# DIRECTIONS REPORT

First Nations Cultural Heritage Reform


## ABSTRACT

A summary and analysis of the first stage of the national engagement process on cultural heritage reform which will inform the development of reform options.



The Australian Government and the First Nations Heritage Protection Alliance

# Contents

# Acknowledgement

The First Nations Heritage Protection Alliance and the Australian Government pay our respects to the First Nations peoples of these lands, waters and seas. We pay our respect to their Elders, their Ancestors and their cultures and legacy.

We acknowledge the unbroken, continuing familial lines where culture and heritage have been passed down for thousands of generations and know this must be protected. First Nations culture and heritage must be protected for thousands of generations to come so all Australians can appreciate and celebrate our deep and unique history.

# Executive Summary

On 29 November 2021, the Australian Government and the First Nations Heritage Protection Alliance (the Alliance) entered into a partnership agreement to co-design options to reform First Nations heritage protections. It is a unique partnership agreement informed by the principles set out in Closing the Gap. Under the partnership agreement, the Australian Government and the Alliance are co-designing and undertaking a national engagement process to develop options for modernising cultural heritage protections. This engagement is being undertaking in two stages. This Directions Report presents the results of Stage 1 Engagements.

## Key findings from Stage 1 Engagements

Thirty-two engagements with First Nations heritage bodies, peak First Nations advisory bodies, industry organisations, and state and territory governments were undertaken during Stage 1. Discussions were guided by ten questions about cultural heritage protections and the results are presented in this Directions Report. Key findings are:

1. All respondents indicated support for cultural heritage reform.
2. There was broad support for developing mandatory National Standards that states and territories would need to meet, and significant support for Standards to be implemented through local decision making.
3. Further engagement is needed to inform the process for modernising Aboriginal and Torres Strait Islander heritage protections, particularly about how potential options for reform could be implemented.

Key themes arising from Stage 1 Engagements include:

- First Nations heritage protection reform is urgent, in the context of ongoing destruction of important cultural heritage.
- First Nations peoples should be making decisions about their own heritage.
- First Nations heritage should be considered at the earliest possible opportunity, ideally before project conception.
- Intangible heritage needs to be better considered by governments, proponents and in legislation.
- Protections should focus on protection and celebration of First Nations heritage, rather than on the ‘managed destruction’ facilitated by most current legislative regimes.
- Effective, well-resourced compliance and enforcement mechanisms are needed.

- Enhanced resourcing of First Nations peoples and their representative organisations is required in order for First Nations people to be able effectively engage in consultation processes and decision-making.

Stage 1 Engagements also highlighted that the principles of the United Nations Declaration on the Rights of Indigenous People (UNDRIP) should be central to the design of reform options. There are particular principles that emerged as key considerations in design reform options, including fairness, data sovereignty, certainty and consistency, clarity and transparency, accountability, and value and connection.

## Policy Options and Next Steps

The results from Stage 1 engagements have informed the Options Paper, which describes the design principles and policy options to improve First Nations cultural heritage protections.

Due to the broad support for developing National Standards, the Options Paper presents three legislative mechanisms that could be used to implement National Standards, as well as additional reforms that could support these legislative options.

Supporting analysis for these policy options considers key themes arising from Stage 1 Engagements, prior reports and review processes pertaining to First Nations cultural heritage, and analysis of existing legislations affecting First Nations cultural heritage.

The Options Paper also provides background information which summarises the results of the Directions Report/Stage 1 Engagements and the reasoning behind the proposed three options for reform. The Paper also presents discussion questions which will be used to guide Stage 2 Engagements, to facilitate targeted discussions to understand support for, and viability of, the proposed options for reform.

Following Stage 2 Engagements the Australian Government and the Alliance will prepare an Options Report presenting options for reforming Aboriginal and Torres Strait Islander heritage protections, for consideration by the Minister for the Environment.

# Background

On 24 May 2020, as part of the expansion of its Brockman 4 Mine, the Rio Tinto Corporation destroyed the Juukan Gorge in the Pilbara region of northern Western Australia, a site rich in Aboriginal cultural heritage, located on the lands Puutu Kunti Kurrama and Pinikura (PKKP) people. This included material evidencing continual human occupation of the area for over 46,000 years.

The destruction was authorised under the *Aboriginal Heritage Act 1972* (WA) and did not breach an Indigenous Land Use Agreement under the *Native Title Act 1993* (Cth) (NTA) between Rio Tinto and the PKKP people. No application for protection under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) was made in relation to the destruction.

The destruction of Juukan Gorge resounded across the world. There was widespread dismay that the laws of a modern, progressive, prosperous nation like Australia could not protect cultural heritage of such value to humanity. One impact of the destruction was the establishment of by the Australian Senate of a parliamentary inquiry undertaken by the Joint Standing Committee on Northern Australia ("the JSC Inquiry"). While this global dismay was shared by many First Nations Peoples in Australia, there was also a sense of *déjà vu*. As Kado Muir, a Traditional Owner from Western Australia and Co-chair of the First Nations Heritage Protection Alliance, stated:

> *Destruction of our cultural heritage like that suffered by the PPP People at Juukan Gorge is, tragically, a daily event, endured by First Nations Peoples across this country. When it comes to a choice between protecting cultural heritage and economic development, in Australia economic development has always held the trump card.*

Currently the legislative framework for the protection of First Nations heritage is primarily a matter for state and territory governments. Commonwealth protections are largely contained in the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) and the *Environment Protection and Biodiversity Conservation Act 1999 (*EPBC Act).

