal Corporation
PMCH	Protection of Movable Cultural Heritage Act
Qld	Queensland
RAP	Registered Aboriginal Party
RARB	Recognised Aboriginal Representative Body
RRK	Robe River Kuruma

RFD	Regional Framework Deed
RNTBC	Registered Native Title Body Corporate
RTIO	Rio Tinto Iron Ore
SA	South Australia
SDAG	Sugarloaf and Districts Action Group
SOE	State of the Environment report
SSD	State Significant Development
SSI	State Significant Infrastructure
Tas	Tasmania
TOs	Traditional Owners
UCH	Underwater Cultural Heritage
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
Vic	Victoria
VAHC	Victorian Aboriginal Heritage Council
VHC	Victorian Heritage Council
WA	Western Australia
WAM	Western Australian Museum
WGAC	Wintawari Guruma Aboriginal Corporation
YMAC	Yamatji Marlpa Aboriginal Corporation

List of Recommendations

Recommendation 1

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

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

Recommendation 2

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

Recommendation 3

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

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

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

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

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

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

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

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

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

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

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

Recommendation 4

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

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

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

Recommendation 5

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

Recommendation 6

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

Recommendation 7

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

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

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

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

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

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

Recommendation 8

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

1. Introduction

1.1 The destruction of the Juukan Gorge Aboriginal heritage sites by Rio Tinto on 24 May 2020 was an event that shocked the nation. Australians were further disturbed to learn that the destruction was permitted under the *Aboriginal Heritage Act 1972* (WA).

1.2 The blast to extend the Brockman 4 iron ore mine destroyed two rock shelters of great cultural, ethnographic and archaeological significance–along with evidence of continuous occupation and cultural knowledge stretching back 46,000 years. These are the simple facts.

1.3 But these facts do not tell the grief of the Puutu Kunti Kurrama and Pinikura (PKKP) peoples. They understate the extent of the loss caused by the destruction of part of their vital living culture. The Committee stood with the PKKP peoples at the lost sites and felt the depth of their grief and mourned with them.

1.4 This inquiry has been a journey of enlightenment for some members of the Committee. We are exceptionally privileged as a nation to have the continuous cultural knowledge of Aboriginal and Torres Strait Islander peoples and their living understanding of sacred sites of such historical significance. This is not just a loss for the PKKP peoples, but it is a loss for the nation, and the world, as a whole.

1.5 However, this tragic event, and the national condemnation of the actions of Rio Tinto has sparked action to address the legislative failings that allowed the destruction of the Juukan Gorge sites–and similar sites around the nation. The Juukan Gorge disaster is just one example of countless instances where cultural heritage has been the victim of the drive for development and commercial gain.

1.6 The legislative frameworks that govern the protection of Indigenous heritage are complex, comprising state, territory and Commonwealth laws and international treaties. However, none of these frameworks adequately encompass the complexity of Indigenous heritage which is living and evolving and is connected not just through historical artefacts, but through songlines, storylines, landscapes and waters.

1.7 This has always been known by Aboriginal and Torres Strait Islander peoples, and has begun to be more widely understood by non-Indigenous Australians. This depth of connection to country is also increasingly being recognised by the courts:

> It is a connection with land and waters that is unique to Aboriginal Australians. As history has shown, that connection is not simply a matter of what the common law would classify as property. It is a connection which existed and persisted before and beyond settlement, before and beyond the assertion of sovereignty and before and beyond Federation. It is older and deeper than the Constitution. And the connection with land and waters that is unique to Aboriginal Australians does not exist in a vacuum. It was not and is not uniform. It was not and is not static; cultures change and evolve. And because the spiritual or religious is translated into the legal, the integrated view of the connection of Aboriginal Australians to land and waters is fragmented. But the tendency to think only in terms of native title rights and interests must be curbed.[1]

1.8 It has been nearly fifty years since the first legislation was enacted to protect Indigenous cultural heritage. Australia has come a long way in that time in understanding, valuing and respecting this heritage. It should no longer fall victim to the failures of communication, legislation and governance apparent in so many of the destructive events detailed throughout this report.

1.9 It is time for legislative frameworks to catch up to the nation that now understands its Aboriginal and Torres Strait Island heritage in a way that it perhaps never has before. It is time to get rid of the multiple, complex and confusing legislative regimes referencing Aboriginal and Torres Strait Island heritage−particularly those that cover this heritage as part of the environment, harking back to a time when, offensively, Aboriginal and Torres Strait Islander people were classified as 'flora and fauna'. It is time to

---

1 Love v Commonwealth of Australia; Thoms v Commonwealth of Australia [2020] HCA 3, quoted in Law Council of Australia, *Submission 120*, p. 25.

recognise and protect the Aboriginal and Torres Strait Islander past, present and future cultural heritage as a unique and valuable part of our nation.

1.10 The Committee commends those in the resources industry, including Rio Tinto, who have proactively responded to the events at Juukan Gorge to improve industry-wide standards and engaged with the Committee's inquiry. The Committee has been disappointed with the level of engagement from the WA Government.

1.11 Finally, the Committee commends the PKKP peoples, and other traditional owners, for engaging with the inquiry and the resources industry, despite the hurt and losses they have experienced. The Committee acknowledges your strength and resilience in the face of this pain and loss.

The Puutu Kunti Kurrama and Pinikura peoples

1.12 The report refers to the PKKP peoples throughout. The Puutu Kunti Kurrama people and the Pinikura people themselves use this acronym. However, in their words:

> The PKKP are two distinct Aboriginal socio-territorial groups, the Puutu Kunti Kurrama people and the Pinikura people, whose country lies in the West Pilbara region of Western Australia.
>
> The Puutu Kunti Kurrama people and the Pinikura people are separate peoples with discrete rights and interests in country, though we have some shared laws and customs. Puutu Kunti Kurrama are also closely related to, and share boundaries with, the Eastern Guruma to the east and Kuruma Marthudunera to the north.
>
> PKKP country includes areas of Puutu Kunti Kurrama country, areas of Pinikura country, and shared areas as shown [at Appendix E]. Puutu Kunti Kurrama people speak for Puutu Kunti Kurrama country and the Pinikura people speak for Pinikura country.[2]

Terminology

1.13 The Committee also recognises that Aboriginal and Torres Strait Islander peoples may refer to themselves and be referred to by others in a variety of ways: collectively as First Nations, First or Indigenous Australians, Australia's first peoples, traditional owners or native title holders or

---

2 PKKP, *Submission 129*, p. 11. See Appendix E for maps.

claimants; and individually according to language or geo-cultural community groups.

1.14 The Committee notes that some of these terms have specific legal meanings. The terms 'native title holders' and 'native title claimants' are used to refer to those groups who have obtained or are seeking a determination of native title under the *Native Title Act 1993* (Cth).

1.15 The term 'traditional owners' is similarly given specific meaning under various statutes, including the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) and the *Traditional Owner Settlement Act 2010* (Vic). However, it is also used more broadly to refer to Aboriginal and Torres Strait Islander peoples who assert "traditional ownership" of a certain area under traditional laws and customs, including where there has been no determination of native title.

1.16 Wherever possible, this report refers to the specific nation or language group concerned. Where collective terms are necessary, this report prefers the term Aboriginal and Torres Strait Islander peoples, although the terms outlined above may be used interchangeably throughout. Unless specified, the term 'traditional owner' is used in the broader sense of referring to a group or groups of Aboriginal or Torres Strait Islander peoples who have a recognised connection to an area under traditional laws and customs, including the ability to speak for cultural heritage.

Conduct of the inquiry

1.17 On 11 June 2020 the Senate referred the inquiry for report by 30 September 2020. Due to the impact of the COVID-19 pandemic and resultant restrictions on travel and the complexity of the issues as they emerged over the course of the inquiry, the Senate granted an extended reporting date of 18 October 2021.

1.18 Submissions were invited from a wide range of stakeholders, including Indigenous groups, industry groups and state and territory governments. The inquiry received 175 submissions, 64 supplementary submissions, 41 exhibits and held 23 public hearings. Submissions, exhibits and witnesses at public hearings are listed respectively at appendices A and B.

1.19 The Committee deeply regrets that the COVID-19 pandemic prevented an extensive travel program and the opportunity to sit on country with communities and yarn. The Committee expresses its gratitude to the

communities that offered to host it but were unable to, for their understanding and patience.

Interim findings

1.20 The Terms of Reference address two distinct issues:

1. Terms (a) to (e) asked the Committee to consider the events that resulted in the destruction of the heritage sites at Juukan Gorge, including the relevant state legislation, the decision-making processes by Rio-Tinto, the impact on the traditional owners and remediation efforts conducted at the site.
2. Terms (f) to (j) asked the Committee to consider the legislative framework government the protection of Indigenous heritage and how these laws might be improved to better protect Indigenous heritage.

1.21 Given the significant impact on the PKKP peoples and the need for immediate action to protect the site from further damage, the Committee decided that it was a matter of priority to address these two issues separately, and therefore issued an interim report on 9 December 2020 addressing the first terms of the inquiry.[3]

1.22 Although the Committee has no jurisdiction over the actions of state legislatures or resources companies, the failings at Juukan Gorge were so manifold that it took the unusual step of making recommendations to Rio Tinto, the Western Australian Government and the mining industry more broadly in an effort to make clear the extent of the issues at play. These recommendations are listed at Appendix C.

The report

1.23 This report primarily addresses the second set of issues referred in the Terms of Reference. However, Chapter 2 reviews the events that occurred at Juukan Gorge and the decision-making processes undertaken by Rio Tinto leading up to the event, and actions undertaken by Rio Tinto since the Committee's interim report was tabled. Sadly the destruction of the heritage sites at Juukan Gorge was not an isolated event but the detailed examination of this incident and the multiple associated corporate, communication and

---

3 Joint Standing Committee on Northern Australia, December 2020, *Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara Region of Western Australia – interim report*.

legislative failures serves as a lesson for proponent industries, corporations and governments negotiating with Indigenous peoples globally.

1.24 Chapter 3 gives voice to the other destructive events that have occurred more broadly in Western Australia at the hands of the resources industry and inadequate cultural heritage protections.

1.25 Chapter 4 analyses the *Aboriginal Heritage Act 1972 (WA)* and its deficits that gave legal authority for the destruction of heritage sites at Juukan Gorge. It also considers the proposed Aboriginal Cultural Heritage Bill 2020 (WA) in this context.

1.26 Chapter 5 outlines the relevant legislation governing the protection of Aboriginal and Torres Strait Islander heritage in the states and territories and considers the benefits and critiques of each of these frameworks.[4] A timeline of legislation governing Aboriginal and Torres Strait Islander heritage protection from 1955 to today is at Appendix F.

1.27 Chapter 6 discusses the Commonwealth legislative framework governing the protection of Aboriginal and Torres Strait Islander heritage and the international laws and covenants that bind Commonwealth obligations. A list of recent case law under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is at Appendix G.

1.28 Chapter 7 concludes the report with recommendations to guide the nation forward in its protection of cultural heritage, based on the Committee's detailed examination of events that occurred in, and legislation being developed, in Western Australia. As will be made clear throughout the report, no state or territory legislative or policy framework is adequately protecting the interests and the heritage of Aboriginal and Torres Strait Islander peoples and it is past time that this is rectified.

1.29 This Chapter makes recommendations aimed at achieving nationally consistent and integrated approaches to Indigenous heritage protection to prevent future catastrophic events like that which occurred at Juukan Gorge, and that which has occurred throughout Australia.

1.30 What was missing from Rio's decision-making process was the voice of Aboriginal and Torres Strait Islander people. The Committee does not want to make this same mistake. Included throughout the report are case studies

---

4 The Committee notes with thanks the research and analysis provided by Terri Janke and Company Pty Ltd on the national and international legislative frameworks governing First Nations cultural heritage protection. This work is reflected throughout Chapters 5, 6 and 7.

of similar events and the impact that these cultural losses have had on Aboriginal and Torres Strait Islander communities, as told to the Committee by those communities.

1.31 The Committee has prioritised the voices of Aboriginal and Torres Strait Islander peoples throughout the report. The Committee acknowledges that there are many companies within the resources industry taking strong measures to protect heritage sites and commends those companies. However, the resources industry has more access to governments, the media and therefore the broader Australian community, than traditional owners and the Committee considered it important to highlight Aboriginal and Torres Strait Islander voices above all others.

2. Juukan Gorge destruction

2.1 This chapter will explore the sequence of events in the lead up to the incident at Juukan Gorge, as well as several factors that contributed to the incident. In particular, it will examine the different perspectives of the Puutu Kunti Kurrama and Pinikura peoples (the PKKP) and Rio Tinto in relation to key events, the role of Rio Tinto and the PKKP.

2.2 A detailed chronology of events is included at Appendix D from Rio Tinto and the PKKP's perspectives. Considerable detail is also available in their submissions and supplementary submissions.[1]

2.3 The chronology of events at Appendix D demonstrates that rather than being a series of process and communication failures in early 2020, Rio Tinto had 18 years of engagement with the PKKP peoples, and eight years of technical and archaeological work on the Juukan Caves sites prior to their destruction.

2.4 This Chapter is not intended to be a reinvestigation of the Juukan Gorge events, but rather intends to summarise the events as an illustrative case of corporate and communication failures at the highest levels and the impact these failures can have on our valuable heritage.

2.5 The contributing legislative failures are discussed in detail in following chapters.

Different perspectives

1 Rio Tinto, *Submission 25*; (PKKP), *Submission 129*.

2.6 The two main parties to the events at Juukan Gorge−Rio Tinto and the PKKP−give different evidence on several aspects of the events that led to the destruction of the Juukan heritage sites.

2.7 A critical difference of opinion between the PKKP and Rio Tinto is whether the PKKP knew or should have known that Rio Tinto was intending to destroy the caves as part of the expansion of Pit 1, and if there was opportunity to stop the blast after the blast charges had been loaded.

PKKP's perspective

2.8 The PKKP maintained that the destruction of the caves was unexpected, with the PKKP's heritage manager, Dr Heather Builth, arguing that obtaining a section 18 consent does not necessarily infer an intention to impact a site:

> It is mining practice that a section 18 consent is sought as a precaution against future collateral damage from adjacent mining activity. This is what was produced in the situation by PKKP for the Juukan Gorge and its proximity to pit 1. They never thought it was going to go. That map is still in the admin building…showing that the gorge is excluded from pit 1. So it has come as a complete shock that this has occurred.[2]

2.9 The PKKP also noted that the rock shelters were not situated within the 2005 or 2011 mine plans and the map provided to the DIA in support of the 2008 section 16 application showing sites Brock 20 - 24 were outside the pit and waste dump areas.[3]

2.10 The PKKP also reference the conversation between Dr Builth and the Manager of Mine Operations in the field on 28-29 October 2019 as another reason why they did not expect the rockshelters to be destroyed:

> We visited as part of the LIC [Local Implementation Committee] meeting, which only happens twice a year, on 29 October the B4 site. We asked for a site visit to Purlykuti, and while I was there I talked to the mine operations planning manager, pointed out the gorge and said, 'Can you please tell me how the situation is with those two rock shelters, Juukan?' and I proceeded to tell him how significant they were in not only the Pilbara but Australia and globally. I wanted to know what the plans were for any prospective mining, and he reassured me. He said, 'No, they are not in any danger. They are not on

---

2 Dr Heather Builth, Culture and Heritage Manager, PKKP, *Committee Hansard*, Canberra, 12 October 2020, p. 5; PKKP, *Submission 129*, p. 27.

3 Dr Builth, PKKP, *Committee Hansard*, Canberra, 12 October 2020, p. 5; PKKP, *Submission 129*, pp. 26-27.

> our mine plan. In fact, we are undertaking vibrational studies on them and we wouldn't be doing that if we wanted to blow them up.' That was 29 October 2019. And then we tried again the following March, 4 March 2020, because we knew they were safe. I told lots of people; there were witnesses to that meeting. We knew they were safe.[4]

Rio Tinto's perspective

2.11 Rio Tinto has maintained that the intention to destroy the caves was clear from the beginning, and that the PKKP knew or should have known this, with the Board Review stating that 'there was clearly an awareness within the PKKP that the impact was imminent'.[5]

2.12 As noted in the summary of events at Appendix D, on 16 July 2013 Rio Tinto gave a presentation to the PKKP at a LIC meeting on the potential of seven section 18 applications being submitted by September 2013.[6] Rio Tinto submitted that its 'understanding based on that meeting [was] that the PKKP supported the section 18 and the notion of further excavation, and that it was understood by the PKKP that the consequence of this would be disturbance to the sites in the future.'[7]

2.13 Rio Tinto further argued that such significant discussion was held with the PKKP around the section 18 application, to the extent that the PKKP should have been aware that:

> The approval did not come out of the blue and the records of engagement do not reveal any significant dissent or opposition to the section 18 process…The age of these sites, and the fact that they would be disturbed, was never hidden. It was discussed openly with the PKKP on a number of occasions. It was the subject of external papers and presentations to the wider archaeological community. The information was also shared with government agencies on multiple occasions. In 2014 we moved forward on the basis we had the necessary legal approvals and the salvage was complete.[8]

---

[4] Dr Builth, PKKP, *Committee Hansard*, Canberra, 12 October 2020, p. 7.

[5] Rio Tinto, *Board Review of Cultural Heritage Management*, p. 18.

[6] PKKP, *Submission 129*, p. 32; Rio Tinto, *Submission 25*, p. 21.

[7] Rio Tinto, *Submission 25*, p. 21.

[8] Rio Tinto, *Supplementary Submission 25.1*, p. 32.

2.14 Rio Tinto also submitted that the section 18 consent in relation to Juukan 1 and 2 states that it was anticipated the sites would be 'fully impacted' by the development of Pit 1.[9]

2.15 Rio Tinto further contended that section 18 consents are generally only sought when impacting a site is expected and cannot be avoided:

> By its nature, when a section 18 application is made, impact to a site is necessarily contemplated, given it is an offence to alter, damage or destroy an Aboriginal heritage site without a section 18 consent. Where sites can be avoided, in most cases, historically no further surveys or heritage research is performed on those sites and they are managed and preserved in situ.[10]

2.16 In response to the PKKP's claims that the rockshelters were outside of the mine plans, Rio Tinto stated:

> The Juukan 1 and Juukan 2 rockshelters were not within the indicative or conceptual pit outline at that point in time but were very close to the edge of the pit outline, such that they could not be expected to have avoided impacts to the rockshelters from mining activities, including blasting. The EPA application materials, including the Public Environmental review document, expressly referred to the Juukan sites...
>
> The initial plan map was created in 2005, based on a resource declared in 2004. As orebody knowledge increases, pit outlines can evolve and change a number of times as more information is received in relation to the nature and location of the relevant orebody. The likelihood that the original pit design would be amended over time and would more formally incorporate the areas on which the Juukan sites sat was apparent from at least 2008 when archaeological and ethnographic surveys were conducted having regard to the likelihood that section 18 consents would be required.[11]

2.17 For example, the Williams ethnographic report of 2008 states that:

> [Rio Tinto] will now apply to the minister for a conditional section 18 consent to fully excavate those [sites] with further research potential, to salvage artefacts from these and other sites (as recommended by Scarp 2008), and ultimately secure ministerial consent for the removal of [the relevant] sites to make way for the Brockman 4 mine and associated infrastructure.[12]

---

[9] Rio Tinto, *Supplementary Submission 25.1*, p. 29.

[10] Rio Tinto, *Supplementary Submission 25.1*, p. 32.

[11] Rio Tinto, *Supplementary Submission 25.1*, p. 27.

[12] Rio Tinto, *Supplementary Submission 25.1*, p. 28.

2.18 Rio Tinto also denies the PKKP understanding that the Brockman 4 mine manager had stated that there was no intention to mine through the Juukan Gorge caves.[13]

Mitigation efforts

2.19 The PKKP submitted that Rio Tinto had told them they were mitigating the effect of the blast on Juukan 1 and 2, stating that:

> On 23 May 2020 PKKP representatives were told by a Rio Tinto employee that work was being undertaken at Juukan Gorge to reduce the effect of the blast. PKKP representatives were told that Rio Tinto was taking out the explosives from the holes over the top of the Juukan rockshelters.
>
> … They were led to believe that the removal of these charges was to minimise the damage to the Juukan rockshelters.[14]

2.20 The PKKP also claimed that Rio Tinto did not attempt to remove the charges over Juukan 1 and 2, and were only concerned with removing the charges relating to the three extra sites which did not have section 18 consent:

> [The] fact is that Rio Tinto did unload a number of holes. It did so in order to mitigate possible damage to sites over which it did not have Section 18 approval to disturb.[15]

2.21 Whilst Rio Tinto asserted they considered other options it denied that representations were made to the PKKP suggesting that the charges over Juukan 1 and 2 would be removed to protect the caves.[16] Rio Tinto stated that the 226 holes that were loaded on 13 May were the 'primary cause of damage, so subsequently loading the other holes would not have had a material effect on the outcome at Juukan 1 and 2'.[17]

2.22 The PKKP contested this, and argued that based on the drilling and blasting timeline provided by Rio Tinto on 12 October 2020, that 'it is difficult to understand how Rio asserts that the 'unloaded holes' (which were loaded on

---

13 Rio Tinto, *Supplementary Submission 25.1*, pp. 34, 60; Rio Tinto, *Submission 25*, p. 29.

14 PKKP, *Submission 129*, p. 53.

15 PKKP, *Supplementary Submission 129.2*, p. 2; PKKP, *Submission 129*, pp. 51-54.

16 Rio Tinto, *Supplementary Submission 25.1*, pp. 62, 80; Mr Brad Haynes, Vice President, Corporate Relations Australia, Rio Tinto, *Committee Hansard,* Canberra, 16 October 2020, p. 4.

17 Mr Chris Salisbury, Chief Executive, Iron Ore, Rio Tinto, *Committee Hansard,* Canberra, 16 October 2020, p. 16.

16 and 17 May) would not have had a material effect on the outcome at Juukan 1 and Juukan 2'.[18]

2.23 The PKKP contended that the continued loading of the blast holes contributed directly to the destruction of the Juukan shelters and that:

> It is clear … that if Rio had stopped loading holes at the time PKKP raised its concerns on 15 May 2020 there would have been:
>
> a. Fewer holes to unload;
>
> b. Multiple 'edges' to work in from in unloading the holes; and
>
> c. More time and opportunity for Rio Tinto to undertake this difficult task.[19]

2.24 The PKKP further added:

> Rio Tinto did not need to remove all of the other charges to protect Juukan 1 and Juukan 2. However, notwithstanding its successful removal of these seven charges, Rio Tinto did not attempt to remove any of the charges most likely to damage the Juukan 1 and Juukan rockshelters.[20]

Rio Tinto

2.25 The Committee received evidence about the organisational structure and internal culture of Rio Tinto that contributed to the decision to destroy the caves at Juukan Gorge. In particular, certain changes to the company's corporate structure and its approach to relationships with traditional owners contributed to breakdowns in communication, both between Rio Tinto and Aboriginal groups and between different parts of Rio Tinto itself. Decisions at the board level triggered a downstream focus on latent management and minimising issue escalation rather than true engagement and genuine partnership.

The impact of structural and cultural changes in Rio Tinto

2.26 Several witnesses and submitters stated that restructuring implemented by Rio Tinto's CEO from 2016 had the effect of changing lines of responsibility and accountability within the company, leading to changes in culture and personnel. New approaches to managing relationships with traditional

18 PKKP, *Supplementary Submission 129*; PKKP, *Supplementary Submission 129.2*, p. 1.

19 PKKP, *Supplementary Submission 129.2*, p. 2.

20 PKKP, *Submission 129*, p. 55.

owners and to obtaining approvals for damage to sites were highlighted as key contributing factors to the communications breakdown that preceded the destruction of the caves.[21]

2.27 Professor Glynn Cochrane and Mr Bruce Harvey both argued that the changes in 2016 did away with the community relations system established in 1995 by Professor Cochrane and other senior figures at Rio Tinto, and handed functions for cultural relations management to those responsible for public relations.[22]

2.28 Professor Cochrane described the system established in 1995 as follows:

> [This system] operated on military lines – that is to say that the line management was responsible for cultural management and for all social performance functions. They were advised by advisers. They had to work closely with those advisers and take their advice into account. Had there been a well-qualified heavyweight archaeologist in the Pilbara who was working closely with the head of iron ore and a person that the iron ore head was familiar with, he would've listened to their advice…the system we had for 25 years was line management which was responsible and was advised by well-qualified advisers and took their advice because they knew the quality of the people and their experience.[23]

2.29 Mr Harvey provided more detail about the changes of personnel in Rio Tinto and the different approach to community management that the new staff adopted. He observed that several long-term, experienced cultural heritage and social performance professionals have left Rio Tinto over the past 5 years during the restructure as part of a 'switch out' in which Rio Tinto recruited 'into corporate positions a range of new people with skills in brand promotion, corporate marketing and internal relations'.[24] The result of this, Mr Harvey argued, was that Rio Tinto's previous strategy of 'attempting to understand affected community concerns and respond to them was replaced in 2016 to one of 'managing communities', presumably to achieve their compliance with Rio Tinto's imperatives'.[25] He stated:

---

21 Professor Glynn Cochrane, Private capacity, *Committee Hansard,* Canberra, 28 August 2020, p. 3; Mr Bruce Harvey, *Supplementary Submission 19.1*, p. 2.

22 Professor Cochrane, *Committee Hansard,* Canberra, 28 August 2020, pp. 2-3; Mr Harvey, *Committee Hansard,* Canberra, 28 August 2020, p. 18.

23 Professor Cochrane, *Committee Hansard,* Canberra, 28 August 2020, p. 2.

24 Mr Harvey, *Submission 19*, pp. 1-2.

25 Mr Harvey, *Supplementary Submission 19.1*, p. 1.

> [T]he new strategy implemented after 2016 directly led to the destruction of the Juukan shelters because, among other things, it did not recognise that Social Performance and Corporate Affairs professional competencies and accountabilities are fundamentally different and cannot be substituted one for the other.[26]

2.30 The Rio Tinto Board Review also identified changes in personnel as causing a loss of knowledge and awareness of the location and significance of the rockshelters among operating and senior management.[27]

2.31 Mr Harvey submitted that the restructuring also affected accountability for cultural heritage and reduced the level of engagement between mine site management and local Aboriginal people:

> …taking direct line accountability for Aboriginal engagement and heritage protection away from mine site leaders. This removed CSP [Communities and Social Performance] accountability and staff from day to day work at mine sites, resulting in reduced mine site engagement with land-connected Aboriginal groups, along with a focus on remedying issues after events occur rather then prioritising the identification of possible issues before they occur.[28]

2.32 In particular, Professor Cochrane argued that the changed lines of responsibility adversely affected the quality of the company's interaction with traditional owners, because there was a loss of understanding about traditional protocols, leadership and decision-making in Aboriginal communities:

> Part of this system that we put in place was to create a baseline, initially, in order to understand how to consult with local people. We had to understand the local society−the way it ought to work and the way it actually was working. We had to understand the leadership patterns. We had to understand the values and the world view of those people and we had to work within that. That told us how we ought to engage with those people, when we ought to engage and how we would know when they had made a legitimate decision and when they hadn't. We would have to know the protocols, the things that made sense to them, because we had to do it in a way that was satisfactory to them. That is what has been lost, and I don't think that baselining is done anymore on a regular basis.[29]

---

[26] Mr Harvey, *Supplementary Submission 19.1*, p. 2.

[27] Rio Tinto, *Board Review of Cultural Heritage Management*, 23 August 2020, p. 16.

[28] Mr Harvey, *Submission 19*, p. 2.

[29] Professor Cochrane, *Committee Hansard,* Canberra, 28 August 2020, p. 6.

2.33 Part of the changed approach in Rio Tinto was a drive for expedient rather than thorough processes for the protection and management of cultural heritage.[30] Professor Cochrane stated:

> Rio Tinto has been following its own stripped-down version of Cultural Resources Management (CRM) in the Pilbara. The focus has been on the development of the skills and procedures needed to secure quick clearance – the removal of impediments to mining – something that too frequently results in the destruction of sacred sites. This clearance thinking would have encouraged Rio Tinto to think the caves could be destroyed without too much fuss.[31]

2.34 Dr Mary Edmunds submitted that the focus on expedited approvals was a by-product of Rio Tinto's site-focused as opposed to landscape or regional approach to cultural heritage protection. This is 'less a cultural heritage protection and management approach and more an industry-focused approach to enable the expedient and efficient removal of cultural heritage from areas subject to exploration and mining.'[32]

2.35 In particular, Dr Edmunds noted that, in the case of Juukan Gorge, there appears to have been a failure to properly implement the regional standard for life of mine planning.[33]

2.36 Crucially, the Board review identified that there existed at Brockman 4 a:

> …work culture that was more focused on ensuring that necessary approvals and consents were in place for ground disturbance of culturally significant sites, rather than also managing changing cultural heritage issues that could arise on sites where authorisation and consents for ground disturbance had previously been obtained.[34]

Communication with the PKKP

2.37 Poor communication with the PKKP was identified as a key element in the chain of events that led to the destruction of the Jukaan caves. The following section details the breakdown in communication and its implications.

---

30 Professor Cochrane, *Committee Hansard*, Canberra, 28 August 2020, pp. 2-3; Mr Harvey, *Submission 19*, p. 2.

31 Professor Cochrane, *Submission 11*, p. 1.

32 Dr Mary Edmunds, *Submission 55*, p. 5.

33 Dr Edmunds, *Submission 55*, p. 5.

34 Rio Tinto, *Board Review of Cultural Heritage Management*, pp. 16-17.

Failure to adhere to the spirit of agreements

2.38 Good communication is critical to the relationship between Rio Tinto and the Indigenous communities affected by its mining operations. This is highlighted in Rio Tinto's Communities and Social Performance (CSP) standard, which is the company's internal guidance on cultural heritage management, in accordance with relevant international standards produced by the International Finance Corporation (IFC) of the World Bank.[35] Communication is also important for the proper implementation of the cultural heritage provisions under the various agreements requiring consultation by Rio Tinto with the PKKP.

2.39 For Dr Edmunds, the organisational and cultural changes in Rio Tinto discussed above led to communication issues that adversely affected the implementation of the agreements:

> As … envisaged originally in the discussions, each of the groups would be involved from the beginning right through all the major developments in relation to any mines on their country. It seems to me that that's where the process has fallen down in relation to the Juukan Gorge caves, because, although there were meetings about that, I understand, … the letter of the law has been followed but not the spirit of those original agreements.
>
> …had the participation agreements been appropriately implemented in the way in which they were envisaged, I don't think that the destruction would've taken place. Cultural heritage protocol and the life of mine planning processes, as they were set out and the in the spirit of the process, would have engaged the PKKP people very closely, and I very much doubt that that destruction would have taken place.[36]

2.40 A key example of Rio Tinto's failure to properly adhere to the terms and/or spirit of both the agreements and its own internal standards was its failure to share the 4 pit design options with the PKKP at the March 2013 LIC meeting. This was a critical juncture where the destruction of the rockshelters at Juukan Gorge might have prevented if the opportunity for communication had been taken up.

---

35 International Finance Corporation, *Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts (2012)*, www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps1 viewed 24 August 2021.

36 Dr Edmunds, *Committee Hansard,* Canberra, 28 August 2021, pp. 8-9.

2.41 Under its Regional Framework Deed (RFD,) Rio Tinto is required to take all practicable measures to avoid sites of special significance, with Rio Tinto, acting reasonably, having the final decision in determining whether it was practicable to avoid sites of significance. In determining whether it was practicable, Rio could take into account several factors. One of these factors was 'any views and concerns of the opt-in groups received by Rio'.[37]

2.42 Under its Cultural Heritage Management Regional Standard, Rio Tinto committed to work with the PKKP through the Local Implementation Committee (LIC) to early identification of sites of special significance and sites of immediate concern to ensure such sites are considered by Rio Tinto in longer-term development decisions. Rio Tinto also committed itself to give consideration to the impact of their operations on Aboriginal sites, including their heritage values, and consult with the traditional owners on preserving the heritage values or minimising or mitigating the loss or diminution of those heritage values.[38]

2.43 In failing to present to the PKKP and seek their views on the different pit options, Rio Tinto failed in fulfilling its obligations under the Regional Standard[39] to consult with the PKKP on preserving the heritage values or minimising or mitigating the impact on the caves.

2.44 Mr Harvey argues that Rio Tinto was in breach of its own internal standards and guidance on cultural heritage management, because 'If Rio Tinto had operated at Brockman 4 according to its own CSP standard, it would not have proceeded with the destruction of the shelters'.[40]

2.45 In particular, the failure of Rio Tinto to present 'full context of the mine design options considered' at the 28 March 2013 LIC meeting was specifically found by the Board review to be inconsistent with the CSP and

---

37 Rio Tinto, 23 August 2020, *Board Review of Cultural Heritage Management*, p. 13, www.riotinto.com/news/inquiry-into-juukan-gorge, viewed 24 August 2021.

38 Rio Tinto, 23 August 2020, *Board Review of Cultural Heritage Management*, p. 13, www.riotinto.com/news/inquiry-into-juukan-gorge, viewed 24 August 2021.

39 Regional Standards form part of the signed Regional Framework Deed and contain both Specific Commitments (which can be enforced by application to a court) and Implementation Commitments (where alleged non-compliances can be referred to an independent expert for advice). Rio Tinto, *Submission 25*, p. 18.

40 Mr Harvey, *Submission 19*, pp. 2-3.

internal guidance on cultural heritage management and Rio's commitment to IFC PS7[41].[42]

Failure to communicate with the appropriate PKKP representatives

2.46 Another key communication failure by Rio Tinto that may have directly contributed to the destruction of Juukan Gorge is their decision to send the draft copy of the section 18 application notice for Juukan 1 and Juukan 2 to the Yamatji Marlpa Aboriginal Corporation (YMAC) instead of directly to the PKKP Aboriginal Corporation (PKKPAC). The role of the YMAC and its failure to appropriately communicate with the PKKPAC is discussed further below.

2.47 On 3 October 2013 the draft section notice was sent to YMAC, and confirmation that the notice was lodged was sent to PKKP LIC members care of YMAC by letter dated 17 October 2013. Rio stated in both their submission and supplementary submission that they have not located a response from the PKKP LIC members or YMAC.[43]

2.48 As noted previously, the Performance Agreement requires Rio Tinto to send draft notices of section 18 applications to the LAC which, as YMAC noted in their submission, was the PKKPAC as of 18 July 2012. The Cultural Heritage Management Regional Standard also requires Rio Tinto to consult with PKKP LIC members on the section 18 application.[44]

2.49 Consequently, by sending the draft notice to YMAC and not the PKKP, Rio Tinto failed to adhere to the terms of the agreement to send the draft notice to the correct body.

2.50 Crucially, the draft section 18 notice set out in the clearest terms that the Juukan rockshelters were going to be 'fully impacted' by the expansion of Pit 1.[45]

2.51 By failing to send the draft notice to the PKKP, Rio Tinto denied the PKKP the clearest indication that the Juukan rockshelters were going to be

---

41 International Finance Corporation, Performance Standard 7: Indigenous Peoples (2012).

42 Rio Tinto, 23 August 2020, *Board Review of Cultural Heritage Management*, p. 14, www.riotinto.com/news/inquiry-into-juukan-gorge, viewed 24 August 2021.

43 Rio Tinto, *Supplementary Submission 25.1*, p. 32; Rio Tinto, *Submission 25*, p. 22.

44 Mr Simon Hawkins, Chief Executive Officer, Yamatji Marlpa Aboriginal Corporation (YMAC), *Committee Hansard,* Canberra, 13 October 2020, p. 3; YMAC, *Submission 114*, pp. 3-4.

45 Rio Tinto, *Supplementary Submission 25.1*, pp. 29, 64.

impacted. It also denied them an opportunity to review the application documents and verify the accuracy of the information provided by Rio Tinto to the Aboriginal Cultural Material Committee (ACMC) and Department of Aboriginal Affairs.

2.52 Indeed, the PKKP have since obtained the draft notice and have discovered that the section 18 application 'omitted or misrepresented a number of details of significance'.[46] These included:

a. in its summary of the sites within the Juukan complex, the ethnographic significance of those sites was listed as 'N/A';

b. in summarising Dr Builth's 2013 survey, the submission recorded 'No new ethnographic sites were recorded during the ethnographic survey';

c. the recommendation of Dr Slack in relation to the preservation of Juukan 2 was omitted; and

d. the 'major omission' of not providing information under section 39(2) –(3) of the AHA connecting the traditional owners to either site by their knowledge of and connection with it, thereby giving it ethnographical significance.[47]

Failure to pass on new information relevant to section 18 consent

2.53 With respect to the 2013 Builth report and 2014 Slack preliminary reports, Rio Tinto admitted that:

> In light of the material new information which was provided as a result of ethnographic and archaeological reports from 2014 (and after the granting of the section 18 consent in December 2013), a more explicit engagement by Rio Tinto with the PKKP on the implications of the new knowledge, especially in terms of its ongoing consent to the impacts on the Juukan 1 and Juukan 2 rockshelters that had been foreshadowed for a long time, would have resulted in better alignment with Rio Tinto's FPIC aspiration.[48]

---

46 Dr Builth, PKKP, *Committee Hansard*, Canberra, 12 October 2020, p. 5; PKKP, *Submission 129*, pp. 35, 36-38.

47 PKKP, *Submission 129*, p. 35

48 Rio Tinto, 23 August 2020, *Board Review of Cultural Heritage Management*, p. 19, www.riotinto.com/news/inquiry-into-juukan-gorge viewed 24 August 2021.

2.54 Indeed, the PKKP noted that after the section 18 notice, there was no effort by Rio Tinto to discuss the findings of the Slack report(s), stating there was 'just silence'.[49]

The lead-up to the blast

2.55 The Rio Tinto Board review has also identified communication issues with the PKKP in the time leading up to the destruction of the caves on 24 May 2020, in which 'the effectiveness of the engagement between Rio Tinto and the PKKP appeared to diminish'.[50]

2.56 More specifically, the Board review notes:

> Lines of communication became blurred. Flows of information were not always clear and timely. Informal interactions suggesting evolving views within the PKKP about the significance not only of the Juukan 1 and Juukan 2 rockshelters but other sites in the Juukan Gorge were not followed up in a formal way nor escalated to appropriately senior levels within the Rio Tinto organisation. Stronger indications of changing perceptions (as reflected in Dr Bruckner's Social Surroundings survey and reports in early 2020) were not assessed as a matter of urgency at the appropriate level of seniority within Rio Tinto in order to clarify the implications for the PKKP's attitude to the imminent impact of mine operations on the Juukan 1 and Juukan 2 rockshelters. Furthermore, although there was clearly an awareness within the PKKP that the impact was imminent, the precise timing of the blasting that would impact the Juukan 1 and Juukan 2 rockshelters was not conveyed to them with the clarity and advance notice that it warranted.[51]

2.57 Communication issues also appear to have continued to plague Rio Tinto during the crucial days prior to the blast, with Rio Tinto failing to discuss with the PKKP regarding both the drilling and the loading of the holes, as well as failing to provide clear information around efforts to mitigate the impact of the blast on Juukan 1 and 2.

2.58 The PKKP stated that on 13, 16, 17 and 19 May 2020, Rio Tinto loaded blast holes and but did not inform the PKKP on any occasion. On 15 May the

---

49 Dr Builth, PKKP, *Committee Hansard*, Canberra, 12 October 2020, p. 6.

50 Rio Tinto, 23 August 2020, *Board Review of Cultural Heritage Management*, p. 18, www.riotinto.com/news/inquiry-into-juukan-gorge viewed 24 August 2021.

51 Rio Tinto, 23 August 2020, *Board Review of Cultural Heritage Management*, p. 18, www.riotinto.com/news/inquiry-into-juukan-gorge, viewed 24 August 2021.

PKKP had been informed that all of the holes had been loaded, when in fact only 226 of the 382 holes had been loaded.[52]

2.59 With respect to the removal of the charges, as noted previously, the PKKP maintained that efforts by Rio Tinto to remove charges only occurred after Rio Tinto discovered that the blast would damage three additional sites for which they did not have a section 18 consent over.[53]

2.60 PKKP contended that Rio Tinto did not inform the PKKP of their discovery that the blast would impact these additional sites, nor did Rio Tinto inform them that their efforts to remove charges from the blast were only directed at protecting the three additional sites, not the rockshelters. It was only through this Committee process that the PKKP found out the full details:

> We met with Rio Tinto on the morning of 23 May, and our understanding from that discussion was that they were attempting to remove blasts so that it would mitigate the impact on the rock shelters. We had no knowledge that they were trying to remove blasts from the three sites that they did not have section 18s over. We only knew that after, when we saw the submission. Through the whole time, we were under the impression that they were trying to exercise mitigating actions to save or lessen the blast impact on the shelters.[54]

Communication within Rio Tinto

2.61 Communication problems within Rio Tinto led to information – including new information about the cultural significance of the Jukkan Gorge – not being passed on between the relevant parts of the company, leading to uncoordinated decisions that contributed to the blast.

Failure of Rio Tinto to act on new information highlighting the significance of the caves

2.62 As seen in the summary of events at Appendix D, during the period 2013-2020, in particular the period 2013-2014, more information came to light on the significance of the rockshelters which should have prompted a reconsideration of the decision to mine Juukan 1 and 2, but failed to occur. This has been acknowledged by the Rio Tinto Board Review:

---

52 PKKP, *Submission 129*, p. 46.

53 Mr Rick Davies, Adviser, PKKP, *Committee Hansard,* Canberra, 12 October 2020, p. 10.

54 Ms Carol Meredith, Chief Executive Officer, PKKP, *Committee Hansard,* Canberra, 12 October 2020, p. 18.

> The new insights provided by ethnographic and archaeological research and reports in the period from 2013 provided a basis for re-assessment by Rio Tinto of its mine planning for Brockman 4, and in particular the impact of the mine design on the Juukan Gorge.[55]

2.63 The reasons given for this failure by the Rio Tinto Board review are 'shortfalls in linked-up decision-making within the Rio Tinto organisation, and standards of governance and accountability, which call into question aspects of the work culture and priorities at Brockman 4'.[56]

2.64 In particular, the Board Review notes that:

> …there was insufficient flexibility in our operating procedures in terms of responding to material new information about the cultural heritage significance of the Juukan Gorge area reflected in the reports of Dr Builth in July and September 2013 and the preliminary archaeological reports of Dr Slack in 2014.[57]

2.65 With respect to linked-up decision-making, the Review acknowledged that:

> [There was a] significant gap between the granting of [the] section 18 consent in December 2013 for impacts at the Juukan 1 and Juukan 2 rockshelters, the increased understanding of the exceptional significance of the site arising from the salvage operations in 2014, and the timing of the actual impacts in May 2020. During that period, consistent with Rio Tinto's Risk Management Standard and its Communities and Social Performance Standard…risks should have been reviewed and updated regularly…[A]fter the section 18 consent had been granted in December 2013, and after confirmation had been received from the archaeologists working on the site in 2014 that, as agreed with the PKKP, all heritage artefacts had been salvaged at the Juukan 1 and Juukan 2 rockshelters, active management or assessment of the site from a cultural heritage perspective was no longer regarded as required. This view neglected the reality that cultural heritage sites for which required approvals had been granted and all agreed mitigation and salvage work completed are not necessarily 'low risk' and that there are situations in which cultural

55 Rio Tinto, 23 August 2020, *Board Review of Cultural Heritage Management*, p. 15, www.riotinto.com/news/inquiry-into-juukan-gorge, viewed 24 August 2021.

56 Rio Tinto, 23 August 2020, *Board Review of Cultural Heritage Management*, p. 15, www.riotinto.com/news/inquiry-into-juukan-gorge, viewed 24 August 2021.

57 Rio Tinto, 23 August 2020, *Board Review of Cultural Heritage Management*, p. 15, www.riotinto.com/news/inquiry-into-juukan-gorge, viewed 24 August 2021.

> heritage issues evolve in ways that require them to be reassessed, as indeed was the case at the Juukan Gorge from 2014.[58]

2.66 Fundamentally, the systems were not in place to either communicate to the PKKP or within Rio Tinto to prevent this disaster, despite the many years of archeologically and ethnographic assessment undertaken:

> There were no discussions. One of the failings of this whole issue, which was identified in our board review, was both the lack of joined up decision-making between heritage and the operations team, and, secondly, that our systems weren't helping us. I'll give you a very specific example. Because we believed that Juukan 1 and 2—that we had consent to mine through that area—were removed from the mine planning system as sites per se. So there was no trigger to alert the mine planning staff who planned the drilling, the loading of the blast, and so on and so forth, to actually identify there was an issue. They believed that they were, if you like, authorised by the system that flags heritage sites, because these weren't identified any longer as heritage sites. I'm not saying that's correct, but that is the fact that led to the start of this misunderstanding. So there was no flag to talk to traditional owners about the fact that we were approaching those sites.[59]

2.67 Crucially, the Board review identified that the previously-mentioned culture-related issues at Brockman 4 meant that 'from 2014, different parts of the Rio Tinto organisation had different access to data about the location of heritage sites in mine operations areas where all agreed mitigation and salvage plans had been completed, thereby inhibiting linked-up decision-making'.[60]

2.68 This led to a number of erroneous assumptions, such as the failure of the technical services team to arrange for loading to cease after deciding to reschedule the blast. Rio Tinto stated that the technical services team assumed the blast had been fully loaded, when in fact it had not. The loading of the remaining 40 percent of the blast continued, making any efforts to save the rockshelters much harder.[61]

---

58 Rio Tinto, 23 August 2020, *Board Review of Cultural Heritage Management*, pp. 15-16, www.riotinto.com/news/inquiry-into-juukan-gorge, viewed 24 August 2021.

59 Mr Salisbury, Rio Tinto, *Committee Hansard*, Canberra, 16 October 2020, p. 4.

60 Rio Tinto, 23 August 2020, *Board Review of Cultural Heritage Management*, pp. 16-17, www.riotinto.com/news/inquiry-into-juukan-gorge, viewed 24 August 2021.

61 Mr Salisbury, Rio Tinto, *Committee Hansard*, Canberra, 16 October 2020, p. 16; PKKP, *Supplementary Submission 129.2*, p. 2.

Failure to escalate information to appropriate higher levels

2.69 Part of the internal communication problems within Rio Tinto appears to be a failure to escalate issues to the proper level or inform people higher up the chain of command of issues relating to the significance of the caves.

2.70 The Board Review noted that:

> Systems and processes designed to provide layered governance and oversight did not work effectively in terms of responding to changing understanding of the cultural heritage significance of the Juukan Gorge area after 2014. In general, the Standards and internal guidance that Rio Tinto set for itself on heritage protection issues established appropriately high benchmarks and responsibilities.[62]

2.71 Mr Bruce Harvey agreed:

> The accountability for execution lies with people in the line of command. So the fact that, for whatever reason, senior people who were in advisory roles had left does not resile from the fact that the line accountability was neglected and that, for whatever reason, particularly subsequent to the excavation of the site, people were either not aware of the importance of it, having not made themselves aware of it, or…were aware of it and went ahead anyway.[63]

PKKP and its representatives

2.72 The PKKP held a number of views and good faith working assumptions that became an impediment to progressing their opposition to the blast proceeding. They were also let down during the process by those who were meant to be working in their best interest.

Views and assumptions in the lead up to the incident

2.73 In the lead up to the incident, the PKKP held two main views and assumptions:

a. That the Juukan rockshelters were not going to be impacted by the planned expansion of pit 1.

62 Rio Tinto, 23 August 2020, *Board Review of Cultural Heritage Management*, p. 16, www.riotinto.com/news/inquiry-into-juukan-gorge, viewed 24 August 2021.

63 Mr Harvey, *Committee Hansard*, Canberra, 28 August 2020, p. 24.

b. That Rio were attempting to remove the blast from the loaded holes directly impacting the rockshelters.[64]

Assumption that the rockshelters would not be impacted

2.74 The PKKP believed that the Juukan rockshelters would not be impacted by the expansion of Pit 1, due to mine plans and maps showing the rockshelters were located outside of the mine zone, and their experience that section 18 approvals are often sought as a precautionary measure in case of damage from nearby mining activities.[65]

2.75 On Rio Tinto's assertion that it had consulted with the PKKP, through the YMAC, at a community meeting in 2008, making clear that the Juukan sites were within the pit design and therefore unavoidable, the PKKP stated:

> PKKP understands Rio Tinto to be asserting that, as a result of the Juukan sites not being included in the Rights Reserved Area, PKKP had given its free, prior and informed consent to the inclusion of the sites within the pit design subject to Rio Tinto undertaking mitigation works.
>
> PKKP totally rejects that proposition.
>
> In this respect, Rio Tinto's submission ignores the grossly unequal negotiating position of the parties, a matter Rio Tinto was acutely aware of.
>
> It also indicates how, with the prime purpose of securing certainty of mining, Rio Tinto turned a blind eye to the difficulties and complexities of securing certainty of heritage protection.[66]

2.76 This assumption was further reinforced by Dr Builth's aforementioned conversations with the mine manager in October 2019 and with Rio Tinto's heritage specialist and archaeologist in early 2020. In both instances Dr Builth came away thinking the Juukan rockshelters were safe.[67]

2.77 The EPA Assessment process for the Brockman Syncline proposal, including Daniel Bruckner's social surroundings preliminary advice, also reinforced the PKKP's view that the sites would be protected:

---

64 Dr Builth, PKKP, *Committee Hansard*, Canberra, 12 October 2020, pp. 5, 8.

65 Dr Builth, PKKP, *Committee Hansard*, Canberra, 12 October 2020, p. 5.

66 PKKP, *Submission 129*, p. 30.

67 PKKP, *Submission 129*, p. 41; Dr Builth, PKKP, *Committee Hansard*, Canberra, 12 October 2020, p. 7.

> PKKP's Culture and Heritage Unit felt actively encouraged by this process and that Rio Tinto had a genuine appetite to protect Juukan Gorge. PKKP's heritage team felt that Rio Tinto gave a clear impression that it, Rio Tinto, was willing to consider the areas of significance.[68]

2.78 The PKKP relied in good faith upon conversations that were had outside the formal forums with Rio Tinto officials:

> PKKP, in its negotiations, relied on Rio Tinto's representations about Rio Tinto's values, which included the recognition of culture and protection of heritage. PKKP trusted that Rio Tinto would approach the concept of 'practicability' in good faith, having regard to the information PKKP would give to Rio Tinto in relation to the significance of each site.[69]

Assumption that Rio Tinto was attempting to remove blasts from the shelter

2.79 The PKKP were also under the assumption, after discovering that the rockshelters were going to be destroyed and notifying Rio Tinto that they wanted them protected, that Rio Tinto were doing everything possible to protect the caves in the lead up to the blast on 24 May.[70]

2.80 This assumption appears to have developed firstly due to initial conversations between Dr Builth and Rio Tinto's heritage staff on 17 May, as he told the Committee:

> …on 15 May when they told me that it was going to be blown up in two days' time, they asked for that information, and they said – well, on the 17th; we had another phone call on the 17th – "Give us this information and we will see if it is of high enough significance that we could stop the blast".[71]

2.81 It also appears to have developed due to conversations between the Dr Builth and Rio Tinto's strategic manager, Scott Edwards and superintendent of communities and communications, Ainslie Bourne:

> The blast was initially set to go on Sunday 17 May. It was then put off to the 19th, then the 20th – the 20th was a Wednesday – and then to the Friday. It was put off again on the Friday. We had a meeting on the Saturday with Ainslie

68 PKKP, *Submission 129*, p. 43.

69 PKKP, *Submission 129*, p. 31.

70 Dr Builth, PKKP, *Committee Hansard*, Canberra, 12 October 2020, p. 8; Ms Meredith, PKKP, *Committee Hansard,* Canberra, 12 October 2020, p. 18.

71 Dr Builth, PKKP, Canberra, *Committee Hansard*, Canberra, 12 October 2020, p. 8.

> [Bourne] about this, and we were told that they were taking out blast holes, emptying them. We thought that was the case, but it was the 3 sites.[72]

2.82 This is further reinforced by the fact that the PKKP were seemingly not made aware of the potential impact to the other three heritage sites until after the destruction of the rockshelters on 24 May when Rio Tinto released their submission to this inquiry.[73]

2.83 Consequently, the PKKP were again relying in good faith upon conversations had with Rio Tinto officials, this time on the assumption that as the PKKP had highlighted the significance of the rockshelters to Rio Tinto, it was the rockshelters that Rio Tinto were working to preserve by removing some of the charges.

Impact of agreements

2.84 The Agreements between the PKKP and Rio Tinto contain various clauses which restrict the ability of the PKKP to protect their cultural heritage. These include 'non-objection' clauses which prevent the PKKP from voicing opposition to Rio Tinto projects, and clauses which prevent the PKKP from seeking a state or federal heritage protection declaration without Rio Tinto's consent.

2.85 The PKKP argued that the effect of these clauses was that they were afraid to clearly express their opposition to the destruction of the caves:

> We wanted to approach [Rio Tinto] and talk to them about [the section 18 application]. I'm sorry, but all I can remember is that we felt that we couldn't do anything. When we wanted to talk to them about it, YMAC told us that we couldn't face them because of the clauses in the agreement telling us that we couldn't say anything to them as traditional owners – because we had to follow the agreement…We couldn't talk to anybody, not even Rio, because there's a clause in there that say that we cannot talk about anything to anyone – because there's a non-disparagement clause in there. That was something that was always told to us. I remember it clearly, because when I heard about this, and everybody wanted to focus on doing something about it, I said: 'hang on a minute. In that agreement, there's a clause. We can't. That stops us'.[74]

---

72 Dr Builth, PKKP, Canberra, *Committee Hansard*, Canberra, 12 October 2020, p. 9.

73 PKKP, *Submission 129*, pp. 45-46.

74 Ms Donna Meyer, Representative, Board of Directors and Traditional owner, PKKP, *Committee Hansard*, Canberra, 12 October 2020, p. 6.

2.86 Asked whether the PKKP people who signed the agreements may not have fully comprehended what they were signing, the PKKP told the Committee:

> At the time, because we were meeting all the time with Rio Tinto and YMAC, people had a little bit of an understanding. But, when it came down to talking about the agreement and people understanding it a bit more clearly, I don't think they did understand it when it came to signing it…[75]

2.87 PKKP representatives explained that the sheer size and complexity of the agreements was a major reason for the lack of understanding. Ms Meredith told the Committee:

> The other thing I'd like to point out is that, when Donna talked about whether or not our mob understood what they were signing, the depth of the agreement is shown in front of me—a 740-page document. At the same time, they signed a regional framework deed of 330 pages. You can see, graphically, the amount of information they were required to process during that negotiation period.[76]

2.88 Affirming this view, Ms Meyer added:

> It wasn't given out to the members to read and go over. A lot of our members wouldn't have read it because it was too big and time-consuming.[77]

2.89 The Agreements also prevented the intervention of Commonwealth protections. On 19 May 2020 the PKKPAC directed its lawyers to seek an emergency declaration pursuant to section 9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (ATSIHP Act).[78]

2.90 The ATSIHP Act will be discussed in detail in Chapter 6, but, in summary, the role of the ATSIHP Act allows Aboriginal and Torres Strait Islander peoples to make an application to the Minister for the Environment to make a declaration protecting an area or object of 'particular significance in accordance with Aboriginal tradition', where it is under threat of injury or desecration.'[79]

2.91 PKKP submitted that the ATSIHP Act failed the PKKP peoples in two key ways:

---

75 Ms Meyer, PKKP, *Committee Hansard,* Canberra, 12 October 2020, p. 4.

76 Ms Meredith, PKKP, *Committee Hansard,* Canberra, 12 October 2020, p. 4.

77 Ms Meyer, PKKP, *Committee Hansard,* Canberra, 12 October 2020, p. 4.

78 PKKP, *Submission 129*, p. 46.

79 Department of Agriculture, Water and the Environment (DAWE), *Submission 23*, p. 8.

1 The Act does not contain any provisions which prevent traditional owners from contracting out their right under the Act to seek a protection declaration. Consequently, the terms of the Claim Wide Participation Agreement (the CWPA) signed with Rio Tinto restricted the PKKP from making a protection application under the ATSIHP Act unless they had first provided Rio Tinto with 30 business days' notice before making the application, and received Rio Tinto's consent.[80]

2 A failure of governance in the implementation of that Act, specifically the failure relevant staff being available, to provide timely advice to the PKKP's legal representation about claim processes.

2.92 Given the advice from both the PKKP's blast consultant and Rio Tinto's independent consultant regarding the limited sleep time of the charges before they had to be detonated, it was not possible for the PKKP to provide enough notice to Rio Tinto of its intention to make a protection application under the ATSIHP Act. After advising Rio Tinto that the protection application under the ATSIHP Act was to be pursued, notice was received by the PKKP from Rio Tinto's counsel that this was not an option under the CWPA.[81]

2.93 The PKKP's legal representation (Mr Richard Bradshaw) noted difficulties in attempting to flag an application under the ATSIHP Act. In the first instance, he was not aware that responsibility for the administration of the ATSIHP Act lay with the Minister for the Environment (who has administered the Act since 1998 except between September 2013 and December 2013)[82] and thought that responsibility for the Act lay with the Minister for Indigenous Australians.[83]

2.94 Mr Bradshaw stated:

> I first contacted Jarrod Lomas, in Minister Ken Wyatt's office, on the morning of 20 May, on instructions, to flag the potential application for an emergency declaration under the Aboriginal and Torres Strait Islander Heritage Protection Act. He advised me that the matter was within Minister Ley's scope, rather than Minister Wyatt's, and that I should contact her office. He also advised that I should contact the National Indigenous Australians Agency to advise them. I contacted Minister Ley's office and spoke to someone there

80 PKKP, *Submission 129*, p. 48.

81 PKKP, *Submission 129*, pp. 48-49.

82 DAWE, *Submission 23*, p. 10; DAWE, *Supplementary 23.1*, p. 3.

83 Mr Richard Bradshaw, Lawyer, *Committee Hansard*, Canberra, 12 October 2020, p. 10.

> and I advised as to the possible application that would be made. I provided a substantial outline of what the circumstances were of the potential destruction by Rio of 46,000-year-old rock shelters, and I was informed that someone would contact me. They would get back to me. I provided a telephone number. Someone called James would contact me later in the day. I certainly wasn't told that he was on leave. The minister indicated that, I think, in a radio interview.
>
> I then contacted NIAA and spoke to two people, one in the Pilbara office, in Port Hedland, and the other in the Perth office, and provided them with details, as Mr Lomas had advised. Later in the day, I contacted Minister Ley's office again, because I hadn't been contacted, and expressed concern that I still hadn't been contacted. By that time, the postponement from the 20th to the 22nd had been advised to us, from Rio, through Carol and Heather, so we knew we had a couple of days and there was time for the PKKP's explosives expert to provide advice for the purposes of the land committee that was meeting. The land committee, as I understand it, was meeting throughout this period and being provided with legal advice, as well as some advice from the independent experts.

2.95 The Department of Agriculture, Water and the Environment told the Committee that Mr Bradshaw was advised to put his query in writing.[84] Mr Bradshaw denies this claim.[85]

> At no stage was I ever told to put anything in writing. I was simply told I would be called back and, after the 20th, the matter would proceed on the basis of what should be done in light of the independent explosives expert—what his advice was as to particular safety issues, about the removal and safety for the people on the ground around the site. Decisions were made in light of that advice. The issue of an application for an emergency declaration was not proceeded with for that reason. Of course, during that period, before that decision was made, there was a discussion via a zoom conference with the in-house legal advisers and the external legal advisers. That information was being provided to them about what the PKKP Aboriginal Corporation's intentions were and that the matter was on hold, regarding any application. It was at that time, as paragraphs 226 and 227 of the submission made clear, that we were advised of specific gag provisions in the participation agreement.[86]

84 DAWE, *Supplementary Submission 23.1*, p. 2.

85 Mr Bradshaw, Lawyer, *Committee Hansard*, Canberra, 12 October 2020, p. 10.

86 Mr Bradshaw, Lawyer, *Committee Hansard*, Canberra, 12 October 2020, p. 10.

2.96 Notwithstanding the PKKP's decision to opt against making a declaration under the ATSIHP Act, even if the PKKP had wished to proceed with making an application, these governance issues, particularly the fact that no relevant adviser was available to speak with Mr Bradshaw may have denied them time crucial for making an application.

2.97 The PKKP were let down by their legal representation. Mr Bradshaw was also not aware of important aspects of procedure for lodging an application for an emergency declaration under the ATSIHP Act.[87] He also stated that his instructions were to 'flag the matter with the Minister's office' which is why he did not pursue the matter beyond awaiting return telephone calls.[88]

2.98 The Department of Agriculture, Water and the Environment noted to the Committee that there is a checklist available on the Department's website that sets out the procedures for making applications. [89] The fact that the PKKP's legal representation was not aware of this process would have been a problem, because had an ATSIHP Act protection application been available, it would have adversely delayed the process.

YMAC

2.99 Yamatji Marlpa Aboriginal Corporation (YMAC) is the Native Title Representative Body (NTRB) for the Yamatji and Pilbara regions of Western Australia, in accordance with s11 of the *Native Title Act 1993*.[90]

2.100 YMAC acted as the legal representative of the PKKP until the PKKP Aboriginal Corporation (PKKPAC) became the Registered Native Title Body Corporate in January 2016. YMAC accordingly represented the PKKP people in relation to the negotiation and execution of the several agreements between the PKKP and Rio Tinto, including the Binding Initial Agreement (BIA), the Preliminary Advice, (PA) and the Indigenous Land Use Agreement (ILUA).[91] YMAC also represented the PKKP in the negotiation and execution of the CWPA dated 18 March 2011.[92]

---

87 Mr Bradshaw, Lawyer, *Committee Hansard*, Canberra, 12 October 2020, pp. 10-11.

88 Mr Bradshaw, Lawyer, *Committee Hansard*, Canberra, 12 October 2020, p. 11.

89 Mr Stephen Oxley, First Assistant Secretary, Heritage, Reef and Marine Division, DAWE, *Committee Hansard*, Canberra, 7 August 2020, p. 19.

90 PKKP, *Submission 129*, p. 13.

91 PKKP, *Submission 129*, p. 13.

92 PKKP, *Submission 129*, p. 13.

2.101 YMAC also acted as the Heritage Service Provider under the agreements until 30 June 2019, in which it was responsible for organising and facilitating the surveys undertaken by Rio Tinto and PKKP.[93]

2.102 The PKKP were particularly critical of YMAC's role in representing them during the negotiation process:

> Having gone through all of those meetings over those years, I think that PNTS—now YMAC—always negotiated on our part. When they came back to the table, they'd say, 'We've been talking to these people, and this is the result.' So any time we had a meeting, they'd already had the meeting and they brought it to the table to let us know. And we would bring to their attention that, 'You're our lawyers, you should be going to them to talk and negotiate on behalf of us and saying what we want.' So I felt that they were working on behalf of the mining company and getting results for the mining company.[94]

2.103 The PKKP also asserted that YMAC did not distil the information in a manner that the PKKP representatives could easily understand, and that whilst 'plain English' versions of the agreement were produced, these and other documents were not provided to the PKKP representatives prior to their meetings with YMAC, contributing to their lack of understanding when signing the agreements.[95]

2.104 PKKP further claim that the only reason why Juukan caves were not included as Rights Reserved Areas was due to advice from YMAC that Rio Tinto would not accept the agreement if there were too many Rights Reserved Areas, and that given the late stages of negotiations between Rio Tinto and PKKP, there were severe time constraints, and there would be only one opportunity to present the proposal to Rio Tinto.[96]

2.105 The PKKP are also critical of YMAC for failing to either forward on the draft section 18 notice to the PKKPAC or inform Rio Tinto that the draft notice should instead be sent to the PKKPAC as the LAC under the PA.[97] This is despite YMAC knowing that Rio Tinto had incorrectly sent the notice to them.[98] This failure denied the PKKP a crucial moment in which they would

---

93 PKKP, *Submission 129*, p. 13.

94 Ms Meyer, PKKP, *Committee Hansard,* Canberra, 12 October 2020, p. 20.

95 Ms Meyer, PKKP, *Committee Hansard,* Canberra, 12 October 2020, p. 4-5.

96 PKKP, *Submission 129*, p. 30.

97 PKKP, *Supplementary Submission 129.3*, pp. 2-3.

98 Mr Hawkins, YMAC, *Committee Hansard,* Canberra, 13 October 2020, p. 3

have been clearly informed of Rio Tinto's intention to impact the Juukan rockshelters.

State administrative failures

2.106 The *Aboriginal Heritage Act 1972 (WA)* (the AHA) will be discussed in full in Chapter 3. However for the purposes of this Chapter, it is worth noting a number of administrative failures that prevented the PKKP from fully protecting the Juukan Gorge heritage sites at even an early stage of the project.

2.107 Several individuals raised concerns with the approvals process for section 18 applications, and the apparent conflict of interest the State government faces in being both the facilitator of mining and the protector of Aboriginal cultural heritage.[99] Section 18 approval involves both the Department of Aboriginal Affairs (WA) (DAA) and the ACMC.

2.108 Cedric Davies argued that the mining industry desires an expedited approvals process, and that there is an 'eagerness within Government to accommodate the industry by ignoring its own procedures to the point that the industry has significant influence not only over the process as a whole, but individual bureaucratic decisions'.[100] Mr Davies submitted that he had been interviewed for a government position to assess section 18 applications and a representative from Rio Tinto was on the selection panel, which appears to be a clear conflict of interest for an assessment role.

2.109 Mr Davies further observed that there is often a lack of rigour applied to issues raised during the approvals process, to the extent that 'there appears to be a culture whereby the rules can be bent if the normal approvals process cannot keep up with the demands of the mining industry'.[101]

2.110 Evidence provided to this Committee in relation to Juukan Gorge supports these concerns.

2.111 The PKKP noted several issues with the Heritage Information Site Forms (HISFs) as part of Rio Tinto's section 18 application, including incomplete or

---

99 Mr Cedric Davies, *Submission 82*, p. 1, 3.

100 Mr Davies, *Submission 82*, p. 1, 4.

101 Mr Davies, *Submission 82*, p. 6.

erroneous information. These issues were not identified by the assessing department, the DAA, nor the ACMC.[102]

2.112 Indeed, it appears that both Departmental staff and members of the ACMC failed to verify for themselves the accuracy of the information in the forms against the supporting submissions, and seemingly accepted the information provided by Rio Tinto as both accurate and complete.[103]

2.113 There also appears to have been a failure of the department and ACMC to conduct basic due diligence in assessing the risks to the Juukan rockshelters. In particular, the PKKP argue the ACMC and the Department of Planning, Land and Heritage (WA) (DPLH) failed to correctly apply the precautionary principle in assessing the risks to the Juukan rockshelters, and that 'if the precautionary principle had been adequately utilised, as it should have been, the Juukan rockshelters would have been better protected, and less likely to be destroyed.'[104]

2.114 Notwithstanding the inaccuracies in the HISFs, and despite the information provided in the application noting the high archaeological significance of Juukan 1 and 2, and the recommendation in Dr Slack's report that Juukan 2 be protected, there was only one condition placed on the consent – to report on the extent of the impact to the sites after completion of 'the purpose'.[105]

2.115 State administrative processes also failed the PKKP by failing to adequately perform its role to seek full and accurate information, instead abdicating its assessment roles to Rio Tinto.

Update on Rio Tinto: Responses to Juukan Gorge and Never Again

2.116 Rio Tinto has responded to most of the recommendations of the Committee's interim report. In relation to the restitution and reconstruction of Juukan Gorge, Rio Tinto actively approached this task. Rio Tinto engaged with the PKKP to determine the best remedy process for the destruction of the shelters but admit that the 'remediation of the Gorge will be a

102 PKKP, *Submission 129*, p. 36.

103 PKKP, *Submission 129*, p. 36, 71.

104 PKKP, *Submission 129*, p. 71.

105 PKKP, *Submission 129*, p. 37.

challenging project'.[106] Sadly the Juukan 2 rock shelter is likely irreparably damaged but Juukan 1 appears to be largely intact and despite damage to the water flows feeding the Sacred Snake-head Rock Pool the pool has been repaired. Rio Tinto is collaborating with the PKKP to understand their vision for the future of the rockshelters and the Juukan Gorge area in the restitution process.

2.117 The Committee is pleased that Rio Tinto has agreed to a moratorium on mining in the Juukan Gorge area. This action demonstrates to the Committee a commitment to restoring not only Juukan Gorge but the company's relationship with traditional owners. The Committee had sought for this moratorium to be respected by other mining and exploration companies, and is disappointed that Fortescue has applied for a mining licence for an area 10km from Juukan without informing the PKKP.[107]

2.118 A significant issue for the Committee throughout the inquiry is the issue of inappropriate agreements which utilise clauses that restrict the ability of traditional owners to raise concerns about cultural heritage maters. Rio Tinto had been guilty of this practice in their relationship with the PKKP, as 'gag clauses' had restricted the PKKP's ability to prevent the destruction of Juukan Gorge. Fortunately, Rio Tinto have pursued the modernisation of agreements with traditional owners, not just with PKKP but with other traditional owners of the Pilbara.[108]

2.119 In relation to the final recommendation of the interim report relating to Rio Tinto, the company has moved artefacts and other materials extracted during archaeological excavations to a purpose-built conservation facility. Rio Tinto is in a process of discussion with the PKKP on the provision of an appropriate, permanent keeping place.[109] It is important that Rio Tinto ensure that all artefacts are returned and or placed in a keeping place as directed by the PKKP.

2.120 The Committee also acknowledges that Rio Tinto, in September 2021, issued its first Communities and Social Performance Commitments Disclosure

---

106 Rio Tinto, *Juukan Gorge*, www.riotinto.com/en/news/inquiry-into-juukan-gorge, viewed 18 August 2021.

107 Dr Builth, PKKP, *Committee Hansard*, Canberra, 12 October 2020, p. 16.

108 Rio Tinto, *Juukan Gorge*, www.riotinto.com/en/news/inquiry-into-juukan-gorge, viewed 18 August 2021.

109 Rio Tinto, *Juukan Gorge*, www.riotinto.com/en/news/inquiry-into-juukan-gorge, viewed 18 August 2021.

Interim Report.[110] While Rio Tinto should be commended on the form of the report and the honesty in reporting traditional owner feedback, it is noted that traditional owners are largely critical of the company's progress, indicating more work needs to be done.

Other industry responses

2.121 The resources industry expressed broad dismay at the events at Juukan Gorge and the process failures within Rio Tinto that led to these events and considers that the events reflected poorly on the industry as a whole.[111] It is noted that BHP has released traditional owners from gag clauses and that the Peak industry group, Minerals Council of Australia (MCA), has expressed its view that gag clauses and other restricting clauses should not be used by the resources industry.

2.122 The MCA made this statement recognising Reconciliation Week 2021:

> Over the past 12 months the minerals industry has deeply reflected on its own relationships with First Nations.
>
> It has been a time of listening and learning.
>
> Industry is grateful for the openness and willingness of First Nations landholders, communities and organisations to share their experiences of mining – to share what has worked well, what has not and their visions for the future of mining partnerships.
>
> We have heard that industry must do more to be a better, more engaged partner in many circumstances while further demonstrating industry's deep respect for the cultures, histories, knowledge and aspirations of the diverse First Nations communities with which it partners.
>
> Industry is taking action to do so, at sites, at companies and together.
>
> It will take time, and industry is committed to putting strong relationships at the forefront of its engagement approach.[112]

---

110 www.riotinto.com/-/media/Content/Documents/Invest/Reports/CSP-reports/RT-CSP-commitments-disclosure-interim-report-2021.pdf?rev=74138a4a4d624ef7bd892cf0f6de36b7

111 Minerals Council of Australia (MCA), *Learning from tragedy and acting to prevent it happening again*, May 2021, www.minerals.org.au/news/learning-tragedy-and-acting-prevent-it-happening-again, viewed 24 August 2021.

112 MCA, *Reconciliation Week Reflection*, May 2021, www.minerals.org.au/news/reconciliation-week-reflection viewed 24 August 2021.

2.123 A number of companies submitted that they had reviewed their own processes as a result, for example:

> Roy Hill has completed an audit within the last four weeks to review the status of all heritage sites across our operating footprint, as well as reviewing the escalation process for such matters internally. This audit was requested in recognition of the importance of ensuring there is a clear line of communication for concerns raised within the business by our heritage experts, that they can be heard by leadership team members in a timely manner prior to key decisions being made.
>
> Roy Hill can confirm there are and always have been clear lines of communication from the heritage professionals working within Roy Hill and the Roy Hill Leadership team and we are confident that we have a practical system for the escalation of issues.[113]

2.124 The MCA has continued to respond to the events at Juukan Gorge and has developed, and is reporting on, a 'multi-year work program' in the following core priority areas:

- Supporting stronger heritage protection laws and systems
- Increasing industry transparency and accountability
- Improving land use agreement implementation
- Further developing industry capability, systems and engagement.[114]

2.125 The Committee notes that FMG proceeded with an application for mining leases over part of the moratorium area agreed with Rio Tinto, causing distress to the PKKP. The PKKP and FMG expressed different views about whether the decision to apply for the leases had been communicated during a sensitive time. FMG declined to rule out mining in the moratorium area, but stated that the company had no present plans to do so and that any further moves could only be conducted by 'working with the PKKP'.[115]

Committee comment

113 Roy Hill, *Submission 72*, p. 4.

114 MCA, *Response to Juukan Gorge*, www.minerals.org.au/response-juukan-gorge, viewed 24 August 2021.

115 Ms Elizabeth Gaines, Chief Executive Officer, Fortescue Metals Group, *Committee Hansard*, Canberra, 17 Nov 2020, p. 18.

2.126 This Chapter provides a case study in, at best, corporate incompetence or, at worst, deliberate corporate misdirection leading to the deception of a group of Aboriginal peoples and the destruction of their sacred heritage.

2.127 The evidence presented to the Committee suggests that a combination of factors was responsible for the destruction of the heritage sites at Juukan Gorge. State and Commonwealth legislative frameworks enabled Rio Tinto to exercise excessive power over the PKKP peoples in negotiation, but it was Rio Tinto's internal processes that made the destruction of the Juukan Gorge heritage sites almost inevitable.

2.128 Changes to the corporate structure of Rio Tinto introduced in 2016 by the then CEO saw appropriately skilled and experienced staff replaced with less experienced and unsuitably qualified replacements, resulting in a drop in adherence to internal standards and an organisational culture focused around securing quick and easy approvals. Certain community relationship responsibilities were taken away from mine managers who were on the ground and redistributed to corporate roles. The Committee heard arguments that the company's priority became one of 'managing' communities rather than understanding their concerns. Such changed priorities undermined the relationships with local Aboriginal people to which former Rio Tinto staff told the Committee they had been committed.

2.129 The structural changes also created issues around internal communication and decision making, resulting in important information not being communicated properly to relevant parts of the business, or issues were not escalated up the chain of command when they should have been.

2.130 Rio Tinto's corporate deficiencies contributed to the company's failure to share the pit design options with the PKKP, and its failure to send the draft notice onto the PKKPAC as the LAC. These deficiencies may also have contributed to Rio Tinto's omission in not accurately informing the PKKP that the company had discovered that the blast was also going to damage three additional sites not covered by section 18 approvals, and that they were only removing charges from these three sites, not from Juukan 1 and 2.

2.131 Given their weaker legislative and contractual position, the PKKP relied on upon Rio Tinto's good faith in adhering to the terms of the agreements. In particular, PKKP depended on Rio Tinto to consult thoroughly with them in relation to cultural heritage matters and to provide them with full, consistent and accurate information at all times.

2.132 Rio Tinto's failure to do so resulted in the PKKP forming assumptions (particularly on the basis of verbal conversations) that, despite various

documents clearly stating otherwise, the caves were safe, and that Rio Tinto was doing everything possible to save the caves once the company had discovered they were about to be destroyed.

2.133 The agreements which severely restricted the PKKP's ability to protect their own cultural heritage were facilitated in large part by inherent weaknesses in the existing Native Title framework (see Chapter 6). These agreements contained clauses denying the PKKP access to heritage protection provisions under both state and federal legislation, were used to restrict PKKP's ability to raise concerns in an effective manner, and limited their capacity to protect the caves once they discovered they were going to be destroyed.

2.134 Finally, the government bodies tasked with ensuring the protection of Aboriginal cultural heritage in Western Australia – the Aboriginal Cultural Material Committee and the Department of Aboriginal Affairs – failed to conduct due diligence and verify the accuracy of the information provided by Rio Tinto in the section 18 application forms against what was actually provided in the accompanying ethnographic and archaeological reports.

2.135 These are monumental failings in a legislative scheme that, as discussed in Chapter 4, was forward-thinking in its intent to protect cultural heritages sites when it was originally enacted.

3. Broader Western Australia experience

3.1 The evidence presented to the Committee indicates that conflict over the protection of Aboriginal and Torres Strait Islander peoples' heritage and the loss of Aboriginal and Torres Strait Islander peoples' heritage is not isolated to Juukan Gorge.

3.2 Australia's mining boom has largely taken place in Western Australia but the failure of its cultural heritage laws has resulted in widespread destruction of tangible and intangible cultural heritage assets with Aboriginal and Torres Strait Islander people being left without assistance in dealing with developers.

3.3 The Hon Robin Chapple MLC, a long-standing advocate of Aboriginal and Torres Strait Islander peoples in Western Australia, observed that:

> The issues around destruction of Aboriginal, archaeological and cultural heritage have been ongoing for many years with consultants being threatened, having their reports modified by mining corporations, and being dismissed for refusing to amend reports in favour of the proponent's desires.[1]

3.4 This Chapter tells the experiences of Aboriginal and Torres Strait Islander peoples dealing with the resources industry and how some in the industry approach agreement-making in Western Australia. It also highlights some of the state arrangements, including specific legislation and national park agreements that both harm and protect heritage sites.

3.5 Ms Sara Slattery of the Robe River Kuruma (RRK) Aboriginal Corporation stated:

---

1 Hon Robin Chapple MLC, *Submission 65*, p. 8

> RRK are not anti-mining. RRK are for self-determination. We are for protecting our beautiful RRK country for our children and grandchildren. And we are for an economic and culturally secure future for Australia and our RRK people that means they reach their full potential.[2]

Aboriginal and Torres Strait Islander peoples' experiences

3.6 The Kimberley Land Council (KLC) submitted that:

> Sadly, damage to and destruction of cultural heritage occurs far too frequently in the Kimberley region and opportunities to stop such destruction are limited, expensive, onerous on native title parties, and are available in the context of legislative schemes that presume mining and exploration, and other economic activities, should always be prioritised over cultural heritage.[3]

3.7 This claim is evidenced by the following Aboriginal and Torres Strait Islander peoples' experiences which demonstrate failures in the governing legislation and the power disparity between Aboriginal and Torres Strait Islander groups and large mining companies. It should be noted that these experiences are just a few of the many destructive events that have occurred throughout Western Australia, causing irreparable harm to cultural heritage sites.

Banjima people

3.8 The Banjima Native Title Aboriginal Corporation (BNTAC), representing the Banjima people of the Pilbara, stated:

> Banjima People have a long and sometimes difficult relationship with mining companies on our lands, and the cumulative destruction of our country is something which sits uneasily with our people.[4]

3.9 Banjima country is a clear example of the sheer number of developments that Aboriginal and Torres Strait Islander peoples have to manage. Developments on Banjima country have included:

- Rio Tinto Hope Downs
- Rio Tinto Yandi

---

2 Ms Sara Slattery, *Submission 139*, p. 1

3 Kimberley Land Council (KLC), *Submission 101*, p. 5.

4 Banjima Native Title Aboriginal Corporation (BNTAC) RNTBC, *Submission 89*, p. 1.

- BHP Yandi
- BHP Area C
- BHP South Flank
- Rio Tinto Koodaideri development
- Hancock Mulga Downs development
- Numerous smaller mines and developments
- Hundreds of active exploration tenements
- Hundreds of kilometres of rail line.[5]

3.10 During the inquiry the Committee travelled to the Pilbara and met with both the Banjima and BHP at the South Flank Mine. In the time spent with the group the Committee witnessed a reasonably constructive relationship between both groups. It was apparent that BHP was aware of the importance of cultural heritage and that the company respected the Banjima's heritage and interests.

3.11 But despite laudable efforts by BHP to improve its relationship with the Banjima, there were still apparent problems. For example, in the centre of a mine pit was an untouched ravine with a significant rock shelter used by the Banjima. The Banjima expressed concerns that the ravine would end up an island in the centre of the pit, and the fact that there had been little investigation relating to the site itself.

3.12 There were also concerns that at certain sites, pits had been excavated to allow for archaeological assessments in consultation with the Banjima. However, the Banjima took issue with the fact that they had not been filled in for over a year, an affront to Banjima culture as the sites looked like graves.

3.13 Other issues related to the storage of artefacts. The Committee and the Banjima were shown BHP's keeping places for artefacts. A repository room for artefacts also had random equipment and a shipping container was filled with boxes of artefacts. Understandably the Banjima were upset about the storage of their artefacts.

3.14 Discussions on these issues took place between the Banjima and BHP. It was apparent that BHP was listening to the Banjima's concerns and that they would seek to rectify these problems in collaboration with the Banjima.

3.15 In a joint decision with the Banjima, BHP has established a heritage council comprising elders from the Banjima and senior people from BHP. BHP

---

5 BNTAC, *Submission 89*, p. 1.

believes that this will provide extra certainty for the Banjima as BHP has agreed to not impact sites unless the council has agreed to decisions. The heritage council will ensure that BHP has people within the operations, general and mine managers to work directly with Elders on future mine plans.[6]

3.16 The Committee noted with concern that, in January 2021, a rock fall occurred at the South Flank project. BHP stated that the cause of the fall was unknown. BHP and Banjima Elders commenced a joint investigation into the fall. Banjima Native Title Aboriginal Corporation (BNTAC) chairperson and Banjima Elder Maitland Parker said:

> Our Heritage Council was convened to ensure open lines of communication between BHP and Banjima on heritage issues and other matters — something that is now happening. BNTAC and our Heritage Council, alongside BHP, will continue this investigation to ascertain the exact causes of the impact on the site.[7]

Guruma country

3.17 The Wintawari Guruma Aboriginal Corporation (WGAC), which oversees the native title lands of the Eastern Guruma People, noted that 'more than 93 per cent of Eastern Guruma country is covered by mining tenements, and it is one of the most heavily explored and minerally prospective locations in Australia'.[8] A recent review of the effects of mining within Eastern Guruma country found that:

- More than 20,000 drill holes have been drilled
- At least 434 heritage sites have been destroyed through mining activity
- A further 285 are in very close proximity to current mining operation areas.[9]

3.18 In addition, WGAC was aware 'of major expansion plans that will see more and more country irreparably destroyed, and with it sites of cultural importance and significance'.[10]

---

6 Mr David Bunting, Manager, Heritage, Minerals Australia, BHP, *Committee Hansard*, Canberra, 17 September 2020, p. 2.

7 'BHP to assess rock fall at Aboriginal heritage site', *Australian Mining*, 25 February 2021, www.australianmining.com.au/news/bhp-to-assess-rock-fall-at-aboriginal-heritage-site/, viewed 30 September 2021.

8 Wintawari Guruma Aboriginal Corporation (WGAC), *Submission 50*, p. 1

9 WGAC, *Submission 50*, p. 1.

3.19 Rio Tinto Iron Ore (RTIO) and Fortescue Metals Group (FMG) are the two main companies operating on Eastern Guruma country, with seven mines (six owned by RTIO) and three rail lines (RTIO), and new railways and mines under construction. WGAC noted that:

> Within two generations, Eastern Guruma people have seen their country change from a remote place teeming with wildlife, fresh water and unbroken sacred narratives that networked through the Pilbara, to a heavily industrialised mining hub, now dissected by railways, dry and devoid of animals.[11]

3.20 Located on Guruma country is Marandoo. Located 35 km northeast of Mount Tom Price, it is an important cultural area for the Eastern Guruma people for a range of cultural, spiritual, historical and familial reasons.[12] Marandoo is on the southern flanks and lowlands of Punurunha-Mount Bruce, the mountain from which Law stems and all songs are stored. Punurunha is one of a collection of several prominent hills and mountains that form a complex of sacred sites, with each hill an embodiment of different aspects of Law and spiritual practice. The Law that flows from Maradoo is sacred to the Guruma people, and neighbouring Aboriginal groups. It is considered to be the place where Creation was started, and where all of Creation is regenerated.[13]

3.21 Plans to mine Marandoo began in 1975 but it was not until 1992 that the Western Australian Government allowed the project to proceed. In that period there were efforts by industry to ensure the mine went ahead while the Eastern Guruma, Banyjima and Yinhawangka people formed the Karijini Aboriginal Corporation (KAC) to fight the mine.[14] Ultimately the Minister for Aboriginal Affairs ruled in favour of the mine going ahead.

3.22 As detailed in Chapter 4, in 1992 the WA Parliament passed the Aboriginal Heritage (Marandoo) Bill 1922 to safeguard the Marandoo project and to prevent future legal challenges, as well as enshrining the existing section 18 consent over the area in law in order to enable the mine to continue.[15] An

---

10 WGAC, *Submission 50*, p. 1

11 WGAC, *Submission 50*, p. 1.

12 WGAC, *Submission 50.5*, p. 3.

13 WGAC, *Submission 50.5*, p. 3.

14 WGAC, *Submission 50.5*, p. 7.

15 WGAC, *Submission 50.5*, p. 10.

effect of the Act was to remove areas of the Marandoo section 18 consents from the operation of the AHA (WA). This meant that Hamersley Iron Pty Ltd (later Rio Tinto Iron Ore) was not required to uphold the requirements of the AHA.

3.23 It should be noted that currently Rio Tinto is actively working towards the repeal of the Marandoo Act through discussions with the State Government and the Eastern Guruma.[16] The Committee has outlined in greater detail below its concerns with the Marandoo Act and other state and territory legislation exempting certain areas from general heritage protections. The Committee urges Rio Tinto and the WA Government to progress work to repeal the Act as a matter of urgency.

3.24 There were four conditions that Rio Tinto was required to comply with as part of the Marandoo section 18 consent. The company was required to avoid the Rock Art Complex in the area and maintain the integrity of the Thoongari Burial Complex, a place of deep significance to the Eastern Guruma.[17] Rio Tinto was also required not to damage Punurunha-Mount Bruce, but this condition did not contribute a useful protective mechanism as there has been no section 18 application over the area.[18]

3.25 The fourth condition provides for the salvage of sites. Hamersley Iron was required to engage an accredited[19] archaeology firm to undertake a salvage and management program of the area. The programme had to be implemented with the participation of KAC and relevant government agencies.[20] However, KAC was not afforded much of a role in this process.

3.26 Kinhill was contracted by Hamersley Iron to undertake this task immediately after the Marandoo Act was passed. Kinhill engaged archaeologists to conduct the work, a team from Western Australia and a team from the Northern Territory University (NTU). It is understood that at least 28 sites were salvaged as part of the program, including samples from

16 Ms Kellie Parker, Chief Executive, Australia, Rio Tinto, *Committee Hansard,* Canberra, 27 August 2021, p. 3.

17 WGAC, *Submission 50.5*, p. 11-12.

18 WGAC, *Submission 50.5*, p. 12.

19 By the Australian Archaeological Association.

20 WGAC, *Submission 50.5*, p. 12.

the Manganese Gorge which contained material dating back 18,000 years. The materials were taken to NTU for further analysis.[21]

3.27 The analysis was undertaken by highly qualified archaeologists who separated the material into three categories: material to be returned to Hamersley Iron; material to be taken to ANU which was later returned to Hamersley Iron; and material to be disposed of. Rio Tinto's current review of the process was not able to confirm if the process was consistently applied, due to a lack of records, as heritage had not been considered important enough to keep records on. As a result Rio Tinto has not been able to determine the potential archaeological value of the materials.[22]

3.28 A 1996 letter from NTU to Kinhill delivered the shocking news that the cultural material excavated from the 18,000 year old rock shelter had accidently been taken to the Darwin tip. There is no record of what was discarded.[23]

3.29 In 1997 NTU prepared a brief report for Rio Tinto that detailed the university's failures in keeping the Marandoo cultural materials. Cultural materials had been poorly stored, mislabelled and allowed to sit for a prolonged period in a rusted-out sea container and, more importantly, other cultural material had been discarded.[24]

3.30 The Committee received conflicting evidence about Rio Tinto's handling of the cultural materials in 1997. WGAC submitted that there was evidence that Rio Tinto had expressly approved the disposal of some materials held by NTU.[25] On the other hand, Rio Tinto told the Committee that it had 'not identified any evidence that Rio Tinto directed any disposal of artefacts.'[26] Rio Tinto's position was subsequently criticised by WGAC, who submitted that the company's evidence to the Committee was 'extremely disappointing' and 'sought to downplay the importance of the cultural

21 WGAC, *Submission 50.5*, p. 13.

22 Mr Brad Welsh, Chief Advisor, Indigenous Affairs, Rio Tinto, *Committee Hansard*, Canberra, 27 August 2021, p. 4.

23 WGAC, *Submission 50.5*, p. 14.

24 WGAC, *Submission 50.5*, p. 14.

25 WGAC, *Submission 50.6*, p. 2.

26 Mr Welsh, *Committee Hansard*, Canberra, 27 August 2021, p. 5.

material disposed and lessen Rio's involvement and responsibility for what occurred.[27]

3.31 The Committee was not successful in its efforts to obtain further information or explanation about the events from NTU (now Charles Darwin University).

3.32 The Eastern Guruma believe that the dumping of material affected at least 20 of the 28 sites salvaged. For some of these sites the material was the only remaining proof of the sites existence, due to no reports, data or photographs being produced as part of the salvage program.[28]

3.33 The Eastern Guruma were not made aware of this loss at the time and only became aware this year (2021). What happened to Marandoo was devastating for the Eastern Guruma people, the losses of cultural sites on an unprecedented scale and their treatment at the time made them feel powerless against the Aboriginal heritage approvals system. Their discovery this year that their cultural materials had been lost was deeply distressing. They were angry that this information had been kept from them. To this day, the Eastern Guruma do not have proper access to Marandoo sacred sites.

3.34 The Committee urges Rio Tinto to work with the Eastern Guruma in relation to their ongoing concerns about the destruction of the material excavated at the Marandoo sites. At a minimum, the Eastern Guruma must have appropriate access to these sites.

Yinhawangka country

3.35 Yinhawangka country stretches from the Beasly River to the Great Northern Highway and the Karijini National Park to the Ashburton River. Twenty-five percent of their land is covered by mining leases, which is considered underrepresented in the National Reserve System.[29] The Yinhawangka have numerous heritage agreements and negotiate multiple new agreements each year. They are resourced jointly by Rio Tinto and BHP, through a legal trust, to support this agreement-making process.

3.36 One of the most important archaeological sites to the Yinhawangka is Yirra. Yirra is the largest of a series of rockshelters situated along the rock face at Rio Tinto's Channar Mine. A section 18 consent has been in operation since

---

27 WGAC, *Submission 50.6*, p. 1.

28 WGAC, *Submission 50.5*, p. 14.

29 Yinhawanka Aboriginal Corporation, *Submission 38*, p. 1.

2000. Since this time, testing has revealed significant amounts of cultural material and there is strong evidence of occupation dating back 23,000 years.[30] The Yirra site itself is not accessible to traditional owners and is not protected in a culturally appropriate manner.

3.37 Future work is planned near the site and the Yinhawangka have not been informed how this will happen in a way that will keep the Yirra site safe. This is extremely concerning to the Yinhawangka people.[31]

3.38 The Yinhawangka Aboriginal Corporation submitted that Rio Tinto is currently planning the Western Range expansion project in the last remaining area of the Hammersley Ranges subregion. Of the 327 sites in the area, 124 are at risk from the project. Currently, 26 of the sites have had section 18 approval with the rest scheduled.[32] The only thing protecting the sites is the goodwill of Rio Tinto.

3.39 The Yinhawangka have a participation agreement with Rio Tinto. The document is 300 pages long with accompanying schedules, deeds and summarised forms. The CEO of Yinhawangka Aboriginal Corporation, Mr Grant Bussell told the Committee that the agreement does not explicitly say '"'In return for getting these payments from the mining of your land, you don't have any rights in protecting your country'"', but he inferred that the document did create pressures to comply with Rio Tinto's wishes.[33]

Murujuga Aboriginal Corporation

3.40 The Murujuga Aboriginal Corporation (MAC) consists of traditional owner and custodian groups, the Ngarluma, the Mardudhunera, the Yaburara, the Yindjibarndi, and the Wong-Goo-Tt-Oo. Murujuga is the language name for the entirety of the area, encompassing the Burrup Peninsula and the off-shore islands of the Dampier Archipelago.[34]

3.41 MAC was established in 2006 to administer the Burrup and Maitland Industrial Estates in collaboration with the Department of Biodiversity,

30 Yinhawangka Aboriginal Corporation, *Submission 38*, p. 2.

31 Dr Anna Fagan, Implementation Officer and Archaeologist/Anthropologist, Yinhawangka Aboriginal Corporation, *Committee Hansard*, Canberra, 21 September 2020, p. 18.

32 Dr Fagan, Yinhawangka Aboriginal Corporation, *Committee Hansard*, Canberra, 21 September 2020, p. 23.

33 Mr Grant Bussell, Chief Executive Officer, Yinhwangka Aboriginal Corporation, *Committee Hansard*, Canberra, 21 September 2020, p. 19.

34 Murujuga Aboriginal Corporation (MAC), *Submission 87*, p. 2.

Conservation and Attractions (WA) under an agreement that secured the development of the Burrup and Maitland strategic industrial areas in exchange for freehold title of Murujuga.[35] Mr Peter Jeffries, Chief Executive Officer of MAC, explained that:

> A condition of the agreement was the withdrawal of native title claims over the Burrup and that freehold title was to be transferred back to the state government and managed as a national park. Murujuga Aboriginal Corporation is in a unique position where the land and the culture are managed without any legal native title rights or interest but where the traditional custodians have legislated, administrative and traditional responsibilities for its protection.[36]

3.42 MAC is not a Prescribed Body Corporate (PBC) for the purposes of the Native Title Act, and it does not receive any mining royalties. Instead MAC holds the freehold title to the Murujuga National Park[37] which is co-managed with the Department of Biodiversity, Conservation and Attractions.[38]

3.43 In MAC's experience the AHA (WA) has not prevented the destruction or removal of sites and cultural objects For example, during the construction of Woodside's North West Shelf facilities during the 1980s, 1828 pieces of rock art were removed from their cultural context and stored in a fenced compound for 30 years.[39] These pieces were finally returned in 2014.

3.44 The MAC expressed fears that there might be financial repercussions following their statements in the hearing with the Committee. This is an important example of the unacceptable power imbalance between Aboriginal groups and proponents.[40]

Yindjibarndi country

3.45 The Yindjibarndi Aboriginal Corporation (YAC) representing the Yindjibarndi people have experienced serious issues with Fortescue Metals Group's (FMG) Solomon Hub project which has proceeded without proper

35 Mr Peter Jeffries, Chief Executive Officer, MAC, *Committee Hansard,* Canberra, 2 November 2020, p. 9.

36 Mr Jeffries, MAC, *Committee Hansard,* Canberra, 2 November 2020, p. 9.

37 The sacred ancient petroglyphs of the Murujuga National park are more than 40,000 years old.

38 MAC, *Submission 87*, p. 2.

39 MAC, *Submission 87*, p. 14.

40 Mr Jeffries, MAC, *Committee Hansard,* Canberra, 2 November 2020, p. 9.

consent since 2008.[41] Two important rock shelters have been destroyed in this time, one dating over 50,000 years and the second in the 46,000-48,000 range.[42]

3.46 In 2008 FMG sought to obtain mining leases for the Solomon Hub Project, resulting in negotiations with the Yindjibarndi. FMG insisted on terms that aligned with other agreements made in the Pilbara. These agreements would have allowed FMG broad control, including allowing joint ventures with other mining companies without consultation with the Yindjibarndi. Their agreement terms were refused by YAC.[43]

3.47 In response, YAC claims that FMG engaged an anthropologist who encouraged a group of dissenting Yindjibarndi to establish Wirlu-Murra Yindjibarndi Aboriginal Corporation as a rival corporation to the YAC which FMG then engaged with. YAC considers that the dissenting Yindjibarndi were not adequately knowledgeable about the *Native Title Act 1993* and associated processes, resulting in their agreement to every application FMG has made for ministerial consent to destroy sites.[44]

3.48 FMG stated that it 'categorically rejects the allegation that Fortescue encouraged or orchestrated the creation of the WMYAC' and cited a National Native Title Tribunal finding in support of this contention.[45] The Federal Court nevertheless found that FMG had played a 'significant role' in promoting a meeting of WMYAC members that would have defeated the Yindjibarndi claim for exclusive native title over their lands and 'orchestrated the convening of the meeting and the voting procedure to a considerable degree'.[46]

3.49 Research conducted by YAC based on reported financials on the ORIC website suggests that Wirlu-Murra have received $120.6 million from FMG since its establishment.[47]

---

41 Mr George Irving, Principal Legal Officer and In-House Counsel, Yindjibarndi Aboriginal Corporation (YAC), *Committee Hansard*, Canberra, 13 October 2020, p. 27.

42 Mr Irving, YAC, *Committee Hansard*, Canberra, 13 October 2020, p. 27

43 Mr Irving, *Committee Hansard*, Canberra, 13 October 2020, p. 28.

44 Mr Irving, YAC, *Committee Hansard*, Canberra, 13 October 2020, p. 28.

45 FMG, *Submission 85.1*, p.12.

46 TJ (on behalf of the Yindjibarndi People) v State of Western Australia [2015] FCA 818 (21 July 2015), para 115.

47 Mr Michael Woodley, Chief Executive Officer, YAC, *Committee Hansard*, Canberra, 13 October 2020, p. 34.

3.50 YAC has attempted to object to the existence of Wirlu-Murra to the Aboriginal Cultural Material Committee (the ACMC), but there has never been a response to their objections.[48]

3.51 Restrictions from visiting their own country and no communication from FMG mean that it is unclear to the YAC what has been destroyed on their land.[49]

3.52 Yindjibarndi spent 26 years trying to achieve Native Title over their lands. In 2017 a Native Title determination was finally made for the Yindjibarndi. But the determination was contested by FMG, and it took until 2020 for FMG's appeal to be dismissed.[50] Despite now being the Native Title holders, the YAC has seen no change from FMG's behaviour. FMG has not communicated with it and there has been no effort to negotiate an Indigenous Land Use Agreement (ILUA).[51]

Burden of administration of legislative protections

3.53 As was the case with Juukan Gorge, and discussed throughout the report, many Aboriginal and Torres Strait Islander peoples have identified the lack of protection provided by the *Aboriginal Cultural Heritage Act 1972* (WA) (the AHA)[52] as a critical issue in the destruction of Aboriginal and Torres Strait Islander peoples' cultural heritage. Dealing with the administrative processes involved in protecting cultural sites can be an onerous burden.

3.54 BNTAC highlighted the disconnect between the decision making body, the Aboriginal Cultural Material Committee, and the people affected by its decisions:

> There is currently no role for Traditional Owners in the assessment and approval of any section 18 application. The Aboriginal Cultural Materials Committee (ACMC), which meets to consider applications under the Act and provide non-binding advice to the Minister. The ACMC has no cultural authority or connection with the Banjima People and is not considered representative of the Banjima People.[53]

---

48 Mr Irving, YAC, *Committee Hansard*, Canberra, 13 October 2020, p. 33.

49 Mr Irving, YAC, *Committee Hansard*, Canberra, 13 October 2020, p. 32.

50 Mr Irving, YAC, *Committee Hansard*, Canberra, 13 October 2020, p. 29.

51 Mr Irving, YAC, *Committee Hansard*, Canberra, 13 October 2020, p. 34.

52 The AHA is discussed in detail in Chapter 4.

53 BNTAC, *Submission 89*, p. 4.

3.55 WGAC noted that since 2017 it had 'responded to 15 statutory applications for mining purposes made pursuant to the AHA (WA) by RTIO and FMG, all located within Eastern Guruma country':

> Of the 123 sites affected by the approvals sought for mine expansion, 12 sites were identified by Eastern Guruma people to be of great cultural importance, being sites where customary law originated, birthing places, rockshelters dating back to earlier than 40,000 years ago, ceremonial sites, sites for storing sacred objects and rock art sites.[54]

3.56 WGAC observed that where cultural sites will be adversely affected by proposed land use, WGAC made 'full use of the processes available through the AH Act, which involves writing submissions'. It also engaged the Minister and his office, 'the Minister being the primary point of decision-making', and corresponded 'articulating the views and concerns of Eastern Guruma Elders and Traditional Owners'. WGAC noted that it regularly invited the Minister 'to meet to discuss various cultural heritage preservation. The Minister is yet to take up the offer to meet with WGAC. Mining companies seemingly meet with the Minister at will.'[55]

3.57 The consequence of this, WGAC stated, was that:

> …any outcome that sees the preservation of culturally important sites is the result of WGAC's own initiative and perseverance, through negotiating directly with the mining company, making use of any tool available (including media) and without any support, involvement, intervention or dialogue with the Minister, the ACMC or the DPLH.[56]

3.58 WGAC has focused its efforts on building its capacity through dedicating time of the Board and its Directors, engaging full time staff, commissioning legal advice and building data management systems. However, WGAC notes that:

> Influencing and informing mining company decision and mine planning is a labour-intensive, full time pursuit that requires determination, dedication and constant vigilance. For WGAC, it requires a team of people with different skillsets and expertise, a unified and highly functional board and a consistent drive to keep mining companies accountable.[57]

---

54 WGAC, *Submission 50*, p. 3.

55 WGAC, *Submission 50*, p. 3.

56 WGAC, *Submission 50*, p. 3.

57 WGAC, *Submission 50*, p. 3

3.59 WGAC submitted that the greater power of the mining companies, and the conflict inherent in the administration of the AHA directly resulted in the loss of cultural heritage sites:

> FMG has secured many section 18 approvals from the Minister of Aboriginal Affairs to use land within the Eastern Guruma native title determination area, and to permanently modify the land and destroy significant Aboriginal sites.
>
> It is Wintawari's [WGAC] experience that FMG chooses each time it applies for section 18 consent to precipitate a contest between Wintawari and FMG about destroying Eastern Guruma sites and relies on the government being the arbiter and decision-maker under section 18. It is Wintawari's view that FMG use to their advantage the fact that successive Aboriginal Affairs Ministers in WA have not declined a section 18 notice on mining tenure for over ten years.[58]

Registration of cultural sites

3.60 There were mixed views from submitters about the effectiveness of the Registrar for Aboriginal sites, established under the AHA (WA). Accusations were put to the Committee that bureaucrats arbitrarily amended the Register to make way for mining applications. It should be noted that there were some misconceptions that a site had to be registered to be protected, however sites are in fact protected regardless of whether they are registered or not. Nonetheless, this misconception fuelled a number of fears for traditional owners.

3.61 The Yindjibarndi were dissatisfied with the fact that over 3,000 sites from the Pilbara were removed from the Register, including 172 that belonged to the Yindjibarndi. They have never received an explanation for the removal but, given the sites were in the Pilbara, they suspect that the removal was due to mining.[59]

3.62 Robe River Kuruma have experienced a number of issues with the registration of sites, in particular that the process is long and drawn out. They also note the fact that the process is quicker when lodged under the process of a section 18 application, and a site is ultimately to be damaged or destroyed.[60]

---

58 WGAC, *Supplementary Submission 50.2*, p. 1

59 Mr George Irving, YAC, *Committee Hansard,* Canberra, 13 October 2020, p. 31.

60 Ms Slattery, Traditional Owner and Chief Executive Officer, Robe River Kuruma Aboriginal Corporation, *Committee Hansard*, Canberra, 2 November 2020, p. 19.

3.63 Some Aboriginal groups submitted that there was reluctance to register their sites due to concerns that it only led to destruction of the sites. There was concern that registering previously unknown sites would allow outsiders to pursue their destruction.

3.64 Clearly the current Register process has flaws. Registration of heritage sites should not be a drawn out process and should be a matter for traditional owners to identify sites they wish to be registered and to inform the relevant department. Registered sites should also not be removed without good explanations to affected Aboriginal and Torres Strait Islander groups.

3.65 The new Aboriginal Heritage Act Bill proposes to replace the register with a new process that will allow traditional owners to identify sites of significance, with the intention that other groups, including landholders, will not be able to dispute this fact.[61]

Agreement making

3.66 Agreement making between Aboriginal peoples and resources companies is a central part of mining development in Western Australia. Key criticisms of the Agreement between the PKKP and Rio Tinto was its complexity as well as gag clauses that prevented the PKKP from discussing the terms of the agreements and from seeking heritage protection, without first advising Rio Tinto. Other traditional owners reported similar gag clauses that only served to protect the interests of the resources company.[62]

3.67 Agreements with traditional owners are a standard part of resources development in Western Australia. The Chamber of Minerals and Energy observed that:

> Resource projects undergo a wide variety of extensive and complex approvals processes in order to gain the requisite permits, permissions and approvals to undertake exploration, construction and operations in Western Australia. Stable, life-of-mine access to land is fundamental to the long-term success of operations. Agreement making with Traditional Owners is a critical component of project development, with complex negotiations often extending for years prior to signing of an agreement.[63]

---

61 Hon Benjamin Wyatt MLA, Minister for Aboriginal Affairs, Western Australian Parliament, *Committee Hansard*, Canberra, 13 October 2020, p. 38

62 WGAC, *Submission 50*, p. 4.

63 Chamber of Minerals and Energy (CME), *Submission 83*, p. 5.

3.68 The Chamber of Minerals and Energy (CME) further noted that:

> Land tenure for mining is tightly linked to Native Title and project tenure is generally not granted for mining purposes until Native Title negotiations conclude, and heritage protocols are in place. In practice, this means that Traditional Owners are involved in major mining projects from their inception.[64]

3.69 Critically, the CME highlighted the importance of certainty of tenure to mining investment, stating:

> The grant of tenure for the purpose of a mining lease does not give the proponent freehold rights to the land. Mining tenure is a finite right with a limited timeframe: all time is critical. Long-term certainty of tenure is also crucial for sovereign risk and investment purposes.[65]

3.70 The central importance of agreement making to set a base for land use was highlighted in the evidence received by the Committee from the resources sector.

3.71 Roy Hill highlighted the importance of native title agreements to its operations, stating that:

> Roy Hill considers its relationships with native title groups an integral part of the Roy Hill community, with the foundation of these positive relationships anchored in native title agreements with the Kariyarra, Nyiyaparli and Palyku people… [our approach] is to engage in understanding the broader cultural landscape as well as support activities of recording and preserving Aboriginal knowledge and culture for future generations'[66]

3.72 Critical to Roy Hill's approach was that:

> …under those agreements the Nyiyaparli and Kariyarra people retain the right to object to heritage issues. To be clear, the agreements do not require the Nyiyaparli or Kariyarra people to waive their right to object to heritage issues.[67]

3.73 The Fortescue Metals Group (FMG) advised the Committee that it had:

---

64 CME, *Submission 83*, p. 5.

65 CME, *Submission 83*, p. 5.

66 Roy Hill, *Submission 72*, p. 2.

67 Mr Barry Fitzgerald, CEO, Roy Hill Holding Pty Ltd, *Committee Hansard*, Canberra, 13 October 2020, p. 22.

> …built excellent relationships with Aboriginal People across the Pilbara region of Western Australia built on deep engagement, mutual respect and the agreement-making process of seven comprehensive Native Title Agreements.

3.74 The agreements facilitated:

> …identification and protection of significant Aboriginal cultural heritage through Aboriginal Cultural heritage surveys. FMG and native title holders had 'surveyed 2.5 million km2 of land and identified and protected over 5900 cultural heritage places'.[68]

3.75 FMG argued that it was only due to their presence that heritage sites were mapped and protected. FMG observed that 'many of these places were estranged to the contemporary [native title claimants] until they were rediscovered during the Aboriginal Heritage Survey process funded by Fortescue'.[69] In addition:

> Fortescue has extensive mechanisms in place that identify, promote and protect Aboriginal cultural heritage across our operations. These mechanisms, combined with the close on-the-ground relationships between Fortescue team members and local Traditional Knowledge Holders provide a number of fail-safes to ensure the protection of, and mitigate the risk of ill-considered damage to, important Aboriginal cultural heritage.[70]

3.76 FMG argued that it worked to ensure that native title parties had appropriate legal representation and understood agreements:

> We work very closely to make sure that there is appropriate legal representation and that these agreements are known and understood, and, importantly, we have processes in place to establish working groups and to establish heritage subcommittees. So, there are a range of programs and processes. As I said, we seek to ensure that the native title party is fully informed of the agreement.[71]

3.77 FMG also stated that they did not have 'gag orders' in agreements:

> The distinction between our agreements and other agreements is that there is no requirement to consent. Under our land access agreements, our native title

---

68 Fortescue (FMG), *Submission 85*, p. 3

69 FMG, *Submission 85*, p. 6

70 FMG, *Submission 85*, p. 3.

71 Ms Elizabeth Gaines, Chief Executive Officer, FMG, *Committee Hansard*, Canberra, 17 November 2020, p. 13.

> partners are actually free to consent and oppose. They're also able to speak publicly about their views.[72]

3.78 In broad terms, FMG stated that its agreements include:

- Governance structures established to regularise ongoing and continuous communication between Fortescue and the Native Title party about all matters that are included in agreements.
- Processes and procedures for the consultation and disclosure obligations related to the submission of section 18 applications. Fortescue's Land Access Agreement's do not hinder nor restrain the Native Title parties from opposing section 18 consents or from seeking relief under federal law or making public comments.
- Environmental management and protection processes, and the ability for Native Title parties to make representation to environmental authorities on any of Fortescue's approval applications.
- Agreement to compensate the Native Title party for the effect that the grant and use of mining tenure will have on the Native Title party's ability to use and enjoy their Native Title rights and interests.
- Native title party consent to the future grant of Fortescue mining tenure and to execution of State Deeds when required.[73]

3.79 FMG emphasised that a key element of their agreements was economic opportunities for traditional owners. The native title agreements provided 'a range of benefits including vocational training and job opportunities with Fortescue, commercial contracting arrangements and compensation in return for the temporary suppression of Native Title rights during mining'.[74] FMG noted that:

> Fundamental to the provision of meaningful employment is the ongoing development of our Aboriginal workforce through sustainable career opportunities. Since 2006, over 900 Aboriginal people have been offered full-time employment through our pioneering Vocational Training and Employment Centre program. Currently, almost 50 per cent of our apprentices are Aboriginal. Since the inception of our Billion Opportunities Aboriginal procurement program in 2011, Fortescue has awarded contracts and sub-

72 Ms Gaines, FMG, *Committee Hansard*, Canberra, 17 November 2020, p. 13.

73 FMG, *Submission 85.1*, pp. 3-4.

74 FMG, *Submission 85*, p. 5

contracts worth over A$2.5 billion to over 120 Aboriginal businesses and joint venture partners.[75]

3.80 Woodside, alongside a number of other resource companies, submitted that it had reviewed its processes in response to the Juukan Gorge incident, and acknowledged its previous failings:

> The Juukan Gorge incident prompted Woodside to review the risks associated with our current and future activities, to ensure that our management is thorough, transparent and underpinned by close engagement with Indigenous stakeholders and communities.
>
> Woodside acknowledges that our approach to managing and protecting cultural heritage has improved over time. Cultural heritage impacts were managed differently in the 1980s, and those practices did not meet the standards that we now set ourselves and that the community expects today.[76]

3.81 Woodside reiterated the benefit of the resources industry presence in Western Australia:

> Indigenous communities including Traditional Custodians continue to benefit from our operations. We believe that our host communities value our presence and our contributions through financial benefit agreements, social investments, direct and indirect employment and Indigenous contracting opportunities. Woodside is clear that support for our operations and developments from our host Aboriginal communities is contingent upon caring for Country, improving economic and social outcomes and supporting the transmission of cultural knowledge from old people to young people.[77]

3.82 BHP, when asked by the Committee if it supported traditional owners having a right to veto activities, stated that:

> BHP recognises that agreements entered with traditional owners on the protection and management of cultural heritage must be sought with the free, prior and informed consent (FPIC) of those traditional owners. Consistent with this approach to FPIC, BHP looks to reach agreement with traditional owners in relation to the conduct of BHP's business on the relevant lands, including in respect of the areas where BHP can and cannot undertake its business.[78]

---

75 FMG, *Submission 85*, p. 5

76 Woodside, *Submission 79*, p. 1.

77 Woodside, *Submission 79*, p. 2.

78 BHP, *Submission 86.1*, p. 1.

3.83 The Committee acknowledges that while some companies have committed to review and modify their agreements with traditional owners in light of the Juukan disaster, there is very limited public information about whether that has occurred and what changes have been made.

Aboriginal and Torres Strait Islander peoples' perspectives

3.84 The agreement process looked a little less positive from Aboriginal and Torres Strait Islander peoples. BNTAC noted that:

> Many (if not all) Pilbara Traditional Owner groups are signatories to 'Claim Wide Agreements' which dictate the manner in which the Aboriginal Heritage Act 1972 (WA) is to be applied and administered by the relevant mining company within the subject agreement area(s).[79]
>
> …
>
> Claim Wide Agreements place traditional owners in a position of being expected to trade away their heritage for mining interests. In this regard, the contribution that Aboriginal people make to support the prosperity of this nation is significant, and largely goes unrecognised.[80]

3.85 The Kimberly Land Council (KLC) agreed:

> The KLC recognises that there are good agreements between native title holders and proponents that are negotiated in a spirit of mutual respect and understanding, and there are proponents who are genuinely committed to ensuring their activities are only done with the free, prior and informed consent of native title holders including in relation to heritage. However, the KLC submits that these agreements are made despite and not because of the NTA future act provisions, in particular the operation of the right to negotiate.[81]

3.86 KLC further stated:

> The extremely high likelihood that proponents will obtain the necessary approvals even if they don't reach agreement with and obtain the consent of native title parties means that the playing field for agreement-making is never level and native title parties participate in the future act process knowing that if they don't reach agreement with a proponent there is an almost 100% chance

[79] BNTAC, *Submission 89*, p. 5.

[80] BNTAC, *Submission 89*, p. 4.

[81] KLC, *Submission 101*, p. 5

the proponent will have its interest granted if it makes a future act determination application.[82]

3.87 Ms Sara Slattery submitted that resource industry agreements are only one component of land use, and that there are multiple other land users that are not required to seek agreement with the traditional owners prior to using traditional lands:

> We have many other companies mining and exploring in our country too. Nearly all our country is covered by mining leases or exploration licences or if it is not, it is affected by pastoral leases.
>
> We have an ILUA [Indigenous Land Use Agreements] with Rio Tinto. And we have agreements with other mining companies too. Some are better than others and all have their ups and downs. Our agreements are only as good as the good faith and the effort that both parties put into the relationship – this must incorporate fair processes and honest communication.
>
> We hold exclusive native title to some areas, and non-exclusive native title to the rest of our determinations. However, we have no national parks, Aboriginal reserves or land tenure holding where we can make decisions and exercise true self-determination.
>
> Our land access, our traditional rights and our cultural sites are all at risk from mining, pastoralism and decisions of the State. And we do not yet have an agreement with the State about our country or any legislation that allows us to take our rightful place at the centre of decision making. Indigenous people need to be treated as partners in the management of our country, to better protect our heritage, assert our cultural obligations and rights, and to ensure development is culturally appropriate.[83]

3.88 The WGAC told the Committee that FMG had been:

> …withholding our royalty payments, an amount of $1.9 million, since February 2020 because we have simply asked for information about their plans for some mining leases they have applied for. These mining lease areas contain numerous sacred sites. We have asked FMG to reconsider their position, and they have advised us they will not; they will only pay the royalties when we sign off on the mining leases. We know that if FMG is

---

82 KLC, *Submission 101*, pp. 4- 5

83 Ms Slattery, Submission 139, p. 2.

> granted their mining leases then we'll have no power to stop them destroying our sites and causing damage to the places we care about.[84]

Committee comment

3.89 The events at Juukan Gorge were not one-off. Rather, as evidenced by the Aboriginal and Torres Strait Islander experiences outlined in this Chapter−which only highlighted a few−the destruction of cultural heritage sites is an alarmingly common occurrence.

3.90 The power held by the mining industry over negotiations and agreement making is concerning, particularly claims about companies funding the establishment of rival groups to seek compliance with development requests. Failure to identify and require engagement with organisations that have cultural and statutory authority, such as PBCs, leaves groups vulnerable to exploitation.

3.91 The Committee is heartened to see that in the reckoning over the events at Juukan Gorge, some companies in the resource industry are reflecting on their previous relationships with traditional owners and trying new models of engagement that are more culturally appropriate. Nevertheless, while commitments have been made to review and modify agreements, there is little transparency about how this is being done.

3.92 The Committee is dismayed to hear reports that some companies continue to endanger critical heritage sites. It calls upon those in the industry who are improving their processes, to hold their peers to account for these inappropriate actions. The mining industry peak bodies also have a role in driving change. The Committee feels too that it is incumbent on shareholders, particularly institutional investors, to hold publicly listed companies to account for their actions or inaction in regard to improving relationships with traditional owners. After the destruction of the Juukan caves it is clear that Aboriginal and Torres Strait Islander heritage is intertwined with Australia's heritage and that its destruction is the destruction of ancient Australian heritage.

---

84 Mr Dennis Hicks, Director and Eastern Guruma Elder, WGAC, *Committee Hansard*, Canberra, 13 October 2020, p. 13.

4. Western Australian legislation

4.1 Across Australia, the legislation governing Aboriginal and Torres Strait Islander cultural heritage sites has proved to be inadequate. As discussed further in Chapter 5, some jurisdictions inappropriately balance proponent landholder rights over Aboriginal and Torres Strait Islander voices. Others have legislative regimes that are opaque, making it difficult for both proponents and those seeking to protect cultural heritage sites to navigate.

4.2 The terms of reference for this inquiry sought an analysis of the operation of the *Aboriginal Heritage Act 1972* (WA) and the approvals provided under this Act. Since the commencement of the inquiry, the Western Australian Government released an exposure draft of a Bill to replace this Act.

4.3 This Chapter provides this analysis, including an analysis of the draft Bill. The Chapter is not intended to be a critique of the actions of this or former Western Australian governments. However, the history, the current Act and the draft Bill to replace it, highlight issues of concern that can be found in similar legislative regimes across the country.

The Aboriginal Heritage Act 1972

History of the Act

4.4 The *Aboriginal Heritage Act 1972* (WA) (the AHA) came into operation on 15 December 1972, but the Act had its genesis in the confluence of a number of developments from the early 1960s onwards.

4.5 The first was the activities of the 'anthropological discipline and the Western Australian Museum' (WAM) which embarked on the 'first attempt to

document the variety and Aboriginal sites in the state' during the 1960s.[1] This made WAM a leading player in the identification of sites, and by 1979 the registrar of the Aboriginal Sites Department in the Museum held 4000 entries. WAM and associated anthropologists became advisors to the state government on site protection and were 'seminal influences on the drafting of [the Act] as professional bodies active in the Aboriginal heritage management space'.[2] Indeed the WAM registry became the basis for the Register of Aboriginal Sites which was included as one of the mechanisms for the operation of the AHA.[3] In the original draft of the Act the Museum Trustees were given the authority to make decisions about providing permits to damage Aboriginal heritage under the contentious section 18 provisions which are discussed in detail later in this chapter.[4]

4.6 Secondly, growing official and public awareness about Aboriginal sites coincided with the mining boom which began in WA in the late 1960s and early 1970s, leading to rapid development and exploitation of the state's mineral resources. Inland areas of WA which had previously been largely untouched by non-Indigenous people, apart from pastoral use, became affected by large-scale developments that had an unprecedented impact on local Aboriginal and Torres Strait Islander peoples. Disputes over the development of land on which important Aboriginal sites were located were growing, and it became increasingly clear that formal mechanisms were required to protect Aboriginal heritage.[5]

4.7 Finally, a major factor pushing the decision to draft new legislation was the Weebo case, where a miner was given permission in 1969 to excavate at a site in Weebo in the Goldfields region of WA. The successive confrontations between the miner and the local Aboriginal peoples 'highlighted the fact that Western Australia had no way of protecting places that were significant to Aboriginal people'.[6]

---

1 Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Submission 57.1A*, p. 257.

2 AIATSIS, *Submission 57.1A*, p. 257.

3 AIATSIS, *Submission 57.1A*, p. 257.

4 *Aboriginal Heritage Act 1972* (AH Act), s. 18 [as enacted in 1972].

5 Western Australian Department of Planning, Lands and Heritage (DPLH), 'A Brief History of the Aboriginal Heritage Act 1972', p. 1, https://www.dplh.wa.gov.au/getmedia/54f16de4-b7d9-4f0c-8416-1e9ff2da617e/AH-History-of-the-AHA, viewed 11 August 2021.

6 AIATSIS, *Submission 57.1A*, p. 258.

4.8 The affair began to 'provoke discussions about the government's responsibility for protecting 'Western Australian heritage' in the face of the enormous mineral exploration of the 1960s, with criticism of the out-dated *Mining Act 1904* (WA)'.[7] Against this background, a new government elected in 1971 introduced the AHA into the WA Legislative Assembly in April 1972.

4.9 The stated purpose of the AHA was 'to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants'.[8]

Reviews of the Act

4.10 Since its introduction, the AHA has been the subject of five different reviews – in 1984, 1991, 1995, 1996 and 2011. But despite significant changes in the legal, social and environmental circumstances surrounding the preservation and protection of Aboriginal cultural heritage, few significant changes to the legislation have been made in almost 50 years of operation. Whilst each review identified the need for major legislative reform, most initiatives failed to garner parliamentary support and lapsed at the conclusion of parliamentary terms.[9]

4.11 In all five reviews, independent and government departmental reviewers made broadly similar recommendations for reform, including:

- greater protection of cultural heritage sites
- amendments to ministerial powers
- improvements to consultation with traditional owners, protection of sites, procedural fairness, conflict resolution, compensation, interaction with other state and federal legislation, and enforcement of the Act
- better identification of traditional owner groups and sites of significance.[10]

---

7 AIATSIS, *Submission 57.1A*, p. 258.

8 AH Act.

9 Western Australian Department of Planning, Lands and Heritage (DPLH), 'A Brief History of the Aboriginal Heritage Act 1972', p. 2, https://www.dplh.wa.gov.au/getmedia/54f16de4-b7d9-4f0c-8416-1e9ff2da617e/AH-History-of-the-AHA, viewed 11 August 2021.

10 Western Australian Department of Planning, Lands and Heritage (DPLH), 'A Brief History of the Aboriginal Heritage Act 1972', pp. 2-7, https://www.dplh.wa.gov.au/getmedia/54f16de4-b7d9-4f0c-8416-1e9ff2da617e/AH-History-of-the-AHA, viewed 11 August 2021.

4.12 Some proposed action was taken by the respective governments in response to these inquiries, including proposing new legislation to replace the AHA, but nothing was ever enacted.[11]

Amendments to the Act

4.13 The Act has been amended on four occasions – in 1980, 1995, 1999 and 2004.

4.14 The most significant amendments were those passed in 1980. Several key changes were made:

- The definition in section 5 of what constituted 'an Aboriginal site' was narrowed and made more onerous to meet. New requirements specified that the site should be of 'importance and significance', or a 'sacred, ritual or ceremonial site' or 'should be preserved because of its importance and significance to the cultural heritage of the State'.[12]
- The Minister became the primary decision-making authority for the use of land containing Aboriginal sites, including through amendments to section 18 which empowered the Minister to give consent that a landowner could use land contrary to prohibitions specified in section 17.[13] As mentioned above, the original provisions of section 18 had placed the decision-making authority in the hands of the WA Museum Trustees.[14]
- The Minister's authority to make decisions regarding the disruption and protection of Aboriginal sites was broadened to include the 'general interest of the community' (section 18).[15] Before this amendment, consideration needed only to be given to the 'importance and significance' of any sites to be affected.
- A right of appeal to the Supreme Court was introduced for landowners in respect of decisions made by the Minister under section 18.[16] Notably the right of appeal was not extended to other parties. An application to the Supreme Court under the terms of legislation other than the AHA

11 Western Australian Department of Planning, Lands and Heritage (DPLH), 'A Brief History of the Aboriginal Heritage Act 1972', pp. 2-7, https://www.dplh.wa.gov.au/getmedia/54f16de4-b7d9-4f0c-8416-1e9ff2da617e/AH-History-of-the-AHA, viewed 11 August 2021.

12 AH Act, s. 5.

13 AH Act, ss. 17 and 18.

14 AH Act, s. 18 [as enacted in 1972].

15 AH Act, s. 18.

16 AH Act, s. 18.

was, and remains, the only avenue through which Aboriginal peoples can appeal.

4.15 The 1980 amendments were made in the wake of a dispute at Nookanbah Station between the owners of the pastoral lease, the local Yungngora people, and the Amax company drilling for oil on a heritage site. The Yungngora people, represented by the Kimberley Land Council (KLC), had been opposing drilling since 1978 because of potential damage to the site. The Trustees acting under the AHA had examined the cultural information and did not give consent to the drilling. The WA Government directed the Trustees to consent to the exploratory activity.

4.16 The Government subsequently passed the amendments to Act in order to give the Minister direct authority to give consent orders under section 18, rather than acting on the advice of the Trustees.[17] Thus, in the view of Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), the amendments were a response to the 'politically charged atmosphere'[18] created by the dispute, which came to national and international prominence when a picket of local people protesting the drilling was forcibly broken up by police to allow Amax drilling equipment and personnel to move onto the site.[19]

4.17 As noted in Chapter 3, in order to expedite the exploitation of mineral deposits at Marandoo in the Pilbara region, the WA Government passed the *Aboriginal Heritage (Marandoo) Act 1992* to 'enshrine in legislation consent under section 18 of the AHA'. This effectively allowed the Government to excise from the AHA the areas that the proponent was seeking to develop.[20]

4.18 This view was echoed by the Wintawari Guruma Aboriginal Corporation (WGAC):

> This meant that no provisions of the AH Act apply to any of the Marandoo operations. RTIO is not required to comply with any aspect of the AH Act for any activity or purpose within an area of land approximately 193 km^2 in size.

---

17 Mr John Southalan, *Submission 130*, p. 5.

18 AIATSIS, *Submission 57.1A*, p. 260.

19 D Plater, 'Noonkanbah: fight for Aboriginal land rights', *Australian Geographic*, 7 September 2010, www.australiangeographic.com.au/topics/history-culture/2010/09/noonkanbah-fight-for-aboriginal-land-rights, viewed 12 August.

20 Western Australian Department of Planning, Lands and Heritage (DPLH), 'A Brief History of the Aboriginal Heritage Act 1972', p. 4, https://www.dplh.wa.gov.au/getmedia/54f16de4-b7d9-4f0c-8416-1e9ff2da617e/AH-History-of-the-AHA, viewed 11 August 2021.

> RTIO is not required to seek any form of approval, to provide any information about cultural heritage places, report on any activity or cultural site found, or engage with Aboriginal people about any aspect of its mining at Marandoo. To WGAC's knowledge there is no other part of Australia where no form of Aboriginal heritage legislation applies.[21]

4.19 The principal effect of the amendments of 1995 was to abolish the Trustees of the Museum and move their functions to the Aboriginal Cultural Material Committee (ACMC), appointed by the Minister as an advisory body.[22]

4.20 In 1999 the Act was again amended to broaden the definition of landowners. Section 18 was amended to read that 'the expression the owner of any land' included holders of any rights in relation to land under the *Petroleum Act 1967*, *Dampier to Bunbury Pipeline Act 1997*, *Petroleum Pipelines Act 1969* and *Energy Coordination Act 1994*.[23] 2012 amendments included persons who hold a licence under the *Water Services Act 2012* as an owner of land.[24]

4.21 Further amendments to the Act in 2004 transferred jurisdiction for appeals under section 18 from the Supreme Court to the WA State Administrative Tribunal.[25]

Key provisions of the Act

4.22 The Minister for Aboriginal Affairs is responsible for administering the Act with the assistance of the Department of Lands, Planning and Heritage (DLPH) and the ACMC. The ACMC serves as a specialist advisory body to the Minister as established by the Act. The Act grants the Minister broad powers to both protect sites of significance and grant land holders permission to destroy sites.

4.23 The key operative sections relevant to this report contained in Part IV, dealing with the protection of Aboriginal sites, including the critically important sections 17 and 18.

4.24 Section 17 creates a general prohibition against damage or alteration of an Aboriginal site without authorisation.

---

21 Wintawari Guruma Aboriginal Corporation (WGAC), *Submission 50.5*, p. 10.

22 AH Act, ss. 28-39.

23 AH Act, s. 18(1).

24 AH Act, s. 18(1).

25 AH Act, s. 18(5).

4.25 Section 18 allows a land owner to make an application to the Minister (through the ACMC) to use land for a purpose which, unless the Minister gives consent under this section, would be likely to result in a breach of section 17. The ACMC, which then 'forms an opinion as to whether there is any Aboriginal site on the land, evaluate the importance and significance of any such site', and submits a recommendation to the Minister. The Minister must consider the ACMC recommendation and also consider the 'general interest of the community', before consenting or declining the application. Conditions may be attached. Where consent is given, actions which would constitute an offence under section 17 no longer do so.[26]

4.26 The Minister has discretion to act outside the recommendation made by the ACMC, as confirmed by *Minister for Indigenous Affairs; ex p Woodley*[27] and *Wintawari Guruma Corp v Minister Wyatt*.[28]

4.27 Section 19 allows the ACMC to recommend to the Minister that sites of outstanding importance should be declared protected areas. A declaration gives the Minister exclusive use and occupation of the area, vested on behalf of the Crown. Before making a determination, the Minister must consider protection in the general interest of the community.[29]

4.28 Section 20 allows for a temporary declaration of protection to be made in cases where the ACMC recommends that it may become expedient to declare any locality to be a protected area, or that an archaeological or other investigation should be conducted. Traditional owners highlighted that no protected areas have been declared since 1994.[30]

Critiques of the Aboriginal Heritage Act

4.29 The Committee received extensive evidence criticising provisions of the AHA and the way it has been applied by successive governments. In general, criticisms of the Act take two different forms:

1 the Act was progressive for its time but that it has proved ineffective in the face of the pressures on Aboriginal heritage from the scale of economic development in WA.

---

26 AH Act, s. 18.

27 *Re Minister for Indigenous Affairs; Ex Parte Woodley [No 2]* [2009] WASC 296.

28 *Wintawari Guruma Aboriginal Corporation RNTBC v The Hon Benjamin Sana Wyatt* [2019] WASC 33.

29 AH Act, s. 19.

30 AH Act, s. 20.

2 the AHA has not delivered on its initial stated aims because of the actions of successive governments who have either 'watered down'[31] the Act or have applied it in such a way that it has not protected Aboriginal heritage and in some instances has even facilitated destruction of sites.

4.30 It is notable that the AHA was enacted before native title rights were formally recognised by the High Court of Australia:

> At the time of its introduction, it was widely recognised that the AHA was the most comprehensive piece of Aboriginal heritage legislation in Australia, affording automatic (or blanket) protection to places and objects important to Aboriginal people. In contrast to other legislation developed around the same time, the AHA emphasised the importance of Aboriginal tradition, culture and heritage to contemporary Aboriginal people and their culture, rather than merely matters of archaeological, anthropological or other scientific interest.[32]

4.31 However, it is now broadly accepted as being outdated. The Chamber of Minerals and Energy of Western Australia (CME) stated:

> There is general acceptance from a range of stakeholders that the current Act has not maintained pace and currency with modern expectations of Aboriginal cultural heritage management, having had no significant amendment since its inception. Further, the current WA legislation pre-dates the recognition of Native Title further highlighting the need for modernisation.[33]

4.32 In the view of AIATSIS, even some empathetic approaches to the protection of Aboriginal heritage that characterised the tone of the original debates over the Act tended to focus on Aboriginal 'as something of the past to memorialised rather than something contemporary that is utilised, shared and revitalised'.[34]

4.33 AIATSIS added that there were 'well meaning' arguments in favour of the Act that showed some 'genuine and sophisticated understanding and value of Aboriginal people and culture'. But this early thinking behind the Act was

---

31 Tracy Chaloner, Murdoch University, *Submission 65A*, p. iv.

32 Western Australian Department of Planning, Lands and Heritage (DPLH), 'A Brief History of the Aboriginal Heritage Act 1972', p. 1, https://www.dplh.wa.gov.au/getmedia/54f16de4-b7d9-4f0c-8416-1e9ff2da617e/AH-History-of-the-AHA, viewed 11 August 2021.