The ATSIHP Act is legislation of last resort, available where state or territory laws have failed to provide adequate protections. It is in practice only activated when an application is made by an Aboriginal and/or Torres Strait Islander person, placing the onus on First Nations peoples to take action against a known threat, rather than creating protection from the outset and without application. There are opportunities to modernise the legislative approach to provide the avenue for seeking protection of First Nations cultural heritage prior to a threat being imminent.

The EPBC Act is designed as a means of protecting a defined set of 'matters of national environmental significance' (MNES), including heritage values that are of world, national or Commonwealth heritage significance, through assessment and approvals processes. Decision making power sits with the Minister for the Environment (or their delegate). The Act's threshold test of 'national significance' is benchmarked against the Western notion of there being one Australian nation, rather than against the multiple, diverse First Nations groups contained within the Australian continent. The EPBC Act may, therefore, not be an appropriate avenue for the protection of First Nations cultural heritage. Other mechanisms could provide for consideration of significance at the regional or language-group level.

First Nations peoples have been working for reform of legislation and other cultural heritage protections in this country for decades. Report after report led to proposal after proposal but still no real change. Following the destruction of Juukan Gorge in May 2020, at a National Ministerial Indigenous Heritage Roundtable convened by the Hon. Sussan Ley MP, former Minister for the

Environment, and the Hon. Ken Wyatt AM MP, former Minister for Indigenous Australians, Commonwealth, state and territory Ministers with responsibility for Heritage and Indigenous Affairs noted the Commonwealth's intention to address Indigenous heritage protection reform opportunities as part of its response to the final report of Professor Samuel's EPBC Act Review and welcomed the Commonwealth's intention to engage Aboriginal and Torres Strait Islander communities in a national reform process.

On 29 November 2021, the Australian Government signed a Partnership Agreement with the First Nations Heritage Protection Alliance (**Alliance**) to co-design options for cultural heritage reform. This Partnership Agreement is overseen by a Joint Working Group, made up equally of six representatives from the Commonwealth and the Alliance. The key purpose of the Partnership Agreement is to undertake a national consultation process that will lead to the development of options to be considered by the Minister for the Environment to improve protections for First Nations cultural heritage.

The commitment to a genuine Partnership to lead the co-design process is a crucial aspect of the success of this project. Any eventual legislation that deals with the protection and management of Aboriginal and Torres Strait Islander cultural heritage is necessarily racial in character. For racially based legislation to be legitimate it must be considered a "special measure" under the *International Convention on the Elimination of All Forms of Racial Discrimination*. In order to be considered a special measure under this Convention it is necessary that the group for whose benefit the measure was put in place has been consulted in relation to the measure and consented. [1]

The establishment of the Partnership, the co-design process it leads, and the extensive consultation that has taken place around this co-design ensure that Australia is well placed to fulfill its obligations under international law.

Since the commitment to establish the co-design partnership there have been several processes and reports directly or indirectly dealing with First Nations cultural heritage, including:

- the development of the *Dhawura Ngilan Vision and Best Practice Standards*, released in September 2020, and produced by the Heritage Chairs of Australia and New Zealand, as a roadmap to improving First Nations cultural heritage protections;
- the *Independent Review of the Environment Protection and Biodiversity Conservation Act* 1999 (EPBC Act), tabled October 2020 (Samuel Review); and
- the *Never Again* report, tabled December 2020, (Interim Report) and the *A Way Forward*, report, tabled October 2021 (Final Report), produced by the Parliamentary Joint Standing Committee on Northern Australia's Inquiry into Juukan Gorge.
- the *2021 State of the Environment Report*, an independent statutory report required under the EPBC every five years and released in July 2022.

The *2021 State of the Environment Report* provided a succinct summary of the current position when it noted (pp 164-165):

[1] UN Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, CERD/C/GC/32 (24 September 2009) at [5].

> Significant reform of Indigenous heritage legislation is required. The destruction of the Juukan Gorge rock-shelter in 2020 highlighted that the range of legislation that relates to Indigenous heritage is either not working effectively (e.g. the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, the EPBC Act in relation to emergency powers), or not working effectively together (e.g. the Native Title Act 1993 and state-level Indigenous Management heritage legislation), resulting in devastating loss of Indigenous heritage.
>
> In addition, despite having significant connections to heritage sites, and the knowledge, cultural practices and ecological management that come with this, Indigenous Australians have limited control and decision-making power over the management of Indigenous sites across Australia. This demonstrates a disregard for Indigenous people's right to self-determination over their cultural heritage, as outlined in the United Nations Declaration on the Rights of Indigenous Peoples.

In addition to these Reports produced at a Commonwealth level, many State and Territory governments continued or commenced reviews of their own legislation.