33 Chamber of Minerals and Energy of Western Australia (CME), *Submission 83.1*, p. 2.

34 AIATSIS, *Submission 57.1A*, p. 259.

revealed as inadequate in the face of the massive increase in the exploration and exploitation of mineral resources in the 1960s and 1970s.[35]

4.34 Ms Tracy Chaloner from Murdoch University argued:

> …the Government has paradoxically used the AHA to favour developers over Aboriginal peoples. …the AHA has been amended to progressively water down its application to protecting Aboriginal heritage and consequently to increase the powers of the Minister and the State government in achieving a 'prodevelopment' agenda.[36]

4.35 According to the WA DLPH:

> The Act has been a source of conflict involving Aboriginal people and land use proponents due to its procedural uncertainty and lack of dispute resolution mechanisms. It does not encourage protection of Aboriginal heritage through co-existence with compatible land uses or modification of proposals to avoid or minimise impacts.[37]

4.36 The KLC highlighted the concerns of many Aboriginal organisations and likeminded bodies, that the Act disempowered Aboriginal peoples because 'Traditional Owners have no procedural rights in relation to any aspect of decision making under the AHA':

> …they have no ability to:
>
> (i) initiate any kind of enforcement or other process which may lead to a prosecution for damage to Aboriginal sites, as this power sits only with the Minister of the day; or
>
> (ii) determine whether consent to destroy Aboriginal heritage sites should be granted, nor do they even have a statutory right to be heard in any consent to destroy applications or procedural rights under the AHA to seek a review of such decisions.
>
> …The regulatory design of the AHA is such that the primary interaction between Traditional Owners and the AHA is through the authorisation of destruction of cultural heritage rather than through any means of managing or protecting cultural heritage.[38]

---

35 AIATSIS, *Submission 57.1A*, p. 259.

36 Tracy Chaloner, *Submission 65A*, p. iv.

37 DPLH, *Submission 24*, p. 2.

38 Kimberley Land Council (KLC), *Submission 101.1*, pp. 3-4.

4.37 Criticism of the Act was most forthrightly summarised by Hon Robin Chapple, in the following terms:

> The problem has always been the conflict between this piece of legislation and the economic desires of industry and the State. We have seen the Act amended a number of times to diminish its capability of protecting sites whether anthropological, archaeological, or ethnographical; including sacred ritual or ceremonial sites.
>
> We have seen administrative decision to water-down protection of sites; which eventuated in many being removed from the register, and it was the very Department charged with protecting aboriginal sites that did this. Since the introduction of the AHA we have seen the Department support, via the almost blanket advice to the ACMC that sites should be impacted or destroyed, and all Ministers with final oversight willingly go-against the advice of the ACMC in allowing almost every application to destroy or impact sites and surrounds.[39]

Section 18 and its application

4.38 The bulk of the critical evidence about the AHA focused on section 18 of the Act and the manner in which it has been interpreted, amended and applied by successive governments.

4.39 The Department of Planning, Lands and Heritage (DPLH) told the Committee:

> The current Act's Section 18 Notice and Consent process does not adequately facilitate risk-based decision-making and requires all proposals to follow the same approval pathway irrespective of the degree of actual or predicted heritage impact. Importantly, the Act currently does not provide for any right of appeal by Aboriginal people in relation to decisions about their cultural heritage. There is also a lack of transparency required by the Act about decisions made.[40]

4.40 A number of witnesses made the case that section 18 has, in effect, become a 'damage by permit system', an instrument which has actually facilitated the capacity of mining companies to legally destroy Aboriginal heritage. It has frequently been observed that the destruction of the Juukan Gorge rockshelters was carried out legally, not only not in contravention of the law, but with the explicit sanction of law. For example, Dr Sue-Anne Wallace

---

39 Hon Robin Chapple MLC, *Submission 65*, p. 21.

40 DPLH, *Submission 24*, p. 2.

contended that 'Rio Tinto seems to be taking shelter under the legality of its actions under [s]ection 18 approvals'.[41] Similarly, Mr Bruce Harvey made the observation that Rio Tinto used section 18 to act 'according to a strict interpretation of the law … to destroy specified Aboriginal heritage objects and places'.[42]

4.41 The Australian Archaeological Association (AAA) pointed out that a section 18 permit can become permanent permission for destructive activity, even if new information about significant heritage values is uncovered after the permit is issued:

> The loss of the significant Juukan Gorge rockshelters, despite new and compelling evidence from archaeological excavations conducted after the [section] 18 permit to destroy was issued, highlights the need to reform the WA Aboriginal Heritage Act, 1972. … Once a [section] 18 permit is granted, there is no opportunity in the approvals process to allow re-evaluation of sites at which significant archaeological or other finds are subsequently made, such as at Juukan Gorge. In such cases, any decision to mitigate the destruction of significant sites is entirely at the discretion of, and dependent on, the goodwill of the developer.[43]

4.42 The point was highlighted by the then WA Minister for Aboriginal Affairs, Hon. Ben Wyatt, who, in response to a question about the section 18 approval granted to Rio Tinto at Juukan Gorge in 2013, told the Committee that 'once that section 18 is granted … under the legislation there is effectively nothing I can do as Minister'.[44]

4.43 The Australian Speleological Federation also drew attention to the issue and questioned the rationale of Rio Tinto's lack of action when it received new information about the heritage value of Juukan Gorge:

> Permission to blast the site under [s]ection 18 of the AHA 1972 was granted in December 2013 by WA Minister for Aboriginal Affairs, Peter Collier, provided further digs were carried out. In 2014 a retrieval/salvage archaeological trip by Scarp Archaeology to Juukan caves occurred, resulting in the site showing aboriginal occupation going back 46,000 yrs BCE. More than 7,000 items retrieved. This was funded by Rio and involved PKKP representatives.

---

41 Dr Sue-Anne Wallace, *Submission 17*, p. 1.

42 Mr Bruce Harvey, *Submission 19*, p. 1.

43 Australian Archaeological Association (AAA), *Submission 37*, pp. 2-4.

44 Hon Ben Wyatt MLA, Minister for Aboriginal Affairs, *Committee Hansard*, Canberra, 7 August 2020, p. 32.

> Nevertheless, it is not until five (5) years later in early 2020 that destruction of the site occurred. What was happening in that five years?[45]

4.44 The effect of section 18 in entrenching a 'right to destroy' is reinforced by the gap between the rights of mining companies and those of traditional owners under the Act: miners have the right to appeal the Minister's decision, but traditional owners do not.

4.45 This point was highlighted by Blue Shield Australia, which said of the Juukan Gorge:

> Once the significance of the place had been established, there was no process under the Act, or within the administration of the Act, that could alter the terms of the section 18 permit. Under the AHA, no parties other than the Land Owner can appeal a section 18 decision. So, the Traditional Owners had no right of appeal after section 18 was granted, despite having found new and compelling evidence about the significance of the site.[46]

4.46 The view was supported by the submission from the PKKP which stated:

> A longstanding deficiency of the current Act is that the power to permit damage to an Aboriginal site is exercised by the Minister and that appeal mechanisms are only available to landowners and developers- and not to Traditional Owners. It is repugnant to Traditional Owners that the 'owner of any land' for the purpose of Section 18 does not include the Traditional Owners…[47]

4.47 WGAC concurred with the view that section 18 of the AHA has become a tool by which corporations can exercise power over Aboriginal communities:

> It is Wintawari's experience that FMG [Fortescue Metals Group] chooses each time it applies for section 18 consent to precipitate a contest between Wintawari and FMG about destroying Eastern Guruma sites and relies on the government being the arbiter and decision-maker under section 18. It is Wintawari's view that FMG use to their advantage the fact that successive Aboriginal Affairs Ministers in WA have not declined a section 18 notice on mining tenure for over ten years.[48]

---

45 Australian Speleological Federation, *Submission 46*, p. 2.

46 Blue Shield Australia, *Submission 40*, p. 2.

47 PKKP, *Submission 129*, p. 66.

48 WGAC, *Submission 50.2*, p. 1.

4.48 The Committee also received evidence that successive governments had relied on section 18 to the exclusion of other provisions in the law which could be more protective of Aboriginal heritage, thus strengthening the view that the Act had become an instrument for destruction not protection. WGAC stated:

> It is worth noting that the AH Act contains a number of provisions intended to provide protection that are not currently utilised by those administering the Act, and have not been used for a long time. For example, the AH Act provides for the declaration of "protected areas" for sites of outstanding importance (s19) which gives the Minister exclusive use and occupation of the area, vested on behalf of the Crown. No protected areas have been declared since 1994. In Western Australia, this government, like successive governments before it, has chosen to focus its resources on one provision at the expense of all others –section 18. It is open to any Aboriginal affairs minister to recalibrate their administration of the legislation and focus on preservation rather than destruction, without any legislative amendments or redrafting.[49].

Criticisms of the ACMC

4.49 The ACMC, as a key element of the process for determining applications under section 18 of the Act, was the target of much critical comment. The Committee was presented with strong views that the ACMC is unable to fulfil its intended purpose because of the way it is constituted and because of actions by both the Department and the Minister.

4.50 Many witnesses made the point that the Act does not require any Aboriginal membership in ACMC, that governments had failed to include relevant specialists in the Committee, and that the ACMC had failed to consult Aboriginal peoples in its deliberations, labelling this 'breathtakingly inadequate'[50].

4.51 The Australian Research Council Centre of Excellence for Australian Biodiversity and Heritage (CABAH) argued that ACMC:

> …requires a detailed and up-to-date knowledge from Indigenous stakeholders and a range of disciplines, including anthropology, archaeology, history, ecology, and Earth and climate science. … While the ACMC must include one person recognised as "having specialised experience in the field of

---

49 WGAC, *Submission 50*, p. 7.

50 Yamatji Marlpa Aboriginal Corporation, *Submission 114*, p. 12. See also: Professor Samantha Hepburn, *Submission 54*, p. 19; Environmental Defenders' Office, *Submission 107*, p. 18.

> anthropology as related to the Aboriginal inhabitants of Australia", there is currently no requirement under the Act to include specialists in other relevant fields, such as suitably qualified archaeologists and cultural heritage professionals. We consider this a notable omission of essential expertise from the ACMC.[51]

4.52 The AAA concurred with this view and said that the absence of specialists forced the ACMC to rely on 'the expertise of departmental officers, who often have no professional qualifications in any field of heritage'. In addition, documentation in support of applications depends on the 'expertise and professionalism of internal heritage officers within the proponent organisation' or on their external consultants.[52]

4.53 The concentration of decision-making power in the hands of the Minister, rather than a qualified and consultative body, was criticised by several witnesses. The Yinhawangka Aboriginal Corporation stated:

> … the discretionary power of the Minister (to direct the ACMC to do anything [underlining in original]) that has existed since 1980, the limited resources of the Department and the ACMC, the limited role of Aboriginal people speaking for their country, and the limited role of experts like archaeologists and anthropologists, all act to render the ACMC impotent in the exercise of the functions that the Parliament originally intended them to exercise.[53]

4.54 The WGAC suggested that the Minister, the ACMC and the Department:

> …regularly accept and make decisions on information that is preliminary and incomplete, and rely on work-arounds and compromises, such as applying conditions to more fully investigate sites before they are destroyed.[54]

4.55 Mr John Southalan, a lawyer with expertise on Indigenous rights and mining, went as far as to suggest that the recommendations of the ACMC were routinely ignored or circumvented by the Department and the Minister. Mr Southalan cited a 2009 example where the Supreme Court noted a difference between the ACMC's recommendation to the Minister and what the Department reported to the Minister. The Court stated that the discrepancy:

---

51 Australian Research Council Centre of Excellence for Australian Biodiversity and Heritage, *Submission 18*, p. 1.

52 AAA, *Submission 37*, p. 3.

53 Yinhawangka Aboriginal Corporation, *Submission 38*, p. 2.

54 WGAC, *Submission 50*, p. 3.

> … came about because decisions had been made within the department as to the terms in which that recommendation should be expressed. There was no reference back to the committee or any member of the committee before the officers of the department changed those terms.[55]

4.56 Mr Southalan also cited another case where the Court stated that the Department's briefing note to the Minister had misrepresented information provided by the ACMC.[56]

4.57 Mr Southalan provided evidence that he said showed the Department had attempted to narrow the definition of what constituted a significant site to be included in the Registry. New guidelines adopted by the Department in 2013 'misconstrued the statute and improperly narrowed the Act's protection', a finding that was supported by a Supreme judgement on the issue in 2015.[57]

4.58 Getup elaborated, stating that the departmental guidelines had changed criteria, such as stating that the 'meaning of "site" is narrower than "place"', and that 'or a place to be a sacred site means that it is devoted to a religious use rather than a place subject to mythological story, song or belief'. Getup also highlighted that the Supreme Court had:

> …concluded that the guidelines adopted by the ACMC for the determination of what is an Aboriginal site under the AHA WA were inconsistent with the definition of 'Aboriginal site' in the AHA WA.[58]

4.59 Mr Southalan further suggested that the courts had even come to regard advice provided by the ACMC as virtually irrelevant by adjudging that government non-compliance with ACMC advice did not invalidate any consent under section 18.

4.60 In *Wintawari Guruma Aboriginal Corporation v Minister Wyatt* the Court 'reasoned that the Minister did not need to inquire or be satisfied that the Committee's decision was legally valid before acting on it'.[59] The case of *Abraham v Aboriginal Affairs Minister* (2016) revealed that the Government had failed to appoint an anthropologist to the ACMC, as required by the

---

[55] Mr Southalan, *Submission 130*, p. 4.

[56] Mr Southalan, *Submission 130*, p. 4.

[57] Mr Southalan, *Submission 130*, p. 4.

[58] GetUp, *Submission 128*, p. 8. The Environmental Defenders Office also submitted that the Departmental guidelines had made it more difficult for sites to be registered as significant. *Submission 107*, pp. 16-17.

[59] Mr Southalan, *Submission 130*, p. 6.

AHA, but the Court held that this did not affect the Act's operation.[60] In *Minister for Indigenous Affairs; ex p Woodley* 2009, the fact that the Department had changed the information submitted by the ACMC was immaterial because:

> From the point of view of the Minister, the committee's work has been done, its recommendation is known and that recommendation would make no difference to the substance of the Minister's decision.[61]

4.61 A number of witnesses submitted that the record of Ministers' decisions on section 18 conclusively demonstrated that the provision had effectively become a mechanism to permit destruction of Aboriginal heritage and that the ACMC had been marginalised and ignored by successive Ministers. For example, 957 section 18 approvals had been processed by the ACMC up until 2004 and it had approved 702 applications, refusing only 32 and referring the remainder back to the proponent. From 2008 to 2011 there were 360 applications, 302 of which were approved by the Minister. This included 12 which the ACMC had recommended against, but which were nevertheless approved by the Minister.[62]

'Watering down the Act': The effect of amendments to AHA

4.62 The Committee received evidence that amendments to AHA had weakened the Act and provided greater power to Ministers who have used this to disadvantage Aboriginal interests.

4.63 Ms Chaloner submitted:

> Each time amendments have been proposed to the AHA it has been in response to a specific situation which was politically difficult for the incumbent government. The effect has been to water down the legislation and make it ineffectual in protecting Aboriginal heritage.[63]

4.64 AIATSIS said that the 1980 amendments narrowing the coverage of the Act to sites of 'significance' had:

> …introduced a philosophical change to the WAAHA as it now required subjective decisions to be made on what was important and significant… This

---

60 Mr Southalan, *Submission 130*, p. 6.

61 Mr Southalan, *Submission 130*, p. 6.

62 Hon Chapple MLC, *Submission 65*, pp. 11-13. Similar data were also presented by Prof Hepburn, *Submission 54*, p. 20; Ms Tanya Buttler, *Submission 152* p. 5; AIATSIS, *Submission 57.1A*, p. 257.

63 Tracy Chaloner, *Submission 65A*, p. 42.

> has been criticised because value-based assessments are ethnocentric, and judgments were not necessarily made by the Aboriginal people themselves (but rather by the trustees of the WAM or later by the ACMC and [M]inister) and were often made in the context of a proposed development of the site'...[64]

4.65 The insertion of a requirement for the Minister to consider the 'general interest of the community' was criticised by several witnesses on the basis of its ambiguity and the latitude it gives the Minister to make decisions for political advantage. Hon Chapple argued:

> The ambiguity of the wording, which neither defines what is meant by 'community' nor describes 'scope of 'interests', allows the Minister to, at their discretion - and without qualification - make a decision, without accountability. It follows that within a political context, this is likely to result in a decision based on the political imperatives of Premier and Cabinet.[65]

Aboriginal Cultural Heritage Bill 2020

Consultation and drafting of the Bill

4.66 The drafting of the Aboriginal Cultural Heritage (ACH) Bill took place in response to the growing clamour for major reform of legislative protections for Aboriginal heritage in WA. Acknowledging the criticism of the existing Act discussed above, the Hon Ben Wyatt stated:

> Although ground-breaking in its time, … the Act has been described as 'embarrassingly out of kilter' with modern standards of heritage management, but also and more importantly, the rights and reasonable expectations of Aboriginal people.[66]

4.67 The WA Government commenced a review of the AHA in 2018. A three-stage consultation process has since taken place. Phase one of the process sought to identity issues and gaps in the AHA legislation and to promote ideas on what modernised legislation should look like and how it should operate in the interests of stakeholders. DLPH held a series of workshops across the state to enable Aboriginal peoples to have direct input into the

64 AIATSIS, *Submission 57.1A*, p. 260.

65 Hon Chapple, *Submission 65*, p. 11. See also: Prof Iain Davidson, *Submission 52*, p. 2. AIATSIS, *Submission 57.1A*, p. 278; Law Council of Australia (LCA), *Submission 120*, p. 30

66 DPLH, *Review of the Aboriginal Heritage Act 1972: Proposals for new legislation to recognise, protect and celebrate Western Australia's Aboriginal heritage. Discussion Paper*, 2019, p. 3.

review. More than 130 submissions were received in this phase of consultation.

4.68 According to Hon Ben Wyatt, feedback from the initial consultation was that:

> …the current Act is no longer fit for purpose. We have heard that too much Aboriginal heritage has been damaged or destroyed; but we have also heard that dealing with the cumbersome, costly and uncertain processes to comply with the Act has economic consequences that should be addressed.[67]

4.69 Phase two began in March 2019 with the release of a discussion paper based on submissions and feedback received in the initial phase of consultation. The Discussion Paper set out proposals for new legislation. Fifteen information sessions and 35 workshops were held with some designed for Aboriginal peoples and others for non-Indigenous stakeholders and peak bodies. More than 70 submissions were received.[68]

4.70 Phase three of the review commenced in October 2020 with the release of the draft exposure bill of ACH. Eighteen community information sessions were held in September and October designed to receive input from Aboriginal community members and residents. 158 submissions were received.[69]

Key features of the Bill

4.71 The objects of the ACH Bill are:

a. To recognise the importance of Aboriginal cultural heritage and Aboriginal custodianship

b. To recognise, protect and preserve Aboriginal cultural heritage

c. To manage activities that may harm Aboriginal cultural heritage

d. To promote an appreciation of Aboriginal cultural heritage.[70]

4.72 As explained by the DPLH, key features of the Bill include:

---

67 DPLH, *Review of the Aboriginal Heritage Act 1972: Proposals for new legislation to recognise, protect and celebrate Western Australia's Aboriginal heritage. Discussion Paper*, 2019, p. 3.

68 DPLH, *Submission 24*, p. 5.

69 DPLH, *Submission 24*, p. 5.

70 *Aboriginal Cultural Heritage Bill 2020, Consultation Draft*, s 8.

1 Updated Aboriginal cultural heritage definition, replacing a 'focus on sites and artefacts' with a recognition of Aboriginal 'living culture' and 'cultural landscapes'.

2 Recognised Aboriginal custodianship and control of cultural heritage, including encouraging the return of secret and sacred objects.

3 A new directory of Aboriginal cultural heritage, led by the Aboriginal Cultural Heritage Council (ACH Council).

4 Establishment of the ACH Council, and the Local Aboriginal Cultural Heritage Services (LACHS) to manage Aboriginal cultural heritage.

5 Protecting areas of outstanding significance by declaration of Protected Areas.

6 Managing activities that may harm Aboriginal cultural heritage through Aboriginal Cultural Heritage Management Plans agreed by Aboriginal parties and proponents.

7 Stronger compliance and enforcement, with heavier penalties, and the Minister able to issue stop activity and remediation orders.

8 Both Aboriginal parties and proponents afforded rights of review.[71]

4.73 The ACH Council and the LACHS are at the heart of the WA Government's stated objective of 'including an Aboriginal voice in the management of Aboriginal cultural heritage'[72] and are envisaged as 'an architecture that elevates' Aboriginal bodies in the management system.[73]

4.74 The ACH Council, chaired by an Aboriginal person, will 'provide oversight of the Aboriginal cultural heritage system'[74] and 'proactively assist in the identification, protection, preservation and management of Aboriginal cultural heritage'.[75] The Council will appoint the LACHS across the state

71 DPLH, 'Overview: Aboriginal Cultural Heritage Bill 2020', www.wa.gov.au/government/document-collections/the-aboriginal-heritage-act-reform-process, viewed August 2021.

72 DPLH, 'Overview: Aboriginal Cultural Heritage Bill 2020', www.wa.gov.au/government/document-collections/the-aboriginal-heritage-act-reform-process, viewed August 2021.

73 Hon Ben Wyatt MLA, *Committee Hansard*, Canberra, 7 August 2020, p. 35.

74 DPLH, 'Overview: Aboriginal Cultural Heritage Bill 2020', www.wa.gov.au/government/document-collections/the-aboriginal-heritage-act-reform-process, viewed August 2021.

75 *Aboriginal Cultural Heritage Bill 2020, Consultation Draft*, s 8 (1).

which will, in turn, produce an Aboriginal Cultural Heritage Management Plan for that locality, negotiated as an agreement between the Aboriginal representatives and proponents of mining and other activities in the area. The Plan will be approved by the ACH Council.

4.75 If there is difficulty in reaching an agreement, the Council will assist the achievement of an agreed outcome.[76] Beyond this, the Minister can make a ruling if disagreements cannot be resolved at the ACH Council level.[77]

4.76 The then Minister described the arrangement in the following terms:

> The Council's there to provide a strategic oversight … in the first year or two, the council will be quite active in setting parameters on what they see as the standards, the broad parameters that need to be in an agreement, and then it's up to the LACH and the planned proponent to have agreements that suit. It's up to the Council to approve those agreements. The Council needs to see all of those things [such as] informed consent, consultation and how they deal with new information, for example. ... And when an agreement can't be reached, its role is to try to mediate those outcomes. It's quite a different process from the ACMC. Basically, it's about enabling the LACHS to enter into agreements around how their country is used.[78]

4.77 The Bill establishes a tiered land use approvals system encouraging proponents to undertake due diligence to determine if an activity will affect Aboriginal cultural heritage. Activities that are rated as having medium to high impact would require an agreement with the relevant Aboriginal parties and development of an Aboriginal Heritage Management Plan. Low impact activities would require a DPLH permit, while minimal impact and exempt activities would not require approval.[79]

4.78 The ACH Council will manage the Aboriginal Cultural Heritage Directory, which will replace the existing Register, and will be a record of Aboriginal cultural heritage of the State, and a depository of all information and documents relevant to Aboriginal cultural heritage, including cultural

---

76 DPLH, 'Overview: Aboriginal Cultural Heritage Bill 2020', p. 2, www.wa.gov.au/government/document-collections/the-aboriginal-heritage-act-reform-process, viewed August 2021.

77 Hon Ben Wyatt MLA, *Committee Hansard*, Canberra, 7 August 2020, p. 35; *Aboriginal Cultural Heritage Bill 2020*, Consultation Draft, 140 (1).

78 Hon Ben Wyatt MLA, *Committee Hansard*, Canberra, 7 August 2020, p. 42.

79 DPLH, 'Overview: Aboriginal Cultural Heritage Bill 2020', p. 3, www.wa.gov.au/government/document-collections/the-aboriginal-heritage-act-reform-process, viewed August 2021.

heritage permits and Management Plans. The ACH Council will also promote public awareness and appreciation of Aboriginal cultural heritage in WA.[80]

4.79 Hon Ben Wyatt emphasised that the new arrangements would link directly with the bodies established under the Native Title Act. The Prescribed Bodies Corporate (PBCs) established under native title would become the Aboriginal entities that develop Management Plans.

4.80 As the then Minister told the Committee:

> We are linking in very closely … with the native title process and the native title architecture that's been well created across the nation, particularly in Western Australia, because we see that PBCs have gone through the process of being identified as the key groups, so we want to come in off the back of that and make that indication that they are the right groups to negotiate with and to enter into agreements with…[81]

4.81 In recognition of the unequal resources available to mining companies and Aboriginal bodies in negotiating agreements, the then Minister also proposed that the Commonwealth should support the strengthening of PBCs:

> …if you're a Rio or BHP … the resources that they have are without limit versus an Aboriginal prescribed body corporate. And sometimes more support needs to be given to those groups. So one thing that I think the Commonwealth can do, rather than create a separate heritage regime, is actually invest in the architecture that's been created under the Native Title Act. I see that as the real opportunity now. If we're wanting to elevate agreement making, if we're wanting to elevate the voice of Aboriginal people at this table, the Commonwealth has an easy way to do it—it's to provide more support to PBCs.[82]

Critiques by Aboriginal organisations

4.82 Submissions from Aboriginal organisations conveyed deep scepticism about the Bill. They indicated a lack of trust that the proposed legislation would improve the management and protection of Aboriginal heritage, even

---

80 DPLH, 'Overview: Aboriginal Cultural Heritage Bill 2020', p. 2, www.wa.gov.au/government/document-collections/the-aboriginal-heritage-act-reform-process, viewed August 2021.

81 Hon Ben Wyatt MLA, *Committee Hansard*, Canberra, 7 August 2020, p. 35.

82 Hon Ben Wyatt MLA, *Committee Hansard*, Canberra, 7 August 2020, p. 35.

extending to concerns that the Bill would make things worse and be 'a step backwards'.[83] Criticisms of the Bill challenged the conceptual foundation of many provisions, while also arguing that the practical application of the Bill would, like the existing legislation, lead to the destruction of Aboriginal cultural heritage.

4.83 The KLC submitted that the Bill represented a 'failure to meet international or best practice standards',[84] arguing that:

> …reform should be based on the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation developed by the Heritage Chairs and Officials of Australia and New Zealand … designed by reference to the *minimum* [emphasis in original] standards set out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which the Australian Government endorsed in April 2009…[85]

4.84 According to Aboriginal witnesses, the root problem with the Bill is that it 'does not recognise Aboriginal people as the primary decision makers about their cultural heritage'.[86] Submissions were united in their calls for a key role to be provided for both engagement with, and decisions by, traditional owners.[87] Instead, the 'due diligence' process empowers proponents and government bodies to decide what constitutes Aboriginal cultural heritage and to make critical judgements about whether or not it could be damaged or destroyed.[88] The witnesses argued that, whatever the Bill's intention, the precedent of the existing AHA showed that the proposed system would be exploited by proponents to their benefit at the cost of Aboriginal heritage.[89]

4.85 KLC highlighted its concerns by citing the example of the recent destruction caused by exploration by Kimberley Granite Holdings (KGH) in an area in the east Kimberley region and the distress it has caused to the recognised Malarngowem native title holders. The KLC submission:

83 KLC, *Submission 101.1A*, p. 3, 10, 23.

84 KLC, *Submission 101.1A*, p. 4.

85 KLC, *Submission 101.1A*, p. 3.

86 KLC, *Submission 101.1A*, p. 3.

87 Yamatji Marlpa Aboriginal Corporation (YMAC), *Submission 114*, pp. 11-12; National Native Title Council (NNTC), *Submission 34.1*, pp. 5-6; KLC, *Submission 101.1A*, pp. 5-7.

88 KLC, *Submission 101.1A*, p. 4, NNTC, *Submission 34.1*, p. 5.

89 KLC, *Submission 101.1A*, p. 19.

> …notes with concern that destruction similar to that caused by KGH could occur under the regime proposed in the Draft Bill because native title holders are excluded from critical decision making about impact assessment pathways (which is instead bestowed upon proponents…) and are also excluded from the final decision making process, which is the sole purview of the Minister … and the Aboriginal Cultural Heritage Council...[90]

4.86 The Committee received critiques of both the conceptual foundation and probable practical application of the Aboriginal Cultural Heritage Directory proposed in the Bill. KLC submitted that the Directory would be 'anathema to the fundamental concepts surrounding Aboriginal cultural knowledge and information'[91]:

> The ACH Directory fails to account for the secret and sacred nature of certain Aboriginal cultural knowledge. To make Aboriginal cultural knowledge accessible by proponents, government administrators and other non-Indigenous people completely disrespects and undermines the traditional ways that knowledge is transmitted and gained in Aboriginal societies…[92]

4.87 Because of what KLC saw as the Directory's flawed conception, it could not fulfil its proposed role as a repository of all Aboriginal heritage because some Aboriginal people would be reluctant to disclose certain information to a government body such as the ACH Council:

> Reluctance to provide details of the significance of Aboriginal sites, places and object does not necessarily mean they are not important or in need of protection. Rather, it is often the most important sites that are most secret and sacred and therefore least likely to be included on a searchable database such as the ACH Directory.[93]

4.88 KLC submitted that, in practice, the Directory would disempower Aboriginal peoples and create a mechanism by which both proponents and the government would silence Aboriginal voices and circumvent their role in heritage management. Custodians would be expected to disclose knowledge to the Directory, or information would be placed on it by the ACH Council without their consent.[94] Such information would then be used

---

90 KLC, *Submission 101.1A*, p. 8.

91 KLC, *Submission 101.1A*, p. 19.

92 KLC, *Submission 101.1A*, pp. 18-19.

93 KLC, *Submission 101.1A*, p. 19.

94 KLC, *Submission 101.1A*, p. 20.

by proponents to 'displace the need for direct engagement by proponents with Traditional Owners at the due diligence assessment stage'.[95]

> Following precedent, the industry catchcry will likely become "if it's not on the ACH Directory, it doesn't exist". Inappropriate and undue reliance on the ACH Directory in the due diligence assessment stage will mean that Aboriginal cultural heritage can, and will, continue to be destroyed if the Draft Bill is made law in its current form.[96]

4.89 The disempowering effects of the Directory would thus extend into each subsequent step in the due diligence process described in the Bill.

4.90 The perspective of Aboriginal organisations is that the due diligence process, and the powers it gives to proponents, the ACH Council and the Minister will, in practice, circumvent the capacity of traditional owners to make decisions about their cultural heritage at all stages of the processes provided for in the Bill. In the words of the PKKP, 'the ultimate power still rests with the Minister to make decisions about the destruction of sites'.[97]

4.91 KLC told the Committee that the tiered land use approvals system was 'unacceptable' because it gave proponents the power to make assessments about what constituted each level of potential impact without any 'engagement with Traditional Owners, nor right of appeal or review'.[98]

> Proponents have a commercial interest in setting a lower level of impact assessment because this will lower project costs. If a proponent assesses the level of impact as lower rather than higher, they will avoid the time and costs associated with higher impact assessment such as having to notify or consult with the affected Aboriginal persons, apply for an ACH permit or negotiate an ACH management plan for the activity.[99]

4.92 National Native Title Council (NNTC) supported this view:

> This gifts to the proponent the power of assessing the likely impact of their proposed activity, whether there is Aboriginal cultural heritage in the area and whether it will be harmed thus allowing the proponent to determine the

---

95 KLC, *Submission 101.1A*, p. 18.

96 KLC, *Submission 101.1A*, p. 19.

97 PKKP Aboriginal Corporation, *Submission 141 to WA Government on the Aboriginal Cultural Heritage Bill 2020*, p. 2.

98 KLC, *Submission 101.1A*, p. 13.

99 KLC, *Submission 101.1A*, p. 14.

> procedural rights to be afforded to Traditional Owners. … The WA Bill provides for no right of review or scrutiny of the proponent's assessment.[100]

4.93 NNTC also criticised the linking of the Bill's provisions to the federal native title system, arguing that:

> The powers and functions of the LACHS … are limited in a manner mimicking the pitfalls of the Native Title Act 1993 (Cth), in that they only have rights, in relation to certain classes of activities, to be notified, be consulted or to negotiate agreements within a prescribed timeframe about the management of Aboriginal cultural heritage affected by a particular activity. Failure to reach agreement with a proponent within the prescribed timeframe results in the matter being pushed up the line to the ACH Council and the Minister. Like the Native Title Act 1993, consent of the affected Traditional Owners is ultimately not required.[101]

4.94 If a proponent conducts due diligence and assesses their activity as exempt or having minimal impact they would not require a DPLH permit. KLC noted that judgements by the National Native Title Tribunal (NNTT) and Federal Court that even these activities could 'significantly and unacceptably interfere with Aboriginal heritage sites'. NNTC and other Aboriginal organisations also condemned the 'unfounded assumptions that such minimal or low activities can never have a significant impact on heritage'[102]. In any case, according to KLC, such assessments 'should not be a matter for a proponent or a government department to determine in the absence of consultation with native title holders'.[103]

4.95 In a similar vein, the NNTC expressed the concern that:

> As LACHS have no right to even be notified of minimal or exempt activities, and can only be notified of low impact activities, then a huge proportion of activities which can, and do, detrimentally interfere with Aboriginal cultural heritage could proceed on the basis that proponents undertake their own due diligence assessment.[104]

4.96 In the case of activities that a proponent assesses to be of low impact, the KLC submission observed that the permits 'appear to replicate the process

---

100 NNTC, *Submission 34.1*, p. 5.

101 NNTC, *Submission 34.1*, p. 6.

102 NNTC, *Submission 34.1*, pp. 9-10.

103 KLC, *Submission 101.1A*, p. 15.

104 NNTC, *Submission 34.1*, p. 9.

under s18 of the AHA'[105] because the decision to grant a permit is made by the ACH Council, a body that 'is not representative of the interests of Aboriginal people'.[106] Moreover, the KLC pointed out that an:

> ACH permit applicant or holder has rights of review in respect of their permit but native title holders are not provided any procedural rights when the ACH Council decides to grant a permit.[107]

4.97 The NNTC also submitted that the proposed arrangements replicated current problems:

> …this process is almost identical to the disastrous s18 process under the existing Aboriginal Heritage Act 1972 (WA) that led to the destruction of Juukan Gorge, differing only in that it requires notification of native title parties, "knowledge holders" and LACHS.[108]

4.98 In the last scenario, if a proponent assesses their proposed activity as having a medium-high impact they are required to engage with traditional owners to negotiate an ACH management plan. But, if no agreement is reached, the proponent may apply to the ACH Council to have the Minister approve the management plan without the consent of traditional owners. Thus the ultimate decision is made by the Minister on the recommendation of the ACH Council. In the view of the KLC:

> The option for a proponent to apply for approval of an ACH management plan in the absence of an agreement with Traditional Owners undermines the negotiating position of Traditional Owners…[109]

4.99 A number of witnesses drew the Committee's attention to the fact that the process of making agreements between proponents and traditional owners did not recognise the 'power imbalance'[110] and 'unequal bargaining power of the parties'[111] which undermines the capacity of traditional owners to reach agreements based on their free, prior and informed consent.

---

105 KLC, *Submission 101.1A*, p. 15.

106 KLC, *Submission 101.1A*, p. 16.

107 KLC, *Submission 101.1A*, p. 16.

108 NNTC, *Submission 34.1*, p. 8.

109 KLC, *Submission 101.1A*, p. 16.

110 NNTC, *Submission 34.1*, p. 1. ANTaR, *Submission 36*, p. 5, WGAC, *Submission 50*, p. 4, Banjima Native Title Aboriginal Corporation (BNTAC), *Submission 89*, p. 5.

111 KLC, *Submission 101.1A*, p. 17.

4.100 According to Ms Amy Stevens from Murujuga Aboriginal Corporation, such imbalance undermines the agreement making process on which the Bill is based:

> I have serious reservations about an Aboriginal heritage protection act that is based entirely on agreement making, when our current experience is the agreement-making with mining companies is fundamentally unequal … the majority of mining companies can meet all their legal obligations to consult and negotiate in a way that only serves to further disempower Aboriginal people.[112]

4.101 Several submissions therefore called for the resourcing of LACHS to enable them to adequately engage in any agreement making process.[113] Indeed the then Minister also called on the Commonwealth to provide appropriate funding for Aboriginal corporate bodies.[114]

Perspectives from other stakeholders

4.102 The Committee gathered evidence from a range of other stakeholders in the business, academic and non-government worlds. Their submissions largely echoed the concerns of Aboriginal organisations, as well as adding points from particular non-Indigenous perspectives.

4.103 The evidence mostly related to issues such as the rights of Aboriginal peoples to be decision-makers about their own cultural heritage, the preponderance of provisions about agreement making and permitting damage in the Bill, the costs to traditional owners in negotiating agreements, and the powers and appeal rights for Aboriginal organisations.

4.104 The International Council on Monuments and Sites (ICOMOS) presented a critique of the Bill and a series of recommended changes which largely focused on the need for greater empowerment of Aboriginal peoples in the conservation of cultural heritage – as distinct from merely harm management: ICOMOS said the Bill is flawed because:

> 1 It does not adequately empower Aboriginal people as decision-makers in a way consistent with the United Nations Declaration on the Rights of Indigenous Peoples.

---

112 Ms Amy Stevens, World Heritage Officer, Murujuga Aboriginal Corporation, *Committee Hansard*, Canberra, 2 November 2020, p. 9.

113 KLC, *Submission 101.1A*, p. 17, NNTC, *Submission 34.1*, p. 8, PKKP, *Submission 129*, p. 30,

114 Hon Ben Wyatt MLA, *Committee Hansard*, Canberra, 7 August 2020, p. 35.

> 2 There is insufficient guidance in the Bill on how the local ACH services will be constructed, operated and supported.
>
> 3 It has unbalanced review and appeals processes in relation to decisions that impact on Aboriginal heritage which appear to favour proponents over Aboriginal people.
>
> 4 It fails to provide adequately for the full process of cultural heritage conservation.[115]

4.105 Of ICOMOS' detailed set of recommendations for changes to the Bill, the most important included:

- Increase the decision-making powers of LACHS and ACH Council
- Strengthen the rights of appeal for Aboriginal organisations
- Ensure that all areas of WA have a LACH and that they are adequately resourced
- Broaden the definition of Aboriginal cultural heritage to include all intangible heritage
- Shift the focus of the Bill from protection and management of harm to conservation of cultural heritage, including by empowering LACHS to conduct comprehensive heritage assessments.[116]

4.106 From a broadly similar perspective, the AAA and the Anthropological Society of WA (ASWA) expressed particular concern about the Bill's narrow focus on the management of harm to Aboriginal heritage as part of encouraging economic development. According to the AAA, the Bill is still an 'instrument for facilitating development approvals rather than for protecting and celebrating sites of cultural and historic significance'.[117] The ASWA, in its submission to the WA Government consultations on the Bill, made the case that the:

> …forced transition, under the Bill, of land defined by cultural tradition to a tradable commodity to provide for 'balance' in the recognition of value to the State and broader community formally establishes a new heritage economy, with its foundation reliant upon the doing of harmful activities upon Aboriginal heritage.[118]

---

115 International Council on Monuments and Sites (ICOMOS), *Submission 98.1*, p. 2.

116 ICOMOS, *Submission 98.1*, pp. 4-10.

117 AAA, *Submission 37*, p. 10.

118 Anthropological Society of WA (ASWA), *Submission 92 to WA Government on the Aboriginal Cultural Heritage Bill 2020*, p. 1.

4.107 Continuing this theme, and adding support to the view common amongst Aboriginal witnesses that the Bill replicates the problems of the existing legislation, the ASWA submitted:

> …the Bill provides for the lodgement of an Aboriginal Cultural Heritage Management Plan (ACHMP) only when an activity is proposing harm to be done to Aboriginal heritage. The Aboriginal Heritage Council (AHC) is placed in the situation of examining and approving an ACHMP only in the context of the harming activity. This proposition enshrines in law the fatal flaw suffered by the Aboriginal Cultural Material Committee (ACMC) under the AHA section 18 process.[119]

4.108 Griffith University Centre for Social and Cultural Research argued that the 'consultation' that actually occurs with Aboriginal organisations is effectively only a precursor to damage to cultural heritage:

> …most heritage consultation that occurs throughout Australia commences with a client wanting to impact cultural heritage and going through the process of "consulting" in order to gain legal permission to do so; consultation rarely results in any fundamental change to planned developments, and thus rarely meets the definition of active, genuine consultation.[120]

4.109 Concerns about negative effects of the Bill on all parties managing cultural heritage were raised by Mr Marcus Holmes, a native title lawyer, who predicted:

> …massive proponent works delays, Aboriginal heritage service provider corporations being out of pocket, sites being impacted by 'exempt" and so-called "low impact" works and massive micro management and oversight by the State and quasi state agencies of any real Aboriginal control of their cultural heritage.[121]

Mr Holmes nevertheless submitted that positive aspects of the Bill were that it broadens definitions of cultural heritage, provides for appeal rights for Aboriginal people to the State Administrative Tribunal, establishes Aboriginal heritage service-providers, creates links to native title agreements, and provides for higher penalties for infringements.[122]

---

119 ASWA, *Submission 92 to WA Government on the Aboriginal Cultural Heritage Bill 2020*, p. 1.

120 Griffith University Centre for Social and Cultural Research, *Submission 33*, p. 3.

121 Mr Marcus Holmes, *Submission 99.1*, p. 1.

122 Mr Holmes, *Submission 99.1*, p. 1.

4.110 The Law Council of Australia made a generally positive submission to the Committee about the ACH Bill, noting that it 'creates a multitude of new and improved processes, compared to the Aboriginal Heritage Act 1972 (WA)', and a number of its concepts 'bear some similarity to those existing in other State legislation'. [123] The Council welcomed the inclusion of 'intangible elements' as part of the definition of Aboriginal cultural heritage, but made the argument that the limitation of the definition of harm to 'ground disturbance' effectively 'renders irrelevant' the concept of 'intangible elements'.[124] The Council recommended that the Bill should 'adopt provisions similar to those in the *Aboriginal Heritage Act 2006* (Vic)' in relation to the registration and management of intangible heritage. Other recommendations included that the Bill should clarify how LACHS will be resourced, and that it

> …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.[125]

Industry perspectives on the Bill

4.111 Rio Tinto told the Committee that it 'has and will continue to support the WA Government's reforms to repeal the AH Act and replace it with new Aboriginal heritage legislation' and that it has participated in the ongoing review of the Act. [126] The essence of Rio Tinto's view is that it supports processes for managing the protection of Aboriginal culture which 'balance' the interests of the respective parties and that it endorses the Bill's approach of negotiating agreement-based systems:

> [Rio Tinto] supports new Aboriginal heritage legislation that balances meaningful Aboriginal stakeholder engagement and protection and management of Aboriginal heritage values with the delivery of certain, timely and efficient outcomes for stakeholders.[127]

4.112 The company's submission added that while Rio Tinto supports agreement making, the new process should not create uncertainties for current operations:

---

[123] LCA, *Submission 120.1A*, p. 1.

[124] LCA, *Submission 120.1A*, p. 17.

[125] LCA, *Submission 120.1A*, p. 26.

[126] Rio Tinto, *Submission 25*, p. 38.

[127] Rio Tinto, *Submission 25*, p. 38.

> Heritage protection should first seek to be achieved through agreement making with the Traditional Owners of the affected land, rather than through the current statutory framework which does not contemplate agreements. … However, this should occur in a manner that does not introduce uncertainties for operations under existing agreements.[128]

4.113 Therefore, any changes to the current regime should:

> a. not introduce uncertainty or risks to proponents who have acted in good faith to appropriately manage heritage values within the context of their existing operations and in compliance with current laws; and
>
> b. be proportionate in balancing the protection of cultural heritage and the potential for land development, as actions prohibiting land development may affect not only the land use proponents but also Traditional Owners who can, and often choose to, benefit through agreements in regards to land use.[129]

4.114 Rio Tinto presented a generally positive outlook on other provisions in the proposed legislation, while noting certain issues about how the provisions might operate in practice.

4.115 On the Bill's provisions for the creation and resourcing of Aboriginal bodies to participate in agreement making, Rio Tinto stated:

> Traditional Owners must have a primary role in the management of heritage values, including through the introduction of Local Aboriginal Heritage Services (LAHS) [also LACHS], noting this change will need to be supported by ensuring LAHS are appropriately resourced…[130]

4.116 The company's support for the due diligence process through tiered assessment was qualified by its opinion that the Minister should have the ultimate authority:

> …the introduction of the Aboriginal Heritage Council to assist with the tiered assessment process and an expedited approval process for proposals that have no or low impacts on heritage values, will ensure greater focus on sites of higher significance. However, the Minister must retain overall accountability and decision making-powers for the Aboriginal heritage system in Western Australia…[131]

---

128 Rio Tinto, *Submission 25*, p. 38.

129 Rio Tinto, *Submission 25*, p. 39.

130 Rio Tinto, *Submission 25*, p. 38.

131 Rio Tinto, *Submission 25*, p. 38.

4.117 The submission expressed support for extended definitions of cultural heritage to include 'intangible heritage or cultural landscapes'. But it noted that:

> …intangible values can cover larger areas of land, including whole mines or developments. Accordingly, the legislation will also require a clear framework to determine how these sites can be identified and impacts can be measured as this has the potential for large areas to be quarantined from development, notwithstanding investment in exploration and mining investment over many years.[132]

4.118 Rio Tinto also stated that it:

> …supports transparency in decision making and appeal rights for Traditional Owners and land use proponents for future statutory approvals that authorise disturbance of heritage sites.[133]

4.119 Finally, the company informed the Committee of its view that 'heritage protection should primarily occur under state legislation' and 'where State heritage preservation laws are effective, there should not be a significant need for Commonwealth protective action'.[134]

4.120 Submissions to the WA consultative process included those from the Association of Mining and Exploration Companies, Australian Petroleum Production and Exploration Association, BHP, Chamber of Minerals and Energy, Fortescue Metals, Roy Hill Holdings and Woodside Energy.

4.121 The submissions generally recognised the need to modernise WA's legislation on Aboriginal cultural heritage and welcomed the drafting of new legislation. There was wide acceptance of the key principles enshrined in the Bill, including broadened definitions of Aboriginal cultural heritage, an increased role for Aboriginal organisations, the agreement making process between proponents and Aboriginal representatives, and the establishment of new Aboriginal bodies such as the ACH Council and LACHS. A continued role for the Minister as the ultimate decision maker was mostly supported.

4.122 There was less acceptance, however, that the Bill as drafted would provide certainty for proponents and traditional owners and that there was sufficient balance reached between the interests of the parties involved. Some

---

132 Rio Tinto, *Submission 25*, pp. 38-39.

133 Rio Tinto, *Submission 25*, p. 39.

134 Rio Tinto, *Submission 25*, p. 37.

submissions expressed concerns that the processes described in the Bill would cause unacceptable delays to development and impose economic costs on the state.

4.123 Criticisms did not, in broad terms, attack the objectives behind processes proposed in the Bill, but a frequently expressed view was that there is insufficient detail and explanation and that, as a result, there could be unintended consequences in practice. For example, questions were raised about the responsibilities and resourcing of the LACHS. In particular, there was criticism of the absence of clear regulations, codes and guidelines to give meaning to the proposals provided for in the Bill. Some submissions argued that proper judgements about the effectiveness of the legislation could not be made until these were available. The penalty regime was the subject of particular disapproval, with some submissions arguing that lack of clear definitions of offences could put explorers and developers in the position of unintentionally breaking the law.[135]

Committee comment

4.124 The Committee notes that the Aboriginal Heritage Bill 1972 was, for its time, a progressive legislative initiative made when the WA mining boom was exposing Aboriginal cultural heritage in vast new areas of the state to the threat of damage or destruction. It was passed into law when Australian and international awareness about the need to protect Aboriginal heritage was still relatively undeveloped.

4.125 But the legislation has not fulfilled its initial promise, and the Committee considers that the WA experience is a salutary lesson. A law with stated good intentions became, in practice, a mechanism through which the disturbance, damage and destruction of both physical and intangible Aboriginal cultural heritage has repeatedly taken place.

4.126 This occurred partly because of amendments to the law, but mainly because of the manner in which the legislation was interpreted and administered by successive Ministers. In particular, section 18 has become the key operative provision of the law and the basis for a system of damage by permit. The Minister has become the arbiter for decisions about the approval of damage to the exclusion of the voice and interests of traditional owners. The AHA

135 DPLH, *Aboriginal Heritage Bill 2020: Published responses*, October 2020, www.consultation.dplh.wa.gov.au/aboriginal-heritage/aboriginal-heritage-bill-2020/, viewed 14 August 2021.

has failed to strike a balance between the needs and aspirations of the various parties and has excessively favoured the interests of proponents.

4.127 The Committee commends the WA Government initiative in finally taking action to modernise its legislation governing cultural heritage. The Committee notes that the AHA has been the subject of five reviews, the recommendations of which were largely unacted upon. A thorough re-examination of the objectives and approach of WA legislation on Aboriginal cultural heritage is long overdue.

4.128 The Committee considers that the drafting of the Bill is an opportunity to produce legislation that incorporates best practice and standards from Australian jurisdictions, as well taking inspiration from international experience and meeting or exceeding the commitments Australia has made in international agreements.

4.129 The Committee supports the objectives of the Bill to strengthen Aboriginal voice in the management of Aboriginal cultural heritage, and acknowledges the efforts of the WA Government to seek a better balance between proponents and traditional owners in the development of the state's resources.

4.130 The Committee notes the proposal for the establishment of new bodies to manage the protection of Aboriginal heritage and to facilitate the involvement of traditional owners. These bodies will form the basis of the Aboriginal side of the process of agreement making with proponents that is the foundation of the Bill's approach to the management of cultural heritage.

4.131 The Committee notes the apprehension expressed by Aboriginal witnesses about the power imbalance between the two parties to agreement making, and the unequal resources available to Aboriginal representatives compared to those of proponents such as mining companies. If negotiations between the two parties are to proceed effectively, with a fair chance of reaching equitable outcomes, the Local Aboriginal Cultural Heritage Services (LACHS) must be supported with adequate human and financial resources.

4.132 The Committee notes the evidence from Aboriginal organisations arguing that the due diligence process described in the Bill hands out to proponents the right to make decisions about what constitutes significant Aboriginal cultural heritage and what impact proposed activities would have on the heritage. Aboriginal organisations, on the other hand, have limited scope to challenge such decisions.

4.133 The Committee also received conflicting views about the role of the Minister under the proposed new arrangements. Submissions from mining representatives expressed agreement with the sections of the Bill which provide for the Minister to have a final deciding role in the agreement making process when the two parties are unable to reach agreement. Submissions from Aboriginal organisations and other stakeholders, on the other hand, argued that the draft legislation gives the Minister too much power and that this will replicate the problems of the current Act where the Minister has been the decision-maker in the great majority of cases concerning approvals to damage Aboriginal heritage. The view of Aboriginal organisations is that the relevant traditional owners should have final responsibility for deciding whether their cultural heritage should be damaged or destroyed.

4.134 The Committee notes with concern that the Aboriginal organisations' views indicate that they have concluded that provisions allowing that the Minister *may* make decisions about approvals in certain circumstances, will mean that the Minister *will* make the decisions, and do so on a routine basis. This interpretation appears to reflect traditional owners' negative experience of the operation of the AHA over many years. There is a clear lack of confidence and trust that such a situation will not be replicated under the proposed legislation. It will be challenging for the WA Government to pass legislation that is generally acceptable to all parties if such fundamental problems of trust are not overcome.

4.135 In the light of the above issues raised by Aboriginal representatives, the Committee encourages the WA Government to review the ACH Bill and make amendments to address these concerns. Particular consideration could be given to accommodating the principles of free, prior and informed consent. Consultations with Aboriginal representatives must be conducted in a way that accords with Aboriginal traditions of dialogue. And indeed the new law must seek to establish processes which recognise that Aboriginal knowledge may be passed on in ways that are not yet recognised in our existing systems.

4.136 The Committee acknowledges the evidence from witnesses about the operation of Aboriginal heritage protection legislation in other jurisdictions. For example, reference was made to provisions on the registration and management of intangible heritage in Victorian legislation. The Committee considers that there is scope for the WA Government to further investigate approaches adopted by the Commonwealth and other states and territories and to adapt the WA Bill in the light of these approaches.

4.137 In light of the criticisms of the operation of the current and proposed Western Australian legislation, the Committee considers that the Commonwealth Government has a role in legislating for minimum cultural heritage protection standards. This is discussed in detail in Chapter 7.

5. State and territory legislative frameworks

5.1 Aboriginal and Torres Strait Islander peoples' cultural heritage is managed primarily by the states and territories through various legislative and policy settings. There are some consistencies across jurisdictions, but no nationally coordinated approach to the management of cultural heritage.

5.2 Stakeholders in each state and territory held predominately negative views about the various schemes and their evidence conveyed that, on the whole, there are problems with the nation's approaches to Aboriginal and Torres Strait Island cultural heritage legislation.

5.3 This Chapter will outline cultural heritage legislation in each state and territory (excluding Western Australia) and discuss the views of submitters on their experiences with these various frameworks.

New South Wales

5.4 NSW is the only jurisdiction without stand-alone Aboriginal cultural heritage legislation.

5.5 Cultural heritage is primarily dealt with by the *National Parks and Wildlife Act 1974*, with other protections afforded by the *Heritage Act 1977*, the *Environmental Planning and Assessment Act 1979* and the *Aboriginal Land Rights Act 1983*.

The National Parks and Wildlife Act 1974

5.6 Aboriginal cultural heritage in NSW is primarily protected and managed under the *National Parks and Wildlife Act 1974* (NPW Act). The objects of this Act include:

> …the conservation of objects, places or features (including biological diversity) of cultural value within the landscape, including, but not limited to … places, objects and features of significance to Aboriginal people…[1]

5.7 'Cultural significance' of certain lands is recognised under this Act, meaning significance 'in terms of the traditions, observances, customs, beliefs or history of Aboriginal persons'.[2] This may be extended to some consideration of intangible cultural heritage, though the actual protections are only extended to nine national parks or similar listed under Schedule 14.

5.8 The NPW Act establishes the Aboriginal Cultural Heritage Advisory Committee (ACHAC), an advisory body of Aboriginal persons to provide consultation and advice to the Minister and the Chief Executive of the Office of Environment and Heritage on matters relating to Aboriginal cultural heritage.[3] The NPW Act also establishes and regulates a database called the Aboriginal Heritage Impact Management System (AHIMS) which identifies Aboriginal objects and places across the state. In 2020, AHIMS recorded 100,000 records of Aboriginal objects and places.[4]

5.9 Under the NPW Act, blanket protections are provided to Aboriginal objects (including ancestral remains). Aboriginal places may be protected by declaration by the Minister,[5] such as the Three Sisters at Katoomba,[6] Moon Rock in northern Sydney,[7] and Wilcannia Mission Camps in western NSW.[8] The process for declaration can be an arduous one–it took the Barkindji

---

1 *National Parks and Wildlife Act 1974* (NSW) (NPW Act (NSW)) s2A.

2 NPW Act (NSW), s71D(1).

3 NPW Act (NSW), ss27-28 and Sch 9.

4 Heritage NSW, *AHIMS turns 20 and reaches 100,000 records*, NSW Government, October 2020, www.heritage.nsw.gov.au/celebrate/latest-announcements/ahims-turns-20-and-reaches-100000-records, viewed 1 September 2021.

5 NPW Act (NSW), ss30K and 84.

6 Mark Holden, *The Three Sisters declared an Aboriginal Place under NSW law*, Environmental Defenders Office, www.edo.org.au/the-three-sisters-declared-an-aboriginal-place-under-nsw-law/, viewed 1 September 2021.

7 M Strom, 'Moon Rock Aboriginal site in Sydney shows long association with astronomy and Dreamtime stories', *The Sydney Morning Herald*, 26 October 2016, https://www.smh.com.au/national/nsw/moon-rock-aboriginal-site-in-sydney-shows-long-association-with-astronomy-and-dreamtime-stories-20161025-gsa5xc.html,

8 J Poulson, 'Barkindji people welcome Wilcannia Mission Camp Heritage Site listing in far-west NSW', *ABC News*, 29 October 2020, www.abc.net.au/news/2020-10-29/wilcannia-heritage/12828036.

people more than two years to achieve a result in Wilcannia. Further, protections can be narrow and not consider the site's cultural value in relation to the wider landscape.

5.10 It is an offence under the NPW Act to damage an Aboriginal object or place, unless a permit–known as an Aboriginal Heritage Impact Permit or AHIP–has been granted.[9] It is a defence to prosecution under the NPW Act if a person can prove that they exercised due diligence in determining whether an act or omission would harm an Aboriginal object.[10] Due diligence is defined in accordance with the regulations, which give effect to certain specified codes of practice.[11]

5.11 Proponents are required to consult with Aboriginal people before applying for an AHIP. In doing so, they must comply with the requirements for Aboriginal community consultation under the regulations.[12] These requirements mandate short timeframes for response and review of impact plans and methodologies, often 14 or 28 days. Evidence to the Committee from Aboriginal and Torres Strait Islander groups across jurisdictions indicates that such requirements are onerous and do not consider the realities of resource-limited groups who have to consult with their community and may be responsible for large areas of country.

5.12 The management of Aboriginal cultural heritage protections under an Act predominantly drafted for the management of flora and fauna is now widely seen as offensive. Called 'a now outdated and distasteful remnant from a time when Aboriginal peoples were considered as merely part of the environment',[13] numerous reviews and articles have highlighted this point for over a decade of cultural heritage legislation analysis.[14]

---

9 NPW Act (NSW), ss86 and 87.

10 NPW Act (NSW), *s*87(2).

11 *National Parks and Wildlife Regulation 2019* (NSW) ('*NPW Regulation*') reg 57. See, for example, the Department of Environment, Climate Change and Water (NSW), *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW* (Code of Practice, 13 September 2010).

12 NPW Act (NSW), regs 60 and 61. Department of Environment, Climate Change and Water (NSW), *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010* (Publication, 1 April 2010).

13 New South Wales Aboriginal Land Council (NSWALC) and NTSCORP Ltd, *Submission in response to the Reform of Aboriginal Culture and Heritage in New South Wales.*

14 Justice Rachel Pepper, 'Not Plants or Animals: the protection of Indigenous cultural heritage in Australia' (Paper, Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 5 March 2014) [37]; NSWALC, Comparison table – Aboriginal Culture and Heritage

Heritage Act 1977

5.13 The *Heritage Act 1977* (NSW) provides another avenue for protection of Aboriginal cultural heritage. While the Act is predominately relevant to non-Aboriginal heritage, it sets out that the relevant State Minister may issue heritage protection orders or authorise councils to do so.[15]

5.14 The Act establishes the Heritage Council of NSW, which is responsible for providing advice, keeping registers of items of significance, heritage orders, notices and heritage agreements. Aboriginal representation on the Heritage Council is minimal−the Minister is required to appoint one person who, in his or her opinion, 'possesses qualifications, knowledge and skills relating to Aboriginal heritage'.[16] There is no requirement that this individual be an Aboriginal person.

Interaction with other legislation

5.15 Further protection is afforded by the *Aboriginal Land Rights Act 1983* (NSW) but, similar to the Native Title Act, this Act is geared more toward securing property rights by providing for the return of claimable land to Aboriginal owners, generally members of Local Aboriginal Land Councils and other specified Aboriginal owners within the legislation. It can do little to prevent harm or desecration of cultural heritage on land or property over which Indigenous groups hold no title or proprietary interest.

5.16 The *Environmental Planning and Assessment Act 1979* (the EPA) regulates the planning and development system in NSW. The objects of the EPA Act include management and conservation of the state's natural resources and cultural heritage (including Aboriginal heritage), facilitating ecologically sustainable development, and protecting the environment. The EPA Act is supported by the Environmental Planning and Assessment Regulation 2000 and also by planning policies which are legislative instruments at local, regional and state levels, many of which provide for further exceptions and work-arounds to Aboriginal cultural heritage protection.

Box 5.1 Case study: Calga Aboriginal cultural landscape

The Calga Aboriginal Cultural Landscape on the central coast of New

Reform 2018, p. 3; Office of the Environment and Heritage, A proposed new legal framework: Aboriginal cultural heritage in New South Wales, NSW Government, p. 1.

15 Law Council of Australia (LCA), *Submission 120*, p. 58.

16 *Heritage Act 1977* (NSW) s8(3)(a).

South Wales is a highly significant place for Darkinjung, Guringai and Mingaletta peoples. In 2015 the Darkinjung Aboriginal Land Council on won a victory in the NSW Land and Environment Court, after the court upheld the Council's appeal against the decision of the NSW Minister for Planning and Infrastructure under the EPA Act to allow the extension of a sandmining quarry on its lands.

The court's finding was particularly significant because it supported the view that environmental issues affecting a site were inseparable from Aboriginal cultural heritage. The Darkinjung Aboriginal Land Council submitted to the court that 'the issues of water, visual impact, noise, vibration and biodiversity are not severable to culture and heritage issues'.[17] In upholding the appeal and refusing the application to extend the quarry, the court stated that it made the decision 'having regard to all of the weighted considerations, including the impact on Aboriginal cultural heritage and the public interest'.[18]

Highlighting the importance of the judgement, the CEO of the Darkinjung Land Council Sean Gordon stated that 'What we've been able to do is get the court to move away from thinking about an individual site and to start to think about the cultural landscape'.[19]

The site was NSW State heritage listed on 1 October 2019.[20] [Type the text box details here]

5.17 Cultural heritage legislation in NSW is not effectively integrated with these land management and planning and approvals systems, and Aboriginal people are not effectively represented in decision-making processes. Aboriginal Heritage Impact Permits (AHIPs) must be approved by the Secretary of the Department and Cabinet and are issued under the NPW

17 NSW Land and Environment Court, *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor*, para 20.

18 NSW Land and Environment Court, *Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor*, para 485.

19 'Court rejects Calga sand quarry extension', *ABC News*, 18 Nov 2015, www.abc.net.au/news/2015-11-18/rocla-loss/6950808, viewed 10 September 2021.

20 The Hon Don Harwin, Minister for Aboriginal Affairs (NSW) and the Hon Taylor Martin, MLC for the Central Coast and Hunter, 'Calga cultural landscape heritage listed' *Media Release*, 1 October 2019, www.aboriginalaffairs.nsw.gov.au/our-agency/news/calga-cultural-landscape-heritage-listed/ , viewed 10 September 2021.

Act. Applications for work approvals that may harm items listed on the State Heritage Register or subject to interim protection orders under the *Heritage Act 1977* are decided by the Heritage Council of NSW. Development applications of various kinds are decided under the *Environment Planning and Assessment Act 1979* (EPA Act) by the Heritage Council, the local council, the Minister, or the Independent Planning Commission of NSW, depending on the type of development. None of these decision-making bodies are Aboriginal.

5.18 There is also a number of NSW Acts that enliven Aboriginal cultural heritage mechanisms and set standards for the protection of cultural heritage by requiring searches be conducted on the AHIMS database before certain certificates or authorities may be issued, such as the Bush Fire Environmental Assessment Code for New South Wales under the *Rural Fires Act 1997*. In this case, Heritage NSW is required to respond to an information request within three working days, otherwise the authority may proceed with issuing the certificate.

Stakeholder perceptions and experiences

5.19 Stakeholders presented negative assessments of NSW cultural heritage protections. Submitters claimed that the protections offered are weak and the heritage framework is inadequate and ineffective. Statistics suggest that destruction of cultural heritage is a common event in the State.

5.20 The Law Council of Australia (LCA) submitted that the NSW cultural heritage framework is considered 'anachronistic and contains serious deficiencies'.[21]

5.21 One of the most fundamental problems is that Aboriginal cultural heritage is considered as flora and fauna, a fact which is seen as highly insulting by Aboriginal peoples. The *National Parks and Wildlife Act 1974* provides no rights of ownership or inclusion in decision making processes for Aboriginal peoples. Aboriginal peoples are unable to determine what is considered significant cultural heritage.[22]

5.22 Destruction of Aboriginal heritage is NSW is occurring at high rates. According to the New South Wales Aboriginal Land Council (NSWALC), during the first half of 2020 approximately four Aboriginal Heritage Impact

---

21 LCA, *Submission 120*, p. 54.

22 Nari Nari Tribal Council, *Submission 90*, p.1

Permits (AHIPs) were being issued every week by the NSW Government.[23] The NSWALC stated that:

> 'The high rates of destruction of Aboriginal sites, both 'approved' and illegal, continues to cause deep distress within our communities. The destruction of Aboriginal sites impacts on the ability of our peoples to maintain living cultures and create wellbeing and healthy communities. Our sites tell important stories and must be protected so Aboriginal peoples can strengthen and maintain our cultures now and in the future'.[24]

5.23 Dr Janet Hunt submitted that 100 to 200 sites and objects are lawfully destroyed every year. Dr Hunt stated that between 2012 and 2017, 704 permits were issued and only one was rejected.[25] These statistics suggest there is very little consideration given to Aboriginal cultural heritage in the permits process.