The Final Report of the JSC Inquiry made eight recommendations about a range of critical matters. These included recommending:

- Australian ratification of *Convention for the Safeguarding of the Intangible Cultural Heritage 2003.*
- A review of the *Native Title Act 1993* (Cth) (NTA) and secure adequate funding and accountability structures for Prescribed Bodies Corporate (PBCs) under the NTA.
- Endorsement and Implementation of *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander Heritage in Australia.*
- Establishment of a model cultural heritage destruction truth-telling process for use by Australian Government and corporations as part of an engagement process with First Nations Peoples.

The Final Report at Recommendation Three also recommended reform of existing Indigenous Cultural Heritage laws in Australia. This Recommendation has informed much of the work of the First Stage of the co-design process of which this Report is a part.

The Final Report Recommendation Three (contained in the Final Report Chapter 7) is as follows:

> 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.

The Implementation Plan developed under the Partnership Agreement sets out that there will be two stages to the consultation leading to the development of options for the modernisation of First Nations Cultural Heritage protections. The First Stage includes consultations with First Nations representative organisations at both a national and regional level but also with relevant state and territory departments and agencies, industry and other relevant stakeholders.

The discussions involved in these consultations go to

- Existing Commonwealth and state and territory legislation and administrative processes and the interaction of these

- The content of *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia.*
- The recommendations and findings of the JSC Inquiry, in particular the Final Report, as well as the Samuel Review.

This paper presents the outcomes of the Stage 1 consultations. In accordance with the Implementation Plan, those outcomes will form the basis for the more focussed discussions that will occur in the Stage 2 consultations.

## Methodology

As outlined above, the methodology adopted for the Stage 1 was twofold. First, a Discussion Paper was prepared and broadly circulated to First Nations organisations and other stakeholder groups. The Discussion Paper included a series of ten key questions. These questions were significantly informed by the recommendations of the Final Report. They are set out below:

1. Do you support reform to current First Nations cultural heritage protections? What type of reforms do you think are a priority?
2. Have you been involved in a process or project that involved cultural heritage legislation? What was your experience?
3. Are you aware of any best practice cultural heritage protection models or standards in domestic or international jurisdictions?
4. Do you have any experience of contractual mechanisms or other *arrangements that limit or prevent* First Nations people from freely discussing or seeking cultural heritage protections? If so, what was your experience?
5. Do you support the development of national standards for cultural heritage protection? If so, what should be the key priorities for national standards? How could the national standards be enforced?
6. Are you aware of Dhawura Ngilan? How could it be implemented, particularly relating to its four visions:
    (i) to make First Nations people the custodians of their heritage;
    (ii) that cultural heritage is central to Australian heritage;
    (iii) that cultural heritage is managed consistently across jurisdictions; and
    (iv) that First Nations heritage is recognised for its global significance.
7. What does Free, Prior and Informed Consent look like to you? How can Free, Prior and Informed Consent be achieved?
8. What does local decision-making look like in relation to cultural heritage management? Are you aware of any best practice decision-making models or standards?
9. How could all levels of government work with First Nations people to address the power imbalance in decision-making on cultural heritage matters?
10. Are there any other priorities around First Nations cultural heritage that you would like to raise, eg policy or administrative improvements, concerns around climate change, repatriation and sacred artifacts, or Indigenous Cultural Intellectual Property?

The second aspect of the Stage 1 methodology was a range of consultations through a qualitative research semi-structured interview. The consultations were comprised of a series of (mainly) virtual workshops. The workshops were jointly facilitated by personnel from both the Commonwealth and the Alliance. Each consultation was arranged with a particular First Nations organisation or other stakeholder group. The full list of consultations is set out below.

Each consultation was of approximately a two-hour duration. In each consultation the facilitators provided participants with a background to the Partnership co-design process. Following this introduction, participants were encouraged to then discuss the ten questions set out above. To the

extent possible, facilitators ensured they were familiar with written submissions made by participating organisations to (in particular) the JSC Inquiry and other recent inquiries.

The consultations were recorded for the purposes of the preparation of notes by staff of the Partnership secretariat. Participants were advised that they were welcome to inspect the secretariat notes, but no participants took up this option. Participants were however advised there would be no direct attribution to any organisation or individual of any comments made, but the general thrust of comments may be attributed by organisation type (for example: "a Prescribed Body Corporate "a state government department" etc.).

17 First Nations representative bodies and State and Territory Land Councils were engaged in stage one engagements from every State and Territory. All State and Territory Government departments administering First Nations cultural heritage were engaged, so too where many of the Heritage Councils or First Nations Heritage Councils. A number of peak industry bodies and individual firms were also engaged. Further detail is provided in Figure 1 and Table 1.

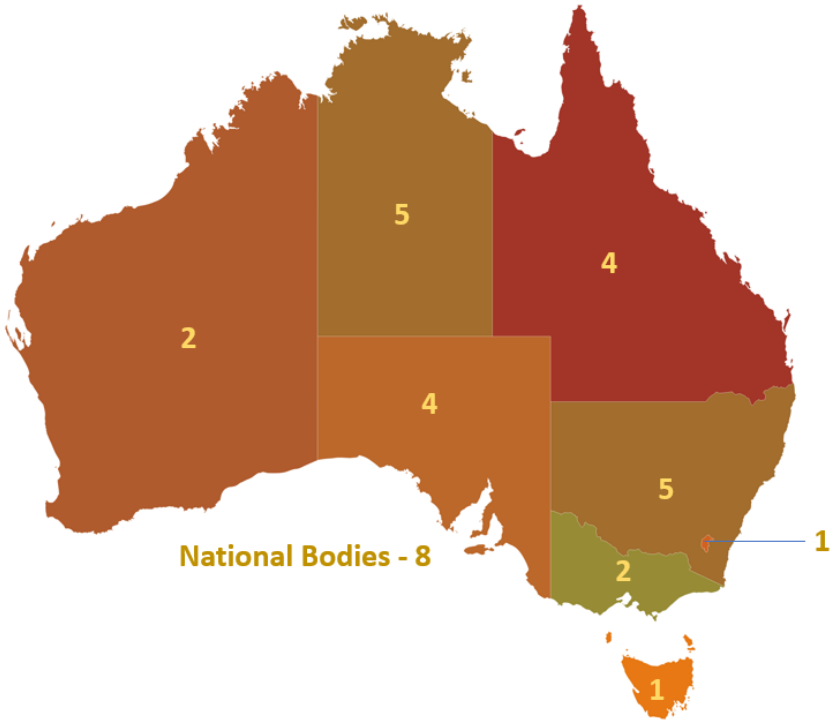


*Figure 1: Total Stage 1 Engagements in each jurisdiction*

*Table 1: Total Stage 1 Engagements by jurisdiction*

| Jurisdiction | Number of engagements | No. of people engaged | No. of First Nations Groups engaged |
|---|---|---|---|
| National | 8 | 42 | 1 |
| Western Australia | 2 | 3 | 1 |
| Northern Territory | 5 | 11 | 4 |
| South Australia | 4 | 15 | 3 |
| Queensland and Torres Strait Islands | 4 | 18 | 3 |
| New South Wales | 5 | 42 | 4 |
| Australian Capital Territory | 1 | 2 | 0 |

| Jurisdiction | Number of engagements | No. of people engaged | No. of First Nations Groups engaged |
|---|---|---|---|
| Victoria | 2 | 10 | 1 |
| Tasmania | 1 | 5 | 0 |

The following section of this report provides a summary of the responses elicited during the Stage 1 Consultation discussions. As will be seen there was a significant degree of consensus from many participants around a large number of the issues explored. Where there was divergence, most frequently this was in the context of a jurisdiction-specific exploration of a particular matter rather than a disagreement regarding matters of principle.

## Responses to questions

**Question 1. Do you support reform to current First Nations cultural heritage protections? What type of reforms do you think are a priority?**

**Context.** *This question was the first put to participants in each consultation. Facilitators encouraged participants to use the question to build on views previously expressed in written submissions and where necessary to identify priority areas in need of reform.*

Beyond consensus there was in fact unanimous support for the proposition that current First Nations cultural heritage protections required reforms. Consistent with many of the submissions to the JSC Inquiry, the most commonly proposed reform was for Commonwealth legislation that operated to accredit state (and territory) based regimes. Overwhelmingly, the requirement for accreditation was seen to be conformity with the provisions of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provisions relevant to cultural heritage protection and promotion. The "Best Practice Standards" contained in *Dhawura Ngilan* were often identified as a measure of conformity with UNDRIP.

Notably this view was expressed by First Nations organisations from across the country. That is to say there was no state or territory where First Nations Peoples considered there was **not** a need for Commonwealth legislative action to ensure improved protection for Indigenous Cultural Heritage. As many informants stated: Juukan could happen in any state [or territory] and in many ways *does* happen every day. While there was consensus amongst First Nations Peoples on the need for Commonwealth legislative action there was also consensus on the ongoing desirability of co-existing state and territory legislation that recognised that each jurisdiction had unique features in terms of their First Nations Peoples and their cultures, the diverse environment of each jurisdiction, their local land rights regimes, the prevalence of native title processes and many other factors.

The views of First Nations Peoples in this regard were, perhaps surprisingly, usually not inconsistent with the views expressed by state (and territory) governments and statutory agencies (collectively 'states'). States most commonly reported that they agreed there was a need for reform of existing protections and pointed to their actions in reviewing existing legislation as evidence of both the need in this regard and their government's commitment to address this need. Most states saw the fact of current domestic legislative reform as consistent with acceptance of legislative action by the Commonwealth to ensure that reform was in conformity with appropriate standards.

It was at this point though that the broad consensus between First Nations Peoples, state governments, state statutory authorities and industry groups became more fragile. Most state government suggested their current (or proposed) legislation would satisfy any applicable

Commonwealth standard. This view was frequently shared by industry groups but less so by state statutory authorities (which were most commonly heritage specific agencies) who frequently saw a need for additional reform beyond the current or proposed state regime.

Of note is that while Industry groups often shared the view of state governments that existing legislation satisfied any relevant standard, they were at some pains to point out that they their particular firms (or industry) operated above the bare minimum legislative standard and sought to achieve conformity with international norms. A key message from industry groups was that whatever model was ultimately adopted it was imperative to ensure that there was no 'duplication of regulation.'