5.24 The NSWALC submitted that the cultural heritage provisions of the NPW Act are not effectively integrated with the development processes in NSW. This results in a reactive system that does not consider Aboriginal heritage until after development assessment processes have occurred or until after Aboriginal heritage is under threat.[26]

Victoria

Aboriginal Heritage Act 2006

5.25 The *Aboriginal Heritage Act 2006* (AH Act (Vic)) is standalone legislation which provides for the blanket protection and management of Aboriginal cultural heritage. Victoria is the only jurisdiction with legislation providing for intangible cultural heritage protection.[27]

5.26 The definition of Aboriginal cultural heritage in the AH Act (Vic) is multi-layered. It defines Aboriginal cultural heritage as 'Aboriginal places,

---

23 NSWALC, *Submission 41*, p. 4

24 NSWALC, *Submission 41*, p. 5.

25 Dr Janet Hunt, *Submission 78*, p. 1.

26 NSWALC, *Submission 41*, p. 5.

27 As of October 2020, only one registration of intangible heritage has been created on the Aboriginal Heritage Register. See *Victorian Aboriginal Heritage Council, Taking Care of Culture: State of Victoria's Aboriginal Cultural Heritage Report* (Discussion Paper, 2021) ('Taking Care of Culture'), p. 13.

Aboriginal objects and Aboriginal ancestral remains.'[28] These terms are defined further in the legislation and reflect the legislation in other jurisdictions. The AH Act (Vic) differs by defining Aboriginal intangible cultural heritage in section 79B(1) and (2) 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).

5.27 In addition to intangible heritage protections under the AH Act (Vic), the *Charter of Human Rights and Responsibilities Act 2006* (Vic) grants Aboriginal people a 'cultural right' which encompasses the right to enjoy culture, identity, language, kinship ties and the relationship to land and water. The Charter could be extrapolated to be a protection of Aboriginal cultural heritage. Non-Indigenous cultural heritage is protected under the *Heritage Act 2017* (Vic).

5.28 Importantly, Aboriginal people are recognised as the owners of their heritage in the case of ancestral remains and secret or sacred objects, and legislative processes are put in place for their return.

Box 5.2 Case study: Sacred trees of the Dhab Warrung

Trees sacred to the Djab Wurrung of Victoria are threatened by the Victorian Government's Western Highway Duplication project. The Djab Wurrung have a history of dispossession from their lands and consequently they have not achieved Native Title. Due to this, they have never been consulted by the State Government regarding the planned destruction and damage to their trees.

In 2013 then Registered Aboriginal Party, Martang Pty Ltd agreed to a cultural heritage management plan relevant to the project area with Vic

28 *Aboriginal Heritage Act 2006* (Vic) (AH Act (Vic)) s 4.

Roads. Despite Martang being deregistered in 2019 by the Victorian Aboriginal Heritage Council this statutory agreement was not impacted.[29]

In 2017, before substantive construction of the project began, Aboriginal Victoria received preliminary reports that trees in the vicinity of the project were culturally significant. Two trees had been identified as birthing trees used by the Djab Wurrung.[30] VicRoads facilitated inspections involving senior Djab Wurrung representatives of Martang Pty Ltd and Eastern Maar Aboriginal Corporation who also had an interest in the area. Claims from the preliminary reports were not substantiated.[31]

Tree-removal was scheduled to begin in 2018, but work ceased when Djab Wurrung Traditional Custodians occupied the site. The occupation later became an established camp, 'the Djab Wurrung Protection Embassy' with several locations along the approved highway alignment.[32] Djab Wurrung Traditional Custodians sought to protect not just the two previously identified trees but others that had also been identified as significant. To this day the Embassy remains in place protecting the sacred trees.

In a similar period, Djab Wurrung custodians made an application under the ATSIHP Act (Cth) for Commonwealth protection for the six trees. Then Minister for the Environment (Cth) found that the trees were significant, but ruled in favour of the Victorian Government.[33]

During this process VicRoads supported a further independent cultural

29 Victorian Aboriginal Heritage Council, *Revocation of an Aboriginal Party*, www.aboriginalheritagecouncil.vic.gov.au/revocation-registered-aboriginal-, viewed 2 August 2021.

30 Victorian Ombudsman, *Investigation into the planning and delivery of the Western Highway duplication project 2020*, p. 15.

31 Victorian Ombudsman, *Investigation into the planning and delivery of the Western Highway duplication project 2020*, p. 15.

32 Victorian Ombudsman, *Investigation into the planning and delivery of the Western Highway duplication project 2020*, p. 15.

33 Mr Michael Kennedy, Legal Adviser, Djab Wurrung traditional owners, *Committee Hansard*, Canberra, 19 March 2021, p. 2.

heritage assessment for the area, involving consultation with Martang and Eastern Marr.[34] As a result modifications were made to the Highway project, but the Djab Wurrung were not satisfied.

On 26 October 2020 authorities proceeded with the destruction of a Directions Tree. It was one of the six trees ATSIHP protection had been sought for. Before further destruction took place, Senior Djab Wurrung woman Marjorie Thorpe was successful in achieving an injunction on the project in the Supreme Court. The injunction stopped work until February 2021, but no further works have occurred since.

Not all the six trees were slated for destruction. Instead the trees would be in close proximity too close to the road. In some cases 15m, which is not acceptable to the Djab Wurrung.[35]

As of yet no further destruction of the trees has occurred, and the Djab Warrung and area farmers have proposed an alternative, cheaper route for the duplication. The matter continues to be pursued in the Victorian courts.

The Djab Wurrung Trees example is a demonstration of the problems of the Registered Aboriginal Party (RAP) system. Aboriginal groups that have not achieved RAP status have little ability to protect their heritage. This flaw has been the cause of heritage destruction for the Djab Wurrung, not to mention years of anxiety over the potential destruction of their heritage.

5.29 The AH Act (Vic) works by reference to a central system of Registered Aboriginal Parties (RAPs) which determine approach to cultural heritage.

5.30 The role of RAPs in decision-making relating to their registered area includes:

- consideration of applications for cultural heritage permits
- evaluating and either approving or refusing cultural heritage management plans
- entering into cultural heritage agreements

34 Victorian Ombudsman, *Investigation into the planning and delivery of the Western Highway duplication project 2020*, p. 19.

35 Mr Kennedy, Djab Wurrung traditional owners, *Committee Hansard*, Canberra, 19 March 2021, p. 7.

- reporting to the Victorian Aboriginal Heritage Council (VAHC) on an annual basis.[36]

5.31 The VAHC is an independent statutory body comprising traditional owners with knowledge of Victorian Aboriginal cultural heritage. It is responsible for managing the system of RAPs and advising the Minister. Members of the VAHC are appointed by the minister for Aboriginal Affairs. Decision-making processes under the AH Act (Vic) afford more power to traditional owners than most jurisdictions, though there is still a high number of functions undertaken by the Department, particularly where there is no RAP appointed for a particular area – approximately 26 percent of the state.[37]

5.32 The Act legislates that a Victorian Aboriginal Heritage Register be established and maintained, containing information on the full scope of cultural heritage protections and instruments. The Register is the responsibility of the Secretary of the Department. Places and objects do not have to be listed on the Register to be protected.[38]

5.33 There are criminal penalties under the Act for knowingly damaging cultural heritage.[39] Notably, the Act goes further by empowering the Court to make orders for financial reparation or any other reasonable steps toward restoration of the damage.[40]

5.34 While the Victorian system can be commended for locating considerable power with Aboriginal bodies like RAPs and the VAHC, the statutory body for non-Aboriginal heritage, the Victorian Heritage Council (VHC), is empowered with significantly greater authority. A 2010 review suggested that the VAHC's powers should be brought more in line with the VAC's capacity to grant permits and registrations and hear cases.[41]

5.35 Though the VAHC's capacities were expanded in 2016 to include managing return of ancestral remains and granting cultural heritage permits, it remains problematic that reviews of decisions made by RAPs are remitted to the

---

36 AH Act (Vic), ss130-132.

37 Victorian Aboriginal Heritage Council, *Taking Care of Culture Discussion Paper 2021*, p. 50.

38 AH Act (Vic), s144.

39 AH Act (Vic), ss27-28.

40 AH Act (Vic), s30.

41 Eloise Schnierer, *Caring for Culture: Perspectives on the effectiveness of Aboriginal cultural heritage legislation in Victoria, Queensland and South Australia* (Report prepared by Watego Legal and Consulting for NSW Aboriginal Land Council, August 2010) p. 37.

Victorian Civil and Administrative Tribunal, rather than a body with knowledge and experience of Aboriginal cultural heritage like VAHC.

Interaction with other legislation

5.36 Other State legislation that provides for the protection of cultural heritage include the *Traditional Owner Settlement Act 2010* (Vic)–which operates in conjunction with the Native Title Act–the *Heritage Act 2017* (Vic) and the *Planning and Environment Act 1987* (Vic).

5.37 The AH Act (Vic) works in conjunction with the *Planning and Environment Act 1987* to manage permits and work approvals relating to cultural heritage. A permit may be applied for voluntarily for certain minor works relating to cultural heritage. Cultural heritage management plans (CHMPs) may be voluntary or required under legislation in certain circumstances, such as where an Environment Effects Statement is required under the *Environment Effects Act 1978*.

5.38 The *Environment Protection Act 2017* was recently amended and came into effect on 1 July 2021. It governs the Environment Protection Authority and regulates the environment with a similar approach to other jurisdictions by incorporating environmental, social and cultural considerations in environmental assessment and decision making, including cultural heritage impacts from development.[42]

Stakeholder perceptions and experiences

5.39 Victoria's Aboriginal cultural heritage legislation is considered by many of submitters as the best in the country, but some key criticisms remain.

5.40 The National Native Title Council considers the legislation as best-practice,[43] noting that it comes the closest of all jurisdictions to embedding the legal norms of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The Minerals Council of Australia submitted that it considers that Victoria is 'leading the way at a national level'.[44]

---

42 The environment is further regulated in Victoria by way of the *National Environment Protection Council (Victoria) Act 1995*.

43 Mr Jamie Lowe, Chief Executive Officer, National Native Title Council, *Committee Hansard*, Canberra, 28 August 2020, p. 40.

44 Ms Tania Constable, Chief Executive Officer, Minerals Council of Australia (MCA), *Committee Hansard*, Canberra, July 2021, p. 16.

5.41 Aboriginal Victoria, which provides secretariat support to the VAHC, states that, based on the approvals processes, 'Victoria has more effective Aboriginal cultural heritage protection legislation than any other jurisdiction in Australia, Canada and Aotearoa/New Zealand'.[45]

5.42 Aboriginal Victoria also points to the fact that proponents take their heritage obligations seriously under this system as an important element of the State's heritage framework. [46] A further benefit of the CHMP process in the State is that proponents have certainty about cultural heritage matters, especially because only the CHMP has to be amended if undiscovered cultural heritage comes to light.[47]

5.43 The Law Council of Australia (LCA) also considers the Victorian Aboriginal heritage legislation as the best in the country because:

> It sets up local bodies who have actual decision-making, rather than advisory capacity to a more centralised body, and I regard that as probably the model legislation.[48]

5.44 The LCA's submission discusses the legislations strengths and weaknesses. It makes the key point that consultation with Aboriginal and Torres Strait Islander peoples is not a mere box ticking exercise as it is in other jurisdictions.[49] Similar to other submitters, the LCA identifies the CHMP process as a key strength of the legislation, as well as other factors including detailed regulations related to the protection mechanisms.[50]

5.45 The Australian International Council of Monuments and Sites (Australia ICOMOS) considers that the RAP system is 'a strong attempt to put traditional owners at the centre of decision making', which makes the State's approach differ from other areas.[51]

---

45 Aboriginal Victoria, *Submission 91*, p. 8.

46 Aboriginal Victoria, *Submission 91*, p. 8.

47 Aboriginal Victoria, *Submission* 91, p. 9.

48 Mr Greg McIntyre SC, Member, Member, Australian Environment and Planning Law Group, Legal Practice Section, and Executive Member, LCA, *Committee Hansard*, Canberra, p.18.

49 LCA, *Submission 120*, p. 64.

50 LCA, *Submission 120*, p. 67.

51 Ms Helen Lardner, President, Australian International Council of Monuments and Sites (Australia ICOSMOS), *Committee Hansard*, Canberra, 2 March 2021, p. 13.

5.46 Even states with stronger legislative frameworks have critical issues with Aboriginal cultural heritage protection, as noted by Mr Rodney Carter, Chairperson of the Victorian Aboriginal Heritage Council:

> Every day, because country, landscape, is important to us, there are forms of destruction of our cultural heritage. What is even sadder in all of this is that what is seen as an artefact by me or by other Victorian First People is just as important as something that might be massive and seen as a site within landscape. So every day there's an intrusion, because development takes place. People do modern activities that aren't aligned with or considerate of our ancestors' management of landscape, and their values. So I can only say that every day it's happening, and a lot of it isn't immediately known to us. The Victorian legislation is extremely challenged in that it affords tenure-blind protection of culture and heritage across the whole state of Victoria, and then it goes on to put in place procedures in the act and through regulation to allow a form of destruction of culture and heritage, and, to some extent, for registered Aboriginal parties and traditional owners to participate in it.[52]

5.47 Submitters identified problems the RAP system. While RAPs give traditional owners leverage against developers and the ability to protect cultural heritage, the protections offered by this system are not extended to traditional owners who are not part of a RAP. There are 38 language groups in Victoria, but there are only 11 RAPs which cover 74 per cent of the State.

5.48 RAPs may only have membership in the 100 to 400 range despite their relevant traditional owner groups numbering in the thousands, and therefore may not represent the views of an entire community.[53] Some criticisms were also made about the membership and appointment process for RAPS, with accusations that certain RAPS were stacked with family members.[54]

5.49 The problem with the consultation process in Victoria is that proponents are only required to go to the RAP and RAPs are not required to obtain Free, Prior and Informed Consent from relevant traditional owners.

5.50 The Victorian Aboriginal Heritage Council commented stated:

---

52 Mr Rodney Carter, Chairperson, Victorian Aboriginal Heritage Council, *Committee Hansard*, Canberra, 19 February 2021, p. 11.

53 Mr Harry Webber, Director, Heritage Services, Aboriginal Victoria, Department of Premier and Cabinet, *Committee Hansard*, Canberra, 19 February 2021, p. 18

54 Ms Annette Xiberras, Co-Chair, Victorian Traditional Owners Land and Justice Group, *Committee Hansard,* Canberra, 19 March 2021, p. 9-10.

> This is where I think the difficulty lies in our own mobs having organisations. What is the degree to which boards and others have clear authorising environments where families, through directorship, can contribute knowingly and can turn their thinking strategically to how we're going to manage culture and landscape? That is a very difficult task for all Aboriginal corporations. But I think it's a fundamental principle of how we do our business culturally and something that I think all corporations need to be reminded of, and boards and executives and others need to be held to account in doing that. I think that is the end goal for all of us, and it will only get more difficult as our families get bigger and our representation through our corporations actually increases.[55]

5.51 The Victorian Aboriginal Heritage Council noted that 'the first iteration of this legislation in Victoria was fit for a time and somewhat fit for purpose'.[56] But the Council developed a discussion paper about traditional owners taking control of their cultural heritage, which proposes:

> Traditional owner groups themselves—very similar to the First Peoples' Assembly—are able to nominate and recommend who their representatives would be. To achieve that at this point in time would be a challenge, because there's an absence of complete coverage of registered Aboriginal parties in Victoria, so that can be a problem in itself. But the vision is very sensible and I think very sound for Victorian traditional owners to be reclaiming their rights to suggest this to government. It is a really good legislative reform to be working towards. Sadly, I'd say, no, it isn't the ideal at the moment, but it's the best we've ever had in Victoria.[57]

5.52 The Law Council, despite considering the Victorian legislation as the best, acknowledges that there are frustrations for Aboriginal people. Such as:

- lack of protection where the intangible cultural heritage is widely known to the public
- limited opportunity to prevent projects proceeding where there is uncertainty about the extent of cultural heritage (due to limited testing) and difficulties in revoking approvals or changing conditions where the

---

55 Mr Carter, Victorian Aboriginal Heritage Council, *Committee Hansard*, Canberra, 19 February 2021, p. 12.

56 Mr Carter, Victorian Aboriginal Heritage Council, *Committee Hansard*, Canberra, 19 February 2021, p. 10.

57 Mr Carter, Victorian Aboriginal Heritage Council, *Committee Hansard*, Canberra, 19 February 2021, p. 10.

heritage values of a site or object are greater than were known at the time of approval
- need for better funding and governance training for RAPs to ensure they have adequate means to assess and protect cultural heritage and to participate in proceedings where cultural heritage matters are raised
- where there are multiple groups seeking to speak for country, the concerns of those not part of a RAP may not be addressed. [58]

Queensland

5.53 There are three key pieces of legislation in Queensland's cultural heritage framework: the *Aboriginal Cultural Heritage Act 2003*; the *Torres Strait Islander Cultural Heritage Act 2003*; and the *Human Rights Act 2019*

Aboriginal Cultural Heritage Act 2003 (QLD) and the Torres Strait Islander Cultural Heritage Act 2003 (QLD)

5.54 The *Aboriginal Cultural Heritage Act 2003* (Qld) (ACH Act (Qld)) is standalone legislation to deal with Aboriginal cultural, including "recognition, protection and conservation"[59] of Aboriginal cultural heritage. Substantially the same as the *Torres Strait Islander Cultural Heritage Act 2003*, the two Acts together are called the QLD Cultural Heritage Legislation.

5.55 The ACH Act defines Aboriginal cultural heritage as anything that is a significant Aboriginal area; or a significant object; or evidence, of archaeological or historical significance, of Aboriginal occupation of an area in Queensland.[60] The Act does not refer to intangible cultural heritage directly.

5.56 The ACH Act refers to a definition of Aboriginal tradition as meaning:

> …the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.[61]

---

58 LCA, *Submission 120*, p. 68.

59 *Aboriginal Cultural Heritage Act 2003* (Qld) (ACH Act (QLD)) s4.

60 ACH Act (QLD), s8.

61 *Aboriginal Land Rights* (Northern Territory) Act 1976 (Cth) ('Land Rights (NT) Act') s 3.

5.57 The Act recognises Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage.[62] The legislation is designed so as not to prejudice any existing rights, including native title.[63] The Act provides a proponent with certainty of a party and a timeframe to resolve issues.[64]

5.58 The ACH Act imposes a duty of care in relation to Aboriginal cultural heritage, requiring a land user to take all reasonable steps to ensure that an activity does not harm cultural heritage. There are criminal enforcement mechanisms for breach.[65]

5.59 The Act establishes an Aboriginal Cultural Heritage Database and a Cultural Heritage Register.[66]

Human Rights Act 2019 (Qld)

5.60 The Queensland *Human Rights Act 2019* contains considerations of the Indigenous peoples of Queensland. The Act states that:

> Although human rights belong to all individuals, human rights have a special importance for the Aboriginal peoples and Torres Strait Islander peoples of Queensland, as Australia's first people, with their distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition and Ailan Kastom.[67] Of particular significance to Aboriginal peoples and Torres Strait Islander peoples of Queensland is the right to self-determination.[68]
>
> Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community, to enjoy maintain, control, protect and develop their identity and cultural heritage, including their

62 ACH Act (QLD), s5(b).

63 ACH Act (QLD), s13.

64 K Hodge, 'The value of Cultural Heritage in Queensland', *Australian Environment Review*, vol. 35, no. 9/10, (June 2021).

65 ACH Act (QLD), ss23 and 24.

66 ACH Act (QLD), Part 5.

67 Traditional child rearing practice. See Legal Aid Queensland, *Ailan Kastom child rearing practice in Torres Strait islander families*, www.legalaid.qld.gov.au/Find-legal-information/Relationships-and-children/Children-and-parenting/Ailan-Kastom-child-rearing-practice-in-Torres-Strait-islander-families, viewed 8 September 2021.

68 Human Rights Act 2019 (Qld), p.7.

> traditional knowledge, distinctive spiritual practices, observations, beliefs and teachings.[69]

Critiques of Queensland legislation

5.61 A number of commentators have criticised aspects of the application of the Queensland legislation.

5.62 The ACH Act (Qld) sets up situations where consultations with Aboriginal parties and the agreement of a CHMP is required. This is primarily for major projects requiring an environmental impact statement.[70] This is intended to place Aboriginal people at the centre of the CHMP process for large projects.[71] But the University of Queensland academic, Mark O'Neill, contends that the process has been shifted towards a commoditised, agreement-making process. The better negotiator is often the successful party, and power depends on the capacity of the Aboriginal party.[72] As a result of the legislative structure and the requirements for agreements and CHMPS:

> … some land users have failed to implement the agreed CHMPs properly, causing delays and cost overruns during project delivery and some Aboriginal parties have used cultural heritage to attempt to delay or stop a project for cultural or commercial reasons. Nonetheless, the number of CHMPs agreed and successfully implemented point to the ability of land users and Aboriginal parties to reach agreements, which facilitate the delivery of major projects.[73]

5.63 Despite the existence of enforcement mechanisms in the legislation, Kristen Hodge from the Queensland South Native Title Services argues that the state does not engage the provisions due to risks of consequential damages

69 Human Rights Act 2019 (Qld), ss28.

70 ACH Act (QLD), s 87.

71 M O'Neill, '"A Completely New Approach" to Indigenous Cultural Heritage: Evaluating the Queensland Aboriginal Cultural Heritage Act', *International Indigenous Policy Journal,* vol.9, no. 1, p. 7, (February 2018), http://espace.library.uq.edu.au/view/UQ:a0a9d85, viewed August.

72 M O'Neill, '"A Completely New Approach" to Indigenous Cultural Heritage: Evaluating the Queensland Aboriginal Cultural Heritage Act', *International Indigenous Policy Journal,* vol.9, no. 1, p. 8, (February 2018), http://espace.library.uq.edu.au/view/UQ:a0a9d85, viewed August.

73 M O'Neill, '"A Completely New Approach" to Indigenous Cultural Heritage: Evaluating the Queensland Aboriginal Cultural Heritage Act', *International Indigenous Policy Journal,* vol.9, no. 1, p. 11, (February 2018), http://espace.library.uq.edu.au/view/UQ:a0a9d85, viewed August.

related to any projects.[74] Avenues for enforcement through legal action are limited. Reviewability of decisions is provided for under the state legislation, or by pursuing an injunction, or finally, by seeking a declaration under the ATSIHP Act (Cth).[75]

5.64 Stakeholders in Queensland raised various issues about the application of the State's cultural heritage legislation. Evidence suggests that threats to and destruction of cultural heritage is a constant occurrence in the State.

5.65 For example, Ms Deborah Moseley is a private land owner on the Sunshine coast whose land contains a Kabi Kabi cultural heritage site called an 'Aboriginal Kitchen'. Ms Moseley registered the site with the Department; the process involved visits from historians, archaeologists, anthropologists and geologists visiting the site as well as Kabi Kabi elders who were invited to share knowledge of the area. The elders also asked the Department for help with registering the area surrounding Ms Moseley's block but received no response. Unfortunately, blocks of land were sold and developers knocked down rock a formation with carvings on it. When asked if there was anything to be done a Kabi Kabi elder stated that such events happen every day on the Sunshine Coast: 'I can only turn my back'.[76]

5.66 Similarly, the Cape York Land Council conveyed a disturbing account of cultural heritage protection in Queensland. They stated that:

> It is impossible to quantify the full extent of destruction of Indigenous cultural heritage in Queensland, including Cape York, resulting from land use and development. Mining, agriculture, urban development, infrastructure and other land uses have taken a huge toll on Indigenous cultural heritage. No comprehensive official record of the damage and destruction has been maintained. The destruction has been ongoing since colonisation and is too extensive, pervasive, unrecorded, qualitative and personal to accurately measure.[77]
>
> Our great concern is that the damage and destruction of Aboriginal cultural heritage on Cape York is ongoing, and most alarmingly, is often legally sanctioned pursuant to the provisions of the Aboriginal Cultural Heritage Act

---

74 K Hodge, 'The value of Cultural Heritage in Queensland', *Australian Environment Review*, vol. 35, no. 9/10, (June 2021).

75 K Hodge, 'The value of Cultural Heritage in Queensland', *Australian Environment Review*, vol. 35, no.9/10, p. 209 (June 2021).

76 Ms Deborah Moseley, *Submission 173*, p. 1.

77 Cape York Land Council (CYLC), *Submission 110*, p. 4.

> 2003 (ACHA), Queensland's principal Aboriginal cultural heritage protection legislation. Our experience has been that non-Indigenous land use and development is routinely prioritised as more valuable than Indigenous cultural heritage, and Indigenous cultural heritage is expendable if it gets in the way of development. In this way the ACHA is frequently used as a tool to facilitate, manage, regulate and legally approve damage to Aboriginal cultural heritage rather than to protect it.[78]

5.67 The Centre for Social and Cultural Research at Griffith University was particularly scathing of Queensland's cultural heritage legislation calling it 'one of the worst performing legal frameworks for protecting Aboriginal heritage':[79]

> No real resourcing has been provided by the State Government to adequately equip Aboriginal communities to administer management of their heritage, and many Aboriginal organisations are already crippled with other responsibilities (such as for broader land management, housing, the provision of health, language survival, improving education outcomes and other essential services). It is absolutely the case that Indigenous peoples should be empowered to control their heritage, but failing to provide cultural custodians with the necessary funding, training and resources with which to do so is, in our view, irresponsible.[80]

> In practice we see the Queensland heritage legislation as allowing developers an almost open hand with how to approach heritage management. Often a "cultural heritage management plan" is drafted prior to the identification of the heritage that will be subject to the plan, which is in diametric opposition to best practice and all the fundamental tenets of cultural heritage management. Most troubling, the current Queensland heritage legislation allows any person to be recognised as a "cultural heritage advisor". Failure to include minimum mandatory qualifications has allowed a small cohort of unscrupulous practitioners, often charging clients exorbitant rates, to provide reckless, inadequate advice.[81]

5.68 Stakeholders raised a number of other issues regarding cultural heritage protection in Queensland.

Duty of Care Guidelines

---

78 CYLC, *Submission 110*, p. 5.

79 Griffith University, *Submission 33*, p. 4.

80 Griffith University, *Submission 33*, p. 4.

81 Griffith University, *Submission 33*, p. 4.

5.69 Stakeholders were critical of the duty of care approach to cultural heritage protection and of related guidelines.

5.70 Quandamooka Yoolooburrabee Aboriginal Corporation (Quandamooka) stated that:

> The Duty of Care guidelines are vague, and when combined with no power to enter land and inspect a breach of the Act turn the Qld Act into a toothless tiger. Without a clear statutory compliance power, the Qld Act is a sham and does not protect cultural heritage at all. You cannot prosecute if you cannot collect evidence.[82]

5.71 Similarly, the Australian Heritage Specialists said that the guidelines do not properly acknowledge intangible heritage and that it is feasible for a land user to base their decision to consult solely on tangible evidence while dismissing anything intangible.[83] They noted:

> What we're seeing with the duty of care guidelines, particularly category 4, which is the area where the risk goes from a low risk to a high risk, is that the centre line of that middle score of self assessment can, unfortunately, be developed and used as a loaded weapon against Aboriginal people by those who choose to use it improperly. We regularly see—as recently as last week—even in government departments, where there is a level of decision-making, the duty of care guidelines used to avoid or exclude Aboriginal people in the decision-making process, deliberately or not deliberately.[84]

5.72 Ms Kathryn Ridge, lawyer for Quandamooka, submitted that the guidelines do not always require consultation with traditional owners, with the lower level impact categories not triggering a need for consultation:

> If a proponent, whether it's a mining company or a developer, determines they're within parts 1 to 4 of the duty of care provisions, they do not even need to notify the Aboriginal party of the proposed works. So Aboriginal people, by and large, are not notified prior to works undertaken in their areas. It's often after the fact that people find out that heritage has been impacted. Our view is

82 Quandamooka Yoolooburrabee Aboriginal Corporation RNTBC, *Submission 106*, p. 6.

83 Ms Ann Wallin, Senior Advisor, Australian Heritage Specialists, *Committee Hansard*, Canberra, 4 May 2021, p. 2.

84 Mr Benjamin Gall, Managing Director and Principal, Australian Heritage Specialists, *Committee Hansard*, Canberra, 4 May 2021, p. 2.

> that you could drive a truck through the duty-of-care guidelines in Queensland.[85]

5.73 O'Neill and Hodge made the same point, arguing that the duty of care guidelines enable proponents to make judgements about heritage significance and have thus have had the effect of excluding many Aboriginal parties from cultural heritage management.[86] The responsibility is placed on Aboriginal parties to be aware of developments and the impact on cultural heritage, without having decision making power or input.[87]

5.74 O'Neill therefore urged that guidelines as tools for cultural heritage management should be used with caution, particularly where there is room for interpretation and a developing 'custom' around how the guidelines are to be applied.[88]

The 'last claim standing' provision

5.75 The Committee heard evidence about has become known the 'last claim standing' provision of the Aboriginal Cultural Heritage Act.

5.76 Section 34 of the legislation provides a mechanism to identify the relevant Aboriginal and Torres Strait Islander party that a proponent must deal with to negotiate or develop a CHMP. In short, if there is no Native Title party for an area then the last claimant is considered to be the registered party for the area. This is highly problematic because under the Native Title Act there are often competing claims over a particular area.

5.77 The Karingbal people told the Committee of their negative experience with the controversial provision. The group made a native title claim for the Arcadia Valley at the same time as another group, but both claims failed. It

---

85 Ms Kathryn Ridge, Lawyer, Quandamooka Yoolooburrabee Aboriginal Corporation, *Committee Hansard*, Canberra, 18 June 2021, p. 22.

86 M O'Neill, '"A Completely New Approach" to Indigenous Cultural Heritage: Evaluating the Queensland Aboriginal Cultural Heritage Act', *International Indigenous Policy Journal*, vol.9, no. 1, p. 8, (February 2018), http://espace.library.uq.edu.au/view/UQ:a0a9d85, viewed August; K Hodge, 'The value of Cultural Heritage in Queensland', *Australian Environment Review*, vol. 35, no. 9/10, p. 207(June 2021).

87 K Hodge, 'The value of Cultural Heritage in Queensland', *Australian Environment Review*, vol. 35, no. 9/10, (June 2021).

88 M O'Neill, '"A Completely New Approach" to Indigenous Cultural Heritage: Evaluating the Queensland Aboriginal Cultural Heritage Act', *International Indigenous Policy Journal Art*, vol.9, no.1, p. 8.

was ruled that the Karingbal people were once native title holders for the Arcadia Valley, but they did not meet the continuity of connection requirements of the Native Title Act 1993. It was found that the other group had never held native title over the determination area and that they were not Karingbal people.[89] Nonetheless due to Department of Aboriginal and Torres Strait Islander Partnerships' interpretation of the Act both groups were considered the registered party for the native title claim area. This has placed Karingbal in the situation where people with no traditional affiliation with, or traditional knowledge of, Karingbal culture are able to make decisions on their heritage.[90]

5.78 To address this problem and prevent harm to their cultural heritage, the Karingbal have taken the initiative to introduce themselves to proponents seeking to work on their traditional lands in order to develop a cooperative relationship. Some proponents have responded positively while others have refused to work with them.[91]

5.79 In 2017 the Nuga Nuga Aboriginal Corporation (representatives of the Karingbal people) successfully brought a judicial review application to the Supreme Court, challenging the States interpretation of the provision. His Honour Justice Jackson found that the relevant sections of the ACHA 2003 did not have the application asserted by the State. But the State government later decided to legislate its interpretation of the legislation, to the dismay of the Karingbal people.[92]

5.80 The 'last claim standing' as re-legislated by the Queensland Government remains as one of the most controversial and problematic elements of the state's legislation.

South Australia

5.81 Cultural heritage protections in South Australia are offered by the *Aboriginal Heritage Act 1988* and the *Aboriginal Lands Trust Act 2013*. There are also two Acts which only pertain to two Aboriginal groups, the *Aṉangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* and the *Maralinga Tjarutja Land Rights Act 1984*.

---

89 Nuga Nuga Aboriginal Corporation (NNAC), *Submission 32*, p. 2.

90 NNAC, *Submission 32*, p. 3.

91 NNAC, *Submission 32*, p. 1.

92 NNAC, *Submission 32*, p. 4.

Aboriginal Heritage Act 1988

5.82 The *Aboriginal Heritage Act 1988* (AH Act (SA)) is standalone legislation guiding the protection and management of Aboriginal cultural heritage. Within the ambit of protection are sites and objects "of significance according to Aboriginal tradition", and Aboriginal skeletal remains.

> Aboriginal tradition means traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonisation.[93]

5.83 The AH Act (SA) does not include explicit protections for intangible cultural heritage, though they may be read in by interpretation. Spirituality is acknowledged as something which may give rise to a traditional owner's affiliation with a site or object, but legislative protection still only attaches to the tangible. Unlike in other jurisdictions, Aboriginal knowledge is protected by provision for criminal penalties where information relating to an Aboriginal site, object, remains or traditions is divulged in contravention of Aboriginal tradition.[94]

Box 5.3 Case study: The sacred mound springs of the Arabana people

The Arabana people have Native Title over Kati Thanda-Lake Eyre, a significant area between Lake Torrens, Coober Pedy and Oodnadatta in South Australia. Their home is a place with a rich abundance of life which is fed by mound springs, seepages at the southern edge of the Lake.[95] These springs are of great significance to the Arabana people and they are an important part of their cultural heritage.

Over the last 20 years the springs have been disappearing due to water extraction from the Great Artesian Basin.[96] BHP, pastoralists and

93 *Aboriginal Heritage Act 1988* (SA) (AH Act (SA)) s 3.

94 AH Act (SA), s35.

95 Arabana Aboriginal Corporation, *Submission 92*, p. 1.

96 Ms Brenda Underwood, Chairperson, Arabana Aboriginal Corporation, *Committee Hansard*, Canberra, 29 June 20221, p. 26.

petrochemical companies in the area pump 200 megalitres a day from the springs.[97] There are fears that continued extraction from the springs will result in a significant reduction to the 'vitality and the ecological viability of the springs',[98] and that there is a high likelihood that more springs will go extinct.

A key problem that has contributed to this pumping of water is the *Roxby Downs (Indenture Ratification) Act 1982*(SA). The Act imposes legal privileges to BHP which takes precedence over the State's Aboriginal Heritage legislation as well as overriding other State laws and due process.[99] The indenture applies over the Olympic Dam Special Mine lease and also includes the 'Stuart Shelf Area' of over 12,000km2, allowing BHP to operate the Olympic Dam Mine without consideration of Aboriginal cultural heritage. .

The Act also gives BHP primary access to water from the Great Artesian Basin, currently pumping at a rate of 34-35 megalitres per day with a planned future increase in water extraction by a further 50 percent.[100] This increase has caused significant concern for the Arabana people.

BHP have committed to working with the South Australian Government and traditional owners to formally transition management of Aboriginal cultural heritage protection at Olympic Dam to the South Australian *Aboriginal Heritage Act 1988* (SA).[101]

It is not yet known how this change will impact BHPs water extraction from the Great Artesian Basin and by relation the mound springs.

5.84 Sites and objects are protected by their being recorded on a Register by the Minister, and are conclusively presumed to not be Aboriginal cultural heritage if the Minister has determined that they should not be on the

97 Ms Underwood, Arabana Aboriginal Corporation, *Committee Hansard*, Canberra, 29 June 20221, p. 27.

98 Mr David Noonan, Private Capacity, Committee Hansard, Canberra, 29 June 2021, p. 21.

99 Mr David Noonan, *Submission* 73, p. 1.

100 Mr Noonan, *Submission* 73, p. 2.

101 BHP, *Submission to Parliament of South Australia Aboriginal Lands Parliamentary Standing Committee Inquiry into Aboriginal Heritage Policies and Standards in South Australia*, p. 2.

Register. The Minister must consult with and accept the views of the relevant traditional owners in making such a determination.

5.85 More than other jurisdictions, South Australia affords some decision-making power to traditional owners. The AH Act (SA) establishes the Aboriginal Heritage Committee (with an all-Aboriginal membership) to act in an advisory role for the Minister, which in turn appoints Recognised Aboriginal Representative Bodies (RARBs) to advise the Minister in relation to specified sites and objects.

5.86 Like Queensland, this legislation seeks to provide proponents and landowners with certainty in dealing with Aboriginal parties. This is somewhat limiting for traditional owners, as the Act does not contemplate situations of conflict over Indigenous ownership or shared Indigenous ownership of cultural heritage, but rather makes it the responsibility of the Aboriginal Heritage Committee to appoint RARBs for protected sites and objects.

5.87 South Australia protects cultural heritage by affording the Minister power to enter into bespoke Aboriginal heritage agreements with landowners and traditional owners on land where an Aboriginal site, object or remains are situated. The agreement is entered into by the owner of the relevant land but attaches to the land itself and is binding on any subsequent owners. Heritage agreements provide better and more robust protections for traditional owners than the legislation would alone, as the agreements 'may contain any provision for the protection or preservation of Aboriginal sites, objects or remains.'[102]

5.88 The effectiveness of Aboriginal heritage agreements is limited by the processes necessary to approve them. Under the AH Act (SA), in areas where native title has been determined, the registered native title body corporate (RNTBC) will be the RARB, subject to their agreeing to be so appointed and their approval by the Committee. The RNTBC, also known as the prescribed body corporate (PBC), is subject to native title laws and regulations.

5.89 The AH Act (SA) creates criminal offences for excavation or damage to Aboriginal sites, objects or remains without the authority of the Minister.[103] Such authority is similar to section 18 of the AH Act (WA), which allowed the destruction of the Juukan Gorge rock shelters. The Minister is required

102 AH Act (SA) s37(A) and s37(B).

103 AH Act (SA), ss 21, 23.

under section 5(2) to consider any relevant recommendations of the Aboriginal Heritage Committee, but otherwise has a wide discretion to apply his or her authority.

Aboriginal Lands Trust Act 2013

5.90 The *Aboriginal Lands Trust Act 2013* replaced the *Aboriginal Lands Trust Act 1966*, the first major recognition of Aboriginal Land Rights by any Australian Government. Its aim was to establish the Aboriginal Lands Trust, with members comprising entirely of Aboriginal people who hold land titles on the behalf of the Aboriginal people of South Australia.[104]

5.91 The new Act was created after a South Australian Government review of the 1966 Act.[105] Notably the Aboriginal Lands Trust was given more autonomy. The Aboriginal Land Trust's role is to lease, mortgage or otherwise deal with the Trust's land including land development. The role of the Trust is further outlined on their website:

> Organising the leasing of land to Communities and managing natural resource management programs to improve the condition of the land. The Trust seeks and has been granted funds from various organisations to undertake land care projects in conjunction with Aboriginal Communities and other landholders. These projects not only benefit landholders but enabled the Trust to take a more direct and proactive role in working directly with local Aboriginal Communities, individuals and both State and Federal government agencies.[106]

Box 5.4 Case study: Lake Torrens

Lake Torrens is the second largest salt lake in Australia and is integral to the beliefs and songlines of the Adnyamathanha, Pitjantjatjara, Yankunytjatjara, Arabana, Barngarla, Kokatha and Kuyani people.[107] The site is not protected by native title. In 2020, the Aboriginal Affairs Minister, South Australian Premier Steven Marshall authorised the

---

104 Aboriginal Lands Trust, *History of the Trust*, alt.sa.gov.au/wp/index.php/about-us/history-of-the-trust/, viewed 7 July 2021.

105 Agreements, treaties and negotiated settlements protect, *Aboriginal Lands Trust Act 2013 (SA)*, http://database.atns.net.au/agreement.asp?EntityID=8378&SubjectMatter=48, viewed 2 August 2021.

106 Aboriginal Lands Trust, *About Us*, http://alt.sa.gov.au/wp/index.php/about-us/, viewed 8 July 2021.

107 S Richards, 'BHP urges huge fines for damaging Aboriginal heritage', *Indaily* http://indaily.com.au/news/2021/07/08/bhp-urges-huge-fines-for-damaging-aboriginal-heritage/, viewed 8 July 2021.

minerals exploration company Kelaray to drill Lake Torrens, targeting iron oxide and copper-gold. Lake Torrens is recorded on the SA Government's Register of Aboriginal Sites and Objects, but section 23 of the Act allows the minister to approve acts which may 'damage, disturb or interfere' with Aboriginal sites.[108]

On 6 July 2021, the Kokatha Aboriginal Corporation made applications to the Federal Environment Minister to protect Lake Torrens from exploratory drilling by Kelaray under section 9 and 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981

5.92 The purpose of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* is to 'provide for the vesting of title to certain lands in the people known as Anangu Pitjantjatjara Yankunytjatjara; and for other purposes'.[109] The Act established the 'Anangu Pitjantjatjara (AP) as the 'body corporate' of traditional owners (TOs) and, through an elected Executive, empowered Anangu decision-making over development, access and other matters'.[110] Any proponent that seeks to conduct mining activity on Anangu Pitjantjatjara Yankunytjatjara land must apply directly to the Executive Board. The Board must then decide on the application with a copy sent directly to the South Australian Minister of Mines and Energy. Should the Board decline the application, the proponent may request that the application is referred to an arbitrator who is appointed by the Minister to decide on the application.[111] The arbitrator must be a judge of the High Court, the Federal Court of Australia, or the Supreme Court of a State or Territory of Australia.[112]

Maralinga Tjarutja Land Rights Act 1984.

108 AH Act (SA) s23.

109 *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981*, p.1.

110 Australian National University, *Shifting State Constructions of Anangu Pitjantjatjara Yankunytjatjara: Changes to the South Australian Pitjantjatjara Land Rights Act 1981-2006*, https://openresearch-repository.anu.edu.au/handle/1885/110788, viewed 8 July 2021.

111 Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981, s20.

112 *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), s20(11).

5.93 As with the above Act, the *Maralinga Tjarutja Land Rights Act 1984* applies the same conditions to the Maralinga Tjarutja. The Act's purpose is 'to provide for the vesting of title to certain lands known as the Maralinga lands in the people who are acknowledged as the traditional owners'.[113]

Stakeholder perceptions and experiences

5.94 South Australian stakeholders were critical of the South Australian heritage framework and there was significant criticism relating to the *Aboriginal Heritage Act 1988*.

5.95 Mr David Noonan conveyed a series of criticisms of the Act:

> Certainly, at the state level, in WA and South Australia, the Aboriginal heritage acts fundamentally fail to protect Aboriginal heritage and gives full ministerial discretion to the minister to grant a power to interfere with and destroy Aboriginal heritage. The South Australian Aboriginal Heritage Act, as a case example, is referred to as a search-and-destroy act by South Australian Native Title Services. Communities, in good will, list their cultural heritage sites and places and interests, whether they be a songline or a storyline, what might be referred to as intangible cultural values. … In good faith they put these values forward to be protected under the act, just to find that, after they have identified those values, the South Australian minister … can grant a right of interference to a mining company or other developer to interfere with and destroy those same Aboriginal values that people have put forward and identified in good faith. There is a recent case of that where the now Lake Torrens National Park was approved for mining access for drilling by Stephen Marshall as the Aboriginal Affairs Minister, and then also as Premier, over the opposition of four Aboriginal groups who have interests on and around the lake and over the direct advice of the South Australian cultural heritage committee to the Minister. Even having that advice and having had the representations from those for Aboriginal groups, the Minister still exercised discretion in favour of mining to allow drilling access on Lake Torrens. Again, that's a completely unacceptable use of power over original interests in an outdated act.[114]

5.96 Ms Brenda Underwood of the Arabana Aboriginal Corporation also decried the excessive powers of the minister to make decisions about Aboriginal cultural heritage:

> Under the South Australian Heritage Act, there is no way that the protection of the springs can be guaranteed. Under the act, the Minister for Aboriginal

113 Maralinga Tjarutja Land Rights Act 1984, p.1.

114 Mr Noonan, *Committee Hansard*, Canberra, 29 June 2021, p. 23.

> Affairs can authorise the destruction of the springs. The only requirement is that he must call a meeting and consult with us. Then he can give authorisation to anyone to continue to take water out and destroy our springs. He alone can make that decision. Should damage occur, the maximum penalty for a body corporate is $50,000. What a joke! In other cases, the penalty is $10,000 or imprisonment for six months. Who collects these fines, and who monitors and identifies damage? It is a conflict of interest, surely, that the South Australian Minister for Aboriginal Affairs is also the Premier.[115]

5.97 Mr Andrew Starkey agreed, stating:

> Our view is not one of very high regard. I've been in the game of site protection most of my life, and I cannot recall that anyone has ever been prosecuted under that act. We've lodged a complaint after complaint that go nowhere.[116]

Tasmania

5.98 The Tasmanian cultural heritage protection framework is guided by seven pieces of legislation:

- *Aboriginal Heritage Act 1975*
- *Crown Lands Act 1976*
- *Historic Cultural Heritage Act 1995*
- *Land Use Planning and Approvals Act 1993*
- *National Parks and Reserves Act 2002*
- *Museums (Aboriginal Remains) Act 1970*
- *Aboriginal Lands Rights Act 1995*.

Aboriginal Heritage Act 1975

5.99 The *Aboriginal Heritage Act 1975* (Tas) (AH Act (Tas)) is the primary legislation governing cultural heritage. It was amended in 2017 and had previously been referred to as the *Aboriginal Relics Act 1975*. The preamble to the Act is still 'the preservation of aboriginal relics', though the requirement that an object must be from before 1876 to be protected as a relic has been removed.

5.100 Like other jurisdictions, Tasmanian cultural heritage protections attach to sites and objects of significance by way of history or Aboriginal tradition.

---

115 Ms Underwood, Arabana Aboriginal Corporation, *Committee Hansard*, Canberra, 29 June 2021, p. 26.

116 Mr Andrew Starkey, Private Capacity, *Committee Hansard*, Canberra, 29 June 2021, p. 32.

Objects made by, objects, sites or places bearing signs of, and remains of the 'original inhabitants of Australia' are captured under this definition.[117]

5.101 Notably, objects made or likely to have been made for the purpose of sale are not protected.

Box 5.5 Case study: Takayna

In 2012 the Tasmanian Government closed 4WD tracks in Tasmanian Aboriginal Cultural Landscape within Takayna/Tarkine. It is one of the longest inhabited areas of Tasmania. The landscape is rich in evidence of continuous occupation, including hut depressions, high, density midden deposits, petroglyphs, and known burial sites. After extensive community consultation, 4WD tracks in the area were closed due to damage that was occurring to cultural heritage sites.[118]

After the closing of the 4WD tracks the area became an EPBC Nationally listed heritage place. Despite this, in 2014, a newly elected Tasmanian Government announced that the tracks would be reopened. No approval was sought under the EPBC Act and no assessment of the impacts on the cultural values to the relevant Aboriginal people was conducted.[119]

The Environmental Defenders Office represented the Tasmanian Aboriginal Centre in legal action taken in 2014-2016 to prevent the reopening of the tracks. The challenge was successful as the Tasmanian Government had not sought EPBC Act assessment and approval. [120]

Since then the tracks remain closed. The fact that it took legal action to ensure that the State Government complied with the Federal EPBC Act is concerning. This case demonstrates that even Federal protection is not necessarily a guarantee of the safety of Aboriginal cultural heritage.

5.102 The AH Act (Tas) is currently under review and a report was tabled in Parliament by the Minister for Aboriginal Affairs on 1 July 2021. The amended legislation will include an 'expanded and more appropriate' definition of Aboriginal heritage (that omits the term 'relic'), although it

---

117 *Aboriginal Heritage Act 1975* (Tas) (AH Act (Tas)) s 2(8)

118 Environmental Defenders Office (EDO), *Submission 107*, p. 32.

119 EDO, *Submission 107*, p. 32.

120 EDO, *Submission 107*, p. 32.

remains to be seen whether protections will be extended to intangible cultural heritage. The report tabled by the Minister does not refer to the issue. [121] The inclusion of intangible heritage is supported by Aboriginal community organisations and organisations with heritage expertise.[122]

5.103 At present, the Act does not provide for the creation and maintenance of a Register of cultural heritage, unlike many other jurisdictions. This is particularly problematic in a system where lack of knowledge may be a defence against a charge laid for harm to Aboriginal cultural heritage. This issue has been identified in the review as one that should be addressed with better cultural heritage management tools and mechanisms.

5.104 Rather than vesting ownership of Aboriginal cultural heritage in Aboriginal people, the AH Act (Tas) automatically legislates that from the date of commencement, relics found or abandoned on Crown land are the property of the state.[123] The Minister has the power to acquire relics from private ownership, unless the owner is of Aboriginal descent and has had possession for more than 50 years.[124]

5.105 Sites on which relics are found may only be declared by ministerial order to be protected sites with the written consent of the owner and/or occupier. [125]

5.106 The Act establishes the Aboriginal Heritage Council to advise the Minister and Director of National Parks on objects, sites and places alleged to be relics, and on administration of the Act. The Council has an all-Aboriginal membership and is required to consult with the Aboriginal people of Tasmania 'where appropriate and practicable'.[126] This is the only requirement for Aboriginal community consultation under this Act. The need for increased representation of Aboriginal people and interests has also been highlighted as an issue to be addressed in the review, though positions on allocations of Aboriginal decision-making power are many and varied.

---

[121] Roger Jaensch, *Aboriginal Heritage Act 1975: Review under s.23–Government Commitment in Response to the Review Findings* (Tabling Report, 1 July 2021).

[122] Department of Primary Industries, Parks, Water and Environment (Tas), *Review of the Aboriginal Heritage Act 1975 (Review Report for the Minister for Aboriginal Affairs, March 2021)*, pp. 36-37.

[123] AH Act (Tas), s11.

[124] AH Act (Tas), s12(7).

[125] AH Act (Tas), s7.

[126] AH Act (Tas), s3(6).

5.107 The AH Act (Tas) establishes a system of criminal offences to acts which harm Aboriginal heritage, including causing damage, removing relics from their place or from the state, and selling or disposing of them. It is also an offence to sell an object 'that so nearly resembles a relic as to be likely to deceive or be capable of being mistaken for a relic'. [127]

5.108 Similar to other jurisdictions, there are mechanisms for permits to harm Aboriginal heritage or to establish a defence to the actions that resulted in harm, such as lack of knowledge. Work approvals are granted for new projects and developments under the *Land Use Planning and Approvals Act 1993* and may have conditions imposed upon them by reference to the AH Act (Tas).

5.109 The review has identified a need to improve the enforcement and compliance mechanisms under the AH Act (Tas), including possible new provisions for stop work orders, community education programs and a greater enforcement role for Aboriginal people.[128]

Stakeholder perceptions and experiences

5.110 Overwhelmingly, the evidence put to the Committee is that the Tasmanian legislative framework is inadequate. The Tasmanian Aboriginal Heritage Council Chairperson, Mr Rodney Dillon, put forward the view that the State legislation is weak and that national legislation should be passed to do what the Tasmanian Government and other jurisdictions cannot.[129] The Tasmanian Aboriginal Centre is of a similar view, stating that the Tasmanian legislation is inadequate and in need of reform to ensure more uniform protection.[130]

5.111 A fundamental problem of the Tasmanian Aboriginal cultural heritage protection framework is that Aboriginal people are not acknowledged as owners of their own heritage. This undermines the capacity of the

---

127 AH Act (Tas), s14.

128 Roger Jaensch, *Aboriginal Heritage Act 1975: Review under s.23–Government Commitment in Response to the Review Findings* (Tabling Report, 1 July 2021), p. 3

129 Mr Dillon, Tasmanian Aboriginal Heritage Council, *Committee Hansard*, Canberra, 19 March 2021, p. 25.

130 Ms Heather Sculthorpe, Chief Executive Officer, Tasmanian Aboriginal Centre, *Committee Hansard*, Canberra, 19 March 2021, pp. 20-21.

Aboriginal community of Tasmania to manage, protect or conserve their own cultural heritage.[131]

5.112 Mr Rodney Dillon, the Chairperson of the Tasmanian Aboriginal Heritage Council, called for increased powers for the Council:

> We want the Heritage Council to be the one that decides and makes that stand; and when we say that this shouldn't be touched, it shouldn't be touched. We want the state government to put that into legislation like they have in white legislation. White heritage sites are fully protected by that committee. We want our committee to have that same power to say 'yea' or 'nay' about whether a site is protected or not. We've got to get that legislation through the state government.[132]

Australian Capital Territory

5.113 The ACT Aboriginal cultural heritage framework is primarily governed by the *Heritage Act 2004*. The *Nature Conservation Act 2014*, and the *Planning and Development Act 2007* also have intersection with the Heritage Act.

Heritage Act 2004

5.114 The *Heritage Act 2004* (HA (ACT)) is designed to protect and conserve both Indigenous and non-Indigenous heritage. The Act's objects include the protection of places and objects with natural heritage significance, cultural heritage significance, or that are Aboriginal. The Act seeks to construct a system of development that allows for land use and planning with regard for heritage significance and heritage guidelines.

5.115 Definitions in this legislation include:

> Aboriginal object means an object associated with Aboriginal people because of Aboriginal tradition.
>
> Aboriginal place means a place associated with Aboriginal people because of Aboriginal tradition. …
>
> Aboriginal tradition means the customs, rituals, institutions, beliefs or general way of life of Aboriginal people.

---

131 Ms Sharnie Read, Aboriginal Heritage Officer, Tasmanian Aboriginal Centre, *Committee Hansard*, Canberra, 19 March 2021, p. 20.

132 Mr Dillon, Chairperson, Tasmanian Aboriginal Heritage Council, *Committee Hansard*, Canberra, 19 March 2021, p. 25.

5.116 By these definitions, 'Aboriginal tradition' could be interpreted to include intangible cultural heritage that connects Indigenous people with place.

5.117 The Act establishes the ACT Heritage Council, wherein at least one member must be a 'public representative…who, in the Minister's opinion, adequately represents … the Aboriginal community'.[133] The Heritage Council is responsible for maintaining the register of heritage places and objects under Part 4 of the Act. The Minister may also appoint representative Aboriginal organisations in relation to places or objects[134], with whom the Council must consult before making decisions relating to registration of a place or object.[135]

5.118 This Act interacts with the *Planning and Development Act 2007*, governing land use in the ACT. Development applications are decided by the Planning and Land Authority on advice from the Heritage Council.[136] The Council further has the power to approve excavations or applications for statements of heritage effect in relation to works that may damage or diminish the heritage value of a protected place or objects.

5.119 The law in ACT is distinctive in that it grants decision-making power to the Heritage Council rather than to a Minister, a system whose like is only seen in the Northern Territory and only there in relation to sacred sites. That said, the ACT Heritage Council may only have one Aboriginal member.

5.120 Other powers of the Council include the making of heritage guidelines and directions, and to apply to the Supreme Court of ACT for heritage orders and enforcement orders.

5.121 Similar to South Australia, heritage agreements relating to conservation of significant objects or places may provide more robust protections than legislation alone. A heritage agreement is entered into between the Minister (in accordance with the advice of the Council) and the owner of the relevant place/object, and attaches to the land on which the place or object is located.

5.122 The Act also contains offence and enforcement provisions for breach of the legislation.

Northern Territory

133 HA (ACT), s17(3)(b).

134 HA (ACT), s14.

135 HA (ACT), ss31, 45.

136 HA (ACT), ss60, 61.

5.123 In the Northern Territory (NT) there are three principle Acts which contribute to the protection of Aboriginal cultural heritage:

- *Heritage Act 2011*
- *Northern Territory Aboriginal Sacred Sites Act 1989* (NTASSA)
- *Aboriginal Land Rights Act 1976* (Cth) (ALRA).

The Heritage Act 2011

5.124 The *Heritage Act 2011* offers automatic protection for all Aboriginal and Macassan[137] archaeological places and objects throughout the Northern Territory. If a site has an associated Aboriginal tradition it will also be considered a sacred site for the purposes of the NTASSA. The Act includes a Heritage Register, maintained by the Northern Territory Department of Lands, Planning and Environment. Currently 8,000 Aboriginal and Macassan archaeological places are included on the database. Information on the database is used to inform decision-making about proposed development, and proponents are required to undertake archaeological surveys if not enough information is available.[138]

5.125 The Act does not mandate consultation when a proponent proposes to undertake work that may affect an Aboriginal or Macassan archaeological place. This has been acknowledged by the Northern Territory Government as a problem, and it submitted that 'it may be possible to amend the Act so that (at the very least) it is made clear that best endeavours need to be made to consult with relevant Aboriginal people about proposed work'.[139]

5.126 Protection provisions are also contained within the Heritage Act that are comparable to other jurisdictions such as stop work orders and repair orders.

Box 5.6 Case Study: McArthur River

The McArthur River Mine in the Northern Territory has been a cause for concern for the local Gurdanji, Garrwa, Yantuwa and Marra people for

137 Macassan fishers travelled to Arnhem Land and the Kimberley regions of northern Australia from the trading port of Makassar in southern Sulawesi (modern-day Indonesia), from as early as the eighteenth century. Their primary reason for travel was to collect sea cucumbers. The fishermen also developed longstanding relationships with Indigenous communities along the northern coastline. [M Clark and S May, *Macassan History and Heritage: Journeys, Encounters and Influences*, ANU E Press, Australia, 2013, p.1.]

138 Northern Territory Government, *Submission 61*, p. 1.

139 Northern Territory Government, *Submission 61*, p. 2.

decades due to its impact on sacred sites. It is one of the world's largest zinc and lead mines

Following the decision in Mabo and before the mine commenced, the NT Government passed the *McArthur River Project Agreement Ratification Act 1992* (NT), which validated the mining leases against any native title claim and deprived the traditional owners of the right to negotiate which they would have been entitled to when the Native Title Act passed two years later. There is a separate section of the Native Title Act (s 46) that recognises the validation of the McArthur mining leases under the NT Act.

The company could still have chosen to negotiate with the traditional owners but didn't - until their commitment during the inquiry to begin negotiations.

In 2003 the mine owners proposed to transition the mine from an underground mine to an open-cut mine, seeking to extend the life of the mine. This was later approved in 2006 by NT Minister Chris Natt. Traditional owners successfully challenged, with a court deciding in 2007 to rule against the approval. However, the NT Government amended the *McArthur River Project Agreement Ratification Act 1992* (NT) to override this decision. As a result the same Act has twice thwarted traditional owner rights.

One of the biggest impacts of the mines transition to an open-cut mine was the diversion of the McArthur River in 2008 to make way for the mine. Plans to divert the river were met with strong Aboriginal and Torres Strait Islander peoples opposition due to the river's, and an associated site's, association with the Rainbow Serpent Dreaming. Mr Jack Green, a Garrwa man, stated that the diversion 'destroyed the back of the Rainbow Serpent', destroying a site of deep spiritual significance.[140]

Traditional owners, Gurdanji, Garrwa, Yantuwa and Marra peoples, state that in the history of the mine, the owners have never properly communicated with them. They were not consulted about the development of the mine or informed of activities that may impact heritage. They have also not had the opportunity to give Free Prior and

140 Mr Jack Green, *Submission 159*, p. 6; Australian Conservation Foundation, *Jack Green, McArthur River*, www.acf.org.au/jack_green_mcarthur_river, viewed 2 August.

Informed Consent as an Indigenous Land Use Agreement was never negotiated. Traditional owners also claim that they have not been provided with access to the mine area to visit sacred sites.

Mr Stephen Rooney, Macarthur River Mine General Manager acknowledged the hurt caused by the mine to traditional owners stating:

> Today, we as Glencore, the current operators of the McArthur River Mine, want to offer an apology and say sorry to the Indigenous people and traditional owners from the four languages groups of Gudanji, Yanyuwa, Garrwa and Marra. McArthur River Mine has never destroyed sacred sites, but we acknowledge that historical actions like the river diversion have clearly not met the expectations of the Aboriginal community. We at Glencore cannot change this history, but we are committed to working together with traditional owners to better meet community expectations going forward.[141]

The McArthur River Mine has made a commitment to pursing an Indigenous Land Use Agreement in an effort to rectify their relationship with traditional owners. The pursuance of an ILUA is in its early stages, should an agreement come to fruition it could be beneficial for traditional owners.

The McArthur River Mine has also made a commitment to allow traditional owners site access to facilitate the ability to visit sacred sites. Lack of access to land has also been a point of contention for traditional owners as they have long been unable to conduct cultural practices on country.

Traditional owners expressed doubts, given past history with the mine, and are in need of legal assistance to properly come to any agreement.[142]

Northern Territory Aboriginal Sacred Sites Act 1989

5.127 All Aboriginal sacred sites on land and water in the Northern Territory are protected by law under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NTASSA).

5.128 Key to the NTASSA was the establishment of the Aboriginal Areas Protection Authority (AAPA) – an independent authority which oversees the protection of sacred sites. Its functions include responding to requests

141 Mr Stephen Rooney, General Manager, McArthur River Mine, *Committee Hansard*, Canberra, 6 July 2021, p. 1.

142 Mr Jack Green, Private Capacity, *Committee Hansard*, Canberra, 18 June 2021, p. 31.

from traditional owners for sacred site protection, as well as documenting and recording sacred sites.[143] The AAPA states:

> We protect our sacred sites for the benefit of all Territorians in balance with the economic development of the Northern Territory. As such, we do not and cannot authorise the destruction of sacred sites in the Northern Territory. We consult always and as mandated by legislation. We respect the rights of custodians, traditional owners and native title holders. We negotiate with and guide developers. We manage risk, and provide certainty for custodians and developers alike. And we prosecute when people do the wrong thing.[144]

5.129 The NTASSA seeks to balance Aboriginal cultural heritage protection with 'aspirations of the Aboriginal and all other peoples of the Territory for their economic, social and cultural advancement'.[145] It operates in conjunction with the Commonwealth Land Rights (NT) Act to protect Aboriginal sacred sites by way of their significance in accordance with Aboriginal tradition. Under both Acts:

> Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.[146]

5.130 Further, the Act has the potential to protect intangible cultural heritage. In a 2013 case, *Aboriginal Areas Protection Authority v OM (Manganese) Ltd*, a prosecution was brought when a proponent acting outside the scope of an Authority Certificate caused the collapse of a rocky outcrop in the sacred site known as 'Two Women Sitting Down'. In the judgment, the Court discussed the Act's definition of 'desecration' as including 'not so much the physical integrity of the site but … whether what has occurred in relation to it has violated the sacred symbols or beliefs that it represents.'[147] This case was the first successful prosecution of a company for desecration of a sacred site in the Northern Territory.[148]

143 MCA, *Submission 104*, p. 17.

144 Aboriginal Areas Protection Authority (AAPA), *Submission 111*, p. 1.

145 *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) ('*NTASS Act*') Preamble.

146 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('Land Rights (NT) Act') s 3.

147 *Aboriginal Areas Protection Authority v OM (Manganese) Ltd* [2013] NTMC 19 [32].

148 James Plumb, *Why care about the cultural heritage duty of care?*, Carter Newell Lawyers, October 2013, www.carternewell.com/page/Publications/Archive/Why_care_about_the_Cultural_Heritage_Duty_of_Care/, viewed 8 September 2021.

5.131 The NTASSA establishes and guides the functions of the Aboriginal Areas Protection Authority (AAPA). The AAPA is an independent statutory authority with a Board of ten Aboriginal custodians and two government nominated members. The Aboriginal custodians are appointed in equal numbers of women and men from a panel nominated by the NT Land Councils.[149]

5.132 The AAPA is responsible for maintaining the Register of Sacred Sites, which in 2018 contained information on more than 12,000 sacred sites in the NT.[150] The Register assists with certainty for development and land management processes, though protection of a site is not contingent on registration as all sacred sites in the NT are protected whether they are known to the AAPA or not.[151]

5.133 The Commonwealth Land Rights (NT) Act makes it an offence to enter or remain on land that is a sacred site without permission.[152] The NTASSA backs up the Commonwealth Act with provision for the same offence, as well as offences of usage or working on a sacred site, desecrating a sacred site, or non-compliance with an Authority Certificate that results in damage to a sacred site or distress to a custodian.[153] The AAPA has sole authority to bring a prosecution in relation to these matters,[154] which presents considerable challenges for enforcement. The AAPA is a small agency with a limited capacity, and much of its enforcement ability relies on voluntary compliance and ad hoc reporting from the community.[155] Nevertheless, the AAPA brings approximately two prosecutions per year for breaches of the NTASSA.[156]

---

149 NTASS Act, s 6.

150 AAPA, *Submission 83 to Department of Planning, Land and Heritage (WA), Review of the Aboriginal Heritage Act 1972, Phase 1 consultation* (*AAPA Submission to AH Act (WA) Review*'), p. 3.

151 R Pocock, 'Aboriginal Cultural Heritage Protections in the Northern Territory' *Australian Environment Review*, vol.35, no.9/10, pp. 211-212.

152 *Land Rights (NT) Act*, s69.

153 NTASS Act ss 33-35 and 37.

154 NTASS Act, s 39.

155 PricewaterhouseCoopers Indigenous Consulting, *Sacred Sites Processes and Outcomes Review* (Report, 26 April 2016), p. 32.

156 R Pocock, 'Aboriginal Cultural Heritage Protections in the Northern Territory' *Australian Environment Review*, vol.35, no.9/10, pp. 211-212.

5.134 Anyone seeking to use or work on land or waters in the Northern Territory may apply to the AAPA for an Authority Certificate under section 19B. Though not compulsory in most cases, an Authority Certificate serves to provide certainty to proponents relating to the locations of sacred sites and the wishes of custodians, as well as a defence to prosecution.[157] Authority Certificates may only be issued where the AAPA considers there to be no substantive risk to sacred sites, or if an agreement has been reached with custodians.[158] Aggrieved proponents may then seek review from the Minister in the form of a Certificate under s 32, but any decision by the Minister must still be consistent with the Land Rights (NT) Act and not permit the desecration of sacred sites.[159]

5.135 Review of an AAPA decision by the Minister has only occurred four times during the lifetime of the NTASSA, and only once was the Authority Certificate overridden. In that circumstance, the site found protection under the federal ATSIHP Act – one of few examples where the ATSIHP Act was applied successfully for traditional owners.[160]

5.136 Even before the Juukan Gorge disaster, in 2018 the AAPA made submissions to the review of the WA *Aboriginal Heritage Act 1972*, highlighting the flaws in the current legislation and suggesting the adoption of a system similar to that which operates in the NT.[161] This recommendation was made again in the AAPA submission to the Inquiry, which emphasised the need to centralise Aboriginal and Torres Strait Islander views when determining matters related to cultural heritage.[162] The positioning of decision-making power with Aboriginal people is an example of how free, prior and informed consent can be centralised in land use decisions and heritage protections under Australian law. In the view of Justice Rachel Pepper:

> Legislation as robust as the Sacred Sites Act can militate against box-ticking "consultation" and "consent" without meaningful explanation and engagement with Aboriginal communities. The fact that the Act is

---

157 R Pocock, 'Aboriginal Cultural Heritage Protections in the Northern Territory' *Australian Environment Review*, vol.35, no.9/10, p. 213.