One state government was, however, of the view that existing legislation satisfied any legitimate expectation as to standards and that accordingly, there was no basis for Commonwealth legislative reform that would disrupt that regime but accepted that Commonwealth standards may be desirable to remedy deficiencies in other jurisdictions. To some extent there was a resonance between this discourse and the frequently expressed views of First Nations Peoples that any Commonwealth standards should ensure conformity with UNDRIP, not merely be an articulation of a 'lowest common denominator.'

Aside from these structural issues there were two additional key themes that emerged from discussion around this question.

The first was that the approach of most current cultural heritage legislative regimes had as their foundation structures to mitigate destruction of cultural heritage. To First Nations Peoples informants it was crucial that the legislative mindset changed to one of ensuring structures that would care, promote and celebrate cultural heritage and not merely see it as an impediment to development.

The second key these that emerged was the need to ensure that in any reforms it was First Nations Peoples themselves, the Traditional Owners of the cultural heritage in question that were making the final decisions around the management of that heritage. Informants frequently identified the feelings of frustration, disempowerment and sadness that came from having decisions about the future of *their* cultural heritage made by "the minister".

**Question 2. Have you been involved in a process or project that involved cultural heritage legislation? What was your experience?**

**Context.** *This question was the second question put to participants and at this point participants were often asked to describe the processes (both desirable and deficient) involved in the regime they currently worked with. Often the discussion around questions 1 and 2 would feed into each other; participants would identify a shortcoming in the existing regime and propose reform to address it (or vice versa).*

From First Nations Peoples informants there were several key themes that emerged in response to this question. The first was the obverse of the point made immediately above. That is the most commonly and strongly reported shortcomings of existing legislative regimes is that Traditional Owners are not empowered to make decisions about their own cultural heritage; but that overwhelmingly the ultimate decisions in this regard are made by "the minister".

The second theme referred to the occasions when the legislative regime was not engaged at all. This theme was reported across all jurisdictions. These occasions arose, so informants advised, because of the very limited circumstances that an 'authority to interfere' (howsoever described) and associated management plan is required. Where the formal statutory approval is not required, frequently

Traditional Owners would not even be aware of the interference with cultural heritage until after this occurred.

Across states and territories informants reported that this situation arose in two circumstances. In the first circumstance the relevant legislation authorised specific types of activity without the need for a cultural heritage authorisation and with specific exclusion of any cultural heritage damage arising from the relevant offence provisions. In the second circumstance the relevant legislation authorised specific types of activity without the need for a cultural heritage authorisation and although any subsequent damage to cultural heritage still constituted an offence there were insufficient resources located in either state enforcement agencies or Traditional Owners to effectively police the issue. This problem was often compounded by offence provisions that were not 'fit for purpose'.

In both circumstances cultural heritage was being destroyed on a widespread and daily basis across the country.

A third theme that frequently was emerged was a reported focus only on tangible artefacts in a projects assessment process to the exclusion of concern around the intangible aspects of cultural heritage associated with the land in question. When this matter was explored with informants it was reported that this 'privileging' of tangible artefacts over intangible aspects of heritage occurred often despite the legislation in question including intangible values in the relevant statutory definitions. The problem, it was reported, lay with the attitude of the proponent engaged experts and state officials.

The issue of inadequate resources was identified by First Nations Peoples informants as a crucial general shortcoming. It was reported that even where legislative regimes provided for the participation of Traditional Owners in the development of management plans there were inevitably insufficient resources and insufficient time to allow Traditional Owners to discharge there statutory and cultural obligations adequately. The matter of inadequate time was reported as often being compounded by the fact that cultural heritage approvals are (or are seen as) an afterthought in project development and planning. Informants emphasised the need to ensure that cultural heritage matters and discussion with Traditional Owners were considered early in the project development process.

A further matter frequently raised was that of consultation, were it occurred, taking place with 'the wrong people' – Indigenous people or groups who were not the Traditional Owners with cultural responsibility for the care and protection of the heritage in question. This matter was frequently reported as a shortcoming with the manner in which the legislation in question directed consultation.

In many jurisdictions informants reported that the shortcomings of the state (territory) regimes had led to future act procedures under the NTA to be utilised as the major vehicle for cultural heritage protection and management. Informants reported that the NTA procedures could overcomer many shortcomings in the applicable cultural heritage regime; decisions were made by Traditional Owners (in the form of an ILUAS or s 31) agreements and not "the minister" and the NTA regime was engaged when frequently the cultural heritage regime would not have been.

Despite these advantages informants also reported many shortcomings in the NTA as a cultural heritage management device. These shortcomings included a lack of resources in PBCs to undertake the work, the fact that often the proposal activity did not require agreement with traditional Owners under the NTA (for example when the relevant future act gave rise to only consultation, or notification or even no procedures). A further shortcoming of the NTA was that of its limited application. The NTA only had relevance where there was a determination of native title or a registered claimant application. In much of the country native title as it is understood in mainstream law has no application.

Two final issues that frequently arose were those of the care of artefacts and Ancestral remains that were 'salvaged' during a development process. This concern led into a broader concern regarding the care of Ancestral Remains and movable cultural heritage more generally. This matter is discussed further below.

Many of these themes also emerged from the consultations with state government and statutory authorities. Most frequently state governments reported that it was concerns such as those described above that had prompted the current reform proposals. It was generally accepted that despite the efficacy of any reform proposal there was inevitably an ongoing need for increased resources for both First Nations organisations and relevant state agencies.