158 NTASS Act, s22.

159 *Land Rights (NT) Act*, s73(1)(a).

160 R Pocock, 'Aboriginal Cultural Heritage Protections in the Northern Territory' *Australian Environment Review*, vol.35, no.9/10, p. 213.

161 AAPA, *Submission to AH Act (WA) Review*.

162 AAPA, *Submission 111*, p. 4.

administered by a dedicated Aboriginal body provides an element of ownership and control to Aboriginal groups that is lacking in other states and territory legislation.[163]

5.137 In addition, the NTASSA mandates the incorporation of custodians' views by not only requiring consultation for Authority Certificate applications,[164] but by legislating that conditions under their approvals must be imposed in accordance with custodians' wishes.[165] The Act also includes a general requirement for the wishes and interests of Aboriginal people to be taken into account in decision making processes and power exercises relating to sacred sites.[166]

5.138 The clear framework for consultation and heritage protection established by the NTASSA has been proposed by the AAPA as "worthy of national adoption".[167]

Aboriginal Land Rights Act 1976

5.139 The *Aboriginal Land Rights Act 1976* (ALRA) is a Commonwealth level Act that pertains only to the Northern Territory. The Act is designed to provide security in relation to land title and to support continuing connections to land for Aboriginal people. The ALRA recognises the Aboriginal system of land ownership and provides the ability for Aboriginal and Torres Strait Islander people to claim land title if traditional association can be proved. Due to the ARLA, 50 percent of the Northern Territory has been returned to traditional owners who under the Act have inalienable freehold title.[168]

5.140 The ARLA provides Land Councils a statutory function to assist traditional owners to protect their sacred sites, both on and off Aboriginal land.

163 Justice Rachel Pepper, 'Not Plants or Animals: the protection of Indigenous cultural heritage in Australia' (Paper, Australasian Conference of Planning and Environment Courts and Tribunals, Hobart, 5 March 2014) [37]

164 NTASS Act, s19F.

165 NTASS Act, 22(1)(d).

166 NTASS Act, s 42.

167 R Pocock, 'Aboriginal Cultural Heritage Protections in the Northern Territory' *Australian Environment Review*, vol.35, no.9/10, p. 211.

168 Australian Institute of Aboriginal and Torres Strait Islander Studies, Land Rights, aiatsis.gov.au/explore/land-rights, viewed 30 September 2021; Central Land Council, The Aboriginal Land Rights Act, www.clc.org.au/the-alra/, viewed 30 September 2021.

5.141 Importantly, the ALRA provides Aboriginal people with a limited right to withhold consent to mining on their land. Where consent is withheld, resource companies must wait 5 years before making another application to mine the land.[169] Key to the rights of Aboriginal and Torres Strait Islander people is that the Act requires the consent of traditional owners for work that would be done on ALRA land. Part four of the Act covers how mining may be pursued on freehold land. Section 40 outlines that for an exploration license to be granted the areas Land Council must give consent, as well as the Minister.[170] But as outlined in section 42-43 the Land Council must first consult with and obtain consent from traditional owners.[171]

Stakeholder perceptions and experiences

5.142 Stakeholders in the Northern Territory are the only ones in the nation to hold largely positive perceptions of Aboriginal cultural heritage legislation. Evidence suggests that the Territories Aboriginal cultural heritage legislation is among the strongest in the country. Notably however, these perceptions are mostly due to the ARLA which is considered as one of the best forms of heritage protection in Australia.

5.143 Dr Josie Douglas, Executive Manager, Policy and Governance, Central Land Council CLC) said:

> In the Northern Territory, we are fortunate to have a strong piece of legislation that underpins our efforts in site protection …[172]
>
> It provides very strong protections for Aboriginal people in the Northern Territory, for traditional owners. Internationally, I think, it's held up as a very strong and unique piece of legislation that protects Aboriginal rights and interests over their land. In terms of parties with an interest, with land use agreements.[173]

5.144 The CLC outlined how the ARLA and the Native Title Act supports the rights of traditional owners. Under these Acts, the CLC has strict rules for developments and activities in their region. Sacred site clearance certificates

---

169 Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA 1976), Part IV.

170 ALRA 1976, s40.

171 ALRA 1976, s42-43.

172 Dr Josie Douglas, Executive Manager, Policy and Governance, Central Land Council (CLC), *Committee Hansard*, Canberra, 2 March 2021, p. 7.

173 Dr Douglas, CLC *Committee Hansard*, Canberra, 2 March 2021, p. 13.

are required to be obtained from the CLC. Proponents must provide a detailed work program for traditional owners to consider ensuring they are properly informed. Certificates from the CLC can contain exclusion zones as well as restricted work areas, restricting the type of work that can occur. When work is going to affect Native Title holder areas, companies must follow any instructions given by the Native Title holder. Furthermore agreements negotiated by the CLC do not contain gag clauses.[174]

5.145 The Law Council had criticisms of the Northern Territory legislation relating to the NTASSA. Their concerns revolve around the role of the AAPA as opposed to land councils in identifying relevant traditional owners to be consulted when works are proposed affecting a sacred site. The Law Council considers this as a problem, stating that:

> After four decades of conducting land claims and identifying traditional owners of land in their respective parts of the Northern Territory, the Land Councils have invaluable resources, archives and understanding of traditional ownership conducted by and controlled by Aboriginal people. By contrast, the Authority is a relatively small body with limited resources and not guided by the experience, history of research or the representative nature of the Land Councils.[175]

5.146 Archaeologist Ms Karen Martin-Stone submitted numerous criticisms of the Heritage Act relating to the lack of protection for archaeological places and objects. The Act does not mandate that developers engage with traditional owners and Custodians with regard to the management of archaeological places and objects.[176] This is compounded by the problem that there is no formal system for developers to connect with traditional owners and Custodians via the Land Councils who sometimes refuse to engage in areas that are not ARLA land.[177]

5.147 Ms Martin-Stone noted:

> I have experienced, and witnessed developers experiencing, difficulty in finding out who the Traditional Owners are for the purposes of heritage management consultation. Therefore, even when there is good will on the part of developers (which is not always the case), there are barriers to connecting

---

174 Dr Douglas, CLC, *Committee Hansard*, Canberra, 2 March 2021, p. 7.

175 LCA, *Submission 120*, p. 69.

176 Ms Karen Martin-Stone, *Submission 58*, p. 5.

177 Ms Martin-Stone, *Submission 58*, p. 5.

with Traditional Owners and Custodians. Once connected, there is no formal framework for the level of consultation required.[178]

5.148 Ms Martin-Stone said that the Northern Territory government lacks a compliance and enforcement policy for the Heritage Act. This results in companies being unaware of what is required of them, such as whether there is a need to complete a heritage survey.[179] Companies may not conduct heritage surveys properly, including through failure to use archaeologists.

5.149 Ms Martin-Stone discussed many other problems within the Act. These include the lack of a repository for heritage objects, the inability for heritage values to be amended, the lack of appeal rights for Aboriginal peoples and the lack of provisions relating to intangible heritage.[180] Due to these problems Ms Martin-Stone makes a series of recommendations on how these problems can be improved:

- provision for appropriate recognition of Aboriginal realities and worldviews, and working towards Indigenous leadership of Indigenous heritage management
- provision for appropriate levels of consultation with Traditional Owners and Custodians, built on the principles of Free, Prior and Informed Consent'
- provision of Keeping Places and statutory repositories for the appropriate custody and care of collections.
- clear triggers for when heritage assessment is required.[181]

Penalties

5.150 The civil and administrative remedies available for damage to cultural heritage were irrelevant in the destruction of the caves at Juukan Gorge, as the legislative framework was able to be circumvented by way of approvals and contractual obligations. Criminal sanctions and enforcement were also not available as part of the remedies for the destruction of the caves, and this is the case in many jurisdictions – even where provisions exist for taking

---

178 Ms Martin-Stone, *Submission 58*, p. 5.

179 Ms Karen Martin-Stone, Principal Archaeologist, In Depth Archaeology, *Committee Hansard,* Canberra, 2 March 2021, p. 16.

180 MS Martin-Stone, *Submission 58*, p. 4-5.

181 Ms Martin-Stone, *Submission 58*, p. 9.

action for destruction of Aboriginal cultural heritage. For example, in New South Wales there have been few prosecutions for destruction of Aboriginal objects under the National Parks and Wildlife Act 1974 either because a permit was in place (which is a defence to any damage) or because planning policies and legislative instruments bypass the cultural heritage protections.

5.151 Criminal penalties for causing harm to Aboriginal and Torres Strait cultural heritage vary widely across jurisdictions in Australia. [182]

Table 5.1 Criminal penalties for causing harm to cultural heritage

Jurisdiction	Maximum penalty for individual	Maximum penalty for corporations
Commonwealth	$22,200 and/or 5 years imprisonment	$111,000
New South Wales	Current: $550,000 or 1 year imprisonment	Current: $1,100,000
Victoria	$327,132 6/12 months imprisonment for impersonating or hindering an authorised officer/ACH officer	$1,817,400
Queensland	$137,850 **one outlier penalty for contravening a stop order at $2,343,450*	$1,378,500 **one outlier penalty for contravening a stop order at $2,343,450*
Western Australia	Current: $40,000 and 2 years imprisonment Proposed: $1 million or 5 years imprisonment for	Current: $100,000 Proposed: $10 million for 'serious' harm

182 Figures current as at August 2021

	'serious' harm $100,000 for 'material' harm	$1 million for 'material' harm
South Australia	$10,000 or 6 months imprisonment	$50,000
Australian Capital Territory	$160,000	$810,000
Northern Territory	Heritage Act: $62,800 or 2 years imprisonment NTASS Act: $62,800 or 2 years imprisonment	Heritage Act: $62,800 NTASS Act: $314,000

5.152 Analysing the NSW legislative framework, the Law Council of Australia submitted that penalties of this level are unlikely to be a successful deterrent, unlike penalties for environmental destruction which are 'in excess of $1 million for individuals'.[183]

5.153 Similarly in WA, BHP called for greater penalty deterrent:

> BHP supports a material increase in the fines and penalties under the AHA (WA) to reflect public concerns, act as a deterrent to unlawful damage and to reflect the unique nature of some cultural heritage sites that are protected by the Act.[184]

Legislative exemptions from cultural heritage protections

5.154 The Phenomenon of states and territories passing specific legislation to exempt certain projects or areas from cultural heritage protections is a significant problem for the protection of cultural heritage. Acts such as the Marandoo Act in WA, the McArthur River Project Agreement Ratification Act in the NT and the Roxby Downs (Indenture Ratification) Act in SA are examples of this phenomenon. Acts such as these have had devastating

183 LCA, *Submission 120*, p. 58

184 BHP, *Submission 86*, p. 5

consequences for traditional owners as rights to protect cultural heritage are intentionally disrupted and prevented.

5.155 The Committee notes that Rio Tinto and BHP have committed to transitioning away from the Marandoo Act/ the Roxby Downs Act as well as the fact that Glencore have committed to entering into a ILUA in relation to MRM in an effort to address and rectify the historical inability for traditional owners to have a say.

5.156 Nevertheless, these Acts remain in force and even when they are repealed their associated histories of injustices will remain.

5.157 States and territories as well as companies involved in such acts should seek to fast-track transitions and recompense traditional owners for injustices that have occurred.

Committee comment

5.158 As this Chapter makes clear, the protection of Aboriginal and Torres Strait Islander cultural heritage across the states and territories is at best complex, with no consistency in how legislative frameworks are developed or applied.

5.159 Those legislative frameworks that have strong Aboriginal and Torres Strait Islander peoples' representation in decision making in standalone legislation seem to have the best acceptance by traditional owners and proponents.

5.160 Those states with multiple pieces of legislation that do not actively seek to include Aboriginal and Torres Strait Islander peoples in decision-making positions perform the worse.

5.161 The Committee acknowledges that Western Australia is not the only state pursuing an inquiry into Aboriginal Heritage legislation. Queensland, South Australia, New South Wales and Tasmania are also conducting inquiries into cultural heritage legislation. But Aboriginal and Torres Strait Islander peoples, in particular from New South Wales and Tasmania, have been waiting a long time for meaningful legislation to will protect their heritage.

5.162 New South Wales' reform process began in 2010, eventually culminating into the Aboriginal Cultural Heritage Bill 2018, which was released for public consultation yet no final action has yet been taken to enact this bill.

5.163 The Committee's views on the way forward for all jurisdictions' legislative frameworks are in Chapter 7 of this report.

6. Commonwealth law and international agreements

6.1 The Commonwealth Government's legislative framework provides protection for cultural heritage sites on lands in Commonwealth control, and provides remedy for seeking injunction against state-authorised destruction.

6.2 Australia is also party to a range of international agreements and conventions that provide for the rights of Indigenous peoples. These agreements and conventions provide frameworks for the management and preservation of tangible and intangible cultural heritage.

6.3 The Committee's views on the future for the Commonwealth legislative framework and the role of international agreements is discussed in Chapter 7.

Commonwealth legislation

6.4 The Commonwealth legislative framework comprises the:

- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*
- *Environment Protection and Biodiversity Conservation Act 1999*
- *Native Title Act 1993*
- *Protection of Movable Cultural Heritage Act 1986*
- *Underwater Cultural Heritage Act 2018*
- *Aboriginal Land Rights Act 1976 (discussed in chapter 5)*

6.5 This framework has serious deficiencies in its protection of cultural heritage.

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

6.6 The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) is designed as a system of protection by application, where Aboriginal and Torres Strait Islander peoples or interested parties can apply to the Commonwealth Minister of the Environment for protection of areas and objects.

6.7 The limitations of the ATSIHP Act were apparent in the Juukan Gorge disaster, as it is legislation of last resort where state and territory protection is not sufficient. It also requires Aboriginal and Torres Strait Islander groups to take the initiative, rather than creating protection from the outset and without application, as the Minister can only act where they receive an application.[1]

6.8 The provisions of the ATSIHP Act allow for the declaration of an area only to be protected and only where all other state and territory pathways have been exhausted. It is therefore limited as a means for protecting cultural heritage as a holistic concept, and it was also not sufficient for the purpose of protecting Juukan Gorge, as discussed in Chapter 2.

Box 6.1 Case Study: Junction Waterhole

In the 1980s, the Northern Territory Government began developing a plan to dam the Todd River as part of a flood mitigation project. The project was stalled by traditional owner protests that the development would cause sacred sites to be inundated. In 1988, a '50 year flood' caused considerable damage and resulted in the deaths of two homeless Aboriginal people who were camping in the usually-dry riverbed. The flood prompted a new proposal for a dam site at Junction Waterhole.

Junction Waterhole had been known as a sacred site since 1984. An approval was initially issued in 1989 for the development by the NT Aboriginal Areas Protection Authority (AAPA), which was a necessary approval under NT law for the project to go ahead. Controversy and outrage led the AAPA to withdraw the authority certificate in 1991, which resulted in the first ever ministerial override of the AAPA in April 1992. In justifying the decision, the Minister of Works put great emphasis on the need to protect the lives of Aboriginal people living in the riverbed.

The NT Government's decision was thwarted in this case by the then

1 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ('ATSIHP Act') s 9(1)(a).

Federal Minister for Aboriginal Affairs. The Minister sought a review of the project under section 10(4) of the ATSIHP Act from Hal Wootten QC, who produced an extensive report covering flood mitigation, engineering, environment, politics, finance and Aboriginal rights, and ultimately recommended against the dam.

> To justify a $20 million dam in the name of the safety of a hundred or so homeless Aboriginal people while having refused for a decade to acknowledge their problems is hypocritical and cynically opportunistic.[2]

The Federal Government then put a 20-year moratorium on the dam's construction in the first ever application of the ATSIHP Act.[3]

6.9 The requirement for making a declaration in relation to Aboriginal heritage under the ATSIHP Act is that the area be declared a place of significance. 'Significance' is determined by the Minister and the purpose of any declaration is to protect an Aboriginal place or object from injury or desecration. Once declared, any damage to the place or object will result in criminal sanctions.[4] The decision by the Minister to declare a place or object as significant under the ATSIHP Act is also subject to remedy through judicial review. Recent cases have challenged the decision making of the Minister.[5]

6.10 In the circumstance of a potential breach of the ATSIHP Act, only the Minister has the statutory power to seek a Federal Court injunction to stop or prevent conduct that would otherwise be a criminal offence under section 22.[6] In addition, there are no civil enforcement provisions for the traditional

---

2 B Brown, 'Tickner bans Alice Springs dam to save sacred sites', *Australian Financial Review*, 19 May 1992, www.afr.com/politics/tickner-bans-alice-springs-dam-to-save-sacred-sites-19920518-k4xbp, viewed 3 September 2021.

3 H Wootten, 'The Alice Springs Dam and Sacred Sites', *The Australian Quarterly*, Vol. 65, No. 4 (Summer 1993) www.jstor.org/stable/20635739?refreqid=excelsior%3A28f45b3b1db49d99a953983c6b4c67f7, viewed 10 September 2021.

4 ATSIHP Act, Part III.

5 Clark v Minister for the Environment [2019] FCA 2027; Onus v Minister for the Environment [2020] FCA 180.

6 ATSIHP Act, s 26(1).

owners on whose behalf the protection has been enacted, or for anyone else, to seek to enforce the Act.[7]

6.11 The ineffectiveness of the ATSIHP Act is evidenced by data from the Department of Agriculture, Water and Environment (DAWE) and as reported in the 2016 State of the Environment (SOE) report. The 2016 SOE report notes:

> The ATSIHP Act has done little to fulfil its intended purpose of protecting significant Aboriginal areas or objects. Between 2011 and 2016, 32 applications were received for emergency protection under s. 9 of the Act, 22 applications were received for long-term protection under s. 10 of the Act, and 7 applications were received for protection for objects under s. 12 of the Act. During the past 6 years, no declarations under ss. 9, 10 or 12 of the Act were made.[8]

6.12 Updated data on applications has not yet been made available by DAWE at the time of writing, a fact which raises concerns about the Department's implementation of the principles of transparency.

Box 6.2 Case study: Butterfly Cave

The Butterfly Cave and its surrounding bushland is an Awabakal women's place,[9] a key focus of cultural activity and a connection to cultural practices and ancestors. Over ten years ago the land was sold to Roche Group/Hammersmith Pty Ltd who planned to build a housing estate in the area which would have resulted in the destruction of the cave, the traditional journey path and surrounding bushland. Awabakal people were never consulted and have fought to protect the cave ever since.

Awabakal women and the Sugarloaf and Districts Action Group (SDAG) have been working to protect the Butterfly Cave. Their battle has been long and hard, taking a toll emotionally, mentally, and spiritually.[10] Despite their efforts their culturally significant site is still at risk.

---

7 Environmental Defenders Office (EDO), *Submission 107*, p. 31

8 Mackay R (2017). Australia state of the environment 2016: heritage, independent report to the Australian Government Minister for the Environment and Energy, Canberra, p. 84.

9 Ms Annie Freer, Campaign Coordinator, Sugarloaf and Districts Action Group (SDAG), *Committee Hansard*, Canberra, 9 March 2021, p. 9.

10 SDAG, *Submission 60*, p. 1.

In 2013 the NSW Government made a NPW Act s84 declaration to protect the cave. But the protected area only extended for a 20-metre radius from the cave centre. It was the smallest declaration ever granted for a site in NSW which would have allowed any development to overlook the cave.[11] A follow up 2016 application was refused. Unsurprisingly the SDAG now has no faith in NSW legislative protections.

An ATSIHP declaration was made in 2019, due to efforts from the NSWALC and the Awabakal Land Council Group, with the SDAG working closely. However, despite the site being declared as a significant Aboriginal area under the Act, the declaration still would have allowed the housing development to be built in too close proximity to the site.[12] This was only the second time since 1999 that the Commonwealth had acted to protect a site under the ATSIHP Act.[13]

Mrs Anne Andrews and Ms Annie Freer of SDAG have alleged that throughout this process they have received various threats. They also allege a local Member of the NSW Parliament was threatened because of his support for the Butterfly Cave[14].

The Butterfly Cave is still under threat. The area subject to the declaration has been significantly reduced and the development amended so its boundaries now lie just outside the Declared Area, which excludes the traditional journey path.[15] Breach of the declaration would result in fines of up to $111,000 for the developer, but the Awabakal women have expressed concern that such penalties would be insignificant as a deterrent.[16]

Recent trend indicating increase to applications and declarations

11 SDAG, *Submission 60*, p. 7.

12 SDAG, *Submission 60*, p. 12.

13 Environmental Defenders Office, *Housing development threat to Butterfly Cave Aboriginal Women's site*, www.edo.org.au/2020/11/13/housing-development-threat-to-butterfly-cave-aboriginal-womens-site/, viewed 3 September 2021.

14 Ms Freer, SDAG, *Committee Hansard*, Canberra, 9 March 2021, p. 12.

15 EDO, *Submission 107*, p. 31.

16 G Crivellaro, 'Federally protected sacred women's site still at risk of irreparable damage', *National Indigenous Times*, 21 August 2020, http://nit.com.au/federally-protected-sacred-womens-site-still-at-risk-of-irreparable-damage/, viewed 21 August 2021.

6.13 Recent case law has demonstrated that there has been a spate of applications for declarations under the ATSIHP Act from 2020 to 2021.[17] Recent gazettals of applications made under ATSIHP and declarations issued by the Minister also support a finding of a recent uptick in applications and declarations being made including:

- for the protection of the former Anglican Holy Trinity Church grounds, in Huskisson, New South Wales[18]
- for the preservation and protection of 'Ravensworth Estate', and including Bowmans Creek and Glennies Creek, in the Hunter Valley, New South Wales[19]
- for the protection of a specified known as Burragorang Valley, near Warragamba, New South Wales[20]
- for the protection of a specified area known as 'Apparrlu (Waubinin Mabauzi Lag and Waubinin Malu)' on Murulag (or Prince of Wales Island), Torres Strait, Queensland[21]
- for the protection of a specified area known as Djaki Kundu, near Gympie, Queensland.[22]

6.14 The increase in applications made since the destruction of the caves at Juukan Gorge an indicator that the existing system of protection by declaration is being used proactively as far as is possible.

Time lags and delays in making declarations

---

17 *Glencore Coal Pty Limited v Franks* [2021] FCAFC 61; *Mairianne Mackenzie & Ors v Head, Transport for Victoria and Minister for Planning* [2021] VSCA; *MairiAnne Mackenzie and others according to the schedule v Head, Transport for Victoria the Minister Of Planning* [2021] VSCA 24; *CXXXVIII v Honourable Justice Richard Conway White* [2020] FCAFC 75; 274 FCR 170; *Onus v Minister for the Environment* [2020] FCA 1807; *Talbott v Minister for the Environment* [2020] FCA 1042.

18 ATSIHP section 10 application gazettal notice published 24 June 2020, www.legislation.gov.au/Details/C2020G00496, viewed 3 September 2021.

19 ATSIHP section 10 application gazettal notice published 24 September 2020, www.legislation.gov.au/Details/C2020G00772, viewed 3 September 2021.

20 ATSIHP section 10 application gazettal notice published 28 January 2021, www.legislation.gov.au/Details/C2021G00074, viewed 3 September 2021.

21 ATSIHP section 10 application gazettal notice published 24 January 2020, www.legislation.gov.au/Details/C2020G00070, viewed 3 September 2021.

22 ATSIHP section 10 application gazettal notice published 19 May 2021 www.legislation.gov.au/Details/C2021G00359, viewed 3 September 2021.

6.15 Despite the increase in applications, the average time for the making of declarations, once notice of an application has been made, appears to be approximately 2 years. The recent declaration of the Mount Panaroma site as protected under section 10 of the ATSIHP Act commenced from the application made in October 2019 to be declared by the Minister as a protected site in May 2021.[23] The Butterfly Cave at West Wallsend in NSW was first lodged as an application in October 2017 and declared as a protected area in January 2019. This is a significant length of time in the context of potential threats to destruction of cultural heritage, particularly given that the declarations have tended to follow longer running public campaigns.[24] The heritage continues to be under threat even once the declaration is made (see case study) and requires significant ongoing input and resources from Aboriginal and Torres Strait Islander peoples.

6.16 The ATSIHP Act provides the Minister with wide discretion, subject to administrative law review limitations, to make a decision on declaring an area protected under the ATSIHP Act. Section 9, which deals with emergency declarations, gives the Minister scope to decide if a site should be protected 'if he or she is satisfied that it is necessary'[25] In section 10, the Minister can make a decision provided he or she 'has considered such other matters as he or she thinks relevant'[26]. These matters, provided they are not irrelevant, can include balancing factors (as in the health and safety concerns for the blasts at Juukan Gorge) that can outweigh protection of cultural heritage with little recourse.

6.17 There are also exemptions under the ATSIHP Act even when a declaration has been made and protection granted. For example, even if an emergency declaration is made under section 9, if a certificate under the *Protection of Movable Cultural Heritage Act 1986* is in force, the declaration will not prevent the export of an Aboriginal object.[27]

Box 6.3 Case study: Gomeroi lands and Shenhua mine

---

23 *Aboriginal and Torres Strait Islander Heritage Protection (Wahluu Mount Panorama Site) Declaration 2021* (Cth), effective from 5 May 2021.

24 G Crivellaro, 'Federally protected sacred women's site still at risk of irreparable damage', *National Indigenous Times*, 21 August 2021, http://nit.com.au/federally-protected-sacred-womens-site-still-at-risk-of-irreparable-damage/, viewed 10 September 2021.

25 ATSIHP Act, s9(3).

26 ATSIHP Act, s10(1)(d).

27 ATSIHP Act, s9 (2A).

Gomeroi lands were under threat of an open-cut mining project in the middle of the Liverpool plains. The project belonged to Shenhua Watermark, a Chinese company. Cultural heritage that was threatened included a mortuary trail, multiple burial sites, multiple grinding grooves and a place of post-colonial massacre.[28] The Gomeroi consider this area to be their Gallipoli site, their war memorial.[29]

Poor perceptions of NSW cultural heritage protections led the Gomeroi to pursue an ATISHP application as their only course of action to protect their heritage.[30] An ATSIHP application was made in 2015, with a follow up application made in 2017 at the request of the Department to ensure all relevant evidence was included.[31] In total the application had over 1,000 pages of evidence.[32]

The Minister for the Environment agreed that the mine would irreversibly destroy sacred places and that destruction would cause high levels of emotional and spiritual devastation. It was also agreed that the Gomeroi's cultural and heritage was of immeasurable value.[33]

Nevertheless, in 2019 the Minister chose to not make a declaration to protect Gomeroi cultural heritage.[34] The decision was made on the grounds that the 'expected social and economic benefits of the mine to the local community outweighed the destruction of these areas of immeasurable cultural values'. This was despite accepted doubts about the potential benefits of the mine to State and National economies.[35]

The Gomeroi were devastated, they were bewildered that despite the Minister's recognition of the value of their culture it could be destroyed due to economic interests. They said that they felt duped that the ATSIHP

---

28 Gomeroi Traditional Custodians, *Submission 148*, p. 1.

29 Mr Mitchum Neave, Traditional Owner, Gomeroi Traditional Custodians, *Committee Hansard*, Canberra, 9 March 2021, p. 16.

30 Gomeroi Traditional Custodians, *Submission 148*, p. 1.

31 Ms Veronica Talbot, Traditional Owner, Gomeroi Traditional Custodians, *Committee Hansard*, Canberra, 9 March 2021, p. 16.

32 Gomeroi Traditional Custodians, *Submission 148*, p. 1.

33 Gomeroi Traditional Custodians, *Submission 148*, p. 1.

34 Ms Talbot, Gomeroi Traditional Custodians, *Committee Hansard*, Canberra, 9 March 2021, p. 18.

35 Beatty Legal, *Submission 39*, p. 1.

Act was disregarded in favour of the interests of a foreign owned company.[36]

In April 2021 the NSW Government reached an agreement with Shenhua to withdraw its mining lease application due to opposition from the local community who feared the mine's impact on the area's fertile food-growing soil. It is not apparent the the Gomeroi's concerns were taken into account in this decision.[37]

Judicial review mechanisms

6.18 Since the events at Juukan Gorge there has been a growth in the number of cases brought under the ATSHIP Act.

6.19 The growing number of cases brought under the ATSIHP Act by Aboriginal and Torres Strait Islander groups, while a demonstration of healthy separation of powers under the Constitution, also indicates that decisions of the Minister are not effectively protecting cultural heritage.

6.20 The recent case of *Onus v Minister for the Environment* [2020] FCA 1807 followed a series of cases relating to scar trees in Victoria threatened by construction of a highway through or near the trees. The Federal Court found the Minister had erred in refusing to declare several of the trees as protected under the ATSIHP Act and the matter was reverted for further decision. Given this was the culmination of several litigation matters, all requiring resourcing and responsibility of Aboriginal communities, there is a case to be made for co-designing decisions relating to cultural heritage from the beginning – rather than after expensive and time consuming litigation.

Stakeholder perceptions of ATSIHP

6.21 Throughout the inquiry stakeholders conveyed their perspectives on the ineffectiveness of the ATSIHP Act. Many stakeholders considered the replacement of the Act as the best course of action to address its inadequacies.

> …the Law Council supports replacing *the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act) with new standalone

36 Gomeroi Traditional Custodians, *Submission 148*, p. 2.

37 Hon John Barilaro, Deputy Premier, 'NSW Government and Shenhua agree to end Watermark project', *Media Release,* 21 April 2021.

> legislation that provides effective protection to First Nations cultural heritage, having regard to the deficits of the current Act's operation, and is accompanied by adequate funding of First Nations representative bodies in order to address current power imbalances.[38]

6.22 Professor Samantha Hepburn expressed significant criticisms of the ATSIHP Act, identifying that there are strong gaps in the scope of the protection provided by the Act. Professor Hepburn identified the following issues:

- It is inappropriate for the act to operate as a 'last resort' measure because of the inadequate legislation that exists for many states and territories. In Western Australia, the act is often actually utilised as a 'first resort' and it is inadequately structured to provide this protection
- The procedures under the ATSIHP [Act] are extremely weak. The basic requirement that the Commonwealth minister consult with State or Territory ministers (rather than the impacted traditional owners) is unnecessarily time consuming, administratively burdensome and insufficiently consultative
- The reporting requirements under ATSIHP [Act] are a significant burden and markedly increase time and administration costs
- Outside the scope of the interim declarations–which can only last for a maximum period of 60 days–obtaining a long-term protective declaration is difficult and time consuming. By the time a declaration is obtained, 'at risk' cultural heritage may already have been damaged or destroyed by corporate entities, like Rio Tinto, operating within the legal mandate of the State.[39]

6.23 Many stakeholders have had negative experiences with the ATSIHP Act including the WGAC. In 2017 WGAC sought protection for a sacred site referred to as Spear Hill, a site that has evidence of occupation back into the Pleistoscene. Fortescue had sought approval from the WA Aboriginal Affairs Minister to construct a railway and mine in the area with only preliminary and cursory knowledge of heritage about the area.[40] In response WGAC attempted to pursue an ATSIHP Act declaration. However, it was not successful. WGAC's perspective of the legislation is that:

> The "last resort" nature of the ATSIHP Act is a potentially useful concept, as a mechanism to protect significant places that become threatened through non-

38 Law Council of Australia (LCA), *Submission 120*, p. 6.

39 Dr Samantha Hepburn, *Submission 54*, pp. 12-13.

40 Wintawari Guruma Aboriginal Corporation (WGAC), *Submission 50*, p. 5.

> compatible land uses. The practical experience of the Commonwealth's "last resort" provisions however confirm the laws to be cumbersome, slow and ineffectual. The same economic momentum that pressures the state decision makers affects the Commonwealth, and outcomes that lead to protection outcomes are rare.[41]

Environment Protection and Biodiversity Conservation Act 1999

6.24 The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is a central piece of legislation guiding protection of Aboriginal and Torres Strait Islander peoples and non-Indigenous cultural heritage.

6.25 With national reach, it is designed as a means of protecting the environment, including cultural heritage, through rigorous assessment and approvals processes with oversight and decision making power in the hands of the Commonwealth Minister for the Environment, with the linked Department administering the legislation. Its objects include:

- protecting the environment, including matters of national environmental significance (MNES), which can include cultural heritage as assessed
- providing for, protecting and conserving cultural heritage
- promoting a co-operative approach to management of the environment, including with Aboriginal and Torres Strait Islander peoples and across levels of government.[42]

6.26 The capacity to carry out these objects is guided by 'appropriateness' as to the role of government in assessing and deciding upon MNES. In carrying out this role, there is flexibility within the legislation to allow for state and territory legislative processes to cross over with the Commonwealth. In effect, this takes place through bilateral agreements on which MNES, and which state or territory processes will be managed by either jurisdiction.

6.27 The process of listing of world heritage, national heritage and Commonwealth heritage places is described in the Act.

- Only the Australian Government can nominate places in Australia for entry onto the World Heritage List. The World Heritage Committee, established under the World Heritage Convention, assesses each nomination and decides whether to enter a place on the World Heritage

41 WGAC, *Submission 50*, p. 6.

42 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act') s3(1-2)

List. A property cannot be included on the World Heritage List without the consent of the State where the site is located.

- National Heritage sites and their heritage values are recorded on the National Heritage List. Natural, historic and Indigenous sites within Australia can be listed as National Heritage. The Environment Minister decides whether to include a place on the List, following the consultation process set out in the Act.
- Heritage on Commonwealth land can be listed, managed and protected. The purpose is to give the Commonwealth greater control over heritage places in areas the Commonwealth owns or controls. Heritage on Commonwealth land can be listed, managed and protected. The Environment Minister decides whether to include a place on the Commonwealth Heritage List, following the consultation process set out in the Act.[43]

6.28 Very few sites of Aboriginal and Torres Strait Islander heritage are listed on the World Heritage List or the National Heritage List.[44] The complex process of listing under the Act means that it is largely ineffective in protecting Aboriginal and Torres Strait Islander heritage.

6.29 The EPBC Act does not, and did not, protect cultural heritage from destruction like that at Juukan Gorge. It is this, together with the gaps left by the ATSIHP Act, which creates a situation that leaves cultural heritage vulnerable to desecration at a national level.

Gaps in the EPBC Act

6.30 The question raised by the destruction of the caves at Juukan Gorge, which was not a site listed or protected under the EPBC Act, is what else is excluded and how far protection of Aboriginal and Torres Strait Islander cultural heritage under the EPBC Act actually goes.

6.31 DAWE noted:

> The matters protected under the EPBC Act may include heritage places listed for their Indigenous cultural heritage values. Other matters protected under the EPBC Act may also have cultural significance for Aboriginal and Torres

---

43 Environmental Defenders Office, *Commonwealth Heritage Protection Law*, www.edo.org.au/publication/commonwealth-heritage-protection-law, viewed 1 October 2021.

44 https://www.environment.gov.au/heritage/places/world-heritage-list, viewed 1 October 2021, https://www.environment.gov.au/heritage/places/national-heritage-list, viewed 1 October 2021.

Strait Islander peoples, although they may be protected or listed for reasons that do not relate to their cultural significance.[45]

6.32 Protection of Aboriginal and Torres Strait Islander peoples' cultural heritage is currently sometimes more reliant upon non-specific protection for non-Indigenous peoples' cultural heritage (for example, where environmental values may have been identified), including under international law or policy, than it is upon explicit consideration by Australian policymakers and legislation. This could be a result of the incomplete definition or understanding of Aboriginal and Torres Strait Islander cultural heritage, not just within the EPBC Act, but more broadly.

Recommendations to amend the EPBC Act

6.33 The EPBC has been subject to a range of reviews and recommendations for the improvement of environmental laws relating to cultural heritage. Many of the same or similar recommendations have been made previously, in particular in the 2016 State of the Environment Report (2016 SOE).

6.34 The 2016 SOE noted that there should be increased Aboriginal and Torres Strait Islander peoples' engagement and that cultural heritage is not adequately protected. It also outlined risks of damage to cultural heritage in Western Australia due to the gaps in the law, and warned of the potential for sites of significance to be destroyed – a warning which has proved to be prescient.

6.35 The 2016 SOE noted that it was a 'major' risk to the heritage of Australia that there would be loss of Aboriginal and Torres Strait Islander peoples' knowledge and an 'almost certain' possibility that there would be 'an incremental destruction of Aboriginal and Torres Strait Islander peoples places' from development and pressures on the environment.[46]

2020 review of the EPBC Act

6.36 The most recent compulsory review of the EPBC Act was undertaken in 2020 by Professor Graeme Samuel (Samuel Review). The Samuel Review recommended that there be additional obligatory National Environmental Standards (NES) included with revised legislation, and highlighting engagement with Aboriginal and Torres Strait Islander communities.

---

45 Department of Agriculture, Water and the Environment (Cth) (DAWE), *Submission 23*, p. 5.

46 Mackay R (2017). Australia state of the environment 2016: heritage, independent report to the Australian Government Minister for the Environment and Energy, Canberra.

6.37 The Samuel Review outlined existing policies and legal issues relating to cultural heritage and Aboriginal and Torres Strait Islander engagement with rigour. The Review concluded that a review of national cultural heritage laws should be undertaken to revise and develop more appropriate laws to protect cultural heritage. The final report of the Review, delivered in October 2020 (EPBC Act Final Report), stated:

> The operation of the EPBC Act has failed to harness the extraordinary value of Indigenous knowledge systems that have supported healthy Country for over 60,000 years in Australia. A significant shift in attitude is required, so that we stop, listen and learn from Indigenous Australians and enable them to effectively participate in decision-making. National-level protection of the cultural heritage of Indigenous Australians is a long way out of step with community expectations. As a nation, we must do better.[47]

6.38 The EPBC Act Final Report outlines in some detail the ineffectiveness of the EPBC Act in protecting Aboriginal cultural heritage. The Report described the current framework as 'tokenistic' and symbolic' rather than prioritising Aboriginal and Torres Strait Islander peoples engagement and protection of cultural heritage. Many of the recommendations in the Report would provide positive steps towards bringing protection of cultural heritage.[48]

6.39 Broadly, the Samuel Review makes key recommendations that the EPBC Act should address issues related to Aboriginal and Torres Strait Islander engagement, environmental decision making and deficiencies in cultural heritage protection, including:

- re-evaluating the role of the Indigenous Advisory Committee and establish an Indigenous Engagement and Participation Committee (IEPC) with a decision making and co-design role in decisions affecting cultural heritage
- making reference to and consideration of Aboriginal cultural heritage and engagement with Indigenous communities a key part of the approvals process under the EPBC Act
- requiring consultation with Indigenous communities early, including obtaining Free, Prior and Informed Consent (FPIC) and following the

47 Samuel, G 2020, *Independent Review* of the EPBC Act – *Final Report*, Department of Agriculture, Water and the Environment, Canberra, p. ii.

48 Samuel, G 2020, *Independent Review* of the EPBC Act – *Final Report*, Department of Agriculture, Water and the Environment, Canberra, p. 6.

Nagoya Protocol,[49] as part of any assessment process and by including protocols as an engagement approach.

- introducing a Commissioner as part of a Compliance Assurance Commission with oversight and guidance from the IEPC in relation to cultural heritage matters
- introducing criminal enforcement mechanisms for harm of cultural heritage, noting that criminal enforcement measures currently exist but should be strengthened for cultural heritage protections

6.40 In summary, the EPBC Act could be significantly improved to empower Aboriginal and Torres Strait Islander peoples decision making and to protect cultural heritage.

Stakeholder perceptions

6.41 The EPBC was a key topic of discussion throughout the inquiry. Similar to the ATSIHP ACT, stakeholders were unanimous in their views that the EPBC is a flawed piece of legislation that does not meet the expectations of Aboriginal and Torres Strait Islander peoples or any other stakeholders. A common view of stakeholders was that the EPBC should be retained, but that it should be amended to ensure that it can provide protection. In addition, some stakeholders such as Australia ICOMOS and Aboriginal Victoria believe that the ATSIHP Act should be incorporated into the EPBC. Many stakeholders noted the Samuel Review and supported its findings.

6.42 Mining companies consistently conveyed views that Aboriginal and Torres Strait Islander cultural heritage is best protected by state heritage laws. BHP stated:

> Currently, State and Territory legislation is the primary means for regulating and protecting Aboriginal and Torres Strait Islander cultural heritage across Australia. BHP believes that this approach is effective and that the current balance between State and Federal cultural heritage laws should be maintained.[50]

6.43 BHP also added that:

> We consider that Commonwealth laws play an important role in protecting cultural heritage that is of national and world heritage significance, and in taking into account Indigenous values associated with matters of national

---

49 See: United Nations Environment Programme, Convention on Biological Diversity, www.cbd.int/abs/, viewed 9 September 2021.

50 BHP, *Submission 86*, p. 5.

environmental significance. This, in our view, should continue as the primary focus of the EPBC Act in relation to Indigenous peoples heritage.[51]

6.44 The Law Council of Australia raised a range of issues regarding the limitations of the EPBC Act, stating:

> Careful consideration should … be given to the emerging findings from the current Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) review [the Samuel Review] regarding the protection of First Nations cultural heritage, and the opportunities to improve its role in achieving this objective, as part of a broader suite of Commonwealth legislation.[52]

6.45 The Central Land Council considered the required listing of cultural heritage to be a key flaw:

> The CLC does not support the proposition that the EPBC Act should be the only, or primary Commonwealth legislation for the protection of Indigenous cultural heritage. The EPBC Act only applies to developments that meet certain criteria, for Indigenous cultural heritage the development must impact on heritage listed on the National Heritage List. It is the CLC's experience that traditional owners are reluctant to expose their sacred knowledge to the public and they often do not want to have their sacred sites listed on a publically available list. They often only bring the existence of sacred sites to the attention of others when those sites are in danger of damage or desecration.[53]

Native Title Act 1993

6.46 The *Native Title Act 1993* (NT Act) was introduced in response to the Mabo decision in the High Court which recognised the rights and interests of Aboriginal and Torres Strait Islander people in land and waters according to their traditional laws and customs. The NT Act has been amended and interpreted over the past 28 years for the purpose of making native title determinations that give Aboriginal owners custodianship of land to which they have proven an unbroken and 'unextinguished' historical connection.

6.47 The NT Act establishes the National Native Title Tribunal (NNTT) to mediate in native title proceedings; determine certain applications and objections relating to future acts; assist in the negotiation of Indigenous Land Use Agreements (ILUAs); provide assistance to native title holders, PBCs

---

[51] BHP, *Submission 86*, pp. 5-6.fcen

[52] LCA, *Submission 120*, p. 61.

[53] Central Land Council, *Submission 109*, pp. 27-28.

and representative bodies; and act on certain reviews and inquiries. The NT Act is limited to review and determination of native title claims, including considering whether extinguishment has occurred. There have been several important native title decisions in the Federal and High Courts.

6.48 Native title rights are defined in accordance with the traditional law and custom of the Aboriginal and Torres Strait Islander group to whom they belong. They are not limited in scope by legislation, but only by reference to the traditional law and custom of the group, and often their legal recognition in determination by the Federal Court is limited by negotiations between the traditional owner group and the state or territory government. Rights may be exclusive or non-exclusive. Commonly, native title rights and interests include:

- right to access, use and occupy an area
- right to use resources (e.g. hunt, fish, gather bush tucker, etc.)
- right to conduct ceremonies and traditional practices, and teach law and custom
- right to visit and protect sites of significance.

6.49 Native title also affords certain procedural rights to claim groups and native title holders, such as the right to comment on or negotiate in development proposals. Procedural rights are directly proportionate to the size of the project. Mining and extractive projects attract the highest procedural right, the right to negotiate under subdivision P. There is no right to veto.

Box 6.4 Case study: Magazine Hill

Magazine Hill is a culturally significant site to the Waanyi people, situated on the boundaries of Century Mine. There are two separate groups of Waanyi who have differing perspectives about current plans for the site. There is a cultural heritage management plan for the site, agreed to by the Waanyi Native Title Aboriginal Corporation (the Waanyi PBC) which will result in the destruction of the Hill, including an important rock shelter. Despite the Waanyi PBC's agreement, some members of the Waanyi community are vehemently opposed to the destruction of Magazine Hill, causing some conflict in the local area.

Century Mine was the first mine established in Queensland through processes in the *Native Title Act 1993* (Cth).[54] Core to the process was the establishment of the Gulf Communities Agreement in 1997. The

[54] New Century Resources (NCR*), Submission 155*, p. 2.

agreement was signed by four Native Title Groups, the company and the Queensland Government. The agreement covers land use and benefit sharing and specifies that Magazine Hill would be preserved and protected from mining activities.[55]

In 2010 the Waayni People achieved Native Title over their country. But the area of the mining leases was excluded from the Waanyi native title determination application, so there is no determination with respect to Magazine Hill itself.[56]

New Century Resources (NCR) acquired Century Mine in 2016. Following this acquisition, geotechnical investigations determined that Magazine Hill was at risk of damage from historical mining activities. It was determined that the best option to address the instability was to excavate and remove the hill and buttress the pit wall of the mine itself.[57] Before proceeding with this course of action NCR consulted with the Waanyi PBC. This consultation led to the development of the cultural heritage management plan under the *Aboriginal Cultural Heritage Act 2003* (Cth).

Despite the Waanyi PBC's agreement, some Aboriginal and Torres Strait Islander peoples in the area remain opposed to the destruction of Magazine Hill. They are dissatisfied by the consultation process and the lack of consultation beyond the Waanyi PBC.

In response to these concerns the Waanyi PBC stated:

> The Waanyi People's final decision to consent to the excavation of Magazine Hill was taken with considerable sadness. But it was an informed decision, not made lightly and made against a background of consideration and investigation of the site by senior Waanyi lore men and their advisers–not just part of the most recent process, but over a number of years. It was made because it was the best decision to be made in the circumstances.[58]

The Waanyi PBC further noted that the cultural significance of Magazine Hill was destroyed due to the destruction of the Ten Mile Waterhole ceremonial ground at Lawn Hill, as part of a 2009-2010 agreement between the Gulf Aboriginal

---

[55] NCR, *Submission 155*, p. 2.

[56] NCR, *Submission 155*, p. 2

[57] NCR, *Submission 155*, p. 2

[58] Waanyi Native Title Aboriginal Corporation, *Submission 159*, p. 2.

Development Company and the then Waanyi PBC. This site 'was the core essential component of the central landscape',[59] and its damage effected the importance of Magazine Hill to the Waanyi.

Current Waanyi PBC Chair Alec Doomadgee initially became involved in negotiations regarding Magazine Hill with the intention to seek a contract to rehabilitate the area. But due to the precarious position of Magazine Hill, the PBC sought to come to an agreement that would benefit the Waanyi people, including compensation and a rehabilitation contract for the area.[60]

6.50 Native title law does not inherently protect Aboriginal cultural heritage in an enforceable way which would prevent the destruction that occurred at Juukan Gorge. The PKKP noted:

> The Federal Court recognised native title over almost the entirety of the PKKP claim area, including Juukan Gorge, by the making of a Consent Determination on 2 September 2015. In making this Consent Determination, the Federal Court recognised the PKKP people's native title rights and interests. These rights and interests include the right to enter, travel over, visit and remain on country; to use the traditional resources of the land; and to engage in cultural activities on country, including visiting places of cultural or spiritual importance, and preserving the integrity of those places. The Consent Determination also recognised PKKP peoples' connection to country through their many land-related laws and customs which facilitate their 'ongoing spiritual connection to country'. It recognised that PKKP connection to country retained 'an active spiritual potency'.[61]

6.51 Even the Federal Court determination demonstrates the primacy of other land interests over native title. Shortly after outlining the native title rights and interests now legally recognised as belonging to the PKKP People, the judgment provided that:

> a. to the extent that any of the Other Interests are inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title rights and interests continue to exist in their entirety, but the native title rights and interests have no effect in relation to the Other Interests to the extent of the inconsistency during the currency of the Other Interests; and otherwise

59 Mr Murrandoo Yanner, Gangalidda Garawa, Native Title Aboriginal Corporation (PBC), *Committee Hansard*, Canberra, 8 July 2021, p. 7.

60 Mr Murrandoo Yanner, Gangalidda Garawa, Native Title Aboriginal Corporation (PBC), *Committee Hansard*, Canberra, 8 July 2021, p. 7.

61 PKKP, *Submission 129*, p. 11.

b. the existence and exercise of the native title rights and interests do not prevent the doing of any activity required or permitted to be done by or under the Other Interests, and the Other Interests, and the doing of any activity required or permitted to be done by or under the Other Interests, prevail over the native title rights and interests and any exercise of the native title rights and interests but do not extinguish them.[62]

6.52 These Other Interests include any provided under the agreement ratified by the *Iron Ore (Hamersley Range) Agreement Act 1963* (WA), of which the mining tenement over Juukan Gorge and held by Rio Tinto was one. The rights as described in the RTIO and PKKP People Indigenous Land Use Agreement (Area Agreement) dated 15 November 2012 (the 2012 ILUA) also created a prevailing interest over common law native title.[63]

6.53 Native title common law and the NT Act are limited in their efficacy to protect cultural heritage even where native title has been determined.

Box 6.5 Timber Creek

The High Court decision in Northern Territory v Griffiths (Timber Creek)[64] confirmed the approach to compensation for extinguishment of native title. The claim was brought on behalf of the Ngaliwurru and Nungali Peoples in the Northern Territory. The claimants were native title holders and argued that extinguishment acts on approximately 127 ha of land affecting native title rights had resulted in cultural and economic loss and harm, with compensation for the loss being applicable. The High Court reduced compensation from the original 2016 Federal Court decision to an award of $2.3 million to the claimants for the loss. The final compensation amount comprised of $1.3 million for cultural loss and $320,050 for economic loss including simple interest.

It has been described as a significant native title case, not only because it was decided by the High Court, but also because it directed a new focus for native title determinations. Rather than native title being concerned primarily with proving continuous connection to land, after Mabo and the Wik decisions, the compensatory nature of the Timber Creek claims

---

62 Chubby on behalf of the Puutu Kunti Kurrama People and the Pinikura People #1 and #2 [2015] FCA 940, [8] ('PKKP Native Title Determination').

63 PKKP Native Title Determination, [4 [3(c)]] and [4[5]].

64 Northern Territory v Griffiths (2019), [4 [3)]] and [4[5]].

ensured focus on loss of that connection due to extinguishment and the resultant compensation applicable.[65] Historical and cultural connection to land of native title claimant groups still remains crucial to the determination of compensation for loss, but compared to Mabo and previous determination decisions, the focus has changed to proving destruction of that connection. 'Cultural loss' was also successfully argued to have been for the impairment of rights to 'connection or traditional attachment to land and intangible disadvantages of loss of rights to live on and gain spiritual and material sustenance from the land.'[66] The concept of intangible connection to land was therefore recognised in the decision.

The High Court in the Timber Creek case assessed both economic loss and cultural loss and provided a template for considering the value of cultural heritage as equated with the value of freehold title. This provides a backdrop for considering the destruction of the caves at Juukan Gorge. The destruction of the caves was carried out in accordance with legislation and private agreements, notwithstanding the warnings and lack of Aboriginal consultation. The extent of the damage and the loss, in the context of considering the Timber Creek decision, must be potentially incalculable.

Prescribed Body Corporates

6.54 When a native title determination is made by the Federal Court, the NT Act requires traditional owners to establish or nominate a corporation to represent them and their native title interests. These organisations are known as registered native title bodies corporate (RNTBC) more commonly known as prescribed body corporates (PBCs).

6.55 PBCs are legal entities that have roles and responsibilities under the NT Act, PBC Regulations and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. The roles and responsibilities of PBCS include:

- to hold, protect and manage determined native title in accordance with the objectives of the native title holding group

---

65 Pamela Faye McGrath, 'Native Title Anthropology after the Timber Creek Decision' (2017) 6(5) Land, Rights, Laws: Issues of Native Title 1.

66 Timber Creek (n 65) [11](3).

- to ensure certainty for governments and other parties interested in accessing or regulative native title land and waters by providing a legal entity to manage and conduct the affairs of the native title holders.
- manage future acts (proposals for work that will affect native title)
- participate in the development of Indigenous land usage agreements (ILUAs - negotiations between governments, companies and the PBC about future developments on the land)
- exercise, negotiate, implement and monitor native title agreements
- consult with native title holders and document evidence of consultation and consent
- consult with and considering the views of relevant native title representative bodies (NTRB) and native title service providers (NTSP) for an area regarding native title decisions
- compensation (considering compensation matters, and bringing native title compensation applications in the Federal Court)
- bringing future native title application cases in the Federal Court. [67]

6.56 A primary role of PBCs is heritage management. It is a role that involves a significant amount of work which correlates to a series of associated problems impacting PBCs. A large part of heritage management for PBCs is dealing with proponents who seek to undertake work on their native title land. In dealing with such issues PBCs will negotiate agreements with the proponent, which can be a strenuous and lengthy process. Negotiations will culminate in agreement documents that are hundreds of pages long, written by the proponent, PBCs can struggle to understand these documents and often require legal assistance to do so.

6.57 Throughout the inquiry, inadequate funding for PBCs was consistently discussed by stakeholders as a core problem inhibiting their ability to function. The Commonwealth Government does not currently contribute to the funding of PBCs, instead there has been a 'hands-off approach' which submitters such as The Association of Mining and Exploration Companies (AMEC) believe has led to poor outcomes.[68]

6.58 Mr Jamie Lowe, Chief Executive Officer of the National Native Title Council stated:

---

67 Office of the Registrar of Indigenous Corporations, *The CATSI Act and native title*, www.oric.gov.au/catsi-act/catsi-act-and-native-title, viewed 1 September 2021; NativeTitle.org, *About PBCs*, www.oric.gov.au/catsi-act/catsi-act-and-native-title, viewed 1 September 2021.

68 Association of Mining and Exploration Company (AMEC), *Submission 66*, p. 5.

> PBCs are not funded by governments to carry out their most basic statutory functions, let alone to negotiate on a level playing field with mining companies. Most PBCs have no money at all … Some of them have to manage [inaudible] workloads, overwhelming on a daily basis.[69]

6.59 Submitters noted that this disproportionate balance of power leads to agreements that heavily favour proponents; there are also problems that timelines can be forced on PBCs in the agreement process itself.

6.60 Examples were particularly prevalent in Western Australia, particularly agreements that imposed gag clauses on traditional owners.

6.61 Some mining companies do fund legal costs and other agreement-related expenses for native title groups,[70] However this also raised questions as to the independency of these processes and whether they result in positive cultural heritage outcomes.

6.62 A key concern relating to the lack of funding of PBCs is that agreement making is a major source of funding for PBCs. Financial compensation may form part of agreements and may contribute to the administrative costs of PBCs. AMEC raised concerns that if this continues PBCs may be more likely to approach heritage agreements as a central source of revenue.[71]

6.63 PBCs often have very few staff even though they may be required to deal with large numbers of proponents. The National Native Title Council noted that one particular PBC had 546 future act tenements on their books, stating that 'for a PBC to manage that on their books with zero resourcing from any Commonwealth or state government I think we can all agree is a gross inadequacy'.[72]

6.64 Northern Queensland Land Council submitted that many PBCs are not in a position to deal with future acts sent to them, and that they often cannot be processed in time for permits to be given for actions on native title land to take place.[73] Lack of staffing also impacts the ability of PBCs to process agreement documents given to them by proponents as they do not have the

---

69 Mr Jamie Lowe, Chief Executive Officer, National Native Title Council (NNTC), *Committee Hansard*, Canberra, 28 August 2020, p. 41

70 Mr Tony Denholder, Senior Associate, Ashurst, *Committee Hansard,* Canberra, 18 June 2021, p. 13.

71 AMEC, *Submission 66*, p. 5.

72 Mr Lowe, NNTC, *Committee Hansard*, Canberra, 28 August 2020, p. 42.

73 Mr Sam Backo, Chair, Northern Queensland Land Council, *Committee Hansard*, Canberra, 18 June 2021, p. 5.

capacity to read through and understand documents that are often lengthy and highly complex.

6.65 Commonwealth funding of PBCs is a necessity that will ensure better cultural heritage management outcomes across Australia. Current funding methods for PBCs are inadequate and do not result in favourable cultural heritage protection. Commonwealth funding of PBCs will provide PBCs with the opportunity to better manage their roles and responsibilities and it will also ensure that more certainty can be provided for proponents seeking to come to meaningful agreements.

Stakeholder perspectives

6.66 Stakeholders to the inquiry were critical of the NT Act, conveying criticisms on difficulties in actually achieving native title, as well as problems with NT Act agreement making. Another core problem discussed was the actual protection for Aboriginal and Torres Strait Islander peoples' heritage offered by the Act. Some stakeholders spoke on the fact that they consider the NT Act a failure due to the lack of support or protection it provides to cultural heritage.

6.67 Dr Samantha Hepburn noted the difficulty in achieving Native Title and the lack of protections it results in, stating:

> … it's incredibly difficult to establish native title. In most instances, the Crown will have already extinguished native title through the issuance of grants, statutory pastoral leases and so forth.[74]

6.68 Dr Hepburn further noted that:

> …the structure of the Native Title Act is essentially about proving that you have this continuing connection with the land where you can reach that level of proof and that a grant hasn't been issued which [inaudible] the native title claim, then you can establish it. And, if you get to that point, the only rights that are protected—it's kind of like recognition … given the evidential difficulties and given the problems with extinguishment, often what happens is that, outside of other land rights legislation, other land rights that might be issued, you will have perhaps an Indigenous land use agreement or some alternative form of [inaudible] framework happening. It's insufficiently focused on heritage protection.[75]

---

74 Dr Samantha Hepburn, Professor of Law, Deakin Law School, *Committee Hansard,* Canberra, 19 February 2021, p. 6.

75 Dr Hepburn, *Committee Hansard,* Canberra, 19 February 2021, p. 7.

6.69 Ms Annette Xiberras noted the challenge with proving 'continual use' which significantly diminishes the ability for some traditional owners to achieve native title, and as a consequence severely inhibiting their ability to protect country and cultural practices:

> I don't believe in the Native Title Act. … Nobody along the east coast will ever be able to get a native title claim in because you have to show continual use of culture, language and customs; and, once we were put on Aboriginal reserves—my grandmother was born on Coranderrk—and into that process, you could no longer practise your customs, your traditions or your language. I think it's so unfair. …Culture changes over time, and we've changed to adapt into a white society so that we can protect our children, our land and our country. We've had to do what we've had to do to survive. Our culture is still alive and it's still adapting, but native title doesn't recognise or see that.[76]

6.70 Further problems were discussed by Dr Kate Galloway who spoke on the lack of rights given by a native title determination, stating:

> …the Native Title Act itself is actually ill-conceived and designed to limit the capability of First Nations people to give expression to their rights. For example, they don't have a right of veto over mining activity on their land.[77]

6.71 As noted throughout the report, the significant problem with the agreement making process under any legislative framework is the power imbalance weighted in favour of proponents.

6.72 The National Native Title Tribunal has an arbiter role under the NT Act but this does not weigh applications in favour of traditional owners:

> While the parties are under an obligation to negotiate "in good faith" prior to taking the matter to arbitration, "good faith" has revealed itself a low bar with the NNTT most often finding in favour of the developer or miner and allowing the proposed land use to proceed with few conditions. … Between 2009 and 2017 the NNTT dealt with over 100 applications to arbitrate the grant of a mining title because agreement could not be reached between the parties. On only two occasions has there been a determination that the grant of a mining title could not proceed.[78]

Protection of Movable Cultural Heritage Act 1986

---

[76] Ms Annette Xiberas, Co-Chair, Victorian Traditional Owners Land and Justice Group, *Committee Hansard*, Canberra, 19 March 2021, p. 10.

[77] Dr Kate Galloway, Private Capacity, *Committee Hansard*, Canberra, 19 February, p. 36.

[78] NNTC, *Submission 34*, p. 10.

6.73 The *Protection of Movable Cultural Heritage Act 1986* (PMCH Act) implements the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 and is designed to assess and protect cultural objects of significance to Australia. 'Significance' is a test which is determined by way of examination of an object that is found to have criteria which is of national importance and therefore worthy of protection. It is administered by the Commonwealth Department of the Arts. The legislation also provides for the return of cultural property illegally obtained by foreign countries.

6.74 The PMCH Act carries criminal enforcement powers. This is relevant for Aboriginal and Torres Strait Islander peoples' cultural heritage because it demonstrates that there are strong mechanisms possible for protecting cultural heritage which can be implemented at a Commonwealth level. But this Act was not widely referred to in evidence, indicating that it is not seen as an avenue for Aboriginal and Torres Strait Islander cultural heritage protection.

Underwater Cultural Heritage Act 2018

6.75 The Underwater Cultural Heritage Act 2018 protects all underwater cultural heritage, implementing cultural heritage considerations under the UNESCO Convention on the Protection of Underwater Cultural Heritage 2001. The Act broadened existing definitions of underwater cultural heritage to include objects of Aboriginal and Torres Strait Islander cultural heritage. There is a discrepancy in the treatment of non-indigenous and Aboriginal and Torres Strait Islander cultural heritage however. Shipwrecks and aircraft are granted automatic protection under section 16. But under section 17 Aboriginal and Torres Strait Islander cultural heritage requires the Minister to be satisfied that the cultural material is of heritage significance.

6.76 This disparity was discussed by the Murujuga Aboriginal Corporation who has had recent archaeological discoveries on their Sea Country. Stone tools and other evidence of human habitation were found up to 25 metres underwater, the finds were dated as being at least 8,500 years old. Despite the importance of the discoveries they still required the Minister the grant protection, even with a 75 year old shipwreck having automatic protection.[79]

6.77 The Murujuga Aboriginal Corporation stated that:

[79] Murujuga Aboriginal Corporation (MAC), *Submission 87*, p. 12.

> …this discrepancy in the Australian legislation's treatment of Indigenous and non-Indigenous archaeological material is in contrast to those countries that have signed the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (which protects all categories of UCH sites over 100 years old)[80]

International conventions and declarations

6.78 Australia is signatory to a range of international conventions and declarations. These declarations should guide national law and policy making with respect to the rights of Aboriginal and Torres Strait Islander peoples.

UN Declaration on the Rights of Indigenous People

6.79 The UN Declaration on the Rights of Indigenous (UNDRIP) is an important document which articulates world Indigenous peoples' rights to set and pursue their own priorities for development, and to maintain and control their cultural heritage. This has not been formally adopted into Australian law, but it was endorsed in 2009. There are remaining steps to be taken before UNDRIP can be adopted into national law.

6.80 Much of the content of UNDRIP is relevant to consideration of cultural heritage laws. The key provisions of UNDRIP include that Indigenous people have the right to:

- practice and revitalise their cultural traditions and customs, and states shall provide redress for cultural property taken without free, prior and informed consent (Article 11)
- practice their spiritual and religious traditions, customs and ceremonies, maintain sites, control ceremonial objects and repatriate human remains, and states shall seek to enable the access and/or repatriation of ceremonial objects and human remains (Article 12)
- revitalize, use, develop and transmit their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons, and states shall take effective measures to ensure that this right is protected (Article 13)
- establish and control their educational systems and institutions providing education in their own languages, the right to all levels and

[80] MAC, *Submission 87*, p. 12.

forms of education of the State without discrimination, and states shall, in conjunction with Indigenous peoples, take effective measures to ensure such education is provided (Article 14)

- maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions and intellectual property over such heritage, knowledge and culture, and states shall, in conjunction with Indigenous peoples, take effective measures to recognize and protect the exercise of these rights (Article 31)
- determine and develop priorities and strategies for the development or use of their lands or territories and other resources, and states shall consult and cooperate with Indigenous peoples in order to obtain their free and informed consent before the approval of any project affecting their lands, territories and resources, provide effective mechanisms for redress for any adverse impact from such activities (Article 32)
- access to and prompt decisions for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights, with due consideration to the customs, traditions, rules and legal systems of Indigenous peoples and international human rights (Article 40).[81]

6.81 The Law Council of Australia (LCA) submitted that:

> The UNDRIP is considered the comprehensive standard on human rights for Indigenous peoples and informs the way governments across the globe should engage with and protect the rights of Indigenous peoples.[82]

6.82 Regarding the obligations created by UNDRIP for the Australian Government, the LCA stated that:

> …insofar as the UNDRIP relies on and elaborates well established human rights in international treaty and customary law, it is binding on Australia… The UNDRIP is not a treaty and therefore it does not itself create legally binding obligations. However, many, if not all, of its provisions have been recognised as reflecting customary international law. Its articles also echo many of the rights articulated in legally binding human rights treaties, but with a specific focus on Indigenous peoples.[83]

81 United Nations Department of Economic and Social Affairs, *United Nations Declaration on the Rights of Indigenous Peoples*, www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html, viewed 27 August 2021.

82 LCA, *Submission 120*, p. 15.

83 LCA, *Submission 120*, pp. 15-16.

Box 6.6 Case study: Warragamba Dam

Hundreds of sacred sites are at risk of being flooded in the Southern Blue Mountains due to the proposed raising of Warragamba Dam by the NSW Government and Water NSW. The land of the Gundungurra people is a rich cultural landscape and is a highly significant part of their country. Despite being the Native Title holders, the Gundungurra have not been consulted by the State government as required by the *Native Title Act 1993* (Cth) and the Gundungurra Indigenous Land Use Agreement. [84]

The 2017 NSW Government Hawkesbury-Nepean Valley Flood Risk Management Strategy report proposed raising the Dam by14 meters to create a flood mitigation zone. This was considered as the best option to reduce risks to life, property and community assets posed by floodwater risks from the Warragamba River catchment.[85]

The Gundungurra Aboriginal Heritage Association and the Illawarra Local Aboriginal Land Council (GAHA and ILALC) both have significant concerns about this proposal. Already a large portion of cultural heritage and Dreaming stories of the Gundungurra were flooded when the Dam was built in the 1960s. If the dam wall is further raised, what remains of those stories will be destroyed.[86] The deep cultural historical value of the land is at risk, values derived from places, stories and cultural resources. Significant tangible and intangible heritage will be lost, including rock shelters, art, significant stories and songlines that form part of the identity of the Aboriginal people of the land.[87]

The Blue Mountains is also a World Heritage Area and the proposed

84 Blue Mountains City Council, 'Fact Sheet: Warragamba Dam Raising: What's at stake?', www.bmcc.nsw.gov.au/sites/default/files/docs/Warragamba%20Dam_Community%20Forum_Factsheet_FINAL_0.pdf, viewed 1 September 2021.

85 Water NSW, *Warragamba Dam Raising*, www.waternsw.com.au/projects/greater-sydney/warragamba-dam-raising, viewed 1 September 2021.

86 Blue Mountains City Council, 'Fact Sheet: Warragamba Dam Raising: What's at stake?', www.bmcc.nsw.gov.au/sites/default/files/docs/Warragamba%20Dam_Community%20Forum_Factsheet_FINAL_0.pdf, viewed 1 September 2021.

87 Illawarra Local Aboriginal Land Council and Gundungurra Aboriginal Heritage Association Inc, *Submission to the Select Committee on the Proposal to Raise the Warragamba Dam Wall*, p.9.

flooding would be in direct contravention to the UNESCO World Heritage convention.[88] There is a possibility that the raising of the dam would result in the de-listing of the area from the UNESCO World Heritage List because of the impact outstanding heritage that would occur.

A final decision has not been made regarding the raising of Warragamba Dam. Aboriginal groups must be properly consulted before this occurs, with financial aid to do so if required. ILALC were optimistic about a positive outcome for the issue. GAHA and ILALC appeared before the NSW Select Committee on the Proposal to Raise the Warragamba Dam Wall. Mr Paul Knight of the ILALC believed that their evidence was accepted and taken into consideration.[89]

Free, Prior and Informed Consent

6.83 Free, Prior and Informed Consent (FPIC) is a core principle of UNDRIP. Stakeholders throughout this inquiry have pointed to it as a crucial principle that must be enshrined within Australian Aboriginal cultural heritage legislation and related practices.

6.84 FPIC is a specific right that pertains to Indigenous people which allows them to give or withhold consent to any project that may affect them or their lands. Once given, consent may be withdrawn at any stage. Furthermore, the principle of FPIC allows Indigenous people the right to negotiate conditions under which the project will be designed, implemented, monitored and evaluated. This is also embedded within the right of self-determination.[90]

6.85 The elements of FPIC can be defined as follows:

- **Free:** The consent is free, given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.

---

88 Blue Mountains City Council, 'Fact Sheet: Warragamba Dam Raising: What's at stake?', www.bmcc.nsw.gov.au/sites/default/files/docs/Warragamba%20Dam_Community%20Forum_Factsheet_FINAL_0.pdf, viewed 1 September 2021.

89 Mr Paul Knight, Chief Executive Officer, Illawarra Local Aboriginal Land Council, *Committee Hansard*, Canberra, 9 March 2021, p. 36.

90 Food and Agriculture Organization of the United Nations, *Indigenous peoples*, www.fao.org/indigenous-peoples/our-pillars/fpic/en/, viewed 10 September 2021.

- **Prior:** The consent is sought sufficiently in advance of any authorisation or commencement of activities.
- **Informed:** The engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.
- **Consent:** A collective decision made by the right holders and reached through a customary decision-making process of the communities.[91]

6.86 There is agreement between Aboriginal and Torres Strait Islander groups and industry concerning the importance of FPIC. In *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia* it is stated that:

> As a foundational principle, Australia's Indigenous Peoples are entitled to expect that Indigenous Cultural Heritage legislation will uphold the international legal norms contained in the UNDRIP.[92]

Dhawura Ngilan is discussed in more detail in chapter 7.

6.87 Many Aboriginal and Torres Strait Islander groups noted that ministerial decision-making powers were in conflict with FPIC. For example, the Cape York Land Council was clear that decisions regarding cultural heritage must be made by traditional owners.[93]

6.88 The Minerals Council of Australia (MCA) also recognised the guiding role UNDRIP:

> The minerals industry recognises the United Nations Declaration on the Rights of Indigenous Peoples as a practical framework to inform engagement, decision-making and partnerships. The Australian minerals industry understands FPIC as genuine and good-faith engagement aiming to achieve consent in the form of a land use agreement that sets out how the participants will work together to maintain the consent over the life of a project.[94]

6.89 The MCA further commented that:

---

91 Food and Agriculture Organization of the United Nations, *Indigenous peoples*, www.fao.org/indigenous-peoples/our-pillars/fpic/en/, viewed 10 September 2021.

92 Heritage Chairs of Australia and New Zealand (HCOANZ), September 2020, *Dhawura Ngilan: A Visions of Aboriginal and Torres Strait Islander Heritage in Australia,* Canberra, pp. 32.

93 Mr Terry Piper, Acting Chief Executive Officer, Cape York Land Council , *Committee Hansard*, Canberra, 8 June 2021, p. 1.

94 Ms Tania Constable, Chief Executive Officer, Minerals Council of Australia (MCA), *Committee Hansard*, Canberra, 6 July 2021, p. 10.

> We are reviewing our whole approach to FPIC at the moment. It's a process of meaningful engagement, with the aim of documenting consent in the form of a land use agreement. That has to be done right at the start of a process—at the beginning, before even pen is put to paper, really. Companies should obtain consent through a process that incorporates traditional decision-making structures, although sometimes that can be really challenging for companies navigating the problem. By working with Indigenous peoples to devise an inclusive engagement plan right from the beginning, that will ensure that consent is gained and that projects can move forward. A company that really does fail to do that from the beginning doesn't have a relationship and it's really going to struggle to gain a social licence to operate in the longer term from the traditional owners and from the communities. In terms of enacting free, prior and informed consent, it must be done alongside and with the traditional owners right from the very, very beginning.[95]

6.90 The Centre for Social Responsibility in Mining observed that the industry is starting to engage with concepts like FPIC to guide agreement making and that the legislative and policy frameworks are falling behind:

> As researchers, we are observing and tracking how the industry is engaging with those terms and concepts, which are gaining prominence. We track what the industry commits to. It's all very voluntary. It's self-regulatory. Our submission is that industry capability to keep up with the commitments that it's making in the policy realm, including around free prior and informed consent, is often lacking. Companies are making commitments in this area but we're not always seeing the capability on the ground, in performance teams, to support the commitments they're making and to put them into practice.
>
> …. We also hear that FPIC is—you used the word 'bastardised'—kind of being picked apart a little bit. So it is free, prior and informed, but there is not the consent piece. We do hear that. We hear that FPIC is consultation. So we do agree with you that it is a term that's open to interpretation. But processes of consultation and consent are very important, and we need to have a more open discussion about what it means and what it looks like.[96]

6.91 The Committee also received evidence about the increasing importance of shareholder power in influencing the actions of companies in the mining industry. National and international shareholders are responding to concerns about heritage and have put a considerable amount of pressure on

---

95 Ms Constable, MCA, *Committee Hansard*, Canberra, 6 July 2021, p. 13.

96 Professor Deanna Kemp, Director, Centre for Social Responsibility in Mining, Sustainable Minerals Institute, University of Queensland, *Committee Hansard*, Canberra, 18 June 2021, p. 45.

Rio Tinto to make the changes they did. [97] These actions remind corporations that their social license and corporate ethical positions will affect how they are able to do business in the future – it will affect their investment prospects and return on investment. The same principles apply to other industries, particularly in the context of a transition to renewables, opening the way for them to learn from the mistakes of the mining boom and pay respect to the living heritage of Aboriginal and Torres Strait Islander peoples.

6.92 It was also submitted that immediate and urgent consideration should be given to the inclusion of FPIC to the NT Act.[98] There were, however, concerns that this is not possible. Mr Simon Hawkins from the Yamatji Marlpa Aboriginal Corporation noted that under the NT Act some processes, such as mining tenements, can be granted without native title consent.[99] This goes against the principles of FPIC.

6.93 The NT Act is not the only legislation that does not adhere to the principles of FPIC. Most, if not all, cultural heritage legislation in Australia fails to adhere this principle as decision making is often is not placed in the hands of Aboriginal and Torres Strait Islander peoples.

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970)

6.94 The United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970[100] was ratified and adopted by Australia in national legislation (PMCH Act, see above). The purpose of the convention is to ensure that cultural objects are

---

97 Ms Louise Davidson, Chief Executive Officer, Australian Council of Superannuation Investors, Committee Hansard, Canberra, 28 August 2020, p. 34. Ms Mary Delahunty, Head of Impact, Health Employees Superannuation Trust Australia (HESTA), Committee Hansard, Canberra, 17 November 2020, p. 8. Ms Claire Heeps, Senior Responsible Investment Adviser, Health Employees Superannuation Trust Australia, Committee Hansard, Canberra, 17 November 2020, p. 8.

98 Emeritus Professor Jon Altman, *Submission 22*, p. 7.

99 Mr Simon Hawkins, Chief Executive Officer, Yamatji Marlpa Aboriginal Corporation, *Committee Hansard*, Canberra, 13 October 2020, p. 1.

100 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972)

not moved or transferred globally, including by way of import or export to Australia.

Convention concerning the Protection of the World Cultural and Natural Heritage (1972)

6.95 The Convention concerning the Protection of the World Cultural and Natural Heritage[101] is an international instrument protecting cultural and natural heritage. Australia ratified the Convention in 1974. The Convention protects cultural and natural heritage by listing heritage of outstanding value on the World Heritage List.

Australia ICOMOS Charter for Places of Cultural Significance (1979)

6.96 The Australia ICOMOS Charter for Places of Cultural Significance (the Burra Charter) was adopted by the Australian National Committee of the International Council on Monuments and Sites (ICOMOS) in 1979, most recently amended in 2013.

6.97 The Burra Charter considers various international instruments, and guides conservation and management of cultural heritage places and states how places are geographically defined in area. It may include elements, objects, spaces and views and it notes that place may have tangible and intangible dimensions.[102]

Box 6.7 Case study: Kakadu walkway

Under the NT Sacred Sites Act, Parks Australia (manager of the world heritage listed Kakadu National Park) was charged with damages to an area near Gunlom Falls. In the matter of the AAPA v the Director of National Parks, it was alleged that section 34 of the Act was breached by Parks Australia. The Aboriginal Areas Protection Authority alleged that a

[101] *Convention concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975)

[102] *Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance*, adopted 19 August 1979, Australian National Committee of the International Council on Monuments and Sites (revised version entered into force 31 October 2013)

walking track was built on a sacred site without permission. The walkway was erected too close to a site and has not been opened.[103] Aboriginal Areas Protection Authority chairman Bobby Nunggumarjbarr stated:

> It is good that AAPA was able to listen to the concerns of the traditional owners and do a thorough investigation… These things have happened in the past, but we really need to work together to make sure things happen in the way that the traditional owners want them to. I want to make sure all the sacred sites are protected in the future for the benefits of the traditional owners and the custodians and all the visitors.[104]

Directions hearings held on 5 August 2021. The Director of National Parks stated they will be entering into a plea of not guilty.[105] According to media reports, Parks is arguing crown immunity, making it immune from prosecution.[106] As at September 2021, the case is yet to be heard.

UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003)

6.98 The Convention for the Safeguarding of the Intangible Cultural Heritage was adopted by the UNESCO General Conference on 17 October 2003 and entered into force starting in 2006, following ratification of the treaty by thirty UNESCO Member States. The convention was adopted with consideration for the importance of 'intangible cultural heritage as a mainspring of cultural diversity', as was highlighted in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989, and in the UNESCO Universal Declaration on Cultural Diversity of 2001.

---

103 'Parks Australia charged with damage to sacred site in Kakadu National Park', *Australian Leisure Management*, 15 September 2020, www.ausleisure.com.au/news/parks-australia-charged-with-damage-to-sacred-site-in-kakadu-national-park/, viewed 3 September 2021.

104 L Allam, 'Parks Australia charged with damaging sacred site in Kakadu National Park', *The Guardian* 15 September 2020, www.theguardian.com/australia-news/2020/sep/15/parks-australia-charged-with-allegedly-damaging-sacred-site-in-kakadu-national-park-northern-territory, viewed 3 September 2021.

105 Aboriginal Areas Protection Authority, 'Aboriginal Areas Protection Authority v Director of National Parks', *Media Release*, 5 August 2021.

106 A Bunch, 'Commonwealth and NT to battle over Kakadu', *The Canberra Times*, 30 July 2021, www.canberratimes.com.au/story/7364896/commonwealth-and-nt-to-battle-over-kakadu/, viewed 28 August.

6.99 As at September 2019, one-hundred and seventy-eight states have either, ratified, approved or accepted the Convention, but it is significant to note that Australia is yet to ratify or become a party to the Convention. The preamble recognises that Aboriginal and Torres Strait Islander peoples' communities are particularly important stakeholders.[107]

6.100 This Convention is discussed further in the final chapter of this report.

Other significant instruments

6.101 There are also a number of key human rights conventions which set frameworks for the recognition of the right of self-determination. These include:

- International Convention on the Elimination of all Forms of Racial Discrimination (1966) (ICERD)
- International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR)
- Aboriginal and Torres Strait Islander peoples and Tribal Peoples Convention (1989) (ILO Convention 169)

---

107 *Convention for the Safeguarding of the Intangible Cultural Heritage*, opened for signature 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006).

7. A pathway forward

7.1 Rio Tinto was not alone in exploiting inadequate state and Commonwealth legislation to pursue resources at the cost of cultural heritage. Case studies throughout the report demonstrate that Aboriginal and Torres Strait Islander peoples have suffered the loss of their cultural heritage sites at the hands of development–by many industries–for generations. Despite the national current awareness, and condemnation, of these destructive acts, they are ongoing.

7.2 The report has examined, in detail, the events that occurred at Juukan Gorge and the legislation in Western Australia that permitted these events to occur. It has also looked broadly at the state, territory and Commonwealth legislation that governs cultural heritage protection.

7.3 The Committee acknowledges that Rio Tinto has responded positively to its interim report and is working towards rebuilding its relationships and modernising its land use agreements not just with the PKKP but with all Aboriginal and Torres Strait Islander peoples on whose lands it operates.[1]

7.4 The Committee, however, also considers that full transparency on heritage destruction, in particular around the company-internal decision-making processes leading to it, leave some questions about how the Juukan Gorge destruction could occur unanswered, even after such an extensive inquiry

7.5 The Committee also acknowledges that Rio Tinto, and the resources industry as a whole, has called for legislative modernisation. Proponents need clarity about the framework in which they are operating and Aboriginal and Torres Strait Islander peoples need surety that their lands

---

1 Ms Kellie Parker, Chief Executive, Australia, Rio Tinto, *Proof Committee Hansard*, Canberra, 27 August 2021, p. 7

will be protected and, if threatened, there are workable avenues of appeal open to them.

7.6 The WA Government has not responded to the findings of the Committee's interim report. While the Committee is disappointed in this, it nonetheless reaffirms the Committee's view that the nature of the Australian legal frameworks governing the protection of cultural heritage needs to be rethought.

Findings

7.7 The Committee is therefore making the following findings:

1. The Australian Parliament should legislate for an overarching Commonwealth legislative framework based on the protection of cultural heritage rather than its destruction, in line with the principles set out below. State and territory legislation should also be required to meet the principles set out in this report.
2. The Commonwealth, state and territory governments should endorse a set of standards that set best practice in the management of cultural heritage sites and objects and the development of cultural heritage management plans.
3. The economic benefits of protecting and celebrating cultural heritage sites should be promoted.

1–Need for an overarching Commonwealth legislative framework

7.8 States have failed. Lack of responses and concerns with WA legislation indicates that states will continue to fail without overarching legislative framework guiding the protection of Aboriginal and Torres Strait Islander cultural heritage.

7.9 This report has demonstrated that time and time again, states have prioritised development over the protection of cultural heritage–including through the enactment of site-specific development legislation intended to further dispossess Aboriginal and Torres Strait Islander peoples.

7.10 The resources industry has also called for reform of the legislative frameworks governing cultural heritage. It too wants a clear set of guidelines–with adequate penalties. There many in the industry who are working to rectify past poor practices and set higher standards for the

industry as a whole and they recognise that singular events like Juukan Gorge diminish the industry as a whole.

7.11 The Committee notes that the development of new legislative frameworks at the national, state and territory level will, and should, take time to develop. Therefore, as a first step, the ATSHIP Act and the EPBC Act must be amended to make the Minister for Indigenous Australians responsible for all Aboriginal and Torres Strait Islander cultural heritage matters. All administrative responsibility for Aboriginal and Torres Strait Islander cultural heritage matters should be transferred to the relevant portfolio agency reporting to the Minister for Indigenous Australians

7.12 This is in line with the recommendations contained in the Committee's interim report, which have not yet been actioned.

Recommendation 1

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

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

Establishing a definition, and the primacy, of cultural heritage

7.15 International standards for Aboriginal and Torres Strait Islander cultural heritage have focused on the rights of Indigenous peoples globally and across a multiplicity of cultures. Debate over what cultural heritage is has been ongoing and has been conducted in numerous policies and discussion papers.[2] Notwithstanding the progression, a clear and final definition of

---

2 For example, Terri Janke's Our Culture, Our Future discusses the meaning of culture and heritage. See Terri Janke, *Our Culture: Our Future – Report on Australian Aboriginal and Torres Strait Islander Cultural and Intellectual Property Rights* (Report prepared for Aboriginal and Torres Strait Islander Commission and the Australian Institute of Aboriginal and Torres Strait Islander Studies, 1998)

cultural heritage at an international level has not been implemented in Australia. Australia has also committed to a number of international conventions to protect the rights of Aboriginal and Torres Strait Islander peoples that are not reflected in national legislation.

7.16 Most legislation across Australia is inadequate in its definitions of cultural heritage, focussing primarily on artefacts and history, and failing to recognise the living nature of Aboriginal and Torres Strait Islander culture.

7.17 The Committee heard extensive evidence about the importance of connectivity between physical places and songs, ceremonies, protocols and stories that are vital to people's identifies and sense of place. The Committee also heard that the landscape, waterways and journeys to sacred sites are often in themselves part of the site.

7.18 The legislative framework reveals there is inconsistency in approach across jurisdictions. New South Wales includes a definition of 'Aboriginal objects' and 'Aboriginal place' within its *National Parks and Wildlife Act 1974*, whereas Victoria includes a more comprehensive definition of 'Aboriginal cultural heritage' as including both landscape and intangible cultural heritage, within its standalone legislation. The Commonwealth definition in the *Aboriginal Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) refers to 'Aboriginal tradition' as meaning:

> …the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships. [3]

7.19 This is closely related to the definition in legislation in the Australian Capital Territory in its standalone legislation. Although this definition would appear to encompass a meaning which acknowledges some complexity regarding concepts of country that include customs and belief, the reference to 'Aboriginal tradition' is engaged by reference to landscape rather than as an understanding of cultural heritage.

7.20 The UN Declaration on the Rights of Indigenous People (UNDRIP) defines the right to a series of meanings including 'cultural heritage', 'traditional knowledge' and 'traditional cultural expressions' per Article 31 as follows:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural

---

3 ATSHIP Act s 3(i)

> expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

7.21 However, Australia has not been obliged to implement standards such as the UNDRIP due to the declaration being a non-binding international instrument. The Committee considers that the time has come to review and change this situation

7.22 Most current definitions of cultural heritage place insufficient emphasis on intangible cultural heritage, despite the fact that it is an internationally recognised legal standard:

> The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills–as well as the instruments, objects, artefacts and cultural spaces associated therewith–that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.
>
> 2. The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains:
>
> (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
>
> (b) performing arts;
>
> (c) social practices, rituals and festive events;
>
> (d) knowledge and practices concerning nature and the universe;

(e) traditional craftsmanship.[4]

7.23 The focus on objects in Australian legislative frameworks means that that heritage is seen as an inert object and an obstacle to redevelopment rather than an asset to be celebrated and protected. It also means that objects and artefacts are seen as removable and relocatable rather than intrinsically linked to place.

7.24 Cultural heritage laws at all levels, therefore, do not have conceptual clarity about what is being protected, and tend to link cultural heritage to land, objects or physical places only. Where there is a more complex understanding this is not consistently implemented across Australia. The effectiveness of implementing and complying with cultural heritage laws is hampered by a lack of a clear definition and this should be addressed in review of cultural heritage laws nationwide.

7.25 The Committee is also concerned about anecdotal reports of buffer zones around cultural sites being 'delisted' or reduced by bureaucrats in response to proponent pressure. Appropriate recognition of intangible cultural heritage may provide additional protection of the cultural meaning of landscapes around heritage 'sites'.

7.26 There is currently no national agreed definition of cultural heritage, meaning that what comprises cultural heritage is defined and managed differently in each jurisdiction, with the Commonwealth, states, territories and local councils having separate and competing responsibilities. While local management plans are essential, they should be based on an agreed national definition of cultural heritage.

7.27 The above definition of intangible cultural heritage is contained in the UNESCO 'Convention for the Safeguarding of the Intangible Cultural Heritage'. Australia is not yet a signatory to this convention.

7.28 Ratification of this convention would not only signal an international commitment to preserving Aboriginal and Torres Strait Islander culture but also support the economic development of sustainable cultural tourism opportunities–a goal which would contribute to Australia's commitment to meet the UN Sustainable Development Goals 2030.

---

4 UNESCO: Intangible Cultural Heritage, *Website*, 'Text of the Convention for the Safeguarding of the Intangible Cultural Heritage', <https://ich.unesco.org/en/convention>, viewed 30 August 2021

7.29 Furthermore, ratification of this convention would support the recognition of Aboriginal and Torres Strait Islander intangible heritage in Australian legislative frameworks.

Recommendation 2

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

Mapping cultural heritage sites

7.31 Mining companies have argued that without their presence on country many cultural heritage sites would not have been discovered. This argument is based on a false premise–that Western recording of sites is the only method of recording 'historical' cultural sites. Land dispossession and forced relocation has resulted in Aboriginal and Torres Strait Islander peoples being disconnected from physical sites, but cultural lore remains alive.

7.32 Nonetheless, it is important that sites are mapped in a manner which is accessible by proponents, governments and future generations. This cultural mapping should be undertaken by walking on country with traditional owners not by desktop survey. The control of mapping and information should be in the hands of the traditional owners.

7.33 Many traditional owners expressed reluctance to provide information about cultural heritage without the ability to control how the information is stored and to protect secret or sensitive information.

7.34 Currently most detailed mapping and studies of sites occur in the context of prospective development and is funded by proponents, rather than for the purposes of heritage protection. This information is then maintained by proponents with, in many cases, no mechanisms to share or return the information to traditional owners.

7.35 It is true that when proponents act responsibly towards traditional owners strong partnerships can be formed to map and protect cultural heritage sites. However, greater public resources must be made available for the mapping and recording of cultural heritage, with the interests of Aboriginal and Torres Strait Islander peoples paramount.

7.36 Alongside the mapping and registration of existing sites, records and maps of past destruction should be made available to traditional owners. The Committee heard distressing evidence of the destruction of sites and

artefacts many decades ago that traditional owners have not been informed about until recently.

7.37 Cultural heritage registers at council, territory, state and Commonwealth levels must also be required to contained details of heritage destruction.

Identification of traditional owner groups

7.38 Currently no heritage framework successfully grapples with how to identify the correct Aboriginal and Torres Strait Islander group/s to speak with about heritage sites. The recognition of traditional owners is complicated by a long history of state-sanctioned disconnection of Aboriginal and Torres Strait Islander peoples and their lands and compounded by complicated legislative frameworks at multiple levels of government.

7.39 In jurisdictions where they operate, entities such as Land Councils and Prescribed Bodies Corporate (PBCs) have specific roles and functions that allow them to speak about cultural heritage with authority. However, some heritage laws pre-date native title laws and as such, newer bodies recognised under Commonwealth law may not be recognised under state laws.

7.40 Identifying appropriate and representative spokespeople is more problematic in areas where there is no clearly defined entity with statutory responsibility. However, many of the disputes about overlapping claims or entitlements to speak for country are a product of divisions caused by colonisation and Anglo-Australian laws. Native Title Law has unfortunately seen division and counter claims between applicants and respondents within Aboriginal and Torres Strait Islander people contending for Native Title recognition over claimable land.

7.41 The Committee heard examples where dissent has been fostered and exploited by proponents, such as FMG's funding of Wirlu Murra and the Yindjibarndi having to fight for their exclusive claim to native title.

7.42 Similarly the contention within the Waanyi community over Magazine Hill in Queensland demonstrates the conflict between the use of Queensland Heritage Laws rather than the Commonwealth Native Title Act which, one Waanyi group claims, exposes Magazine Hill to destruction that could be prevented by applying terms under the Native Title Act.

7.43 The Victorian system of Registered Aboriginal Parties (RAPs) was suggested as a model for the recognition of traditional owner groups, but even this has raised concerns as entities seeking registration as a RAP do not need to

satisfy that they are the only, or the most representative, body for traditional custodians of the relevant area.

7.44 Despite this, if registered, RAPs have the sole responsibility for evaluating projects that may impact cultural heritage sites. The unrepresentative nature of this approach was borne out by the concerns surrounding the Djub Wurrang trees, with multiple groups claiming cultural connection to the trees, but only one of these groups being responsible for evaluation and consent to destroy.

7.45 The recognition of who should speak for country is further complicated by the fact that customary law and decision making processes are not necessarily democratic in the sense that this concept is understood by a western world view. For example, customary law gives weight to the views of those with cultural responsibility, not necessarily all members of a group.

7.46 Therefore the process of recognising traditional owner groups will be unique to each jurisdiction, but this should not prevent the Australian Government from developing a framework to guide a process for recognising traditional owners.

Free, Prior and Informed Consent

7.47 As discussed in Chapter 6, Free, Prior and Informed Consent (FPIC) is a core underpinning principle of the UNDRIP. Aboriginal and Torres Strait Islander peoples, industry groups and government bodies are all calling for FPIC to be enshrined in Australian legislation.

7.48 There is a need for a nationally consistent approach which provides Aboriginal and Torres Strait Islander Australians with a primary role in decision-making. Aboriginal and Torres Strait Islander peoples must have greater access to their areas, sites and places, and the connected knowledge and cultural expression, and the law must empower them to protect their cultural heritage. This will enable them to care for heritage sites in line with their customary obligations, and contemporary aspirations.

7.49 Problems occur in cultural heritage protections where proponents and industries are permitted to self-regulate and develop their own protocols for consultation and consent with traditional owners. Due diligence processes for consultation and consent must be uniform across Australian jurisdictions to adequately protect cultural heritage.

7.50 Aboriginal and Torres Strait Islander peoples can lack bargaining power when dealing with multinational companies in the mining industry. However, there are also issues in other industries, large and small, which are

affected by industry standards which circumvent proper consultation or seek to override obtaining FPIC by taking advantage of currently deficient protections at state, territory Commonwealth levels.

7.51 These issues also extend to infrastructure and development projects supported by government at various levels which impact on Aboriginal cultural heritage. This creates a system which undermines good faith negotiations and which can result in ineffective protection for cultural heritage.

7.52 To address FPIC the following must be observed:

- the timing and method of consent–timeframes and sign-offs must be culturally appropriate and reflect decision-making processes that abide by the traditional law and custom of an affected Aboriginal and Torres Strait Islander group
- ongoing consent issues–how to communicate and seek consent over the life of a project
- remediation processes
- processes for dealing with new information–if an agreement is already in place between a proponent and traditional owners and new information is unearthed, a clear process should be in place. Any new information about the significance of sites, or any associated knowledge that has potential to change traditional owners' consent, should be disclosed, and the consent decision should be able to be revoked or altered.

7.53 Embedding FPIC in Australia's legislative and regulatory frameworks would provide clear protocols for consultation and informed consent, and provide a measure of certainty for traditional owners, proponents and governments at all levels in decision-making processes.

Ban on 'gag clauses'

7.54 There is also a need for legislative guidance about inclusions in agreements that diminish the rights of traditional owners. 'Gag clauses' are a particularly egregious example that prevented the PKKP seeking Commonwealth protections, as noted in Chapter 2.

7.55 It is understood that this industry practice has been re-evaluated and a commitment made not to use these clauses as a general approach. This, however, is not the case across all jurisdictions and it is also not clear that this will be a certainty. As such, 'gag clauses'− which amount to prohibiting

the exercise of right without the express consent of the proponent–should be prohibited at a Commonwealth, state and territory level.

A National Aboriginal and Torres Strait Islander Heritage Council

7.56 There is a need for a new independent statutory body to act as an Aboriginal and Torres Strait Islander voice to the Commonwealth Government in relation to cultural heritage decisions and processes. At present, protections under the ATSIHP Act result from an expert report, generally not drafted by an Aboriginal and Torres Strait Islander person, and are decided by the Commonwealth Minister for the Environment.

7.57 Similar to bodies that exist in some states, an independent National Aboriginal and Torres Strait Islander Heritage Council–made up exclusively of Aboriginal and Torres Strait Islander peoples–would go a long way toward empowering Aboriginal and Torres Strait Islander decision-making in cultural heritage.

7.58 The Australian Heritage Council currently has two Aboriginal and Torres Strait Islander-identified positions. However, its remit is broad and it is clear that an independent Aboriginal and Torres Strait Islander-only statutory heritage body is warranted to guide the protection of Aboriginal and Torres Strait Islander cultural heritage. As noted throughout the report, the final decision-maker in all jurisdictions is at a ministerial level. This is not culturally-appropriate, nor reasonable for ministers to not be supported in their decision making by Aboriginal and Torres Strait Islander input.

7.59 Victoria and the Northern Territory provide good examples of Aboriginal cultural heritage bodies with decision-making power, unlike the purely advisory Aboriginal Cultural Heritage Advisory Committee in NSW, or current Aboriginal Cultural Material Committee in WA that only requires one member to represent the interests of Aboriginal people.

7.60 An appropriately funded Council could hold a number of functions, including but not limited to:

- conducting the investigation or engaging an independent expert to investigate an application for protection under a Commonwealth legislative framework
- deciding protection applications, or acting as a co-decision-maker with the Minister
- hearing appeals relating to decisions made by the Minister under Commonwealth protection legislation, or from state or territory jurisdictions

- managing a national Register of Aboriginal and Torres Strait Islander Cultural Heritage
- mediating disputes between proponents and Aboriginal and Torres Strait Islander groups;
- advising on Commonwealth matters relating to Aboriginal and Torres Strait Islander cultural heritage
- developing protocols and codes of practice for Aboriginal and Torres Strait Islander engagement, consultation and consent.

Review mechanisms

7.61 Under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and the judicial review and standing provisions of the relevant Commonwealth, state and territory legislation there is scope for review of decisions relating to Aboriginal cultural heritage. However, the avenues for judicial review are confined first to administrative principles so that the decision of the relevant Minister must be shown to have been made in error in accordance with, for example, failure to follow proper process or unreasonableness.

7.62 The enforcement mechanisms for judicial review can be time consuming and costly. In addition, the narrow pathway for judicial review is only engaged under the existing legislation. At Commonwealth level, this means that there is only capacity for reviews of decisions which relate to Aboriginal places or objects, rather than decisions which might take into account cultural value.

7.63 This is reflected in the frameworks in states and territories which have weak or no enforcement mechanisms for damage to Aboriginal cultural heritage. An example is under the NSW planning and environment legislation which allows for State Significant Development (SSD) or State Significant Infrastructure (SSI) as declared by the relevant Minister, to override any consultation or permit requirements for protection of Aboriginal cultural heritage.[5] This is similar to the provisions of the Western Australian AH Act and the section 18 provisions. There is no judicial review mechanism for these decisions.

---

5 An example of how this was borne out is in the case of the Sydney Light Rail, a declared SSD which could override local planning and environment provisions. The project resulted in damage to discovered Aboriginal artefacts on one of the construction sites. Due to the exclusions under the State Planning Policies there was no recourse for this damage. See M. Gorrey, ''This is a tragic loss': Sydney light rail construction 'destroys' heritage site', *Sydney Morning Herald*, online, 29 March 2019, <https://www.smh.com.au/national/nsw/this-is-a-tragic-loss-sydney-light-rail-construction-destroyed-heritage-site-20190322-p516qk.html>, viewed 6 September 2021

7.64 The recent case of *Sunstate Sands Bundaberg Pty Ltd v Aboriginal and Torres Strait Islander Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation* indicates a shift in thinking in relation to negotiation. In that case, the NNTT found that Sunstate had not provided sufficient information in relation to a Cultural Heritage Management Plan (CHMP) to enable the Aboriginal Corporation to properly participate in good faith negotiations.[6] The decision demonstrates that the courts will hold proponents to account when information is withheld or not sufficiently provided. This is a positive step in addressing industry standards which have previously attempted to circumvent cultural heritage protections.

7.65 The civil and administrative remedies available for damage to cultural heritage were irrelevant in the destruction of the caves at Juukan Gorge, as the legislative framework was able to be circumvented by way of approvals and contractual obligations. Criminal sanctions and enforcement were also not available as part of the remedies for the destruction of the caves, and this is the case in many jurisdictions – even where the provisions for taking action for destruction of Aboriginal cultural heritage exist.

7.66 This is, for example, illustrated in New South Wales where there have been few prosecutions for destruction of Aboriginal objects under the *National Parks and Wildlife Act 1974*, either because a permit was in place (which is a defence to any damage) or because planning policies and legislative instruments bypass the cultural heritage protections.

7.67 This is a matter which must be remediated. Appropriate review mechanisms should be key element of improved cultural heritage laws.

Compliance, enforcement and penalties

7.68 Rio Tinto has suffered significant reputation damage from the events at Juukan Gorge and its delayed apology. However, because the destruction was within the boundaries of the AHA (WA) no legal penalties were enforceable.

7.69 Where state legislative frameworks do contain penalties, these are manifestly inadequate and do not necessarily compensate Aboriginal and Torres Strait Islander for cultural losses, rather penalties are paid to the state.

7.70 Legislative frameworks also hold limitation periods for commencing enforcement proceedings, which are often restricted to one year. All stakeholders, including the resources industry, have called for stricter

6 RNTBC [2021] NNTTA 44 (24 August 2021)

penalties and extended limitation periods commensurate with community expectations.

7.71 In addition, there is currently little capacity for traditional owners to seek enforcement actions, or any administrative review of decisions made by ministers or designated decision makers. This unfairly weighs legislative frameworks towards the destruction of cultural heritage.

7.72 Criminal penalties for causing harm to Aboriginal and Torres Strait Islander cultural heritage vary widely across jurisdictions in Australia, as noted in Chapter 5. In addition, criminal penalties and enforcement mechanisms for damage to Aboriginal cultural heritage are often much lower than penalties under other legislation for protection of the environment or similar. These penalties need to be raised to a level that will act as a deterrent.

7.73 Stronger enforcement mechanisms may help reduce circumstances of harm to Aboriginal cultural heritage, but there still is a need for legislation to provide for a culturally-appropriate remedy to traditional owners where those protections are breached. Methods for remedy should include:

- Apology to traditional owners–this needs to be culturally appropriate, face to face and on country
- Remediation of site/area/object to be conducted by offender, in consultation with the traditional owners
- Corrective training for the perpetrators of the breach.
- Restitution as agreed between parties.

New legislative framework

7.74 The above form principles on which a new Commonwealth legislative framework governing Aboriginal and Torres Strait Islander cultural heritage should be based.

7.75 Some matters will need to remain within state and territory legislation to ensure consistency with relevant planning and development laws, as long as these laws do not override cultural heritage protection.

7.76 The Committee acknowledges that some state and territory legislative frameworks have been modernised and all frameworks have aspects that that can be considered good practice. But all jurisdictions have omissions. As well as complying with Commonwealth legislation, all state and territory heritage frameworks should be modernised.

Recommendation 3

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

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

7.79 This new legislation should set out the minimum standards for state and territory heritage protections consistent with relevant international law (including the United Nations Declaration on the Rights of Indigenous People UNDRIP) and the *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia.*

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

- **a definition of cultural heritage recognising both tangible and intangible heritage**
- **a process by which cultural heritage sites will be mapped, which includes a record of past destruction of cultural heritage sites (with adequate safeguards to protect secret information and ensure traditional owner control of their information on any database)**
- **clear processes for identifying the appropriate people to speak for cultural heritage that are based on principles of self-determination and recognise native title or land rights statutory representative bodies where they exist**
- **decision making processes that ensure traditional owners and native title holders have primary decision making power in relation to their cultural heritage**
- **a requirement that site surveys involving traditional owners are conducted on country at the beginning of any decision making process**
- **an ability for traditional owners to withhold consent to the destruction of cultural heritage**

- **a process for the negotiation of cultural heritage management plans which reflect the principles of free, prior and informed consent as set out in the UNDRIP**
- **mechanisms for traditional owners to seek review or appeal of decisions**
- **adequate compliance, enforcement and transparency mechanisms**
- **adequate penalties for destructive activities, which include the need to provide culturally appropriate remedy to traditional owners**
- **the provision of adequate buffer zones around cultural heritage sites**
- **a right of timely access by Aboriginal and Torres Strait Islander peoples to protected cultural heritage sites**
- **a process by which decisions can be reconsidered if significant new information about cultural heritage comes to light.**

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

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

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

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

Review of the Native Title Act

7.85 Alongside the establishment of new heritage legislative framework at the Commonwealth level, the Native Title Act should be reviewed with the goal of levelling the playing field in negotiations.

7.86 Concern was expressed that the future act regime present in the Native Title Act disadvantages Aboriginal and Torres Strait Islander peoples in negotiations.

7.87 The systematic use of initial binding agreements, 'gag clauses' (including clauses that restrict rights to seek Commonwealth intervention or to publicly raise concerns about the destruction of sites), full and final compensation clauses, along with timeframes of the future act process has meant that Aboriginal and Torres Strait Islander peoples are unable to adequately protect cultural heritage through agreements negotiated in the context of the Native Title Act.

7.88 Therefore the Committee considers that under a review of the *Native Title Act 1993*:

- standards should be developed for the negotiation of agreements that require proponents to adhere to the principle of Free, Prior and Informed Consent as set out by UNDRIP
- 'gag clauses' and clauses restricting Aboriginal and Torres Strait Islander peoples access to Commonwealth heritage protections should be prohibited
- the authority and responsibilities of PBCs and Representative bodies in relation to cultural heritage should be made explicit.

Recommendation 4

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

- **the current operation of the future act regime and other relevant parts of the Act including s31 (right to negotiate), s66B (replacement of the applicant) and Part 6 (the operation of the NNTT)**

- **developing standards for the negotiation of agreements that require proponents to adhere to the principle of Free, Prior and Informed Consent as set out in the UN Convention of the Rights of Indigenous People (UNDRIP)**

- **'gag clauses' and clauses restricting Aboriginal and Torres Strait Islander peoples access to Commonwealth heritage protections should be prohibited**

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

2–Heritage standards

7.90 In 2020 the Heritage Chairs of Australia and New Zealand (HCOANZ) released *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia*. This document sets out a vision for the protection, management and celebration of Aboriginal and Torres Strait Islander cultural heritage and was developed in collaboration with the chairs of Australia's national, state and territory Aboriginal and Torres Strait Islander heritage bodies, with support from peak organisations representing every major land council and native title representative bodies. It states:

> Dhawura Ngilan embodies the long-held aspirations of Aboriginal and Torres Strait Islander people for their heritage … It has been developed by the Aboriginal and Torres Strait Islander Chairs as members of the Heritage Chairs of Australia and New Zealand. It is offered to inform policy, underpin legislative change and inspire action.[7]

7.91 Dhawura Ngilan sets out a series of practical steps to achieve better protection of Aboriginal and Torres Strait Islander cultural heritage. It recognises a number of the same issues that this Committee has found, including the need for modernised legislation frameworks to better protect cultural heritage.

7.92 The four visions articulated in Djawura Ngilan are:

> 1 Aboriginal and Torres Strait Islander people are the Custodians of their heritage. It is protected and celebrated for its intrinsic worth, cultural benefits and the wellbeing of current and future generations of Australians.
>
> 2 Aboriginal and Torres Strait Islander heritage is acknowledged and valued as central to Australia's national heritage.
>
> 3 Aboriginal and Torres Strait Islander heritage is managed consistently across jurisdictions according to community ownership in a way that unites, connects and aligns practice.

7 Heritage Chairs of Australia and New Zealand (HCOANZ), September 2020, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia*, Canberra, p. 4.

4 Aboriginal and Torres Strait Islander heritage is recognised for its global significance.[8]

7.93 Dhawara Ngilan calls for a truth telling process in which the historical loses of Aboriginal and Torres Strait Islander culture are told from Aboriginal and Torres Strait Islander perspectives. This incorporates the mapping and registers as discussed above as well as telling Australia's history to Australians in a way that recognises the experience and contributions of Aboriginal and Torres Strait Islander peoples.

7.94 The Committee endorses Dhawara Ngilan.

7.95 The Committee notes that, at a roundtable on 21 September 2021, the Commonwealth, State and Territory Ministers with responsibility for Heritage and Aboriginal and Torres Strait Islander Affairs, noted Dhawara Ngilan.[9]

7.96 The Committee considers this to be inadequate. Dhawara Ngilan, along with the findings of this report, set out an important path forward for the protection and celebration of Aboriginal and Torres Strait Islander' cultural heritage and it should be endorsed and implemented.

Recommendation 5

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

National standards for cultural heritage plans

7.98 The process for obtaining CHMPs should be brought up to a national standard that reflects the proposed legislative framework outlined above.

7.99 Negotiation of CHMPs or similar instruments varies widely across jurisdictions, as do the consultation requirements. Some states, like Victoria and South Australia, have appointed Aboriginal parties to speak for particular aspects of cultural heritage. This system is one which helps to ensure that the right people are consulted to speak for country. Bodies in

---

8 Heritage Chairs of Australia and New Zealand (HCOANZ), September 2020, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia*, Canberra, pp. 7-8.

9 Ministerial Aboriginal and Torres Strait Islander Heritage Roundtable, *Communique—21 September 2020*, <https://www.awe.gov.au/news/stay-informed/communiques/ministerial-Aboriginal and Torres Strait Islander-heritage-roundtable-21-sept-2020>, viewed 31 August 2021

this position must be empowered by FPIC rights and decision-making powers.

7.100 Representative Aboriginal and Torres Strait Islander bodies must also have the capacity to adequately contribute to CHMPs via resourcing to conduct cultural heritage surveys, undertake mapping and research exercises, and negotiate with proponents. Resourcing of this kind needs to come from an independent source, not from the proponent, to avoid undue influence over the Aboriginal and Torres Strait Islander party, and issues relating to conflict of interest and consent given.

Truth telling and reconciliation

7.101 Truth telling is an important component of recognising and accepting historical harms and a method of apology, commemoration and redress of these harms.[10] Truth telling allows for:

- understanding our complete national narrative
- learning from, rather than repeating the wrongs of the past
- restorying, being heard, healing, and change
- Aboriginal and Torres Strait Islander peoples owning their experiences, stories, and futures.[11]

7.102 Although not necessarily known as such, truth telling processes are an important part of how the wider Australian community understands past harms. Recent examples include:

- Royal Commission into Institutional Responses to Child Sexual Abuse
- Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability
- National Apology to Victims and Survivors of Institutional Child Sexual Abuse
- National Apology for Forced Adoptions
- National Apology to the Stolen Generation

7.103 Many Australians do not know the extent of the harms perpetrated on Aboriginal and Torres Strait Islander peoples nor how the continued

---

[10] Reconciliation Australia, October 2018, 'Truth Telling Symposium Report', <https://www.reconciliation.org.au/wp-content/uploads/2019/02/truth-telling-symposium-report1.pdf> accessed 7 September 2021

[11] Reconciliation Australia, October 2018, 'Truth Telling Symposium Report', p. 18, <https://www.reconciliation.org.au/wp-content/uploads/2019/02/truth-telling-symposium-report1.pdf> accessed 7 September 2021

destruction of cultural heritage actively harms Aboriginal and Torres Strait Islander peoples. Many would not be aware of the heritage sites on the lands on which they live.

7.104 This is why Dhuwara Ngilan calls for a national truth telling process as part of the protection, management and celebration of Aboriginal and Torres Strait Islander cultural heritage. It is only through recognising and mourning losses with Aboriginal and Torres Strait Islander peoples that protection and celebration can be achieved.

7.105 Dhuwara Ngilan states:

> Telling the truth means framing these histories in ways that recognise Indigenous perspectives. Indigenous Peoples remain traumatised by the difficulty of finding evidence for historically documented massacres and other destructive acts. There are many more events, however, that exist in the memories of Indigenous Peoples that are today without documentation. It is important to consider Indigenous ways to memorialise all the truths of Australia's past through culturally sensitive approaches and creative interpretation.
>
> Memorialisation itself should be considered sensitively. There is great diversity amongst Aboriginal and Torres Strait Islander people, as demonstrated by the more than 250 different language groups spread across Australia.
>
> Each group's experience of colonial contact is different, and each group discusses and represents it in variety of ways. Telling the truth about Indigenous history is the foundation for a full understanding on the basis of which all Australians can come together in acknowledgement of a shared past and a shared future.[12]

7.106 The Committee heard evidence that some resources companies hold a disturbingly high number of objects collected from heritage sites. Some made public commitments as part of this inquiry process to return objects to traditional owners. The Committee welcomes this commitment.

7.107 The Committee calls on all resource companies and state governments to ensure that objects are returned in a culturally sensitive manner with a truth telling process at the core.

12 Heritage Chairs of Australia and New Zealand (HCOANZ), September 2020, *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia*, Canberra, p. 44

7.108 Truth telling should take place as part of the mapping of existing and destroyed cultural heritage sites as recommended above. Sitting on country and being witness to the truth of the loss and grief of the PKKP people over the destruction of the Juukan Gorge sites was profoundly moving for the Committee. No Australian could fail to come away from such a process of truth telling without a better respect for this country's past.

Recommendation 6

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

3–Economic benefits

7.110 Regional and remote Aboriginal and Torres Strait Islander communities throughout Australia often face economic and social challenges. The mining industry has somewhat helped to address these challenges by providing royalties in return for agreements with traditional owners related to mining on country. Unfortunately, the mining industry's provision of royalties often comes at the cost of heritage. While in some cases traditional owners agree to make this trade off, alternatives must be provided to ensure that traditional owners have other options to consider for the economic benefit of their communities.

7.111 Alternatives to resource extraction to promote economic development in regional communities need to be considered and more widely used. The Committee has another ongoing inquiry[13] and intends to use that inquiry to further explore how the preservation of cultural heritage can be leveraged for the economic benefit of traditional owners.

7.112 Seed Aboriginal and Torres Strait Islander Youth Network submitted a desire to use their cultural heritage to build economic opportunity:

> We don't need mining. We've done enough of it already. Leave what's there already. Don't open up anything new. There are so many industries for us rather than the most ancient living culture on the planet. We should definitely not be destroying our cultural sites. They are the real money makers into the

---

13 Inquiry into the Opportunities and Challenges of the Engagement of Traditional Owners in the Economic Development of Northern Australia

> future. Mining is short term. There is too much destruction and too much risk to our water. We are the driest continent on earth. We should be doing nothing to risk our water. Our culture goes in depth, it goes into the water streams, into the springs, and it moves across Australia. That's the way we need to be looking forward.[14]
>
> Do you want mining or do you want this cultural education stuff that will build your community up and we'll do our best to keep it clean and give jobs to future generations for a long time to come? I'm pretty sure that my people around here and a lot of other mobs too are going to pick the stuff that's not damaging their country. We only have one choice most of the time. They're only giving us a choice of mining, mining, mining. We need other ways to make money to boost the economy and other choices. They are out there. We need our government to support us.[15]

7.113 A component of best practice in protecting and managing cultural heritage is ensuring that there are practical and real pathways for Aboriginal and Torres Strait Islander engagement. This includes by providing and developing policies for Aboriginal and Torres Strait Islander employment through industry or government to enable joint management where practicable, and education of Aboriginal and Torres Strait Islander peoples and non-Indigenous people regarding cultural heritage.

7.114 Some key measures for Aboriginal and Torres Strait Islander engagement may include:

- economic opportunities, access and benefit sharing
- employment opportunities
- education and research
- cross-cultural and heritage training for proponents and developers
- repatriation and sharing of traditional knowledge
- management of knowledge and site recordings
- Aboriginal and Torres Strait Islander Ranger and Caring for Country projects
- handback of materials
- remediation processes.

---

14 Mr Nicholas Fitzpatrick, Remote Community Organiser, Northern Territory, Seed Indigenous Youth Climate Network, *Committee Hansard*, 19 March 2021, p.15

15 Mr Nicholas Fitzpatrick, Remote Community Organiser, Northern Territory, Seed Indigenous Youth Climate Network, *Committee Hansard*, 19 March 2021, p.16-17.

7.115 Access and benefit sharing is important to improving culturally appropriate engagement processes. One of the key issues arising from Juukan Gorge, highlighted by the submission of the PKKP, is that contractual obligations and negotiations disempower traditional owners and native title holders. This reflects a deeper problem in how benefit sharing is understood within industry.

7.116 The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (Nagoya Protocol) is a leading international instrument on access and benefit sharing which recognises the appropriate approach to working with Aboriginal and Torres Strait Islander communities. Although Australia is not a party to the Protocol it has been included in some legislation, for example as part of reforms of the *Biodiversity Act 2004* in Queensland. The Protocol could be implemented as part of national cultural heritage protections.

7.117 Currently there are few economic or other benefits that Aboriginal and Torres Strait Islander peoples gain from negotiations over use of their land by mining companies. As discussed in Chapter 3, the Murujuga do not even receive mining royalties as a trade-off for the protection of their country. The Aboriginal and Torres Strait Islander groups that do receive royalties have their own challenges; royalties are often meagre compared to the worth of the mining industry and a significant portion is often spent servicing the requirements of industry such as administration costs of PBCs in relation to mining, and work related to the negotiation of agreements.

7.118 Multiple Aboriginal and Torres Strait Islander stakeholder groups voiced concerns with the Committee over the expenses that are involved in responding to the requirements of industry. There were concerns that such expenses detract from the abilities of PBCs to invest in other necessities for their communities.

7.119 PBCs undertake an important statutory role and should be funded separately for this so royalty payments can be used for the benefit of their community's economic development. This funding may still need to come from industry, who benefit from the work undertaken by PBCs, but should be administered by an independent fund.

Recommendation 7

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

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

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

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

7.124 In the context of the issue of transparency, the Committee notes that mining companies have publicly reported on outcomes of reviews of currently-held section 18 permits, and the high-level results of reviews of agreements with traditional owners undertaken since the interim report, as well as on their engagement with traditional owners more generally. The Committee considers this to be an appropriate practice provided there is agreement between the companies and traditional owners about the release of such information.

Recommendation 8

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

Hon Warren Entsch MP
Chair
15 October 2021

Additional Comments from Senator Smith and Mr Christensen MP

Holding Rio Tinto accountable

Actions by Rio Tinto leading to the destruction of Aboriginal heritage at Juukan Gorge were disgraceful, negligent and wilful - and the executive leadership of the company must be held to account.

More than a year has passed, yet Rio Tinto and its board have fundamentally been let off the hook for obliterating the 46,000-year-old site in WA's Pilbara region.

At the time, the Australian Financial Review reported the destruction was "an egregious story of corporate blindness".

The interim report of this committee described the loss of such a significant cultural, ethnographic, and archaeological feature as "the theft of a vital part" of the living culture of the traditional owners, the Puutu Kunti Kurrama and Pinikura (PKKP) people.

The PKKP characterised the event as "devastating for us".

Rio has conceded it should never have happened and breached the trust placed in it by the PKKP over almost two decades.

Despite the outrage shown in Australia and beyond, no impactful financial penalty or regulatory sanction has been imposed on Rio to date.

Chairman Simon Thompson has admitted he was ultimately accountable yet has been allowed the extraordinary privilege of determining his own exit-strategy, choosing to remain in the role for another year.

Non-executive director Mr Michael L'Estrange has resigned.

He led an internal review that failed to adequately explain why management responsible for cultural heritage protection was unaware of the Gorge's enormous significance.

Rio Tinto's most recent annual report, however, revealed that Mr L'Estrange was paid 46 per cent on top of his annual fees for conducting the inquiry, totalling more than $280,000.

Former Chief Executive Jean-Sebastien Jacques stepped down from the role in January this year, but remained on Rio Tinto payroll until March, after receiving a 20 per cent pay rise and taking home $12.85 million for the year.

And while iron ore boss Chris Salisbury and London-based former corporate relations chief Simone Niven lost their jobs and have foregone bonuses, they will still receive eight months' wages in lieu of notice, totalling $718,000 and £307,000 respectively.

Rio Tinto's shareholders delivered a strong message at its 2021 AGM about the poor corporate culture that Juukan Gorge exposed to the world.

In one of the most significant shareholder protests in Australian corporate history, 60.8 per cent voted against the miner's remuneration report.

The report estimated Jacques, Salisbury and Niven collectively left Rio Tinto, subject to vesting hurdles, with more than 765,000 shares worth tens of millions each.

In rejecting the report, The Australian Shareholders Association said it was an "unsettling fact that the former CEO has departed with a very large remuneration package whilst being held accountable for the Juukan Gorge disaster".

The UK-based Local Authority Pension Fund Forum (LAPFF) was also critical, stating Rio Tinto's leaders had failed over the course of the year to take adequate accountability.

Investors did secure a new policy strengthening the power of future boards to claw back pay and bonuses, as well as increasing the emphasis on environmental, governance and social performance in awarding bonuses.

But they failed to make Rio Tinto more Australian-orientated, with no clear answer why its headquarters would remain in London, rather than relocate to an Australian capital city.

> "Without Australia, we wouldn't be where we are today. It's where more than half our assets are based and for thousands of our employees, Australia is home." – Rio Tinto, Our commitment to Australia. [1]

Institutional investors appear to be softening, giving Rio the benefit of the doubt, with LAPFF suggesting it is now "heading in the right direction".

Media coverage around the release of Rio Tinto's Communities and Social Performance report last month included illuminating results from an anonymous survey of ten traditional owner groups in the Pilbara.

The West Australian and The Australian, among other publications, reported on 30 September that that while the groups generally approved of commitments made by the miner to enhance Indigenous engagement and protect cultural heritage, genuine action was required for change to occur.

One response noted that "the commitment is admirable … but the proof will be in the breadth of the modernisation".

Another accused Rio Tinto of doing the "bare minimum required to recover its reputation" when it came to improving agreements.

On the Australian advisory group being established to help Rio Tinto better understand Indigenous issues, responses were mixed, with groups highlighting the need for the board to "engage directly with its traditional owner stakeholders" and adding "(it) is about establishing relationships".

The head of the Australian Council of Superannuation Investors was also quoted at the time, welcoming Rio Tinto's initial progress but noting this was only "an early signpost on a long road ahead".

In Rio Tinto's defence, it has taken decisive steps to strengthen internal processes, implement new heritage protocols, empower line managers, and modernise agreements with traditional owners.

It is recognised that Rio Tinto has moved on – and been allowed to move on – with business as usual, acknowledging that these were "sensitive and contentious issues", but noting that it had "no choice" but to allow Jacques, Salisbury and Niven to depart in good standing and with the bulk of their entitlements.

There should be a judicial inquiry into the destruction of the site, investigating if conduct preceding or following the event warrants further action – including criminal charges.

[1] https://www.riotinto.com/news/stories/our-commitment-to-australia

It is worthwhile noting here that a Royal Commission is not the only form of judicial inquiry.

Many other methods have been established in recent years to investigate misconduct, corruption, or conduct review for the purposes of law reform, which engage retired judges or senior members of the legal profession.

The success and integrity of Australia's mining industry is central to the prosperity of states such as Western Australia and Queensland and has substantial bearing on Australia's wealth.

An inquiry ensures Rio Tinto's executive leadership is held to proper account, while protecting the international reputation of Australia's mining industry and every other industry stakeholder.

How best to protect Indigenous cultural heritage and the advancement of the resources sector.

Rio Tinto's failures should not reflect upon the entire resources sector.

Much of the submissions and evidence presented to the committee stated outright opposition to the very existence of the resources sector, rather than improving the capacity of Indigenous people to protect their cultural heritage.

We cannot ignore that the resources sector is one of largest generators of employment and economic opportunity in our country – including for Indigenous Australians.

I reject the committee's recommendations that seek to establish new, duplicate and unnecessary laws and regulations at a Federal level.

There is a great danger these proposed laws and regulations will be used as deliberate weapons against the resources sector, produce longer approval lead times, drive up project approval costs, provide further opportunity for activist activity, and ultimately undermine job opportunities and other economic benefits for Indigenous people.

As the current framework is widely accepted to provide sufficient protection, duplication of cultural heritage protection laws at a Federal level is not supported by peak industry bodies.

It also was not a recommendation following the 2013 Productivity Commission Inquiry into Mineral and Energy Resources Exploration in Australia.

However, the Commonwealth could play a unique and distinct role in setting standards and accreditation, assisting the States to develop and adopt best practice around transparency, information sharing, stakeholder engagement and regulatory improvement.

Instead of new laws and regulations, there is already an existing Federal process for the registration of significant cultural heritage sites that could be streamlined and enhanced to enable Indigenous people to list sites for protection.

The existing Federal process is the National Heritage List, which is a database of places of natural, historic and Indigenous significance to Australia.

Currently, people can nominate a place with outstanding value for inclusion on the List, then the Australian Heritage Council assesses that value against set criteria and makes recommendations to the Minister for the Environment about listing.

The final decision on listing is made by that Minister. This could perhaps be enhanced by involving the Minister for Indigenous Australians in decisions on listing Indigenous places of outstanding significance.

It should be noted that listed places are protected by Australian Government laws, as well as special agreements with State and Territory Governments and Indigenous and private owners.

Places on the List are protected under the Commonwealth's Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), which requires that approval be obtained before any action takes place that could have a significant impact on the national heritage values of a listed place.

If Juukan Gorge were on this List, it is unlikely that the destruction of the site would ever have occurred.

Changes should ensure that greater access to the existing National Heritage List process, and appropriate communication about the process, is provided to Indigenous people.

Importantly, overwhelming and convincing evidence has been presented that proposes the end of so-called "gag clauses" in contracts and agreements between resources companies and Indigenous people.

Such clauses impede the free and timely disclosure of corporate and other behaviour that may be motivated to limit the protection of cultural heritage with irreparable consquences.

Senator Smith

Mr George Christensen MP

Additional Comments from Senator Thorpe

Introduction

The Australian Greens acknowledge that First Nations people of this Country have never ceded Sovereignty and acknowledge the Elders past and present of the lands on which we are so grateful to live. We also acknowledge the care First Nations people have taken of Country and culture over thousands of years and the deep knowledge they have of Country.

The destruction of the 46,000 years old Juukan caves caused grief and disbelief not just for the Puutu Kunti Kurrama and Pinikura peoples (PKKP), but for all First Nations communities across Australia, and for the Australian society as a whole.

It was a fully pronounced example of the lack of protection for First Nations heritage in this country, but it was by far not the only one.

This inquiry carries incredible significance in bringing to light the many ways heritage destruction can take place in Australia, and is sometimes even encouraged under the status quo. It is also an important wake-up call that there is an urgent need for a national framework on First Nations heritage protection, built on best international practice and fundamentally ensuring the rights of our First Nations peoples, in making decisions for their Country and cultural heritage and beyond.

The evidence presented in the course of this inquiry has been devastating and heart-wrenching and the Australian Greens express their heartfelt condolences and best wishes to the many communities who have fought so

hard to protect their Country and cultural heritage; unfortunately all too often unsuccessfully as the laws that are meant to protect them are a continuation of colonial oppression, favouring developers' interests over the rights of First Nations peoples.

The Australian Greens wish to deeply thank everyone who contributed to this inquiry. Without the testimony of each and every witness we would not have the substantial evidence of cultural heritage destruction and vision of A Way Forward from here that we have gained through this inquiry.

We wish to thank in particular the many First Nations communities who have participated in this inquiry, recounting their stories of loss of cultural heritage or destruction of Country and struggles to protect it, and relieving these painful experiences. Their courage, honesty and care is deeply admirable.

Case Studies

In his poem 'Red Land Claims', Kevin Gilbert (Wiradjuri poet, playwright and artist) reminds us to:

> Mark well the cry of the dispossessed.[1]

In this spirit, though the committee's report features a number of case studies, the Australian Greens wish to add to these through elevating the voices of First Nations People on a few of the cases where communities are struggling to protect their cultural heritage. Given the prominent role the Juukan gorge and caves' destruction and WA cultural heritage protection framework takes within this report, we thought it valuable to try to include the recollections from Traditional Owners of other parts of the Country as well. Their voices, and their culture and connection to Country, should guide us all in the actions we take following this important inquiry.

As Mr Jack Green, a Garrwa man, pointedly told the Committee:

We need government to understand how important our land is. It's a mother to Aboriginal people, and the river itself is like a garden to all our nation, white or black. We have to survive on the river with what they're doing, and they need to understand and negotiate with Aboriginal people properly.[2]

---

[1] Mr Kevin Gilbert, Wiradjuri man, Black from the Edge, Hyland House Publishing, 1993.

[2] Mr Jack Green, Garrwa man, *Committee Hansard*, 18 June 2021, p30.

McArthur River Mine, Garrwa Country, Northern Territory

The McArthur River Mine (MRM) is a zinc and lead mine on Garrwa Country, 700 kilometres southeast of Darwin. The mine is owned by Glencore. Over the past decade, it has been the subject of significant environmental issues, including a huge burning waste rock dump and lead contamination of fish and cattle.

Mrs Joy Priest, a Yanyuwa Garrwa Gurdanji woman, told the Committee about the history of the McArthur River Mine:

> This is what my father said to the Northern Land Council on 2 November 1978 about his experience with the McArthur River Mine: 'We had a fight with the mining company first go, before that land was given to the Aboriginal people. Borroloola people said to the mining company, "We are not going to talk to you about the land or the corridor until we get the land. When we get the land, we can come back and talk to the mining company." But they didn't listen to us. So, now that they hold a stronger position, it leaves us only some place that we have got no hope anyway, just like sardines in a tin. They have got all these interests protected anyway—the mining company.' Forty years later, that mining company has still got us like sardines in a tin, and they still have all these interests protected, but we are left exposed with our sacred site unprotected. We've been fighting for four decades, and now we've brought our children here to continue the fight.[3]

She further continues about the impact of the mine:

> The spiritual connection that Aboriginal people have, the ties that they have, to the environment that's to be destroyed—it has a total effect on the health of all Indigenous people, particularly Borroloola people. They've seen with their own eyes the changes. Even now, they do not recognise or respect the rights of traditional owners—the governments, the mining companies, the damage that has been done. There hasn't been any penalty or anything like that given to them. They just continue to destroy. They're not willing to negotiate. No-one has sat at that table to negotiate, to talk to them[4].

Mr Jack Green is a Garrwa man who made a submission to the inquiry existing of powerful paintings showing the impact of the mine on Country and the story behind it. He regards the damage to Country and impact it has on people as a continuation of the genocide carried out on Australia's First Nations people.[5] In

---

3 Mrs Joy Priest, Yanyuwa Garrwa Gurdanji woman, *Committee Hansard*, 18 June 2021, p28.

4 Mrs Joy Priest, Yanyuwa Garrwa Gurdanji woman, *Committee Hansard*, 18 June 2021, p33.

5 Mr Jack Green, *Submission 154*, p34.

his painting 'Desecrating the Rainbow Serpent', Mr Green describes the history and impacts of the McArthur River Mine and the loss of his people's authority over their lands:

Desecrating the Rainbow Serpent 2014

> At the top of the painting, guarded by the Junggayi (Boss for Country) and Minggirringi (Owner of Country), are the eyes of The Rainbow Serpent. The Junggayi and Minggirringi are worried that The Snake is being desecrated. The Rainbow Serpent is one of our spiritually powerful ancestral beings. It rests under McArthur River in the southwest Gulf of Carpentaria. Under our Law we hold responsibility for protecting its resting place from disturbance, and responsibility for nurturing its spirit with ceremony and song—just as our ancestors have done for eons. The left of the painting represents a time when we had authority over country. We lived on country, hunted, fished and gathered our food. We used fire to care for country, and most importantly, we protected our sacred places within it. By protecting and nurturing our sacred sites we protect and nurture our spirituality and our wellbeing as Gudanji, Garrwa, Mara and Yanyuwa peoples. The right of the painting represents the present time (2014) when we still have no authority over all of our ancestral country. The artwork illustrates how the resting place of The Rainbow Serpent looks now. It's been smashed by McArthur River Mine. Country, torn open to make way for one of the largest lead, zinc and silver mines the world has ever seen. To do this they cut the back of our ancestor—The Rainbow Serpent—by severing McArthur River and diverting it through a 5.5 kilometre diversion cut into our country. A lot of people have died because of the desecration of

> our sacred places. Interfering with these powerful places, it pulls people down. The stress of seeing our land suffer means we suffer. Men tried to fight but got pulled down. I might be the next one, or the Junggayi will go down. The mining executive might go too. All this pressure, it's no good.[6]

In his painting 'Like an Ice Cream in the Sun', he further describes how Glencore's processes are divisive and flawed:

Like an Ice Cream in the Sun 2014

This painting is about how Glencore work in Borroloola. Glencore won't let us organise under our own Law. Instead, they pick off one or two of our people. They say to them, "If you can work for us we'll get you a motorcar, we'll give you tucker. You'll be well looked after, and you'll have money. They want these people to say to the families, "Look if you work with the mining company you will get money, you'll get motorcar, and you'll get everything you need". But in the back of Aboriginal people's minds we worried about our land, our song lines, and our

---

6 Mr Jack Green, *Submission 154*, p8.

sacred sites. We worried about our bush tucker. We worried about our future. Three men under the dollar signs represent the Aboriginal fellas that have been picked off by the mining company. The mining company man is standing behind the Aboriginal fella, patting his back and saying to him, "You talk up for me old man". The ice cream, lollies on a plate and cake symbolise the absurdity of what's being offered to us. Things that have little long-term value to us. Things that won't last. Here now, but quickly gone, just like an ice cream in the sun. Glencore throw down scraps like this while they destroy our sacred sites and contaminate our land and water, while the government watches. There's no way we should be played off like this. We want people in the cities to know what's happening to us. They have to know how their governments work with mining companies to do us over and destroy our land.[7]

On the other hand, Glencore told the Committee, without providing further detail that:

> MRM is engaging with the Northern Land Council (NLC) to facilitate discussions with Traditional Owners about an Indigenous Land Use Agreement (ILUA) for the MRM site […]
>
> We are in the very early stages of this process. [8]

The case of the McArthur River Mine exemplifies many of the issues that have been raised time and time throughout the inquiry and from all over the country. While Traditional Owners repeatedly raise health, environmental and cultural concerns about mining and development proposals, and the flawed and divisive processes by which consent is gained from Traditional Owners, they too often remain unheard and unable to protect their cultural heritage and Country. Existing legislation is all too often designed to facilitate mining and exploration rather than providing an effective framework to ensure the protection of cultural heritage.