Consultations with industry reinforced the point that came from First Nations Peoples informants regarding the role of he NTA. To industry, the fact of the need to satisfy the requirements of the NTA and of the need to satisfy the requirements of the applicable cultural heritage regime meant that it was desirable that both statutory regimes could be satisfied with a single agreement. Industry informants emphasised the desirability of having native title agreements (where they existed) also serve as cultural heritage approvals.

This noted, Industry informants also accepted that in many respects the existing NTA process did not satisfy the requirements of the international norms to which industry held itself accountable.

**Question 3. Are you aware of any best practice cultural heritage protection models or standards in domestic or international jurisdictions?**

*Context: This question sought to draw on participants' knowledge of other regimes in Australia and internationally, so as to identify if there was a broad view as to what jurisdictions, if any, may provide instructive models for the purposes of reform. The question also allowed for exploration of what was meant by the term 'best practice' and what principles and assumptions may be embedded in the concept as it applies to First Nations cultural heritage.*

First Nations informants repeatedly raised the Northern Territory or Victoria (or both) as the leading jurisdictions within Australia for the protection of First Nations cultural heritage. However, all First Nations informants showed reluctance to label these regimes as 'best practice,' but merely as the leading examples within Australia. Those outside of these jurisdictions appeared reluctant to award these regimes the title of best practice on the basis of a lack of intimate internal knowledge, while those operating inside the jurisdictions, although aware the protections were often superior to other States and Territories, could nevertheless identify weak spots and areas for improvement.

Several States also identified Victoria and the Northern Territory as the leading regimes, however several State Governments also put forward their own legislation as encompassing best practice or elements of best practice. Notably, where elements of best practice where identified there was a general consistency between First Nations organisations and the States, such elements been said to consist of matters such as: (i) the early engagement of Traditional Owners; (ii) the existence of, or elements of, Free Prior and Informed Consent (FPIC); (iii) the ease of identifying the Traditional Owners or cultural custodians; and (iv) the provision of adequate resourcing.

Although the Northern Territory and Victoria operate under very different legislative protections, a number of similar themes emerged as to why they are seen as the most effective examples of First Nations cultural heritage protection in Australia. While often approached differently, each regime was thought by many informants to have particular strengths in those areas identified as indicative of best practice.

For instance, both the *Aboriginal Heritage Act 2006* (Vic) and the *Northern Territory Aboriginal Sacred Sites Act* 1989 (NT) were thought to encourage early engagement from proponents. Early engagement is particularly evident in those areas of the Northern Territory held as Aboriginal Freehold under the *Aboriginal Land (Northern Territory) Rights Act 1976* (Cth) (ALRAR). This form of tenure covers 50% of the Northern Territory, and conveys complete ownership upon Traditional Owners, meaning their consent is required before any project can proceed. This early contact and assessment was seen as important, particularly by First Nations participants, as it allowed input while project scoping and design was still ongoing, allowing for adjustments to the project to be made at little cost or inconvenience.

Each regime was also viewed as including elements of FPIC, with each regime requiring the upfront disclosure of detailed information, and the empowering of Traditional Owners to make decisions around impact, through the granting of authorities or approval of management plans. Some First Nations informants stressed that FPIC was only achieved in full under the ALRA, where Traditional Owners had full authority to grant or withhold their consent on Aboriginal Freehold land.

Another theme emerging from both jurisdictions was the ease in engaging in these processes. This was evident in Victoria, with 75% of the State now covered by an appointed Registered Aboriginal Party (RAP), being the Traditional Owner group with cultural authority for the area, empowered under legislation to approve cultural heritage management plans. These bodies have both resourcing and experience, and were reported by several industry bodies as being able to engage efficiently with proponents. In the Northern Territory, proponents engage with statutory institutions, such as the 4 statutory land councils, or the Aboriginal Areas Protection Authority. With longstanding and deep ties into First Nations communities, these bodies have built relationships of trust and respect over several decades. Several participants reported that the standing of these bodies among First Nations people allowed them to operate from a position of trust with Traditional Owner groups. This is complimented by the statutory regimes, which allow these bodies to grant certificates covering proponents from all liability, in effect meaning that proponents can confidently and efficiently engage with the protection regimes, without being required to engage in questions of Traditional Ownership or custodianship, for which they are ill-equipped.

A final unifying feature that was readily identified by both State and First Nations participant's, was that the First Nations bodies in Victoria and the Northern Territory have access to regular and secure funding. While there was some variance in views as to the adequacy of this funding, it appeared at least sufficient enough to ensure the provision of a reliable service to both Traditional Owners and proponents.

Industry participants displayed less consistency in identifying best practice cultural heritage protection models, or elements of best practice. Responses ranged from assertions that the recent Western Australian legislation was the most contemporary, and represented the highest bar nationally (a view notably not endorsed by First Nations participants), to support for national standards but with some reticence about Commonwealth enforcement and a preference for States to retain their own policy settings, to enthusiastic endorsement of Dhawura Ngilan, and promotion of the 'Dhawura Ngilan Business and Investor Initiative' as an expression of best practice from the perspective of the private sector.

While there was no comprehensive view, some themes were repeated across consultations with industry, such as the need for consistency across legislative regimes, a concern to avoid duplication of compliance requirements, and confidence that most issues could be resolved locally through robust agreement making.

Finally, with exception of some academic participants, there seemed to be little knowledge of international Indigenous heritage protection regimes, although several participants suggested that it was potentially an area of valuable further enquiry.

**Question 4. Do you have any experience of contractual mechanisms or other arrangements that limit or prevent First Nations people from freely discussing or seeking cultural heritage protections? If so, what was your experience?**

**Context.** *This question was in direct response to the Final Report Recommendation 3 at 7.83 ("The legislation should prohibit the use of clauses in agreements that prevent traditional owners from seeking protection through Commonwealth legislation"). In turn the recommendation was a response to the disclosure that under the terms of the land access agreement between the PKKP people and Rio Tinto the PKKP were prevented from "…critiquing the operations of the company and restricting their rights to access state and federal heritage protections without first obtaining the company's consent".*[2]

With one exception, the reports of use of 'gag clauses' in land access agreements (most commonly native title agreements) were restricted to Informants located in Western Australia. Informants from the resources industry suggested the reason for this was the particular structure of the Aboriginal Heritage Act 1972 (WA), in particular s 18 of that Act.

It was explained that under s 18 from a land "owner" (defined to include mining tenement holder) may make an application to do an act which may (broadly) interfere with Aboriginal cultural heritage. Such interference would normally constitute an offence under s 17. The application once made is considered by the Aboriginal Cultural Material Committee who in turn makes a recommendation to the Minister.

Under s 18 there is no necessary consultation with affected Traditional Owners, However, if affected Traditional Owners did not acquiesce to the s 18 application (and they were aware of it) they could object to the ACMC or the Minister in respect of the application. The 'gag clause' is intended (so Informants conveyed) merely to give assurance that no objection to the s 18 application would be made - given the absence of a formal legislative mechanism for Traditional Owners to 'consent' to the s 18 application. As was identified by the JSC Inquiry in both the Interim and Final Report, a further consequence of the gag clause in the case of Juukan Gorge was a contractual prohibition on the PKKP making an application for a (Commonwealth) ministerial direction under ATSHIPA. The Informants suggested that in jurisdictions where there is a legislative process to confirm the attitude of affected Traditional Owners - no gag clause would be necessary or appropriate.

This analysis to a certain extent is consistent with information received from other Informants. The other reported use of 'gag clauses' was in NSW. First Nations Informants from this jurisdiction did report the use of gag clauses. Notably, s 86 of the National Parks & Wildlife Act 194 (NSW) creates an offence of harming or desecrating Aboriginal Objects and Aboriginal Places. Under s 87 it is a defence to the offence if the perpetrator holds an Aboriginal Heritage Impact Permit (AHIP). The process for granting an AHIP under Division 2 Part 6 involves mandatory consultation with Aboriginal people. The outcomes of those consultations are one matter to be considered in the granting of the AHIP (s 90(k)). Accordingly, a 'gag clause' in NSW could serve the same function of guaranteeing the acquiesce of relevant First Nations Peoples to the granting of the AHIP as it does in Western Australia.

By contrast, in jurisdictions such as the Northern Territory, Queensland, parts of South Australia and Victoria, one process to achieve a statutory authorisation to harm Indigenous Cultural Heritage

[2] Interim Report para 1.17.

involves reaching an agreement with affected Traditional Owners (or in Victoria gaining the approval of affected Traditional Owners). In these circumstances a 'gag clause' would be irrelevant as the consent of Traditional Owners is explicit in the execution of the agreement. Of course, in some of these jurisdictions (Queensland, South Australia, and parts of Victoria – where there is no appointed Registered Aboriginal Party) it is not necessary to achieve an agreement with Traditional Owners; an application can proceed in the absence of agreement. However, in this situation also, clearly, if Traditional Owners have not agreed to the application, they would not agree to a gag provision.

Three points emerge from this discussion. First, as clearly pointed out by First Nations Peoples Informants, if the legislative process for the grant of an authorisation to interfere with Indigenous Cultural Heritage requires the consent of affected Traditional Owners, then the issue of gag clauses would not arise (for the reasons described above). Thus, the matter is irrelevant to any legislative regime that genuinely incorporates the principle of Free, Prior, and Informed Consent.

The second point is one emphasised by legal professional body informants. That is that there are a number of current examples where there is a legislative prohibition on any purported attempt to "contract out" of a legislative protection, objection or appeal right. In the context of an Indigenous cultural heritage legislation regime that does not fully implement the FPIC principle, the prohibition on purported attempts to contract out of statutory protections is well made.

The third point goes to a matter more fully explored in relation to questions 7 and 8 below which considers the implementation of the FPIC principle. That point goes to circumstances where affected Traditional Owners, through their representative institutions, have given their free prior and informed consent to the grant of an authority to interfere with cultural heritage. And despite this consent, a sub-group of Traditional Owners or (and) other concerned First Nations Peoples object to the granting of the authority to interfere. Informants, from First Nations Peoples, state governments and statutory authority referred to examples of these circumstances. The question here is whether any agreement reached with the representative institution can or should operate to prevent the dissident group from exercising a statutory right of appeal/objection.