Magazine Hill, Waanyi Country, Queensland

Magazine Hill is a sacred site on Waanyi Country, located on the edge of the New Century zinc mine at Lawn Hill, about 250 kilometres north-west of Mount Isa. New Century Resources recently announced plans to excavate an area adjacent to Magazine Hill.

---

7 Mr Jack Green, *Submission 154*, p19.

8 McArthur River Mine, *Submission 176*, p2.

A group of Waanyi Elders told the Committee about the history of Magazine Hill and their concerns with the process by which excavation around the sacred site was recently approved.

Uncle Glen Willetts, a Waanyi and Alyawarr man, told the Committee:

> What we're saying is that when the agreement was first signed over 27 years ago, it was noted in that Gulf Communities Agreement that Magazine Hill will be preserved and protected from the mining companies, regardless of which mining company comes in.[9]
>
> They said, 'We've got the best engineers in the country. We can design the pit, extract the ore and still protect a significant site.' On that agreement, the mining company proceeded forward. The elders, the Waanyi people and all other people that had a stake in this business, the cultural side of it, were happy with that decision.[10]
>
> The mining company is saying to us now that there's a part of the ore body left there, which previous mining companies mined around to protect Magazine Hill, and they want to extract that.[11]
>
> The companies started talking to them [the Waanyi PBC] and not the native title groups that were parties, signatories, to the Gulf Communities Agreement.[12]

Uncle Barry Dick, a Waanyi Elder, told the Committee:

> When the PBC took over, it was just not operating properly with the native title holders. There were numerous calls [...] and they didn't cooperate with what we wanted to do up here. [13]

Uncle Kevin Cairns, a Waanyi Elder, told the Committee:

> The sad thing with the PBC is that it's supposed to be fighting with us against the mines. [14]
>
> Whatever information the PBC receives, we don't get to hear it. We don't get to hear the discussion that the PBC has with the mining company. [15]

---

9 Mr Glenn Willetts, Waanyi and Alyawarr man, *Committee Hansard*, 4 May 2021, p1

10 Mr Glenn Willetts, Waanyi and Alyawarr man, *Committee Hansard*, 4 May 2021, p2.

11 Mr Glenn Willetts, Waanyi and Alyawarr man, *Committee Hansard*, 4 May 2021, p2.

12 Mr Glenn Willetts, Waanyi and Alyawarr man, *Committee Hansard*, 4 May 2021, p3.

13 Mr Barry Dick, Waanyi Elder, *Committee Hansard*, 4 May 2021, p5.

14 Mr Kevin Cairns, Waanyi Elder, *Committee Hansard*, 4 May 2021, p4.

Waanyi Elder Clarence Walden questioned the validity of the Waanyi PBC's vote to approve the new excavation:

> If they're talking about 17 May, it wasn't signed off; it was an attendance list. That's all it was, because they never got to talking about the Century Mine. I was there. They only signed an attendance form, and those people who signed the attendance form never even stayed for the meeting to hear it out, and the meeting never went ahead, because they wanted to tell their story at the time, and the solicitors just said, 'No, we're not going to listen; we'll adjourn until another day,' and they never came back another day. [16]

Witnesses further described the significance of Magazine Hill to other First Nations people and their disappointment and frustration that this was not recognised in the existing consultation and approval processes.

Mr Gilbert Corbett, an Alyawarr man, told the Committee:

> We got the right to protect our sacred site. We've joined together, Waanyi and Eora, together. It's been passed on from generation to generation. It's been passed for us, forefathers, our fathers and for us now, that we can keep carrying on. We don't want our site to be destroyed. But I've got the songline and Century Mine—I call it windera in my language. The windera I call it, and it's in the songline, as well. [17]

Mr Willetts told the Committee:

> It's a ceremonial place—men's business—and it's connected to the desert people, and that's a strong storyline, one you people can't make a decision on Magazine Hill, one you people have to consult with the people who are on that storyline all the way back from that connection. That's how we do business. That storyline goes all the way back out into the Sandover Desert, with my brother-in-law and his family out there. [18]
>
> There is evidence on Riversleigh Station that points towards the desert of etchings on rocks, of the same paintings that we do out there at ceremonial time. That indicates that that songline went all the way up from Yalarnnga people up to Indjilandji people through Kalkadoon country, all the way up to Waanyi land—all the way along that storyline goes. There are paintings. There's a story over there. There are etchings up on Riversleigh Station that are

---

15 Mr Kevin Cairns, Waanyi Elder, *Committee Hansard*, 4 May 2021, p7.

16 Mr Clarence Walden, Waanyi Elder, *Committee Hansard*, 4 May 2021, p12.

17 Mr Gilbert Corbett, Alyawarr man, *Committee Hansard*, 4 May 2021, p4.

18 Mr Glenn Willetts, Waanyi and Alyawarr man, *Committee Hansard*, 4 May 2021, p7.

> up there on rock that indicate that that storyline is strong—archaeological findings. All the evidence is there.[19]
>
> Way back, before the construction phase of the mine started, we had the meeting with the elders to talk about Magazine Hill, which I spoke about. I attended that meeting. There was a group of us with the elders, and I was instructed at that meeting that this place is not just Waanyi people's keeping place; it's not just Waanyi people's sacred site. This is what we keep going on about.[20]
>
> When we excavated the excavation in Magazine Hill we found artefacts that weren't native to Waanyi country. They were brought from people in the desert. They were brought from the Kalkadoon people where they came up and traded. It's a really neutral place for all Indigenous people's ceremony. That's how strong it is. We can go on and on about politics with PBC or ORIC. We must protect Magazine Hill at all costs.[21]

Mr Walden further elaborated:

> We went down there with the Alyawarr people on 17 May, and they wanted to explain how they were involved. But the solicitors and that were so ignorant of the facts that they just said, 'No more meeting'. They adjourned it for another day, but, when they adjourned it, that's when they went down to Melbourne and signed it all over behind closed doors. [22]

He told the Committee that in holding meetings outside of Waanyi Country, the Waanyi Native Title Aboriginal Corporation were breaching cultural protocols and lore, and restricting Elders' ability to participate:

> So when they go to the meeting in Burketown, no real Waanyi that's got any sense here would go there, because they're talking about their country on another man's land. That's our tradition. That's our law. We don't go there making a mockery of other people.[23]

---

19 Mr Glenn Willetts, Waanyi and Alyawarr man, *Committee Hansard*, 4 May 2021, p10.

20 Mr Glenn Willetts, Waanyi and Alyawarr man, *Committee Hansard*, 4 May 2021, p10.

21 Mr Glenn Willetts, Waanyi and Alyawarr man, *Committee Hansard*, 4 May 2021, p8.

22 Mr Clarence Walden, Waanyi Elder, *Committee Hansard*, 4 May 2021, pp10-11.

23 Mr Clarence Walden, Waanyi Elder, *Committee Hansard*, 4 May 2021, p7.

> We've still got the same laws from before I came into being. But there's got to be a way around, maybe getting a new committee on the PBC, and having our meetings back in the country would be a really good way to go.[24]

In their submission, the Waanyi Native Title Aboriginal Corporation reported that:

> [...] There is no other body which is representative of Waanyi People with responsibility for cultural heritage sites in this area.[25]
>
> The New Century Resources Limited (NCR) Submission accurately summarises the process of agreeing the cultural heritage management plan for Magazine Hill. The community meetings referred to in the NCR Submission were, in accordance with the Waanyi PBC's rule book, open to all Waanyi People and they were well attended.[26]
>
> The Waanyi People's final decision to consent to the excavation of Magazine Hill was taken with considerable sadness. But it was an informed decision, not made lightly and made against a background of consideration and investigation of the site by senior Waanyi lore men and their advisers - not just as part of the most recent process, but over a number of years. It was made because it was the best decision to be made in the circumstances. [27]

That there are some dissenting views held by some individuals who are or claim to be Waanyi is to be expected. Opportunities to express those views were available through the decision-making process, and the existence of those views does not detract from the validity of the collective decisions ultimately made by the Waanyi People through that process.[28]

In their submission, New Century Resources (NCR) told the Committee that:

> The process adopted by NCR gave full opportunity for free, prior and informed consent from the Waanyi People and consent was obtained through an appropriate process. […] Throughout the process in respect of Magazine Hill, the Waanyi People were represented by the Waanyi PBC. […] The fact that there were dissenters does not undermine the process adopted or the quality of the consent provided. [29]

As seen above, some Waanyi Elders, and others in the community, did not support the decision of the Prescribed Body Corporate. Furthermore, matters of intangible

---

24 Mr Clarence Walden, Waanyi Elder, *Committee Hansard*, 4 May 2021, p15.

25 Waanyi Native Title Aboriginal Corporation, *Submission 159*, p2.

26 Waanyi Native Title Aboriginal Corporation, *Submission 159*, p2.

27 Waanyi Native Title Aboriginal Corporation, *Submission 159*, p2.

28 Waanyi Native Title Aboriginal Corporation, *Submission 159*, p2.

29 New Century Resources, *Submission 155*, p1.

heritage and the cultural significance of the sacred site at Magazine Hill to other First Nations People were not considered in the decision making process.

This case study highlights the need for culturally appropriate, well-resourced and ongoing consultation processes to obtain Free, Prior and Informed Consent from Traditional Owners and Native Title holders in relation to activity proposals on Country, as well as the need for avenues available to Traditional Owners to question the apparent 'consent' provided by their PBC and the right to veto activity proposals. It also highlights the need for broader definitions and considerations, including intangible heritage, when assessing cultural heritage protection requirements.

Beetaloo Basin, Northern Territory

The Beetaloo Basin, approximately 500 km south-east of Darwin in the Northern Territory, encompasses a number of traditional lands including the Jawoyn, Alawa, Jingili, Walmanpa, Warumungu, Ngadji and Binbinga. Mining companies including Origin Energy, Empire Energy, Falcon Oil and Gas and Sweetpea Petroleum are involved in oil and gas exploration and production in the Beetaloo Basin.

In submissions to the Senate Environment and Communications References Committee's report on Oil and gas exploration and production in the Beetaloo Basin, the Committee heard that oil and gas exploration and production in the NT is a highly contentious issue, including in the Beetaloo Basin, which Empire Energy was awarded a $21m to explore as part of the Government's gas-led economic recovery. There is strong and widespread opposition to the shale gas industry in the NT.[30] This issue was also picked up as part of this inquiry.

In their submission to this inquiry, Nurrdalinji Native Title Aboriginal Corporation told the Committee that:

> Many native title holders of the Beetaloo Sub-basin region are deeply concerned that while we have achieved formal recognition of our native title, we have no governance structure to facilitate planning our future and making

30 See, for example: Nurrdalinji Native Title Aboriginal Corporation, *Submission 18*, p3; Environment Centre NT and Dr Timothy Neale, *Submission 19*, p2; Traditional Owners of the Beetaloo, *Submission 56*, pp3–7; Ms Amelia Telford, National Director, Seed Indigenous Youth Climate Network, Australian Youth Climate Coalition, *Committee Hansard*, 28 July 2021, p27; Ms Rikki Tanika Dank, Traditional Owner, *Committee Hansard*, 28 July 2021, pp32–33; and Ms Judith Ward, Traditional Owner, Minyerri, *Committee Hansard*, 2 August 2021, p9.

> our own decisions, and virtually no control or say over what happens on our country. That is due in large part to current representation and agency arrangements involving the Northern Land Council (NLC) (the native title representative body for the Top End), and the Top End Default PBC. [31]
>
> We are in urgent need of proper representation and agency arrangements, not the façade that is currently in place. [32]
>
> At present, Origin Energy is fracking our country under exploration permits granted some 15 years ago to other companies, and later assigned to Origin Energy. Our people did not understand what fracking was at the time they were advised to enter into agreements consenting to the grant of those exploration permits. How could they? The exploitation of unconventional gas reserves using extensive fracking was new and barely understood in Australia at that time. Many of our people are now worried about the risks of fracking, and especially about the risks to the interconnected subterranean waters that sustain all life there. Our people are also worried about the risks of contamination to country, our cultural heritage and all living creatures. We still do not know the extent of Origin Energy's plans and what those plans might mean for the use of our water. [33]
>
> Existing cultural heritage protection laws and practices appear to us to be inadequate to address the risks of fracking, especially on our country.[34]

Many concerns were expressed as to the accountability of the Northern Land Council (NLC) towards the communities it should represent and consult with. Asked about the Northern Land Council's lack of support for a new PBC, Mr Johnny Willson, Chair of the Nurrdalinji Native Title Aboriginal Corporation, told the Committee:

> [...] they think they're doing the right thing. A lot of traditional owners don't agree. We've all been saying for so long there is no connection and no cooperation between the NLC and traditional owners with regard to mining or with regard to anything that happens on country. If there is communication, it is to the wrong people, the ones they can manipulate. The NLC also don't

---

31 Nurrdalinji Native Title Aboriginal Corporation, *Submission 156*, p2.

32 Nurrdalinji Native Title Aboriginal Corporation, *Submission 156*, p4.

33 Nurrdalinji Native Title Aboriginal Corporation, *Submission 156*, p2.

34 Nurrdalinji Native Title Aboriginal Corporation, *Submission 156*, p2.

> want to lose that power or to let somebody else take over what they think is rightfully theirs.[35]

Mrs Janet Gregory, Deputy Chair of the Nurrdalinji Native Title Aboriginal Corporation, told the Committee:

> The NLC is very good at telling stories—believable stories—so people who were really not understanding what they were signing believed the story of the Northern Land Council. You've got to understand: Aboriginal people in the community trust and believe in the Northern Land Council because it represents them. So they were signing things that they didn't understand.[36]

When asked about Nurrdalinji Native Title Aboriginal Corporation’s evidence that the Northern Land Council (NLC) had frustrated Nurrdalinji’s efforts to become a PBC, Mr Daniel Wells, Legal Adviser, Northern Land Council told the Committee:

> At a high level, as we understand it one of the key roles of the Northern Land Council, as the native title representative body for the pastoral state in and around Beetaloo, is ensuring that, when decisions are made by groups of native title holders, they are made through the appropriate traditional decision-making process. That involves everybody, particularly the key culturally senior decision-makers. The NLC regards it as its job to ensure that those processes are followed.[37]
>
> Where those processes are followed, the Northern Land Council is there to support native title holders in their aspirations. If that means supporting native title holders to create a replacement PBC and to appoint that replacement PBC, then, as long as those decisions are made in the proper way, the Northern Land Council is there to support those matters going forward. In this case, it was abundantly clear to the NLC that this proposal would have the support of only a minority of constituents from that area. A number of senior native title holders either weren't aware of the proposal or did not support it. In those circumstances, when you look at section 60 and section 251B of the Native Title Act, the NLC saw itself as having an obligation to protect the broader native title holding community from a decision that hadn't been made properly by everyone. At a high level, that's our experience in relation to the Nurrdalinji matter. [38]

---

35 Mr Johnny Wilson, Chair, Nurrdalinji Native Title Aboriginal Corporation, *Committee Hansard*, 18 June 2021, p40.

36 Mrs Janet Gregory, Deputy Chair, Nurrdalinji Native Title Aboriginal Corporation, *Committee Hansard*, 18 June 2021, p38.

37 Mr Daniel Wells, Legal Adviser, Northern Land Council, *Committee Hansard*, 8 July 2021, p26.

38 Mr Daniel Wells, Legal Adviser, Northern Land Council, *Committee Hansard*, 8 July 2021, p26.

In response to a question put about Empire Energy's consultation process, Mt Alex Underwood, Managing Director, Empire Energy advised the Committee:

> Genuine and respectful engagement is central to our relations with traditional owners and other Aboriginal Territorians.[39]
>
> Appropriately, it is not possible to conduct on-country activities without the full and informed consent of traditional owners and regular consultation under the terms of our exploration agreement with the NLC acting as the agent of the traditional owners.[40]

Similar to the case studies above, grassroots Elders and Traditional Owners in the Beetaloo Basin expressed concerns about the decisions of the Prescribed Body Corporate and in this instance attempted to establish an alternate PBC. They also questioned the adequacy of the consultation processes conducted by the Northern Land Council. This reiterates the urgent need for clear guidelines around best practice consultation processes and the importance of Free, Prior and Informed Consent, including the right to veto to ensure that Traditional Owners' voices are heard and they have the authority to protect Country and cultural heritage.

Western Highway, Djab Wurrung Country, Victoria

Since 2017, Djab Wurrung people have been involved in a complex series of court cases in an attempt to protect a group of culturally significant trees near Ararat. Although some trees were eventually saved from being felled as part of the Western Highway diversion, questions and concerns remain about both the process and outcome.

In his opening remarks to the Committee, Mr Michael Kennedy, Legal Adviser, Djab Wurrung Traditional Owners, described the significance of the six trees at risk of being removed as part of the Western Highway extension:

> Without overstating it, this is as significant to my clients as the Juukan Gorge is and was to the PKKP traditional owners.[41]

Mr Kennedy described how between February 2019 and December 2020 he had been involved in three successful applications on behalf of his clients in the Federal Court to have Ministerial decisions regarding the Djab Wurrung trees quashed.[42]

---

39 Empire Energy, *Submission 168*, p1.

40 Empire Energy, *Submission 168*, p1

41 Mr Michael Kennedy, Legal Adviser, Djab Wurrung Traditional Owners, *Committee Hansard*, 19 March 2021, p2.

Mr Kennedy explained that the Registered Aboriginal Party that produced the original Cultural Heritage Management Plan in 2012, which failed to address the significance of the trees and surrounding area, had since been deregistered.[43]

Ms Sissy Austin, Djab Wurrung Traditional Owner, described the ongoing impacts the fight to protect the trees has had on Djab Wurrung Elders and communities:

> As a young Koori woman, seeing the toll it has taken on our elders has been heartbreaking. I'm a young person, but our elders have been fighting for generations, and it's 2021 now. Victoria claims to be progressive in that we've been establishing a treaty. On the other side of that, we have elders who have been literally burnt out to the ground, and have been consistently repeating things over and over again, having to prove them. It's traumatic being Djab Wurrung women, in having to try to convince a very male dominated legal system of the significance and importance of women's country to us, as Djab Wurrung women.[44]

Answering Senator Dodson’s questions, Mr Michael Kennedy, Legal Adviser, Djab Wurrung Traditional Owners agreed that it would be beneficial to adopt a set of national standards within the Commonwealth Aboriginal Heritage Act.[45]

This case study demonstrates that even in Victoria, which is widely regarded as having some of the strongest cultural heritage protection laws in the country, the process of obtaining Free, Prior and Informed Consent from Traditional Owners and Native Title holders in relation to activity proposals on Country can be very difficult and divisive. It also highlights the importance of national standards, and of including intangible heritage when assessing cultural heritage protection requirements.

Concerns with heritage protection legislation

Following these case studies, the Australian Greens further aim to illustrate the common themes and issues that emerged during the inquiry regarding the

---

42 Mr Michael Kennedy, Legal Adviser, Djab Wurrung Traditional Owners, *Committee Hansard*, 19 March 2021, pp 1-2.

43 Mr Michael Kennedy, Legal Adviser, Djab Wurrung Traditional Owners, *Committee Hansard*, 19 March 2021, p6.

44 Ms Sissy Austin, Djab Wurrung Traditional Owner, *Committee Hansard*, 19 March 2021, p5.

45 Mr Michael Kennedy, Legal Adviser, Djab Wurrung Traditional Owners, *Committee Hansard*, 19 March 2021, p4.

legislative, structural and procedural failures that contribute to the ongoing destruction and desecration of Country.

Overview

There is a general preference among many submitters and witnesses to the inquiry that First Nations cultural heritage be protected through standalone Commonwealth legislation under the Minister for Indigenous Affairs, rather than be rolled into environmental-focussed legislation.

For instance, the Cape York Land Council, in their submission to the Committee, states that:

> Indigenous cultural heritage protection and management decisions must be made through objective, transparent and nationally consistent processes that prioritise Indigenous cultural heritage values, the right of relevant Indigenous people to make informed decisions, and an independent regulator to oversee and engage in statutory processes.[46]

In their submission to the Committee, the National Native Title Council elaborates that:

> The Commonwealth regime leaves a substantial gap between the protections afforded by the EPBC Act [...] and the ATSIHP Act that operates as legislation of last resort and has a poor record of protection. This places a heavy reliance on inconsistent and often similarly out of date State and Territory Indigenous cultural heritage protections. [...] Indigenous cultural heritage protection is and should be the responsibility of Traditional Owners and it is the expectation of the International community that national governments facilitate Traditional Owner rights to manage and protect their cultural heritage.[47]

In their submission to the Committee, the New South Wales Aboriginal Land Council:

> … encourages the Committee to recognise the importance of, and honour commitments enshrined in the UNDRIP and work proactively to incorporate Declaration aims into domestic policy and legislation.[48]

---

46 Cape York Land Council, *Submission 110*, p1.

47 National Native Title Council, *Submission 34*, pp8-9.

48 New South Wales Aboriginal Land Council, *Submission 41*, p4.

In their submission to the Committee, the National Native Title Council endorses the work of the Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) on Best Practice Standards in Indigenous Cultural Heritage Legislation, which are based on the principles enunciated in the United Nations Declaration on the Rights of Indigenous Peoples.[49]

In their submission to the Committee, GetUp conclude that:

> There is no legislative regime at a State or Commonwealth level which is effective to guarantee the protection of culturally and historically significant sites such as the caves at Juukan Gorge.[50]

Based on the totality of information received, the Australian Greens believe that current legislation to protect First Nations cultural heritage is not just inadequate, but often favours proponents over Traditional Owners. The Australian Greens wish to emphasise that there is an urgent need for the government to develop a standalone national legislative framework to protect First Nations cultural heritage and that this process be First Nations-led and informed by the extensive findings of this report.

The Australian Greens believe that Commonwealth legislation to protect Indigenous cultural heritage should be designed to fully meet our obligations under the United Nations Declaration on the Rights of Indigenous People (UNDRIP).[51]

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHPA)

The ATSIHPA can be used by Aboriginal and Torres Strait Islander peoples to ask the Environment Minister to protect an area or object where it is under threat of injury or desecration and where State or Territory law does not provide for effective protection.

In their submission to the Committee, the National Native Title Council reports that the Aboriginal and Torres Strait Islander Heritage Protection Act operates as a protection of "last resort" only deployed when relevant state and territory

---

[49] National Native Title Council, *Submission 34*, p13.

[50] GetUp, *Submission 128*, p28

[51] https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (accessed 17 September 2021), in particular Articles 26-29, 31-32 and 45.

legislation failed in addressing Indigenous concerns regarding the injury or desecration of an Aboriginal object or area of significance.[52]

In their submission to the Committee, the Cape York Land Council state that:

> Queensland's Aboriginal Cultural Heritage Act is not effective or appropriate to protect Aboriginal cultural heritage on Cape York; Cape York's Aboriginal cultural heritage is offered little protection by the Federal regime either. The Federal Environment Minister has powers to issue emergency declarations under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) (ATSIHPA) but this power is rarely used. Since 1984, 539 applications have been made across Australia for urgent Ministerial intervention to protect Indigenous cultural heritage under ATSIHPA, including 200 applications for long term protection, yet only seven declarations have been made and only two remain in place.[53]

In their submission to the Committee, the Kimberley Land Council state that:

> For the avoidance of doubt, what the National Native Title Council submits, and Kimberley Land Council supports, is that the Australian Government put in place a legislative scheme that provides the globally accepted, and Australian Government endorsed, minimum standards for protection of Indigenous people. The fact that this submission needs to be pleaded to the Committee should reinforce how woeful current protections available to Indigenous people in Australia are. [54]

In their submission to the Committee, the Yamatji Marlpa Aboriginal Corporation submit that:

> Decisions about Aboriginal heritage should always be considered at the planning stage of projects to ensure that, to the greatest extent possible, projects are developed to avoid any negative impact upon or destruction of Aboriginal heritage.[55]

The provisions under the Aboriginal Land Rights (Northern Territory) Act are considered a stronger regime for land rights and cultural heritage than any other legislation in any other jurisdiction, or nationally. For example Dr Josie Douglas,

---

52 National Native Title Council, *Submission 34*, p8.

53 Cape York Land Council, *Submission 110*, p4

54 Kimberley Land Council, *Submission 101*, p2.

55 Yamatji Marlpa Aboriginal Corporation, *Submission 114*, p8.

Executive Manager, Policy and Governance, Central Land Council, told the Committee:

> The Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) is a 'strong piece of legislation … giving traditional owners an ability to protect sacred sites that is not replicated in any other Australian legislation.[56]

The Victorian Aboriginal Heritage Act (2006) is considered the strongest heritage-specific legislation. For example in their submission to the Committee the National Native Title Council state that:

> '…the Victorian Aboriginal Heritage Act 2006 comes closest to embedding the legal norms contained in the UNDRIP in particular, the right of Traditional Owners to maintain, control, protect and develop their cultural heritage, and the requirement of Free, Prior and Informed Consent. It is also the only State or Territory legislation with a regime directly applicable to intangible heritage.[57]

Many submitters and witnesses referred to the Evatt Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, which was conducted in 1996. Of particular relevance are the Evatt Review's recommendations that amendments to ATSIHP Act should:

> Respect and support the living culture, traditions and beliefs of Aboriginal people and recognise their role and interest in the protection and control of their heritage;
>
> Ensure that the Act can fulfil its role as a measure of last resort by encouraging States and Territories to adopt minimum standards for the protection of Aboriginal cultural heritage as part of their primary protection regimes;
>
> Provide access to an effective process for the protection of areas and objects significant to Aboriginal people;
>
> Ensure that Aboriginal people participate in decisions about the protection of their significant sites and that their wishes are taken fully into account.
>
> Ensure that heritage protection laws benefit all Aboriginal people, whether or not they live in traditional lifestyle, whether they are urban, rural or remote.

---

56 Dr Josie Douglas, Executive Manager, Policy and Governance, Central Land Council, *Committee Hansard*, 2 March 2021, p7.

57 National Native Title Council, *Submission 34*, p6.

> The objective should be to protect living culture/tradition as Aboriginal people see it now.[58]

The Evatt review recommendations remain largely unimplemented but reports since then have frequently referred to it, or made similar recommendations.

Ms Pauline Wright, President of the Law Council of Australia, told the Committee:

> At the Commonwealth level, the Law Council supports substantially reviewing and reforming the Aboriginal and Torres Strait Islander Heritage Protection Act 1994 to provide effective standalone protection to First Nations cultural heritage, having regard to the deficits of the current act's operation. This should be accompanied by adequate building of First Nations representative bodies in order to address current power imbalances and lack of resources.[59]

In their submission to the Committee, the Law Council of Australia summarise the ATSIHPA's deficiencies:

> 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). In contrast, there is a much stronger requirement to consult the relevant state or territory Minister prior to making a declaration. 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, is the Minster [sic] 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.[60]

---

58 Central Land Council, *Submission 109*, pp 11-12.

59 Ms Pauline Wright, President of the Law Council of Australia, Committee Hansard, 2 October 2020, p11.

60 Law Council of Australia, *Submission 120.1*, p7.

Based on the totality of information received, the Australian Greens believe that the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 is outdated, ineffective and inadequate. It fails to uphold our obligations under the United Nations Declaration on the Rights of Indigenous People (UNDRIP). The lack of a requirement to consult, the absence of clear and effective standards and definitions, and the designation of Ministerial responsibility to the Minister for the Environment are a continuation of colonial practices and further marginalise First Nations people who should, in fact, be leading the decision-making processes and have the right to FPIC as well as a right to veto proposals.

Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)

The EPBC Act is the principal piece of Commonwealth legislation that addresses the environmental impacts from development at the Commonwealth level. The Act is the vessel through which the Commonwealth upholds its obligations as signatory to a significant number of international treaties. The EPBC Act focuses Australian Government interests on the protection of matters of national environmental significance, with the states and territories having responsibility for matters of state and local significance. The EPBC Act's role in First Nations heritage protection focuses only on nationally and globally significant areas that are included on the National and World Heritage lists and where those heritage areas have First Nations heritage values.

Dr Josie Douglas, Executive Manager, Policy and Governance, Central Land Council, told the Committee:

> Some have suggested that, nationally, there only needs to be the Environment Protection Biodiversity Conservation Act for the protection of cultural heritage. The CLC strongly disagrees with this. We think it is important to have standalone legislation under the responsibility of the Minister for Indigenous Australians [...] We agree that the EPBC Act can play a role in requiring proper sacred site clearances. But not all developments come under the EPBC Act scrutiny. [61]

In their submission to the Committee, the Cape York Land Council state that:

---

[61] Dr Josie Douglas, Executive Manager, Policy and Governance, Central Land Council, *Committee Hansard*, 2 March 2021, p14.

> Generally, the EPBC Act, like Queensland's ACHA and other State based cultural heritage legislation, should be reviewed against the HCOANZ best practice standards to identify how it could be improved. This would include compliance with the UNDRIP and its requirements for FPIC.[62]

In their submission to the Committee, the National Native Title Council reports that the EPBC Act 1999 currently only protects a very limited number of places or objects that are listed on the National Heritage List and the Commonwealth Heritage List.[63]

In their submission to the Committee, the Law Council of Australia recommends that:

> Careful consideration should also be given to the emerging findings from the current Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) review regarding the protection of First Nations cultural heritage, and the opportunities to improve its role in achieving this objective, as part of a broader suite of Commonwealth legislation. However, this does not displace the urgent need for new Commonwealth Indigenous heritage legislation as the centrepiece of Indigenous cultural heritage protection.[64]

Many submitters and witnesses referred to the Independent Review of the EPBC Act, led by Professor Graeme Samuel AC, particularly section 2.3 of the Final Report which found that current laws that protect First Nations cultural heritage in Australia are behind community expectations, and that national-level cultural heritage protections need comprehensive review, including consideration of both tangible and intangible cultural heritage.[65]

Based on the totality of information received, the Australian Greens believe that the Environment Protection and Biodiversity Conservation Act 1999 does not sufficiently protect First Nations cultural heritage across Australia and requires significant review to address the outlined concerns.

Native Title Act 1993

62 Cape York Land Council, *Submission 110*, p10.

63 National Native Title Council, *Submission 34*, p7.

64 Law Council of Australia, *Submission 120*, p6.

65 https://epbcactreview.environment.gov.au/resources/final-report/chapter-2-indigenous-culture-and-heritage/23-indigenous-australians-seek-and-are-entitled-expect-stronger-national-level-protection-their-cultural-heritage (Accessed 17 September 2021)

The Native Title Act (NTA) is a law that recognises the rights and interests of First Nations people in land and waters according to their traditional laws and customs. The NTA's strongest role in protecting Aboriginal Heritage is via the 'right to negotiate' in relation to a 'future act'.The right to negotiate is designed to provide Native Title claimants or Native Title holders with the most comprehensive procedural rights where mining rights and certain compulsory acquisitions of Native Title rights are proposed.

Many submitters and witnesses to the inquiry consider the Native Title Act does not sufficiently protect First Nations cultural heritage across Australia.[66]

A common concern is that the Native Title Act's heritage protections only apply to areas where Native Title has been established, and that even where they do apply, the protections afforded are inadequate. The National Native Title Council submit that:

> Native Title […] only applies where native title rights are judicially recognised or at least registered. Where they are recognised, native title rights will rarely amount to rights of exclusive possession sufficient to allow Traditional Owners to effectively protect their cultural heritage.[67]

Another common concern is the entrenched inequality and power imbalance whereby both 'right to negotiate' agreements (otherwise known as Section 31 Agreements) and Indigenous Land Use Agreements (ILUAs) can be used to coerce consent from Traditional Owners. The National Native Title Council submit that:

> Both sides to the negotiation know that unless the native title holders acquiesce to the developer or miner's suggested terms the alternative is an arbitrated outcome, likely in the favour of the developer or miner without any provisions for the awarding of compensation, royalties or other arrangements for financial settlement. This analysis holds true whether or not land use proposals are negotiated as "right to negotiate" [...] or under the Native Title Act's alternative Indigenous Land Use Agreements.[68]

In their submission to the Committee, the Kimberley Land Council note:

> [...] that its should not be assumed that consent given under ILUAs which purport to provide the agreement of native title holders to acts done under the "right to negotiate" provisions of the NTA is freely given for the simple reason

---

66 See, for example, Kimberley Land Council, *Submission 101*, Central Land Council, *Submission 109*, Cape York Land Council, *Submission 110*, National Native Title Council, *Submission 34*, Law Council of Australia, *Submission 120*.

67 National Native Title Council, *Submission 34*, p10.

68 National Native Title Council, *Submission 34*, p10

> that, should the native title holders not agree and provide their consent, the proponent may make an application to the NNTT for the act to be done even without the agreement of native title holders...if native title holders do not agree to an act being done and the matter proceeds to determination before the NNTT, there is a 98% chance that the NNTT will determine that the act can be done or done subject to conditions.[69]

In their submission to the Committee, the Law Council of Australia cites Tony McAvoy SC on the impact of the ILUA process:

> The native title system 'embeds racism' and puts traditional owners under 'duress' to approve mining developments or risk losing their land without compensation…the native title system ... coerces Aboriginal people into an agreement. It's going to happen anyway. If we don't agree, the native title tribunal will let it go through, and we will lose our land and won't be compensated either. That's the position we're in.[70]

Additionally, there are concerns about the structures, roles and resourcing of bodies that represent First Nations people to adequately manage and protect their cultural heritage interests. In their submission to the Committee, the Law Council of Australia suggests:

> What [...] 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.[71]
>
> Victoria is often pointed to as an example of best practice in this area. […] However, these bodies are underfunded. If asked to take on further statutory responsibilities, PBCs or their alternative must be appropriately resourced.[72]

The Australian Greens are concerned by evidence that Individual Land Use Agreements (ILUAs) and collateral agreements are used to bypass the Native Title Act's requirement of good faith negotiations. In particular, the inclusion in these confidential agreements of clauses prohibiting Traditional Owners from making any adverse public comment in relation to the project (i.e. 'gag clauses'), magnify the power imbalance and actively undermine, and work against, the principle of Free, Prior and Informed Consent.

---

69 Kimberley Land Council, *Submission 101*, p4-5.

70 Law Council of Australia, *Submission 120*, p49.

71 Law Council of Australia, *Submission 120.1*, p4.

72 Law Council of Australia, *Submission 120.1*, pp4-5.

The Australian Greens note that the former Gillard government attempted to address some of these issues in Schedule 2 of the Native Title Amendment Bill 2012, which would have extended the negotiating period by two months and provided an enforceable statutory definition of negotiating in good faith.[73]

Based on the totality of information received, the Australian Greens believe that the Native Title Act 1993 does not provide for the protection of First Nations cultural heritage across Australia and requires a thorough review.

Community consultation and Free, Prior and Informed Consent

The case studies presented above exemplify the differing views of Traditional Owners, Prescribed Body Corporates (PBCs) and mining companies regarding the adequacy of existing consultation processes and what constitutes Free, Prior and Informed Consent (FPIC). The fact that Traditional Owners on affected Country clearly state that they were not properly consulted or their views not heard is an unignorable sign that FPIC is not currently being ensured in negotiations with project proponents and is of deep concern to the Australian Greens.

Many submitters and witnesses to the inquiry agreed that the consultation processes to date have not included all Traditional Owners and community members who should be consulted, and have therefore been inadequate and should be considered invalid. One major contributor to this shortfall is the fact that proponents often only engage with PBCs, Native Title Representative Bodies (NTRB), registered TRaditional Owner corporations or Land Councils. These often do not represent all Traditional Owners of the affected Country, and do not even necessarily always represent the views of their own communities.

For example the Nurrdalinji Native Title Aboriginal Council submits:

> Many native title holders of the Beetaloo Sub-basin region are deeply concerned that while we have achieved formal recognition of our native title, we have no governance structure to facilitate planning our future and making our own decisions, and virtually no control or say over what happens on our country. That is due in large part to current representation and agency arrangements involving the Northern Land Council (NLC) (the native title representative body for the Top End), and the TED PBC.[74]

[73] https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4944%22 (Accessed 17 September 2021)

[74] Nurrdalinji Native Title Aboriginal Council, *Submission 156*, p2.

Mr Errol Neal, Deputy Chair of the North Queensland Land Council, told the Committee:

> I go back to re-engagement with all traditional owners in the country.[...]. We want to be part of ensuring that no stone is left unturned and no Indigenous First Nations people are left out.[75]
>
> Some of these PBCs under the CATSI Act have sort of framed it so that a majority can rule. It doesn't take into account all the different moieties or clans or family groups. So this is what we come to. Some of these mobs have big families that they think represent the whole tribe. This is where the thing starts again, creating the division and the trauma. It starts all over again.[76]

Similarly, Mr Sam Backo, Chair of the North Queensland Land Council, also talks to the need for inclusive engagement with communities and for them to not being put under pressure to make decisions, but being given the time they need to do so according to customary law:

> So the responsibility that we have as TOs is that, with prior and informed consent, everybody needs to know. The time frames that the legislation puts on it don't give you any time to do anything and make that decision according to cultural protocol.[77]

The Torres Shire Council submits:

> Central to Council's concerns regarding Indigenous cultural heritage legislation is who is the appropriate Indigenous entity or individual with whom Council should consult, and the capacity for that entity or an individual to bind any other entity or individual to an agreement. The issue is particularly difficult where there is no native title determination in place, and no settled Applicant or claim group.[78]

The Australian Greens are concerned that in the status quo, project proponents often expect Traditional Owners to agree to their proposals, with consultation being degraded to a worrying 'tick-the-box' exercise rather than an open-ended process ensuring Traditional Owners get a real say over their Country.

---

75 Mr Errol Neal, Deputy Chair, North Queensland Land Council, Committee Hansard, 18 June 2021, pp3-4.

76 Mr Errol Neal, Deputy Chair, North Queensland Land Council, *Committee Hansard*, 18 June 2021, p6.

77 Mr Sam Backo, Chair, North Queensland Land Council, *Committee Hansard*, 18 June 2021, p6.

78 Torres Shire Council, *Submission 169.0A*, p2.

In their submission to the Committee, the New South Wales Aboriginal Land Council speaks to this point:

> 'Consultation is not an appropriate substitute for consent by Aboriginal people.'[79]

Further to the point of expected consent, many submitters and witnesses to the inquiry expressed concerns about the inappropriate use of financial incentives to gain consent from Traditional Owners to activity proposals on Country.

For instance Mr Neal told the Committee:

> Well, you've got to understand that—not trying to be racist—when colonisation started they had to draw a wedge to conquer and divide. This is their mechanism of control. So you'd have the lollies given to one group of people and the others are going to struggle. [...] There needs to be some sort of accountability on our people and what the activities are, ensuring they are doing the right thing. [80]

Further reports of coercion taking place were provided to the committee at a public hearing on June 18:

> Senator THORPE: Do the mining companies come into community promising gifts if you sign? Cars? Jobs?
>
> Mrs Gregory: Yes, they were promised jobs. I remember that. Some training, but nothing eventuated.
>
> Mrs Gregory: The NLC is very good at telling stories—believable stories—so people who were really not understanding what they were signing believed the story of the Northern Land Council. You've got to understand: Aboriginal people in the community trust and believe in the Northern Land Council because it represents them. So they were signing things that they didn't understand. [...]
>
> Senator DODSON: Mr Chairman, are you saying the Northern Land Council offers people cars and other inducements to get them to agree to the destruction of sacred sites?

---

[79] New South Wales Aboriginal Land Council, *Submission 41*, p3.

[80] Mr Errol Neal, Deputy Chair, North Queensland Land Council, Committee Hansard, 18 June 2021, p6

> Mr Wilson: Yes, that's exactly what I'm saying. A few people have told me this. I wouldn't want to go into the names. I was told that by traditional owners who don't want drilling or fracking on their country whatsoever.[81]

The Australian Greens believe that Free, Prior and Informed Consent includes consultations of all those affected by a proposition and ensuring full access to all the information that concerns community and Country. This includes independent assessments of harm to Country, social and cultural impacts, as well as realistic projections of jobs and opportunities. Consultation processes need to ensure there is time and space for extensive deliberation. Communities should also have access to essentials, including culturally appropriate housing, education and healthcare and employment opportunities, to ensure their consent is not coerced.

Decisions need to be taken jointly and freely and true FPIC means that the outcome is not predetermined, and that it might include objecting to a proposal, giving no consent.

Based on the totality of information received, the Australian Greens are very concerned about the lack of FPIC in many if not most project proposal processes. The Australian Greens consider that there is a need for further action to ensure that consultation is conducted inclusively in a culturally appropriate and well-resourced manner. It is incumbent on government to institute the regulatory requirements to achieve this outcome, including enforcing penalties for proponents disregarding these requirements.

Right to veto

Truly Free, Prior and Informed Consent includes the possibility of consent not being provided. Considering the challenges outlined in current consultation processes and the fabrication or assumption of consent in many of the case studies brought to the attention of the Committee during the course of this inquiry, the requirement for consent alone might not be fully effective in ensuring Traditional Owner’s attempts to protect Country and culture are being fully honoured.

Provisions for judicial review of development decisions under current legislation is in some cases non-existent and at best limited, time consuming and costly and therefore provides Traditional Owners with insufficient protection against decisions causing damage or destruction to their cultural heritage, as outlined in chapter 7 of this report.

---

81 Committee Hansard, pg.38-39

To address this, many submitters and witnesses to the inquiry agreed that Traditional Owners should have the right to veto acts and developments that threaten Country or First Nations cultural heritage.

When asked if he thought that Traditional Owners should have the right to veto, Mr Sam Backo, Chair of the North Queensland Land Council, told the Committee:

> Absolutely.[82]

In their submission to the Committee, the New South Wales Aboriginal Land Council call for:

> Requirements for approvals by Aboriginal people about Aboriginal cultural heritage matters before planning / land use decisions are made - Aboriginal people must be able to refuse an activity or development where there will be unacceptable impacts to Aboriginal heritage, in line with the United Nations Declaration on the Rights of Indigenous peoples.[83]

In their submission to the Committee, GetUp recommend that:

> Agreement making, if it is to have any true heritage protection role must include a capacity for traditional custodians to veto activity which adversely impacts cultural heritage. Any impasse arising from a veto should be ameliorated by a dispute resolution process, including a process of merits review by an independent tribunal of the decision-making process.[84]

> Aboriginal and Torres Strait Islander Heritage legislation should include a power of the Aboriginal party with custodial responsibility for cultural heritage to refuse to permit development impacting on cultural heritage, subject to a right of the proponent of a development to seek an independent merits review of such a decision.[85]

The Australian Greens consider Traditional Owners should have the right to veto acts and developments on Country, for whatever their reasons might be. It is incumbent on governments to institute the regulatory requirements to achieve this outcome. The government should further ensure that any cultural heritage laws provide for appropriate review mechanisms and provide Traditional Owners with support to make use of these mechanisms.

---

82 Mr Sam Backo, Chair, North Queensland Land Council, Committee Hansard, 18 June 2021, p4.

83 New South Wales Aboriginal Land Council, *Submission 41*, p6.

84 GetUp, *Submission 128*, p38.

85 GetUp, *Submission 128*, p40.

Register of heritage sites

The right to veto goes hand in hand with the proposition of a National Register of Heritage Sites, which was proposed by several witnesses, acknowledging that the current registration processes are often insufficient and not regularly updated and operate in a system of myriad state and territory regimes and a lack of resourcing to map heritage sites outside the influence of developers. A National Register of Heritage sites could include a provision for sites to be listed as 'untouchable' by Traditional Owners once, to save them from the onus of potentially having to negotiate time and again with project proponents to protect their sacred sites, repeatedly putting them at risk of damage or destruction and carrying with it the potential of igniting conflict within the community. This could take the form of a 'traffic light system', providing information on areas that can be developed, those that require consultation and negotiation and those not open for activity proposals.

Mr Terry Piper, Acting Chief Executive Officer, Cape York Land Council, told the Committee:

> It is kind of something that is along the lines of what happens on Cape York. There are areas of land that are set aside with a red light where you're not going to be mining. […] I think everybody agrees that these are important cultural and environmental areas where that kind of destruction can't occur. […] And then we've got other areas where it is the amber light—where there are sensitivities and where development is not excluded but we're making sure that due process is followed.[86]

Mr Shannon Burns, Policy Officer, Cape York Land Council, told the Committee:

> Of course, that traffic light system requires the research to be done up-front […] so we can identify areas which should be red light areas but also areas where the research is done to see them from a cultural and environmental point of view and say that those areas are actually the areas where we encourage activity and development […] because they have been identified as being of low risk.[87]

Witnesses agreed on the value of a comprehensive national register. In their submission to the Committee, GetUp recommends that:

---

86 Mr Terry Piper, Acting Chief Executive Officer, Cape York Land Council, Committee Hansard, 8 June 2021, p5.

87 Mr Shannon Burns, Policy Officer, Cape York Land Council, Committee Hansard, 8 June 2021, p5

> Investment in strategic or large-scale assessment of areas of indigenous heritage that could qualify for National Heritage listing should be undertaken to proactively identity [sic] those areas that are worthy of protection under the EPBC Act (in addition to protection under the ATSIHP Act).[88]
>
> Data should be shared between State and Territory regulators and the Commonwealth Department of Agriculture, Water and the Environment to support assessment of areas of indigenous heritage that could qualify for National Heritage listing.[89]

In their submission to the Committee, the Australian Heritage Council recommends:

> that the EPBC Act could make it clear that places linked or not linked by immediate spatial proximity are still eligible, as a group, for listing on the National Heritage List if they are connected in a way that meets the relevant criteria and thresholds. Examples of places with immediate spatial proximity might include a number of islands in an archipelago, and a number of locations within the same area or region, which are commonly recognised as a single place. Examples of places not linked by proximity, but linked by a theme, story or intangible heritage could include songlines, a series of rock art sites in a region, or important cultural trading routes.[90]
>
> Once indigenous heritage areas have been listed and attract the protection of the EPBC Act, the Act must be rigorously applied and enforced.[91]

Based on the totality of information received, the Australian Greens consider it vital that places linked or not linked by immediate spatial proximity should still be eligible, as a group, for listing on the National Heritage List if they are connected in a way that meets the relevant criteria and thresholds. Examples of places not linked by proximity, but linked by a theme, story or intangible heritage could include songlines, a series of rock art sites in a region, or important cultural trading routes.

Furthermore, the Australian Greens consider it vital that heritage sites be proactively identified, ideally before the site or area becomes the subject of a development application or future act proposal, and recorded on a national register of heritage sites, which could ensure standardised access to information. It

---

88 GetUp, Submission 128, p39.GetUp, Submission 128, p39.

89 GetUp, Submission 128, p39.

90 Australian Heritage Council, *Submission 51*, p6.

91 GetUp, *Submission 128*, p39.

is to be acknowledged that such a register is not to be seen as a complete list of First Nations heritage sites and that more sites will continuously be added, but it can provide a starting point for ensuring improved FPIC.

This register should include provisions for sites to be listed as 'untouchable' to enjoy ongoing protection for these sites which subsequently cannot be targeted for activity by any proponents. It is incumbent on the government to institute the regulatory requirements to achieve this outcome.

Standards for heritage protection

Many submitters and witnesses to the inquiry including the Cape York Land Council[92], Kimberley Land Council[93] and National Native Title Council[94] advocate for the adoption of a set of national principles/ best practice standards to support and protect First Nations cultural heritage across Australia.

In their submission to the Committee, the New South Wales Aboriginal Land Council expressed concerns about the approach to date to the establishment of national standards for heritage protection:

> [...] the Commonwealth government response to date, indicates a very rushed approach to setting 'standards' that have not been developed in partnership with peak Aboriginal bodies. We are concerned that a 'national standards' model, which devolves responsibilities to the States/Territories, is not capable of achieving effective mechanisms for strong environmental or Aborginal cultural heritage protections. The approach risks remove [sic] important safeguards and recourse, and setting a course for weak 'minimum' rather than best practice standards.[95]

In their submission to the Committee, the National Native Title Council endorses the work of the Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) on Best Practice Standards in Indigenous Cultural Heritage Legislation, noting that in summary the Best Practice Standards, which are based on the principles enunciated in the United Nations Declaration on the Rights of Indigenous Peoples, provide for:

92 Cape York Land Council, *Submission 110*, p10.

93 Kimberley Land Council, *Submission 101*, p2.

94 National Native Title Council, Submission 34, p13.

95 New South Wales Aboriginal Land Council, *Submission 41*, p8.

> 1. A comprehensive definition of Indigenous cultural heritage that recognises that Indigenous cultural heritage is a living phenomenon;
>
> 2. Legislation that is structured so that it provides a blanket protection for Indigenous cultural heritage subject only to authorisations granted with the consent of affected Indigenous communities;
>
> 3. Authorisations for disturbances of Indigenous cultural heritage to be made by an Indigenous organisation that is genuinely representative of Traditional Owners. Legislation should include mechanisms for the identification and appointment of an organisation that can genuinely be accepted as the 'representative organisation' of the affected community to undertake this role;
>
> 4. Indigenous cultural heritage issues to be considered early in any development process;
>
> 5. Indigenous communities to be provided with adequate resources to manage Indigenous cultural heritage processes;
>
> 6. Enforcement regimes that are effective and broadly uniform;
>
> 7. Regimes for the management of Indigenous ancestral remains and secret or sacred objects based on the primacy of Traditional Owners;
>
> 8. Recognition of frontier conflict sites is undertaken only with the participation and agreement of affected Indigenous communities.[96]

Based on the totality of information received, the Australian Greens consider it vital that a set of national principles/best practice standards be developed to support and protect First Nations cultural heritage across Australia. This process should be First Nations-led and consider the best practice standards set out above.

Intangible heritage

Currently, definitions of cultural heritage vary widely between different jurisdictions and heritage protection legislation. There is a clear need for comprehensive definitions to be included in cultural heritage legislation. The National Native Title Council note:

> The Standards provide that for the legislation to be effective it must contain a comprehensive definition of Indigenous Cultural Heritage consistent with

96 National Native Title Council, Submission 34, p13.

> how Traditional Owners today understand their cultural heritage and their traditions. To be comprehensive it must include definitions of "cultural heritage", "tradition", "Aboriginal place", "Aboriginal site", "Aboriginal object", "intangible heritage", "Indigenous Ancestral remains".[97]

A comprehensive definition of cultural heritage should include intangible heritage. Current cultural heritage protection in Australia focuses on tangible heritage including sites and objects. However, there is little or no consideration of intangible heritage. Intangible heritage is a vital element of First Nations peoples' spirituality and identity, deeply connected to their complex belief and knowledge systems and relationship with Country. The loss or destruction of intangible heritage is as devastating as the loss or destruction of tangible heritage.

In 2003 the United Nations Educational, Scientific and Cultural Organisation (UNESCO) introduced the concept of 'intangible rights' by adopting the Convention for the Safeguarding of Cultural Heritage (the UNESCO Convention).[98] Australia is not a party to the Convention. Article 2 of the Convention defines 'intangible cultural heritage' to mean:

> the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.
>
> The "intangible cultural heritage" [...] is manifested inter alia in the following domains:
>
> (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
>
> (b) performing arts;
>
> (c) social practices, rituals and festive events;

97 National Native Council, Submission 34.1 supplementary to submission 34, p3.

98 https://ich.unesco.org/en/convention#part2 (Accessed 6 October, 2021)

> (d) knowledge and practices concerning nature and the universe;
>
> (e) traditional craftsmanship.

In their submission to the Committee, the New South Wales Aboriginal Land Council (NSWALC) call for:

> Improved protections and promotion of Aboriginal culture and heritage, including conservation mechanisms, better regulatory and land use planning, protections for misuse of intangible heritage, protection and promotion of knowledges and languages, protection and support for cultural practice, access and use, appropriate repatriation mechanisms, mechanisms to support Aboriginal land rights and water rights etc; [99]

In their submission to the Committee, the New South Wales Aboriginal Land Council (NSWALC):

> ... encourages Committee members to broaden understandings of 'significance' from one based solely on archaeological timelines and testing to an understanding that recognises holistic Aboriginal understandings of Country.[100]

In their submission to the Committee, the Australian Heritage Council (AHC) notes that:

> Under the EPBC Act, significant heritage values must be associated with a place or be within a specific boundary in order to gain protection. Under current heritage assessment processes, it is not always possible for intangible heritage values to be addressed.
>
> Aboriginal and Torres Strait Islander peoples' cultural heritage, in its many forms including intangible heritage, is central and important to Australia's heritage story. Intangible heritage is iterative and dynamic, with Indigenous knowledge presenting in multiple forms, linked to philosophical and legal traditions, language and education, stories, song and ceremonies.
>
> The Council notes that consideration should be given to allowing sufficient scope to recognise and protect matters of intangible heritage, particularly Australia's living and dynamic Indigenous traditions. Aboriginal and Torres Strait Islander cultures remain a significant part of the wider Australian culture and continues to evolve.[101]

---

99 New South Wales Aboriginal Land Council, *Submission 41*, p6.

100 New South Wales Aboriginal Land Council, *Submission 41*, p7.

101 Australian Heritage Council, *Submission 51*, p5.

In their submission to the Committee, the Kimberley Aboriginal Law and Cultural Centre (KALACC) notes that:

> Indigenous cultural heritage is expressed through cultural ways of living. It is diverse and is expressed in both tangible and intangible forms. For example, tangible cultural heritage includes physical objects, sacred and secret artefacts, geographical landscape features and ancestral remains. The more subtle, intangible expressions of cultural heritage include cultural expressions such as law, ceremonies, dance, songs, language, myth, narrative and stories. As Aboriginal people interact with, interpret and express aspects of their cultural heritage, it becomes a living, ephemeral culture that evolves as it passes along generations, building and maintaining identity, belonging and continuity.[102]

Mr Jamie Lowe, Chief Executive Officer, National Native Title Council, told the Committee:

> ...the point is that our culture is a live culture. It's a living culture, and these sites are part of that live culture. You see that in other jurisdictions, such as New Zealand, they've actually identified certain sites as living beings within legislation through the Treaty of Waitangi over there. I think Australia can learn from other jurisdictions; we don't necessarily need to reinvent the wheel on these matters. Other countries are enacting these and are far and away ahead of Australia's protection of our heritage as a living and breathing culture.[103]

Based on the totality of information received, the Australian Greens consider it vital that intangible heritage should be considered in the identification and protection under any heritage protection legislation at a Commonwealth, state or territory level. It is incumbent on the government to institute the regulatory requirements to achieve this outcome.

Protection of Country and cultural heritage protection

First Nations people have long recognised and understood that the protection of cultural heritage is inextricably linked to the sustainable management and protection of Country.

Ms Monica Morgan, Chief Executive Officer, Yorta Yorta Nation Aboriginal Corporation, told the Committee:

---

102 Kimberley Aboriginal Law and Cultural Centre, *Submission 21*, p7.

103 Mr Jamie Lowe, Chief Executive Officer, National Native Title Council, *Committee Hansard*, 28 August 2020, p43-44.

> We're the second players there; we're not the negotiators at the very vital stage of looking first, not just at cultural heritage but at country—water, land and biodiversity. Everything contributes to our country, tangibly and intangibly. They all connect to our country.[104]

Martuwarra Council submits:

> Like many rivers across the globe, the Martuwarra-Fitzroy River is under increasing threat due to the acceleration of invasive colonial 'development', which has beset the region for over 150 years. The currently dominant unsustainable extractive approach reflects a colonial framework that sidelines both Traditional Owners and the depth of Aboriginal legal and normative traditions. In doing so, this extractive approach sidelines and disrespects the Martuwarra. […] Martuwarra Fitzroy River Council believes it is now imperative to recognize the pre-existing and continuing legal authority of Indigenous law, or 'First Law', in relation to the River, in order to preserve its integrity through a process of legal decolonization. River personhood is understood as one pathway towards this outcome.[105]

Professor John Altman submits:

> Prior to colonization, the Australian landscape was modified anthropogenically by fire and non-anthropogenically by wildfire, the climate and the biosphere.
>
> Settler colonialism resulted in a very different interaction with the landscape whether by industrial scale agriculture or mineral extraction. New forms of technology have allowed quite extraordinary modifications to the environment be it by industrial scale land clearing for agriculture and open cut mining; or by using explosives as at Juukan Gorge.
>
> The Indigenous and settler colonial ontologies about the landscape were, and in many contexts still are, fundamentally at odds: a simplified dichotomy interprets the former as viewing the landscape everywhere as sentient and to be nurtured to deliver livelihood and wellbeing. For those who maintain traditions and customs, the landscape is imbued with Ancestral power. Settler economies see the land and environment as a factor of production, to be exploited, sometimes sustainably, sometimes destructively, for economic gain.[106]

---

104 Ms Monica Morgan, Chief Executive Officer, Yorta Yorta Nation Aboriginal Corporation, *Committee Hansard*, 19 March 2021, p35.

105 Martuwarra Council, *Submission 108.1*, pp4-5.

106 Professor Jon Altman, *Submission 169*, p1.

Asked about the impacts of climate change with rising sea levels disturbing ancestral remains on Saibai Island in the Torres Strait, Mr Charlie Kaddy, Acting Chief Executive Officer, Gur A Baradharaw Kod Torres Strait Sea and Land Council, told the Committee:

> There are other islands at threat. One of the proponents […] talked a lot about finding bones when he goes for a walk on the beach. There are also graves on the eastern islands, the islands of Dauar and Murray, in the eastern Torres Strait, where there's been some work. The local ranger program did some work on graves that were falling into the ocean.[107]

Asked about the long-term impacts of climate change on cultural heritage, Dr Fiona Johnson, Academic, Global Water Institute, University of New South Wales told the Committee:

> Climate change will most likely exacerbate the impacts that we already see.[108]

The Australian Greens note that the impacts of climate change will increasingly threaten cultural heritage protection and contribute to the ongoing destruction and desecration of sites that should be protected. Climate change disproportionately threatens the health, culture and heritage of First Nations People. For example, sea level rise and associated flooding, and the increasing occurrence and severity of extreme weather events including heat waves, cyclones and bushfires already impact on sites and First Nations People's ability to protect them. These impacts will continue to escalate and accelerate unless urgent, equitable and sustained local, national and global action is taken to avoid climate catastrophe.

The Australian Greens therefore emphasise that an effective framework for cultural heritage protection needs to take into account measures to address climate change and its potential impacts on cultural heritage.

Consequences and penalties

Many submitters and witnesses to the inquiry gave evidence that existing consequences and penalties for damage to and destruction of sacred sites were insufficient, and that mining and other companies lack the capacity to avoid incidents like Juukan Gorge in the future.

---

107 Mr Charlie Kaddy, Acting Chief Executive Officer, Gur A Baradharaw Kod Torres Strait Sea and Land Council, *Committee Hansard*, 8 June 2021, p21.

108 Dr Fiona Johnson, Academic, Global Water Institute, University of New South Wales, *Committee Hansard*, 29 June 2021, p6.

In their submission to the Committee, the Cape York Land Council recommend that:

> Protection of Indigenous cultural heritage and enforcement of Cultural Heritage Management Plans can only ever be effective where the penalties for damage and non-compliance are compelling on the land user. The penalties provided by Indigenous cultural heritage legislation across Australia must be reviewed and increased as necessary to create a significant disincentive for land users to cause any unauthorised harm to cultural heritage.[109]

In their submission to the Committee, GetUp recommend that:

> Aboriginal and Torres Strait Islander Heritage legislation should include a mechanism for the traditional owners or custodians of heritage to initiate and be the beneficiaries of legal proceedings to provide a remedy for damage to and loss of cultural heritage by way of compensation or reparation.[110]

In their submission to the Committee, the Quandamooka Yoolooburrabee Aborignal Corporation (QYAC) discusses a number of shortcomings and loopholes in existing state and federal legislation, including the capacity for developers to undertake their own assessments without consulting Traditional Owners:

> Self assessment against the Duty of Care Guidelines is the part of the Qld Act which is of most concern to QYAC. If a developer self-assesses that the project that they are undertaking is within categories 1-4, then Aboriginal People are not notified and therefore cannot provide advice nor make an informed decision on whether there will be an impact to Aboriginal cultural heritage. [111]

In addition to strengthening Australia's framework for the protection of cultural heritage, the Human Rights Law Centre's submission to the Committee also recommends that the Commonwealth government considers the introduction of broader human rights due-diligence obligations for large Australian companies, operating in high-risk sectors or locations, as have been introduced in a number of European jurisdictions:

> Requiring companies to take proactive steps to identify potential human rights impacts early could prevent serious violations, such as those arising from the destruction of Juukan Gorge, from occurring in the first place.[112]

---

[109] Cape York Land Council, Submission 110, p10.

[110] GetUp, Submission 128, p40.

[111] Quandamooka Yoolooburrabee Aborignal Corporation, Submission 106, p5.

[112] Human Rights Law Centre, Submission 102, p9.

Research by Prof. Deanna Kemp, Prof. John Owen and Rodger Barnes from the Centre for Social Responsibility in Mining suggests that mining companies lack the capacity to avoid incidents like Juukan Gorge in the future:

> The field of mining and social performance is in decline. This has weakened the ability of community relations and social performance professionals to challenge production priorities in circumstances where risks to community exceed reasonable thresholds. Our research highlights shortcomings across organisational structures, internal lines of reporting, management systems, incentives and talent management.[113]

In their submission, the Centre for Social Responsibility in Mining recommends that:

> The Joint Standing Committee should consider incentives for mining companies to build the appropriate governance architecture, management systems, and human resources capability that reflect the contexts in which they operate, and to avoid incidents like Juukan Gorge in the future.[114]

Based on the totality of information received, the Australian Greens believe that the penalties provided for in First Nations cultural heritage legislation across Australia must be reviewed and increased as necessary to create a significant deterrent for land users to cause any unauthorised harm to cultural heritage.

Draft WA Cultural Heritage Bill

The Aboriginal Heritage Act 1972 (WA) (AHA) is the main legal framework for the protection of First Nations cultural heritage in Western Australia. As it currently stands, the AHA is completely inadequate. It enables the legal destruction of tangible and intangible cultural heritage across Western Australia. The AHA facilitates mining and is in the interests of mining companies, not the community.

In the interim report, Never Again, the committee recommended the Western Australian Government:

> Replace the Aboriginal Heritage Act 1972 with stronger heritage protections as a matter of priority, noting the progress already made in consultation on the draft Aboriginal Cultural Heritage Bill 2020. Any new legislation must as a minimum ensure Aboriginal people have meaningful involvement in and control over heritage decision making, in line with the internationally

113 Centre for Social Responsibility in Mining, *Submission 28*, p4.

114 Centre for Social Responsibility in Mining, *Submission 28*, p4.

> recognised principles of free, prior and informed consent, including relevant RNTBCs under the Native Title Act. Any new legislation should also include a prohibition on agreements which seek to restrict Traditional Owners from exercising their rights to seek protections under State and Commonwealth laws (p19)

However, draft versions of the Aboriginal Cultural Heritage Bill that have been presented to the community do not come close to implementing the above recommendation. In its current form, the Aboriginal Cultural Heritage Bill 2021 does not meet best practice cultural heritage standards and is not strong enough to prevent the destruction that occurred at Juukan Gorge.

The following section highlights some of the key concerns with draft versions of the Aboriginal Cultural Heritage Bill.

There are significant concerns across the community that the draft bill contravenes national and international laws, including the rights enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

Analysis by the National Native Title Council found that the draft bill fails to meet the Best Practice Standards in Indigenous Cultural Heritage Legislation developed by the Heritage Chairs and Officials of Australia and New Zealand.

In evidence provided to the committee, the National Native Title Council explain:

> ...the WA Bill falls significantly short in many respects of the Standards, particularly with regard to the principle of self-determination, the requirement of free prior and informed consent and a failure to adequately resource Traditional Owner groups and organisations to engage with proponents let alone perform their most basic statutory functions. In short, the WA Bill does little to redress the legislative pitfalls and significant power imbalance that exists between mining companies and Traditional Owners that led to the destruction of Juukan Gorge.[115]

Recently, a group of First Nations people, Slim Parker, Kado Muir, Dr Anne Poelina, Clayton Lewis and Dr Hannah McGlade, made a request to the United Nations Committee on the Elimination of Racial Discrimination to review the draft Aboriginal Cultural Heritage Bill 2020 under its early warning and urgent action procedure. In their submission to the United Nations Committee on the Elimination of Racial Discrimination the group explain how the bill is incompatible with Australia's obligations under the Convention:

115 National Native Title Council, *Submission 34.1*, p2.

> First, the Bill does not provide any recognition that significant Aboriginal cultural heritage will be protected from destruction. It still permits the destruction of significant cultural heritage and fails to respect, protect and fulfil the right to culture and is incompatible with article 5 of the Convention.
>
> Secondly, while there are some limited procedural guarantees with respect to consultation, they fall well short of free, prior and informed consent and are incompatible with article 5 of the Convention.
>
> Thirdly, Traditional Owners are unable to say 'no' to activities which will destroy significant cultural heritage. The Minister administering the proposed legislation is the final decision-maker...This is incompatible with articles 3 and 5 of the Convention.[116]

The draft bill clearly fails to recognise First Nations people as the primary decision makers in the protection of their cultural heritage. Proponents will be responsible for making assessments about whether their proposed activities will cause harm to First Nations cultural heritage. Allowing proponents to make assessments of cultural heritage does not meet the principle of Free, Prior and Informed Consent.

The Kimberley Land Council believe the draft bill provides less protection than the AHA:

> The Draft Bill overall offers less protection than the current AHA because it gives proponents the authority and responsibility to undertake due diligence assessments. The Draft Bill effectively designates the proponent of an activity as the decision maker in relation to whether Aboriginal cultural heritage exists in a place, and if it does whether or not that Aboriginal cultural heritage may be impacted by the activity, and lastly what level of impact the activity will have on the Aboriginal cultural heritage.[117]

The draft bill also gives the Minister the final say over the destruction of First Nations cultural heritage, and does not include an appeals process. As the Yamatji Marlpa Aboriginal Corporation note:

> Under the new ACHA LACHS are encouraged to reach negotiated outcomes with proponents but ultimately the Minister will still have the right to approve Aboriginal Cultural Heritage Management Plans (ACHMPs) that include the destruction of ACH against the objections of the people to whom that heritage

116 International Convention on the Elimination of all forms of Racial Discrimination - Early Warning and Urgent Action https://www.edo.org.au/wp-content/uploads/2021/09/210830-Final-UN-communication-.pdf

117 Kimberley Land Council, Submission 85 to the Aboriginal Cultural Heritage Bill 2020 consultation, pp8-9.

> belongs. YMAC do not see how this draft bill in its current form will lead to less ACH places being destroyed or damaged.[118]

The Australian Greens believe that all decision making around First Nations cultural heritage must rest with Traditional Owners, not mining companies or the Minister.

Finally, the draft bill leaves critical aspects of cultural heritage protection to regulations and policy documents which have not yet been released.

The Yamatji Marlpa Aboriginal Corporation note this allows the Government of the day to make changes to key processes:

> YMAC is also deeply concerned that the proposed ACHA is not future proofed. The workability of the Local Aboriginal Cultural Heritage Services (LACHS), Aboriginal Cultural Heritage Council (ACH Council), ACH management processes, minimum standards of consultation, management code etc. are all relegated to regulations and guidelines which can easily be amended by the government of the day.[119]

The draft bill provides a once-in-a-generation opportunity to implement best practice cultural heritage protections in WA. The Australian Greens are deeply disappointed in the McGowan Government's failure to genuinely engage with and listen to the voices of Traditional Owners. The current bill does not position First Nations people at the centre of decision-making about their cultural heritage. It will not stop the ongoing destruction of cultural heritage and does not meet community expectations.

Recommendations

The Australian Greens support the findings and recommendations put forward by the committee, in particular the call for an overarching Commonwealth legislative framework based on the protection of cultural heritage, and wish to emphasise the importance of this being developed in a First Nations-led process.

While many of the key principles that should apply in a framework to effectively ensure protection of First Nations heritage have been covered in chapter 7 of this

---

118 Yamatji Marlpa Aboriginal Corporation, Submission 134 to the Aboriginal Cultural Heritage Bill 2020 consultation, p4.

119 Yamatji Marlpa Aboriginal Corporation, Submission 134 to the Aboriginal Cultural Heritage Bill 2020 consultation, p3.

report as well as the minimum standards proposed under the committee's recommendation 3, the Australian Greens wish to put forward the following stand-alone and additional recommendations due to the importance of these essential aspects of any framework and legislation truly considering the interests of First Nations people and the protection of their heritage.

The Australian Greens recommend that

Recommendation 1

The Australian government begin the process of negotiating a Treaty or treaties with First Nations people, including a truth telling process and healing. A Treaty will create a unified national identity that celebrates what unites us, protects the rights of First Nations people and their cultures while also acknowledging the ongoing and historical injustices of colonisation.

Recommendation 2

All legislation relating to First Nations peoples be based on the principles of the United Nations Declaration on the Rights of Indigenous Peoples and ensure any decisions are made based on the principle of Free, Prior and Informed Consent.

Recommendation 3

Giving consideration to the true meaning of Free, Prior and Informed Consent, all Commonwealth, state and territory legislation be amended to provide Traditional Owners with a right to veto any proposed activities.

Recommendation 4

Australian governments on all levels, in a First Nations-led process, develop a nationally consistent approach for obtaining obtain Free, Prior and Informed Consent from Traditional Owners and Native Title holders in relation to activity proposals on Country, with specific consideration of the need to ensure that consultation is conducted inclusively with all affected communities in a culturally appropriate and well-resourced manner with full access to all relevant information and without being subjected to any form of pressure or coercion.

Recommendation 5

Australian governments on all levels ensure communities have access to essentials, including culturally appropriate housing, education and healthcare and employment opportunities, to ensure they can fully engage in Free, Prior and Informed Consent processes considering the best outcomes for their communities and Country.

Recommendation 6

Australian governments on all levels provide for effective mechanisms in legislation to prevent and prohibit unconscionable conduct by project proponents towards First Nations communities, such as the inappropriate use of financial and other incentives in the process to obtain consent from Traditional Owners, including the application of penalties and the non-granting of project permits for such offences.

Recommendation 7

The Australian federal and state and territory governments, in collaboration with all relevant stakeholders and First Nations people, develop a clear definition of cultural heritage, which encompasses intangible heritage.

Recommendation 8

The Australian federal, state and territory governments make ongoing public resources available for the mapping and recording of cultural heritage led by First Nations communities, and be made available in an accessible manner. Alongside the mapping and registration of existing sites, records and maps of past destruction should be made available to Traditional Owners and public cultural heritage registers.

Recommendation 9

Legislation on all levels relevant to the protection of First Nations cultural heritage to require consultation with all First Nations communities impacted by an activity proposition, not just registered Native Title holders or Traditional Owner corporations, to ensure true Free, Prior and Informed Consent even where multiple groups claim cultural connection to a certain area.

Recommendation 10

The establishment of a National and Torres Strait Islander Heritage Council as a new independent statutory body, made up exclusively of First Nations people, along the considerations outlined in chapter 7 of this report.

Recommendation 11

The Australian Government provide First Nations communities with the resources to proactively identify heritage sites and areas that are worthy of protection, including those that are not linked by immediate spatial proximity, and establish a National Register of Heritage Sites for their recording and public access, and that this register be continuously expanded and updated based on the advice of Traditional Owners. The register should include provisions for sites to be listed as ‘untouchable’ to enjoy ongoing protection for these sites which subsequently cannot be targeted for activity by any proponents.

Recommendation 12

The Australian government ensure any cultural heritage laws provide for appropriate review mechanisms and provide Traditional Owners with support to make use of these mechanisms.

Recommendation 13

Notwithstanding the need for national standalone heritage protection legislation, the ATSHIP Act and EPBC Act be reviewed and amended to fully meet our obligations under the United Nations Declaration on the Rights of Indigenous People (UNDRIP). The best practice standards put forward by Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) *Dharwura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia should be enshrined in these Acts.* The EPBC Act should further give full consideration to the recommendations of the Independent Review of the EPBC Act, led by Professor Graeme Samuel AC, particularly section 2.3 of the Final Report, while the review of the ATSIHP Act should give full consideration to the recommendations of the Evatt *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

Recommendation 14

Notwithstanding the need for national standalone heritage protection legislation, the Native Title Act be reviewed and amended to fully meet our obligations under the United Nations Declaration on the Rights of Indigenous People (UNDRIP), in a process led by First Nations people. The best practice standards put forward by the Heritage Chairs and Officials of Australia and New Zealand (HCOANZ) *Dharwura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia* should be enshrined in the Act, and particular consideration paid to avoid power imbalances and coercion in negotiations, ensuring that any agreements are based on Free, Prior and Informed Consent.

Recommendation 15

The Australian government, in collaboration with all relevant stakeholders and First Nations people, develop a set of national principles/best practice standards to support and protect Indigenous cultural heritage across Australia, in consideration of the best practice standards put forward in the Heritage Chairs and Officials of Australia and New Zealand's (HCOANZ) *Best Practice Standards in Indigenous Cultural Heritage Legislation*.

Recommendation 16

The Australian federal, state and territory governments, in collaboration with all relevant stakeholders and First Nations people, review and increase the penalties provided by First Nations cultural heritage legislation across Australia to create a

significant deterrent for land users to take unauthorised action on cultural heritage and Country, and to provide for culturally-appropriate remedy to Traditional Owners where those protections are breached, including through the methods outlined in chapter 7, as well as financial compensation to Traditional Owner communities.

Recommendation 17

The Australian Greens recommend that the Australian, State and Territory Governments, in collaboration with all relevant stakeholders and First Nations people, review and amend existing legislation to introduce broader human rights and cultural heritage due diligence obligations for Australian companies to take proactive steps to identify potential human rights and cultural heritage impacts of their actions.

Recommendation 18

First Nations heritage legislation which contains strong judicial review provisions and a provision allowing for the authorisation of activity impacting upon heritage should include a provision which enables such permission, once given, to be amended or revoked, if the impact upon the Indigenous cultural heritage, or the significance of the Indigenous cultural heritage is greater than was understood when the permission was granted.

Recommendation 19

The Australian Greens recommend that the federal government set up a First Nations Legal Defence Fund to provide First Nations communities with the legal and financial support to stand up for their Country and heritage, including but not limited to Native Title disputes and cultural heritage destruction. The administration of the fund is to be First Nations-led.

Recommendation 20

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

Recommendation 21

The new national heritage protection legislation to include strong environmental protections to ensure protection of Country as well as culture.

Recommendation 22

The Australian Government, in collaboration with all relevant stakeholders and First Nations people, take urgent, equitable and sustained local, national and

global action to avoid climate catastrophe and its impacts on Country and cultural heritage.

Recommendation 23

The Western Australian Government not proceed with the draft Aboriginal Cultural Heritage Bill 2021 in its current form and provide Traditional Owners with the latest version of the Bill (also known as the Exposure Draft Bill (Green Bill)). The Western Australian Government engage in a co-design process on the draft bill (Green Bill) that enables Traditional Owners to lead decision making around cultural heritage. The Western Australian Government abolish all powers that authorise damage to cultural heritage without the consent of Common Law Holders and Traditional Owners.

Senator Lidia Thorpe

A. List of submissions

Submissions

1 Mr Chris Thompson

2 Mr Trevor McGowan

3 Ms Claudia Tregoning (nee Marconi)

4 Ms Wendy Kurka

5 Ms Andrea Herman

6 Mr Benjamin Cronshaw

7 Office of the Registrar of Indigenous Corporations

8 Emmaus College Connecting Cultures Committee

9 Mrs Carol and Mr Fred Newton

10 Mr Bill Gray

11 Professor Glynn Cochrane

- 11.1 Supplementary

12 *Name Withheld*

13 Miss Angela Fulco

14 National Native Title Tribunal

15 Royal Historical Society of Victoria

16 Federation of Australian Historical Societies

17 Dr Sue-Anne Wallace

18 Australian Research Council Centre of Excellence for Australian Biodiversity and Heritage (CABAH)

19 Mr Bruce Harvey

- 19.1 Supplementary

20 *Name Withheld*

21 Kimberley Aboriginal Law and Cultural Centre (KALACC)

22 Emeritus Professor Jon Altman

23 Department of Agriculture, Water and the Environment

- 23.1 Supplementary

24 Department of Planning, Lands and Heritage

- 24.1 Supplementary
- 24.2 Supplementary

25 Rio Tinto

- 25.1 Supplementary
- 25.2 Supplementary
- 25.3 Supplementary
- 25.4 Supplementary
- 25.5 Supplementary
- 25.6 Supplementary

26 *Confidential*

27 Dr Kate Galloway

- 27.1 Supplementary

28 Centre for Social Responsibility in Mining

29 Victorian Aboriginal Heritage Council

- 29.1 Supplementary

30 History Council of Victoria Inc

31 Andy McClusky

32 Nuga Nuga Aboriginal Corporation (icn 8089)

33 Griffith Centre for Social and Cultural Research

34 National Native Title Council

- 34.1 Supplementary

35 HESTA

- 35.1 Supplementary

36 ANTaR

37 Australian Archaeological Association

38 Yinhawangka AC

39 Beatty Legal

40 Blue Shield Australia

41 NSW Aboriginal Land Council

42 Mr Andrew Starkey

- 42.1 Supplementary

43 *Name Withheld*

44 Dr Anna Fagan

45 Arts Law Centre of Australia

46 Australian Speleological Federation Inc

47 Deb Wilkinson and Peter Burnett

48 *Name Withheld*

49 Dr Michael Davis

50 Wintawari Guruma Aboriginal Corporation

- 50.1 Supplementary
- 50.2 Supplementary
- 50.3 Supplementary
- 50.4 Supplementary
- 50.5 Supplementary
- 50.6 Supplementary

51 Australian Heritage Council

52 Emeritus Professor Iain Davidson

53 Ms Sally Fitzpatrick

54 Deakin Law School

- 54.1 Supplementary

55 Dr Mary Edmunds

- 55.1 Supplementary

56 Australasian Centre for Corporate Responsibility

57 Aboriginal Institute of Aboriginal and Torres Strait Islander Studies

- 57.1 Supplementary
- 57.2 Supplementary
- 57.3 Supplementary
- 57.4 Supplementary
- 57.5 Supplementary

58 Ms Karen Martin-Stone

59 Mole Creek Caving Club Inc

60 SDAG

61 Northern Territory Government

62 Federation of Victorian Traditional Owner Corporations

63 Access Fund

64 Original Power Ltd

65 Robin Chapple MLC

- 65.1 Supplementary
- 65.2 Supplementary

66 Association of Mining and Exploration Companies

67 *Name Withheld*

68 Mrs Tracy De Geer

69 AICCM

70 Mr Bob Makinson

71 *Name Withheld*

72 Roy Hill

73 Mr David Noonan B.Sc., M.Env.St. David

- 73.1 Supplementary
- 73.2 Supplementary
- 73.3

74 Dr John Burman and Kay Burman

75 Royal Australian Historical Society

76 Australian Council of Superannuation Investors

77 National Aboriginal Community Controlled Health Organisation (NACCHO)

78 Janet Hunt

79 Woodside Energy Ltd

80 Balranald Local Aboriginal Land Council

81 Maurice Blackburn Lawyers

82 Mr Cedric Davies

83 The Chamber of Minerals and Energy of Western Australia

- 83.1 Supplementary

84 Reconciliation Australia

85 Fortescue Metals Group

- 85.1 Supplementary

86 BHP

- 86.1 Supplementary
- 86.2 Supplementary
- 86.3 Supplementary
- 86.4 Confidential

87 Murujuga Aboriginal Corporation

- 87.1 Supplementary

88 *Name Withheld*

89 Banjima Native Title Aboriginal Corporation RNTBC

90 Nari Nari Tribal Council

91 Aboriginal Victoria

92 Arabana Aboriginal Corporation RNTBC

93 Royal Archaeological Institute and the Prehistoric Society

94 Australian Indigenous Archaeologist's Association

95 Gladwin Legael

96 Arizona Mining Reform Coalition

97 San Carlos Apache Tribe

98 International Council for Monuments and Sites (ICOMOS)

- 98.1 Supplementary
- 98.2 Supplementary

99 Marcus Holmes

- 99.1 Supplementary
- 99.2 Supplementary

100 Margaret Adamson

101 Kimberley Land Council

- 101.1 Supplementary

102 Human Rights Law Centre

103 Professor Dr Marcia Langton AO

- 103.1 Supplementary

104 Minerals Council of Australia

- 104.1 Supplementary

105 First Nations Legal and Research Services

106 Quandamooka Yoolooburrabee Aboriginal Corporation

107 Environmental Defenders Office

- 107.1 Supplementary

108 Martuwarra Council

- 108.1 Supplementary

109 Central Land Council

- 109.1 Supplementary

110 Cape York Land Council

111 Aboriginal Areas Protection Authority

- 111.1 Supplementary

112 Queensland Law Society

113 ElectraNet

114 YMAC

- 114.1 Supplementary
- 114.2 Supplementary

115 Professor Bernhard Boer

116 National Indigenous Australians Agency

117 Ms Jaqueline Outram

118 Concerned Australians

119 Mr Michael Peters

120 Law Council of Australia

- 120.1 Supplementary

121 Royal WA Historical Society (Inc.)

122 David L Allen

123 *Confidential*

- 123.1 Confidential

124 Mr Brendan Shannon

125 Jackie Turner

126 Angela Turner

127 John Brennan

128 GetUp

129 PKKP Aboriginal Corporation

- 129.1 Supplementary
- 129.2 Supplementary
- 129.3 Supplementary
- 129.4 Supplementary
- 129.5 Supplementary

130 Mr John Southalan

131 Mr David Brown

132 Ms Helen Petros

133 Dr Les Davies

134 Mr Nigel Stace

135 Melbourne University Classics and Archaeology Students Society (MUCLASS)

136 Mr Carl and Mrs Margret Doring

137 Professor David Blair

138 Ms Helen Greer

139 Ms Sara Slattery

140 *Confidential*

141 Mr Bruce Robinson

142 Panguna Development Company Limited

143 National Environmental Law Association

- 143.1 Supplementary 3

144 Mr Andrew Pawley

145 Mr John McBain

146 Emeritus Professor Andrew Hopkins

147 Friends of Australian Rock Art Inc (FARA)

148 Gomeroi Traditional Custodians

149 Mr John Wilson

150 Special Mining Lease Osikaiyang Landowners Association Inc (5-4832)

151 Ian Perdrisat

152 Registrar of Aboriginal Sites

153 Mr Stan Vincent

154 Mr Jack Green

155 New Century Resources Limited

156 Nurrdalinji Native Title Aboriginal Corporation

- 156.1 Supplementary

157 Belubula Headwaters Protection Group

158 GWI UNSW

- 158.1 Supplementary

159 Waanyi PBC

160 AECOM

161 Australian Heritage Specialists

162 Mineral Policy Institute

163 Kokatha Aboriginal Corporation RNTBC

164 Ms Pauline Brown

165 Roger Seccombe B.Sc., M.Eng., M.I.E.Aust.

166 Mr Les Johnston

167 Chuulangun Aboriginal Corporation

168 Empire Energy Group Limited

169 Torres Shire Council

- 169.1 Supplementary

170 Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships

171 Mr Jordan Daly

172 The University of Queensland

173 Ms Deborah Moseley

174 Quandamooka Truth Embassy

175 Moreton Family

176 McArthur River Mine

177 Australian National University Law Reform and Social Justice Research Hub

Exhibits

B. List of public hearings and witnesses

Friday, 7 August 2020

Parliament House, Canberra

Rio Tinto

- Mr Brad Haynes, Vice President, Corporate Relations Australia
- Mr Chris Salisbury, Chief Executive, Iron Ore
- Mr Jean-Sebastian Jacques, Chief Executive
- Ms Kate Wilson, Senior Manager, Communities and Social Performance Australia
- Mr Brad Welsh, General Manager, Weipa Operations

Department of Agriculture, Water and the Environment

- Mr Dean Knudson, Deputy Secretary
- Mr Stephen Oxley, First Assistant Secretary, Heritage, Reef and Marine Division
- Mr James Barker, Assistant Secretary, Heritage, Reef and Marine Division

National Indigenous Australians Agency

- Mr Ray Griggs, Chief Executive Officer
- Mr Wayne Beswick, Branch Manager, Lands Branch

Government of Western Australia

- The Hon. Ben Wyatt MLA, Minister for Aboriginal Affairs, Western Australia

- Mr Vaughan Davies, Assistant Director General—Heritage and Property
- Dr Debra Fletcher, Strategic Adviser, Native Title, Aboriginal Engagement Division, Department of the Premier and Cabinet

Friday, 28 August 2020

Parliament House, Canberra

Professor Glynn Cochrane, Private capacity

Dr Mary Edmunds, Private capacity

Aboriginal Institute of Aboriginal and Torres Strait Islander Studies

- Dr Lisa Strelein, Executive Director, Research and Education

Mr Bruce Harvey, Private capacity

Professor Dr Marcia Langton AO, Private capacity

Australian Council of Superannuation Investors

- Ms Louise Davidson, Chief Executive Officer
- Mr Edward John, Executive Manager, Governance Engagement and Policy

National Native Title Council

- Mr Melvin Farmer, Chairperson
- Mr Kado Muir, Deputy Chair
- Mr Jamie Lowe, Chief Executive Officer
- Mr Austin Sweenley, Director of Legal Policy

Thursday, 17 September 2020

Parliament House, Canberra

BHP

- Mr Edgar Basto Baez, President, Minerals Australia
- Mr David Bunting, Manager, Heritage, Minerals Australia
- Ms Elizabeth (Libby) Ferrari, Head of Indigenous Engagement

Kimberley Land Council

- Mr Nolan Hunter, Chief Executive Officer

The Chamber of Minerals and Energy of Western Australia

- Mr Paul Everingham, Chief Executive Officer

- Mr Robert Carruthers, Director, Policy and Advocacy
- Ms Roannah Wade, Policy Adviser, Land Access and Exploration

Monday, 21 September 2020

Parliament House, Canberra

Mr Cedric Davies, Private capacity

Woodside Energy Ltd

- Mr Daniel Kalms, Senior Vice President, Corporate and Legal
- Mr Adam Lees, Senior Manager, Indigenous Affairs
- Mr Daniel Thomas, Senior Corporate Affairs Adviser, Heritage

Yinhawangka Aboriginal Corporation

- Mr Halloway Smirke, Director and Chair
- Mr Grant Bussell, Chief Executive Officer
- Dr Anna Fagan, Implementation Officer and Archaeologist/Anthropologist

Hon Robin Chapple MLC, Private capacity

Friday, 2 October 2020

Parliament House, Canberra

Association of Mining and Exploration Companies (AMEC)

- Mr Warren Pearce, Chief Executive Officer

Law Council of Australia

- Ms Pauline Wright, President
- Ms Robyn Glindemann, Chair, Australian Environment and Planning Law Group
- Mr Tony McAvoy SC, Co-Chair, Indigenous Legal Issues Committee
- Ms Leonie Campbell, Deputy Director of Policy
- Mr Greg McIntyre SC, Member, Australian Environment and Planning Law Group, Legal Practice Section, and Executive Member

Monday, 12 October 2020

Parliament House, Canberra

PKKP Aboriginal Corporation

- Mr John Ashburton, Chairperson

- Ms Carol Meredith, Chief Executive Officer
- Mr Burchell Hayes, Board Of Directors And Traditional Owner
- Ms Suzette Baumgarten, Director
- Dr Heather Builth, Culture And Heritage Manager
- Mr Rick Davies, Advisor
- Ms Donna Meyer, Representative
- Mr Richard Bradshaw, Lawyer
- Mr Andrew Collett, Lawyer

Tuesday, 13 October 2020

Parliament House, Canberra

Yamatji Marlpa Aboriginal Corporation

- Mr Simon Hawkins, Chief Executive Officer
- Mr Cameron Trees, Principal Legal Officer
- Ms Kate Holloman, Deputy Principal Legal Officer

Wintawari Guruma Aboriginal Corporation

- Mr Dennis Hicks, Director And Eastern Guruma Elder
- Mr Terry Hughes, Director And Eastern Guruma Elder
- Ms Judith Hughes, Director And Elder
- Ms Joselyn Hicks, Director
- Mr Anthony (Tony) Bevan, Non-Member Director
- Dr Kathryn Przywolnik, Heritage Manager

Roy Hill

- Mr Barry Fitzgerald, Chief Executive Officer

Yindjibarndi Aboriginal Corporation

- Mr Michael Woodley, Chief Executive Officer
- Mr Middleton Cheedy, Director And Elder
- Mr Davies Philip, Anthropologist
- Mr George Irving, Principal Legal Officer And In-House Counsel

Department of Planning, Lands and Heritage

- Mr Benjamin Wyatt, Minister for Aboriginal Affairs, Western Australian

Friday, 16 October 2020

Parliament House, Canberra

Rio Tinto

- Mr Brad Haynes, Vice President
- Mr Jean-Sebastien Jacques, Chief Executive Officer
- Mr Chris Salisbury, Chief Executive, Iron Ore
- Ms Simone Niven, Group Executive, Corporate Relations
- Ms Kate Wilson, Senior Manager, Communities And Social Performance Australia
- Mr Brad Welsh, General Manager, Weipa Operations, Rio Tinto Aluminium

Monday, 2 November 2020

Karratha Leisureplex, Karratha, Western Australia

Cheela Plains Pastoral Company

- Mr Evan Pensini, Managing Director

Murujuga Aboriginal Corporation

- Mr Peter Jeffries, Chief Executive Officer
- Ms Tui Magner, Corporate Services Manager
- Ms Amy Stevens, World Heritage Officer

Robe River Kuruma Aboriginal Corporation RNTBC

- Ms Sara Slattery, Traditional Owner And Chief Executive Officer
- Ms Gloria Lockyer, Elder And Heritage Advisory Committee
- Mr Mark Lockyer, Elder And Heritage Advisory Committee
- Ms Naomi Bobby, Elder And Board Director
- Mrs Margot Barefoot, Cultural Heritage And Environment Manager

Tuesday, 17 November 2020

Parliament House, Canberra

HESTA

- Ms Mary Delahunty, Head Of Impact
- Ms Claire Heeps, Senior Responsible Investment Adviser

Fortescue Metals Group

- Ms Elizabeth Gaines, Chief Executive Officer
- Mr Timothy Langmead, Director Community, Environment And Government

Friday, 20 November 2020

Parliament House, Canberra

Registrar of Aboriginal Sites, WA

- Ms Tanya Butler, Registrar Of Aboriginal Sites

Friday, 19 February 2021

Parliament House, Canberra

Deakin Law School

- Dr Samantha Hepburn, Professor Of Law

Victorian Aboriginal Heritage Council

- Mr Rodney Carter, Chairperson
- Dr Matthew Storey, Director

Aboriginal Victoria

- Dr Jamin Moon, Manager, Heritage Policy, Information And Registry, Aboriginal Victoria, Department Of Premier And Cabinet (Victoria)
- Mr Harry Webber, Director, Heritage Services, Aboriginal Victoria, Department Of Premier And Cabinet (Victoria)

Environmental Defenders Office

- Dr Anne Poelina, Chair, Martuwarra Fitzroy River Council
- Dr Lauren Butterly, Senior Solicitor
- Ms Fleur Ramsay, Special Counsel, International Program

- Ms Revel Pointon, Managing Lawyer, Southern And Central Queensland

Dr Kate Galloway, Private capacity

Tuesday, 2 March 2021

Parliament House, Canberra

International Council for Monuments and Sites (ICOMOS)

- Ms Helen Lardner, President
- Ms Jo-Anne Thomson, International Member

Central Land Council

- Ms Katrina Budrikis, Legal Practice Manager
- Ms Frances Claffey, Manager, Anthropology
- Dr Josie Douglas, Executive Manager, Policy And Governance
- Ms Francine Mccarthy, Manager, Native Title Program

Ms Karen Martin-Stone, Private capacity

National Environmental Law Association

- Ms Nadja Zimmermann, Treasurer
- Ms Gabrielle Ho, Member

Get-Up

- Ms Larissa Baldwin, First Nations Justice Campaign Director
- Mr Zaahir Edries, General Counsel

Aboriginal Areas Protection Authority

- Mr Bobby Nunggumajbarr, Chairperson
- Dr Benedict Scambary, Chief Executive Officer

Tuesday, 9 March 2021

Parliament House, Canberra

Minerals Council of Australia

- Ms Tania Constable, Chief Executive Officer
- Ms Jillian D'urso, Principal Adviser, Social Policy, Minerals Council Of Australia
- Mr Chris Mccombe, General Manager, Sustainability, Minerals Council Of Australia

Save the Butterfly Cave Campaign

- Mrs Anne Andrews, Chairperson, Sugarloaf And Districts Action Group Inc, Save The Awabakal Butterfly Cave Campaign
- Ms Melinda (Lyn) Brown, Community Member, Sugarloaf And Districts Action Group Inc, Save The Awabakal Butterfly Cave Campaign
- Ms Annie Freer, Campaign Coordinator, Sugarloaf And Districts Action Group Inc, Save The Awabakal Butterfly Cave Campaign

Gomeroi Traditional Custodians

- Uncle Neville Sampson, Senior Elder
- Ms Veronica Talbott, Traditional Owner
- Mr Mitchum Neave, Traditional Owner

Beatty Legal

- Mr Andrew Beatty, Director
- Ms Ballanda Sack, Special Counsel, Beatty Legal

Illawarra Local Aboriginal Land Council

- Mr Paul Knight, Chief Executive Officer
- Mr Dallas Donnelly, Councillor, North Coast Region

Professor Bernhard Boer, Private capacity

NSW Aboriginal Land Council

- Mr James Christian, Chief Executive Officer

Friday, 19 March 2021

Parliament House, Canberra

Djab Wurrung Traditional Owners

- Ms Sissy Austin, Djab Wurrung Traditional Owner
- Mr Michael Kennedy, Legal Adviser, Djab Wurrung Traditional Owners

Victorian Traditional Owners Land and Justice Group

- Ms Annette Xiberras, Co-Chair, Victorian Traditional Owners Land And Justice Group

Seed Indigenous Youth Climate Network

- Ms Amelia Telford, National Director

- Mr Nicholas Fitzpatrick, Remote Community Organiser, Northern Territory

Tasmanian Aboriginal Centre

- Ms Heather Sculthorpe, Chief Executive Officer
- Ms Sharnie Read, Aboriginal Heritage Officer

Mr Rodney Dillon, Chairperson Tasmanian Aboriginal Heritage Council

Yorta Yorta Nation Aboriginal Corporation

- Ms Monica Morgan, Chief Executive Officer
- Mr Neil Morris, Executive Support Officer

Tuesday, 4 May 2021

Red Earth Hotel, Mount Isa, Queensland

Waanyi Elders

- Mr Kevin Cairns, Private Capacity
- Mr Gilbert Corbett, Private Capacity
- Mr Barry Dick, Private Capacity
- Mr Clarence Walden, Private Capacity
- Mr Glen Willetts, Private Capacity

Tuesday, 18 May 2021

Conference Call

Parliament House

Canberra

Australian Heritage Specialists

- Mr Benjamin (Ben) Gall, Managing Director and Principal
- Ms Ann Wallin, Senior Adviser

Tuesday, 8 June 2021

Parliament House, Canberra

Cape York Land Council

- Mr Terry Piper, Acting Chief Executive Officer
- Mr Shannon Burns, Policy Officer

AECOM

- Mr Luke Kirkwood, Principal Heritage Specialist

Gur a Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander Corporation (GBK)

- Mr Lui Ned David, Chair
- Mr Charlie Kaddy, Acting Chief Executive Officer
- Ms Cassie Lang, Legal Adviser

Torres Shire Council

- Mr John Abednego, Councillor
- Mrs Dalassa Yorkston, Chief Executive Officer
- Mr Maxwell Duncan, Director, Governance And Planning Services

Friday, 18 June 2021

Parliament House, Canberra

North Queensland Land Council

- Mr Sam Backo, Chair
- Mr Errol Neal, Deputy Chair

Queensland Resources Council

- The Hon. Ian Macfarlane, Chief Executive
- Mrs Libby Mckillop, Senior Associate, Ashurst
- Mr Tony Denholder, Senior Associate, Ashurst
- Mr David Allinson, Manager, Social And Indigenous Policy

Quandamooka Yoolooburrabee Aboriginal Corporation

- Dr Valerie Cooms, Chairperson
- Mr Darren Burns, Manager, Quandamooka Land And Sea Management Committee
- Ms Kathryn Ridge, Lawyer

Mr Jack Green

- Mrs Joy Priest, Private Capacity
- Ms Josephine Davey, Private Capacity
- Mr Casey Davey, Private Capacity

Nurrdalinji Native Title Aboriginal Corporation

- Mr Johnny Wilson, Chair
- Mrs Janet Gregory, Deputy Chairperson

Centre for Social Responsibility in Mining and the Queensland University

- Mr Sam Backo, Chair, North Queensland Land Council
- Mr Rodger Barnes, Research Manager, Centre For Social Responsibility In Mining, Sustainable Minerals Institute, University Of Queensland
- Professor Bronwyn Fredericks, Pro-Vice-Chancellor (Indigenous Engagement), University Of Queensland
- Professor Deanna Kemp, Director, Centre For Social Responsibility In Mining, Sustainable Minerals Institute, University Of Queensland

Tuesday, 29 June 2021

Parliament House, Canberra

University of New South Wales: Global Water Institute

- Dr Martin Andersen, Academic, Global Water Institute, University Of New South Wales
- Ms Philippa Higgins, Research Assistant, Global Water Institute, University Of New South Wales
- Dr Fiona Johnson, Academic, Global Water Institute, University Of New South Wales
- Dr Matthew Kearnes, Academic, Global Water Institute, University Of New South Wales
- Dr Stuart Khan, Professor, Global Water Institute, University Of New South Wales
- Professor Gregory Leslie, Director, Global Water Institute, University Of New South Wales

Nuga Nuga Aboriginal Corporation

- Ms Rebecca Scheske, Director

Mr David Noonan

Arabana Aboriginal Corporation

- Ms Brenda Underwood, Chairperson

Messrs Andrew and Robert Starkey

- Mr Andrew Starkey, Private Capacity
- Mr Bob Starkey, Private Capacity
- Dr John Pace, Private Capacity
- Mr John Podgorelec, Private Capacity

Tuesday, 6 July 2021

Parliament House, Canberra

McArthur River Mine

- Mrs Tracy Jones, Superintendent, Community And Corporate Affairs, Mcarthur River Mine, Glencore
- Ms Cassandra (Cass), Mccarthy, Corporate Affairs, Australia, Glencore
- Mr Adam Hatfield, Manager, Health, Safety And Environment, Mcarthur River Mine, Glencore
- Mr Steven Rooney, General Manager, Mcarthur River Mine, Glencore

Minerals Council of Australia

- Ms Tania Constable, Chief Executive Officer
- Ms Jillian D'urso, Principal Adviser—Social Policy
- Mr Chris Mccombe, General Manager—Sustainability

Australian Archaeological Association

- Ms Fiona Hook, Former President

Northern Land Council

- Mr Samuel Bush-Blanasi, Chairman
- Ms Marion Scrymgour, Chief Executive Officer
- Mr Joe Martin-Jard, Deputy Chief Executive Officer
- Mr Giuseppe Firinu, Anthropology Manager
- Mr Martyn Gray, Junior Legal Adviser
- Mr Peter Kilduff, Principal Legal Officer
- Mr Daniel Wells, Legal Adviser

Kokatha Aboriginal Corporation RNTBC

- Ms Kahlia Gibson, Chairperson
- Mr Glen Wingfield, Heritage Services Manager

Thursday, 8 July 2021

Parliament House, Canberra

Waanyi Native Title Aboriginal Corporation

- Mr William (Alec) Doomadgee, Chairman
- Mr Henry Aplin, Co-Chair
- Mr Kingston Brown, Director

- Mr Murrandoo Yanner, Gangalidda Garawa Native Title Aboriginal Corporation (Pbc)
- Mr Donald Bob, Private Capacity
- Mr Tony Douglas, Private Capacity
- Mr Garrick George, Private Capacity
- Mr Terrance George, Private Capacity

Friday, 27 August 2021

Parliament House, Canberra

Rio Tinto

- Ms Kellie Parker, Chief Executive, Australia
- Mr Brad Welsh, Chief Advisor, Indigenous Affairs

C. Interim report recommendations

Recommendation 1

1.53 That Rio Tinto:

- Negotiate a restitution package for the destruction of the Juukan rock shelters with the PKKP
- Ensure a full reconstruction of the Juukan rock shelters and remediation of the site at its own expense, with guidance and oversight from the PKKP, acknowledging Rio Tinto's undertaking in this regard and the steps taken to date. The reconstruction should specifically include steps to mitigate water and other damage to the creek that flows in Juukan Gorge and protect the Sacred Snake-head Rock Pool
- Commit to a permanent moratorium on mining in the Juukan Gorge area, negotiated with the PKKP, and that this is respected by all mining and exploration companies
- Undertake an independent review of all its agreements with Traditional Owners to ensure they reflect best practice standards
- Remove any gag clauses or restrictions on Traditional Owner rights under heritage and other laws
- Commit to a stay on all actions under Rio Tinto's current Section 18 permissions until they are properly reviewed to ensure that free, prior and informed consent has been obtained from Traditional Owners and is current
- Commit to a voluntary moratorium on applying for new Section 18 permissions, pending either the passage of stronger heritage protections in Western Australia or the negotiation of a protocol with relevant Traditional Owners to establish an improved process for site surveys, cultural protection and work area clearances based on the principle of avoiding damage wherever possible

- Return all artefacts and other materials held by Rio Tinto to PKKP and after negotiation and by agreement with PKKP, fund appropriate keeping places for artefacts and other materials to be supervised and controlled by the PKKP.

Recommendation 2

1.58 That the Western Australian Government:

- Replace the Aboriginal Heritage Act 1972 with stronger heritage protections as a matter of priority, noting the progress already made in consultation on the draft Aboriginal Cultural Heritage Bill 2020. Any new legislation must as a minimum ensure Aboriginal people have meaningful involvement in and control over heritage decision making, in line with the internationally recognised principles of free, prior and informed consent, including relevant RNTBCs under the Native Title Act. Any new legislation should also include a prohibition on agreements which seek to restrict Traditional Owners from exercising their rights to seek protections under State and Commonwealth laws
- Place a moratorium on the consideration and approval of new Section 18 applications until the new legislation is passed unless it can be established and verified that there is current free, prior and informed consent obtained from Traditional Owners
- Strongly encourage mining companies with existing Section 18 permissions to not proceed with these approvals but to have them reassessed under the new legislation once it is passed unless it can be established and verified that there is current free, prior and informed consent obtained from Traditional Owners
- Urgently establish new procedures to improve the quality and transparency of decision making by the Registrar and ACMC prior to any legislative change, including processes for appropriate escalation of urgent matters to the Minister
- Adequately resource the ACMC
- Institute rolling membership of the ACMC to ensure the involvement of Traditional Owners of the country that is the subject of any decision, as nominated by the relevant RNTBC
- Investigate the large number of heritage sites de-registered since 2011 and ensure that proper procedures are in place for the removal of heritage sites from the register
- Reinstate sites to the register where these were inappropriately removed
- Undertake a mapping and truth-telling project to record all sites that have been destroyed or damaged pursuant to the AHA, including visual

representations of the impact to country, with a view to establishing a permanent exhibition or memorial in the Western Australian Museum.

Recommendation 3

1.59 That all mining companies operating in Western Australia whether or not on Native Title land:

- Undertake independent review of their agreements with Traditional Owners and commit to ongoing regular review to ensure consistency with best practice standards. In particular, companies should review final compensation clauses in recognition that free, prior and informed consent requires continuous review and engagement with traditional owners
- Issue public confirmation that they will not rely on gag clauses or clauses preventing Traditional Owners from exercising their rights under state and Commonwealth heritage laws and remove these clauses from their agreements with Traditional Owners
- Commit to a stay on all actions under currently held Section 18 permissions until they are properly reviewed to ensure that free, prior and informed consent has been obtained, and is current, from Traditional Owners for any damage or destruction to significant sites
- Commit to a voluntary moratorium on applying for new Section 18 permissions, pending either the passage of stronger heritage protections in Western Australia or the negotiation of a protocol with relevant Traditional Owners to establish an improved process for site surveys, cultural protection and work area clearances based on the principle of avoiding damage wherever possible
- Fund appropriate keeping places for artefacts and other materials to be agreed on with and controlled by the relevant Traditional Owners. Wherever possible, working together with other companies operating on country to jointly fund keeping places in agreement with Traditional Owners
- Facilitate the sharing of all heritage information and mapping technology used by mining companies with relevant PBCs, to correct information asymmetry and ensure Traditional Owners have access to records of their cultural heritage and are resourced to set up their own mapping initiatives
- Actively support and fund efforts by the Western Australian and Commonwealth governments to establish mapping and truth telling initiatives as recommended above
- Work with Traditional Owners to ensure better access to country.

Recommendation 4

1.62 The Committee recommends that the Australian Government:

- Seek to legislate a prohibition on agreements that restrict Traditional Owners from publicly raising concerns about heritage protection or exercising their rights under heritage legislation;
- Implement and publicly publish improved procedures within the Ministers offices, the National Indigenous Australians Agency and the Department for responding to and recording heritage concerns raised by Traditional Owners, including protocols for communicating and escalating urgent concerns to the responsible Minister and their Department;
- Work with Western Australia to implement the recommendation above for a mapping and truth telling project in relation to heritage that has been damaged or destroyed, and to extend this project at the national level in collaboration with other states and territories.

Recommendation 5

1.64 The Committee recommends to the Australian Government that ministerial responsibility for the administration of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 revert to the Minister for Indigenous Australians, and that the National Indigenous Australians Agency become the administering authority.

Recommendation 6

1.65 The Committee recommends to the Australian Government that the relevant Minister direct their office and department to more vigorously prosecute use of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 in Western Australia until such time as new legislation is enacted in Western Australia replacing the current Aboriginal Heritage Act 1972 (WA).

Recommendation 7

1.66 The Committee recommends that the Australian Government urgently review the adequacy of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

D. Chronology of events

Chronology of events submitted by Rio Tinto: 2003-2020

Date	Action
2003	Initial engagement between Rio Tinto and PKKP on future operations on PKKP traditional lands
Mid-2003	Initial archaeological survey by Gavin Jackson and Rachael Fry). Subsequent report assesses Juukan 1 and Juukan 2 as each having a “moderate to high degree of archaeological significance”. Initial ethnographic survey report (by Robin Stevens of the Pilbara Native Title Service (PNTS) and commissioned by Rio Tinto) notes the presence of the Juukan 1 and Juukan 2 rock shelters on the Brockman mining lease.
28 June 2006	Rio Tinto and PKKP enter the Binding Initial Agreement (BIA).
1 May 2008	Section 16 permit (Permit 430) granted for collection of Aboriginal cultural material, test-pitting and excavation for purposes of archaeological investigation at Juukan 1 and Juukan 2 (among other sites).
July-October 2008	Scarp Archaeology, retained by Rio Tinto, conducts excavations in July and August at Juukan 1 and Juukan 2 with PKKP representatives and Rio Tinto

	representatives pursuant to Permit 430. Findings recorded in the Scarp Archaeology "Brockman 4 site re-recording and s16 excavation program" Report, October 2008 include that the Juukan sites range from at least 22,000 to 32,000 years in age and are assessed as being of "high archaeological significance".
November-December 2008	Rio Tinto commissioned Roina Williams of the PNTS to conduct an ethnographic survey, together with PKKP representatives. The "Pilbara Native Title Service Ethnographic Site Identification Survey of Brockman 4 Mine Area" Report prepared by Ms Williams notes the Juukan complex "is considered to be of high ethnographic significance to the PKKP". This report referred to the Juukan complex as encompassing Juukan 1 to Juukan 5, with the Purlykuti Creek located at the base of this complex.
2010	Production commences at Brockman 4 Mine.
18 March 2011	The Regional Framework Deed and Participation Agreement are executed.
March 2012	Rio Tinto commences consideration of detailed pit designs for Brockman 4 Pit 1. Rio Tinto Heritage team contacted by Rio Tinto Technical Services team on design for Pit 1. At the Heritage team's request, the Technical Service team develop different pit design options to provide different buffer areas around Juukan 1 and Juukan 2.
October 2012	A memorandum with various pit design options is produced. The memorandum set out four options for the design of Pit 1, with three options avoiding Juukan 1 and Juukan 2 by varying degrees, and one option impacting the sites.
28 Mar 2013	Local Implementation Committee (LIC) meeting: Rio Tinto shares with the PKKP the potential for a section 18 notice over Juukan 1 and Juukan 2, amongst other sites. The different pit design options that had been discussed internally were not shared with the PKKP.

June-July 2013	Ethnographic survey by Dr Heather Builth with PKKP elders and Rio Tinto heritage personnel. Dr Builth prepares a preliminary report following the survey and recommends excavation of Juukan 1 and Juukan 2. No comment on the ethnographic significance of the rockshelters specifically but notes that the "Purlykuti creek with its adjacent large artefact scatter of Brock 25 and nearby rockshelters, Brock 20-24 [Juukan 1-5], is of high significance to Puutu Kunti Kurrama, in the old days and still today." This report identifies previously unrecorded cultural sites in the vicinity and states that the PKKP had requested further surveys take place in order to consider these areas.
16 July 2013	LIC meeting: Presentation by Rio Tinto to the PKKP of upcoming section 18 notice over sites including Juukan 1 and Juukan 2. Notes age of Juukan 1 as at least 32,000 years old and Juukan 2 as at least 22,000 years old. Maps of the sites shown together with the pit design.
3 October 2013	Rio Tinto provides a draft section 18 notice for Juukan 1 and Juukan 2 (amongst others) to the Yamatji Marlpa Aboriginal Corporation (YMAC) for comment. At that time, YMAC was the body representing the PKKP, including in relation to cultural heritage matters.
17 October 2013	Rio Tinto submits the section 18 notice to disturb Juukan 1 and Juukan 2 (**Section 18 Notice**).
26 November 2013	LIC meeting – update provided to the PKKP that the Section 18 Notice had been submitted.
31 December 2013	Section 18 Consent granted to disturb Juukan 1 and Juukan 2 for purpose of development of Brockman 4 Mine Pit 1 (**Section 18 Consent**).
26 May-5 June 2014	Dr Michael Slack of Scarp Archaeology conducts first salvage excavation trip at Juukan 2 with participation from PKKP representatives.

June 2014	Dr Slack provides Rio Tinto a report entitled "Preliminary Advice of Archaeological Site Salvage Excavations at Brockman 4, Pilbara, Western Australia", which includes results from the first salvage excavation trip, conducted in May/June 2014.
1-12 July 2014	Dr Slack conducts second salvage excavation trip at Juukan 1 and Juukan 2 with participation from PKKP representatives.
14 July 2014	LIC meeting: Rio Tinto reported that following a salvage excavation trip between 26 May 2014 and 5 June 2014, radiocarbon testing had been performed at Juukan 2 and came back at 43,000 years.
August 2014	Dr Slack provides Rio Tinto a report entitled "Preliminary Advice of Archaeological Site Salvage Excavations at Brockman 4, Pilbara, Western Australia", which includes results from the second salvage excavation trip, conducted in July 2014. States that Juukan 2 is "one of the most archeologically significant sites in Australia".
5-14 August	Dr Slack performs third salvage excavation field trip at Juukan 1 and Juukan 2, with participation of PKKP representatives and Rio Tinto heritage personnel. A latex peel of one of the walls of the excavation pit is taken.
September 2014	Dr Slack provides Rio Tinto a report entitled "Preliminary Advice of Archaeological Site Salvage Excavations at Brockman 4, Pilbara, Western Australia", which includes results from the third salvage excavation trip, conducted in August 2014.
September 2014	Email request from Rio Tinto Heritage team to the Rio Tinto Heritage Compliance team to change the status of Juukan 1 and Juukan 2 sites in "MapInfo" (GIS) database following Section 18 Consent and completion of salvage works, thereby removing the "buffer zone" identifying the sites on the operational mine information management system.
May 2015	Documentary funded by Rio Tinto, organised by

	YMAC and filmed with PKKP participation records the Purlykuti Creek area. Includes references to Juukan 1 and Juukan 2 rockshelters.
27 May 2016	Archaeological latex peel display of excavated wall from Juukan 2 installed at Brockman 4 administration building.
1 July 2016	LIC meeting: discussion between Rio Tinto and PKKP of artefacts salvaged from Juukan 1 and Juukan 2 sites.
16 November 2017	First draft of Cultural Heritage Management Plan for Brockman 4 (PKKP country) provided to PKKP. States Juukan 1 and Juukan 2 are covered by section 18 consent.
31 Dec 2018	Scarp Archaeology Final Report (Scarp 2018 Report) completed and submitted to Rio Tinto. Copy provided to PKKP and YMAC in January 2019. Confirms that Juukan 2 is of "the highest archaeological significance in Australia".
21-22 May 2019	LIC meeting is held, attended by representatives of PKKP and Rio Tinto. No discussion of Juukan 1, Juukan 2 or blasting plans.
1 July 2019	PKKP Aboriginal Corporation (PKKPAC) replaces YMAC as the "Heritage Body" with heritage management functions acting on behalf of PKKP under the PA.
28-28 October 2019	LIC meeting, attended by representatives of the PKKP, PKKPAC and Rio Tinto. Dr Builth (now PKKPAC Cultural Heritage Adviser) queries impact of mine plan on Juukan Gorge with Brad Webb (Manager of Mine Operations Brockman 4). No indication that either party followed up on this query.
24-28 February 2020	PKKP representatives, Rio Tinto personnel and PKKPAC anthropologist Daniel Bruckner undertake survey activities in the vicinity of Purlykuti Creek and Juukan Gorge for the purpose of a Social Surroundings consultation, part of the works necessary to seek Part IV approval under

	Environmental Protection Act 1986 (WA) (EP Act) for the expansion of the Brockman 4 Mine.
12 March 2020	LIC meeting (scheduled for April 2020) cancelled due to COVID-19.
20 March 2020	Draft Social Surroundings Preliminary Advice received from Daniel Bruckner identifying “Purlykuti Creek and the tributary Gorge featuring Juukan 1 and Juukan 2 rock shelters” as of high significance to PKKP.
20 April 2020	Final Social Surroundings Preliminary Advice issued from Daniel Bruckner to Rio Tinto and Dr Builth. Purlykuti Creek and the tributary Gorge featuring Juukan 1 and Juukan 2 remained as areas of high significance to the PKKP.
22 April 2020	Escalation by the Rio Tinto Heritage officer to managers of potential operational implications of the findings regarding areas including Purlykuti Creek, Juukan 1 and Juukan 2 in the Social Surroundings report.
29 April 2020	Rio Tinto emails PKKPAC summarising a discussion earlier that day. Stated that there was information about the Juukan tributary (associated with Purlykuti) that had not been included in reports previously. Requested that PKKPAC confirm this information was accurate.
3-12 April 2020	Rio Tinto drills in preparation for blasting in the vicinity of Juukan 1 and Juukan 2.
6 May 2020	PKKPAC emails Rio Tinto with a revised draft implementation plan for various initiatives involving the PKKP, PKKPAC and Rio Tinto over the 2020 calendar year, including a proposed site visit to “Celebrate Juukan 47,000 year old rock shelter with traditional owners with a site visit (s18 approved area) we would like to visit whilst we can.”
13-19 May 2020	Rio Tinto charges drill holes in the vicinity of Juukan 1 and Juukan 2.

14 May 2020	Rio Tinto Heritage team members meet with Dr Builth for regular discussion. Dr Builth requests permission for PKKP members to visit Juukan rock shelter sites for NAIDOC week in July 2020. Internal Rio Tinto email from Heritage team to Technical Services asks for confirmation of whether the rockshelters were physically intact.
15 May 2020	Response received from Mine Planning that the area had been loaded and was due to be blasted on Sunday 17 May 2020. Technical Services agrees to delay blast to 20 May 2020. PKKPAC informed that the area directly to the north of Juukan 1 and Juukan 2 rock shelters was due to be blasted on 17 May and that the Heritage team had requested the blast be delayed.
18 May 2020	Email received by Rio Tinto from Dr Builth on behalf of the PKKP giving notice "that the Corporation regards the Juukan Gorge and all its features in the highest possible regard due to its extreme cultural and scientific significance to us" and stating the PKKP were only made aware on the previous Friday (15 May 2020) that "the high level of significance of this place has not been communicated to a sufficient level or formalised by the former PKKP AC representative heritage body with action to ensure its protection." Attached to the email was a report referring to certain cultural sites previously referred to in the Builth 2013 Report (see above). PKKP request escalated within the business to various members of the Rio Tinto Iron Ore Senior Leadership Team (SLT), and a meeting of Rio Tinto personnel is held in the evening.
19 May 2020	Further discussions and communications with PKKPAC. At this stage the blast is planned for Wednesday 20 May.
20 May 2020	Comments from PKKPAC blasting expert received.

	Rio Tinto engaged separate blasting expert to provide advice.
21 May 2020	Meeting of SLT and others agreed to await Rio Tinto's independent technical blast advice. Advice received in the evening from technical expert that it was unsafe to unload the whole blast. J-S Jacques, Chief Executive Officer, first made aware of potential issue with the blasting of Juukan 1 and Juukan 2 rockshelters.
22 May 2020	Morning-Rio Tinto and PKKPAC independent experts agree it is not safe to unload whole blast so will have to proceed with blast. Afternoon-SLT meeting to review the recommendation and confirm the decision to blast, but authorise action to try to preserve additional cultural sites on the periphery of the blast zone.
23 May 2020	Suction truck removes seven loaded holes prior to the blast to minimise impact on the additional cultural sites.
24 May 2020	J-S Jacques first made aware of the exceptional archaeological and cultural significance of the Juukan rockshelters. The blast detonated. Juukan 1 and Juukan 2 severely impacted.

Source: Rio Tinto, Board Review of Cultural Heritage Management, 23 August 2020, pp. 7-11

Chronology of events submitted by PKKP: 2019-2020

Date	Event
28 October 2019	LIC committee members visit Purlykuti cultural sites and Juukan Gorge and reiterate the archaeological and cultural significance of the rockshelters. Rio Tinto confirm no plans to mine Juukan Gorge.
24 and 28 February 2020	PKKPAC Culture and Heritage Unit participate in helicopter surveys of Rio Tinto’s Brockman Syncline tenements to identify sites important to the PKKP.

4 March 2020	PKKPAC request a site visit to the Juukan Gorge as part of NAIDOC week.
13 March 2020	Dr Builth advises Rio Tinto that PKKPAC intend to seek to protect Juukan Gorge pursuant to the EP Act. Rio Tinto encourage Dr Builth to nominate the places most important to PKKP.
20 March 2020	PKKP email Rio Tinto Anthropologist Daniel Bruckner's draft social surroundings preliminary advice, identifying Purlykuti and Juukan 1 and Juukan 2 as of high significance to PKKP.
20 April 2020	Daniel Bruckner issues final social surroundings preliminary advice to Rio Tinto, again identifying Purlykuti and Juukan 1 and Juukan 2 as of high significance to PKKP, and recommending further consultation, recording and mapping.
29 April 2020	Dr Builth advises Rio Tinto that she has additional sensitive ethnographic evidence concerning the Juukan rockshelters that had not been included in previous reports.
29 April 2020	Rio Tinto confirm by email Dr Builth's advice that she has additional ethnographic evidence concerning the Juukan rockshelters that had not been included in previous reports.
13 May 2020	Rio Tinto loads 226 blast holes at the site (RS 209).
14 May 2020	PKKPAC makes second request to visit the Juukan Gorge as part of NAIDOC week and reminds Rio Tinto of the existence of additional ethnographic evidence concerning the Juukan rockshelters.
15 May 2020	Rio Tinto advises PKKP that blasting is scheduled to take place on 17 May 2020. A request to hold the blast has been made but 'the holes have been drilled and the shot placed' (RS 216 and 217).
15 May 2020 (late afternoon)	Rio Tinto re-schedules the blast to Wednesday 20 May 2020 (RS 216 and 224).
16 May 2020	Rio Tinto loads a further 62 blast holes at the site but

	does not inform PKKP (RS 209).
17 May 2020	Rio Tinto asks PKKP to provide the foreshadowed additional sensitive ethnographic information concerning Juukan Gorge so that it can consider whether to call off the blast. Rio Tinto loads a further 72 blast holes at the site but does not inform PKKP.
18 May 2020	PKKPAC emails Rio Tinto reiterating the significance of the Juukan Gorge area and provides additional ethnographic information, as requested.
19 May 2020	PKKPAC instructs its solicitors. Rio Tinto loads a further 22 blast holes at the site but does not inform PKKP (RS 209).
19 May 2020 (midday)	PKKPAC requests suspension of the blast for at least a further 48 hours to allow PKKP to review its options.
19 May 2020 (afternoon)	Rio Tinto denies PKKPAC's request and the deadline of 1pm on Wednesday 20 May 2020 is confirmed (RS 226).
19 May 2020 (evening)	PKKP repeats request for an extension of time, foreshadows section 9 Application and engagement of independent expert.
19 May 2020	Rio Tinto identifies that it does not have a section 18 consent over three additional heritage sites, but does not inform PKKPAC (RS 228).
20 May 2020	The solicitors for PKKP, Johnston Withers, make enquiries regarding seeking an emergency declaration pursuant to section 9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). PKKP engage an independent mining safety expert to advise on possible options blast to save the ancient rockshelters. PKKP's expert seeks further information from Rio Tinto before providing PKKP with its concluded views. PKKP follows up Rio Tinto re PKKP's expert's request

	for further information. Rio Tinto agrees to defer the blast for 48 hours until Friday 22 May 2020 but does not tell PKKP about the three additional heritage sites without Section 18 Consent.
21 May 2020	PKKP follow up Rio Tinto re PKKP's expert's request for further information. With no response from Rio Tinto, PKKP send a further urgent email to Rio Tinto requesting urgent advice on whether it was safe to remove the charges as a matter of urgency.
21 May 2020 (morning)	Rio Tinto engages an independent blast consultant to advise it on mitigation of the effect of blast on the three additional heritage sites without s 18 approval. PKKP is not informed (RS 235). Rio Tinto's minutes of a meeting held at 10:30am on 21 May 2020 record that 'no preventable action was possible' to save the rockshelters and that solicitors are briefed to prepare for any injunction brought by PKKP to stop the blast.
21 May 2020 (afternoon)	Rio Tinto's independent blast consultant advises Rio Tinto on potential mitigation options to minimise the impact of the blast on the three additional heritage sites. PKKP is not informed of this. Rio Tinto delay blast to **Saturday 23 May 2020** (RS 234). PKKP is not informed of the reason.
21 May 2020 (evening)	Rio Tinto asks its blast consultant to provide further advice in relation to unloading the entire blast site (RS 239).
22 May 2020	Rio Tinto says it concludes it is not feasible to remove the shot from the holes to protect Juukan 1 and Juukan 2 but that steps should be explored to unload the shot to protect the additional three heritage sites (RS 241, 242 and 243). Rio Tinto provides PKKP's expert with the answers to his requests and advises that the blast cannot be unloaded due to the unacceptable safety risk.

23 May 2020	Rio Tinto unloaded seven of the blast holes to mitigate the loss of the three additional heritage places (RS 244). PKKPAC was not informed.
23 May 2020 (morning)	PKKPAC representatives and PKKPAC's C & H Manager met with Rio Tinto and were advised that work was being done to minimise the impact of the blast on the rockshelters.
24 May 2020	Rio fires the blast and destroys the rockshelters at Juukan 1 and Juukan 2.

Source: PKKP, Submission 129, pp. 99-100

E. Map of PKKP lands

Figure E.1 PKKP Country, Pilbara Region, Western Australia

Source: Puutu Kunti Kurrama people and the Pinikura people, Submission 129, p. 10

F. Timeline of cultural heritage laws

Table F.1 Cultural heritage laws and international conventions

Year	Jurisdiction	Legislation/Convention
1955-1966	NT	*Native and Historical Objects and Areas Preservation Ordinance* (repealed)
1965	SA	*Aboriginal and Historic Relics Act 1965* (repealed)
1967	QLD	*Aboriginal Relics Preservation Act 1967* (repealed)
1970	International	Australia ratifies the UNESCO *Convention on the Means of Prohibiting the Illicit Import, Export and Ownership of Cultural Property 1970*
1970	VIC	*Environmental Protection Act 1970*
1970	TAS	*National Parks and Wildlife Act 1970*
1970	TAS	*Museums (Aboriginal Remains) Act 1970*
1972	VIC	*Archaeological and Aboriginal Relics Preservations Act 1972* (repealed)
1972	WA	*Aboriginal Heritage Act 1972* (WA)
1974	WA	*Aboriginal Heritage Regulations Act 1974*
1974	NSW	*National Parks and Wildlife Act 1974*
1975	TAS	*Aboriginal Relics Act 1975*
1976	CTH	*Aboriginal Land Rights (Northern Territory) Act 1976*
1977	NSW	*Heritage Act 1977*

Year	Jurisdiction	Legislation/Convention
1978	NT	*Aboriginal Sacred Sites Act Ordinance 1978* (repealed)
1978	NT	*Aboriginal Sacred Sites Act (No. 2) 1978* (repealed)
1979	SA	*Aboriginal Heritage Act 1979* (repealed)
1979	NSW	*Environmental and Planning Assessment Act 1979*
1983	CTH	*Archives Act 1983*
1983	NT	*Aboriginal Sacred Sites Amendment Act 1983*
1983	NT	*Criminal Code Act 1983* (s125)
1984	CTH	*Aboriginal and Torres Strait Islander Heritage Act 1984*
1986	CTH	*Protection of Movable Cultural Heritage Act 1986*
1986	WA	*Environmental Protection Act 1986*
1986	CTH	*Aboriginal Land Grant (Jervis Bay Territory) Act 1986*
1987	QLD	*Cultural Records Act 1987* (repealed)
1988	SA	*Aboriginal Heritage Act 1988*
1989	CTH	*Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989*
1989	NT	*Northern Territory Aboriginal Sacred Sites Act 1989*
1990	WA	*Heritage of Western Australia Act 1990* (repealed)
1991	NT	*Heritage Conservation Act 1991* (repealed)
1992	QLD	*Queensland Heritage Act 1992*
1992	WA	*Aboriginal Heritage (Marandoo) Act 1992*
1993	CTH	*Native Title Act 1993*
1993	SA	*Heritage Place Act 1993*
1994	QLD	*Environmental Protection Act 1994*
1994	TAS	*Environmental Management and Pollution Control Act 1994*
1995	VIC	*Heritage Act 1995*
1995	TAS	*Historic Cultural Heritage Act 1995*
1999	QLD	*Land Resources Tribunal Act 1999*

Year	Jurisdiction	Legislation/Convention
1999	CTH	*Environmental Protection and Biodiversity Conservation Act 1999*
2001	NT	*Heritage Act 2001*
2003	QLD	*Aboriginal Cultural Heritage Act 2003*
2003	QLD	*Torres Strait Cultural Heritage Act 2003*
2004	NT	*Northern Territory Aboriginal Sacred Sites Regulations 2004*
2004	ACT	*Heritage Act 2004*
2004	QLD	*Biodiscovery Act 2004*
2005	NT	*Strehlow Research Centre Act 2005*
2006	NT	*Biological Resources Act 2006*
2006	NSW	*Heritage Regulations 2006*
2006	VIC	*Aboriginal Cultural Heritage Act 2006*
2006	VIC	*Charter of Human Rights and Responsibilities Act 2006*
2009	International	Australia ratifies the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)
2016	VIC	*Aboriginal Heritage Amendment Act 2016*
2018	CTH	*Underwater Cultural Heritage Act 2018*

Source: Terri Janke & Company Pty Ltd

G. ATSIHP Act case law

Table G.1 Recent ATSIHP Act cases

Case	Facts	Decision
Onus v Minister for the Environment [2020] FCA 1807	Applications relating to concerns over the effect of the construction and alignment of a section of the Western Highway between Ararat and Buangor in Victoria on the area and certain scarred trees by nine traditional owners of the Djab Wurrung Country - Minister declined to make a declaration under s 10 and s 12 of the ATSIHP Act.	Minister decision not to make declaration under s 12 unlawful and set aside and matter referred back to Minister to re-consider; decision in relation to s 10 valid.
Talbott v Minister for the Environment [2020] FCA 1042	Judicial review of two decisions made by the Minister for the Environment declining to make a declaration under s 10 of the ATSIHP Act. The areas over which the	Discretion of Minister empowered Minister to have regard to the considerations regarding social and economic benefits.

	declarations were sought lie within or close to the site of the proposed Shenhua Watermark Coal Mine (Shenhua Mine). In making the decisions the Minister took into account, inter alia, the social and economic benefits of the Shenhua Mine to the local community.	
Clark v Minister for the Environment (No 2) [2019] FCA 2028	Protection of an area and of certain objects (six trees) located in the area from a claimed threat of injury or desecration attributed to part of an upgrade of the Western Highway proposed by VicRoads.	Decision of Minister aside; referred back for additional consideration (note that further cases followed this).
Mirvac Queensland Pty Ltd v Chief Executive, Department of Aboriginal and Torres Strait Islander Partnerships [2018] QSC 248	Judicial review of a decision of the Department to set aside Mirvac's cultural heritage plan. The Chief executive decided to set aside the plan on the basis that the Aboriginal party (Jagera People) Mirvac had endorsement from ceased to be an Aboriginal party due to native title claims that were registered in the Greenbank Project area. However, Mirvac	The Court held however that the Chief Executive had erred in their decision to refuse approval. The relevant date is the date that the application is submitted and given that Mirvac had met all the elements of the in section 107(b), the Chief Executive must approve the plan. Section 4 of the ATSIHP Act provides that the main purpose of the ATSIHP Act is to provide effective recognition, protection and conservation

	provided the executed plan to DATSIP on 6 September 2017. There were two native title claims registered with the relevant date of the full area was 14 September 2017. This meant the Jagera people lost their Aboriginal party status from this date. DATSIP made the decision on the 20 October 2017 and rejected the plan stating that there was no endorsement by an Aboriginal party, because the Jagera people were no longer an Aboriginal party	of Aboriginal cultural heritage.

Source: Terri Janke & Company Pty Ltd

Sacred Country (2020)

In 2006, Whitefella miners, with the support of their governments, diverted McArthur River and dug a huge open cut pit in the bed of our river. Then they started building a massive waste rock dump to hide their deadly waste in our Country. The miners waste will be here for thousands of years. They did this to us right in the middle of Sacred Country, right where the Snake Dreamings are, where the Jabiru, the Barramundi, Dingo and Turtle Dreamings are. They cut our Dreaming tracks and threaten our culture and our futures as Aboriginal people. How do we sing the sacred songs when the Dreaming tracks have been destroyed? We feel no good, heavy in our hearts but we keep fighting.[1]

[1] Mr Jack Green, *Submission 154*, p. 10.