As noted earlier the matter is one considered further below but is one that needs further consideration in the context of the design of a reformed legislative scheme.

**Question 5. Do you support the development of national standards for cultural heritage protection? If so, what should be the key priorities for national standards? How could the national standards be enforced?**

***Context.*** *The development of national standards for cultural heritage protection has long been contemplated as a possible focus of reform, and was considered by the JSC Inquiry which ultimately recommended that minimum standards form part of a new national framework to be legislated by the Australian government. This question sought to assess the level of support for this recommendation, and to seek further direction as to the content and purpose of any potential standards.*

Respondents displayed a strong and general consensus in support of the concept of national standards, citing the need for consistency across jurisdictions, and the certainty that this could provide to First Nations, government and industry. However almost all respondents indicated that their support was ultimately dependant on the content and operation of the standards, noting the potential for negative outcomes in the event that standards were insufficiently articulated or poorly implemented.

For instance, some First Nations organisations expressed concern that national standards could represent a lowering of the bar. In particular, the language adopted by the JSC Inquiry of 'minimum standards' concerned some First Nations participants, who viewed this language as containing reductionist tendencies, and that instead the aim should be to establish 'best practice' standards. Some First Nations respondents pointed to States with strong cultural heritage legislation (such as Victoria and the Northern Territory) and stated that attempting to settle upon a 'national minimum' could in effect erode the strength of protections in these jurisdictions.

When discussing whether standards should be 'best practice' or 'minimum,' most respondents, including government and industry, said that best practice national standards was the preferable outcome. Further, there was also widespread agreement among respondents that standards, whether described as bets practice or minimum, should be informed by, and should meet international obligations such as those contained in the UNDRIP and the Nagoya Protocols (which articulate obligations around access and benefit sharing).

Other concerns, raised by First Nations organisations and governments alike, was how it would be possible to reconcile consistent national standards with cultural, regulatory and legislative conditions at the local level. There was recognition that while national standards had much potential for improvement on current circumstances, they would also need to take account of local conditions, and should not necessarily disrupt appropriate and functioning systems that had been reached by reasonable agreement between First Nations and governments at the State or Territory level. Some industry representatives also expressed concern that national standards could cause a duplicative regulatory framework, which would require compliance at both the State and Federal level, adding to project cost and timelines.

A number of respondents suggested that a potential pathway through these concerns was available via an accreditation scheme, and saw this as a potentially useful method for implementing national standards that could provide space for the operation of individualised State and Territory regimes, provided the base metrics contained in the national standards were met. This would allow for autonomous State and Territory regimes, reflecting local conditions, but set within the guidelines of nationally agreed norms.

First Nations respondents frequently felt that national standards should be able to override State and Territory standards, meaning that if local legislation fell below the nationally agreed standards the Commonwealth regime should apply.

Overall there was strong support for national standards from all respondents, whether First Nation, government or industry, and there was a high level of engagement in trying to unpack at what level such standards should be set, and how they should be applied and enforced. Among the reasons given in support of national standards, the increased consistency among jurisdictions featured prominently, and was thought to provide greater certainty for both First Nations and proponents. It was also felt by a number of respondents, predominately First Nations, but also including some government and industry respondents, that national standards could help provide more consistent definitions, particularly with respect to intangible heritage. This would lead to greater consistency in protection, but also greater understanding and appreciation of intangible heritage, and its central role in First Nations cultural heritage.

**Question 6. Are you aware of Dhawura Ngilan? How could it be implemented, particularly relating to its four visions:**

**(i) to make First Nations people the custodians of their heritage;**

**(ii) that cultural heritage is central to Australian heritage;**

**(iii) that cultural heritage is managed consistently across jurisdictions; and**

**(iv) that First Nations heritage is recognised for its global significance**

**Context.** *This question was frequently the opportunity in consultations for Informants to discuss issues beyond legislation and project-based approvals processes. It was seen as an opportunity to discuss some of the broader issues associated with Indigenous cultural heritage. Themes that were frequently pursued related to the role of Indigenous cultural heritage in broader Australian heritage and the global significance of Australian First Nations heritage.*

Most respondents were aware of and strongly supported Dhawura Ngilan. There was a broad consensus from all sectors that the Dhawura Ngilan visons of acknowledging and valuing First Nations heritage as a central part of Australian heritage and ensuring the recognition of its global significance were of vital importance. Proposals such a sole and dual naming and inclusion of First Nations Heritage matters in curriculum were seen as particularly valuable. Perhaps because of the context of the consultation process, frequently this value was also expressed in terms of the impact on land-based project approvals. The theme developed here was that is the broader Australian community had a better understanding of the nature and value of First Nations heritage then events such as the desecration of Juukan Gorge, particularly in the way this occurred, never would have happened.

There was general agreement from all respondents that the vision, that First Nations heritage is recognised for its global significance, was particularly important. If global appreciation for First Nations heritage is increased, it was felt that better decisions about cultural development and asset management would be made. However, it may be that industry representatives support this vision in particular as it could be interpreted as the easiest to implement due to its broad scope and the generic nature of potential indicators for success.

Informants also appreciated that *Dhawura Ngilan* could provide a consistent set of principles to help provide guidance in the absence of clear guidelines in current legislation. All respondents hoped to understand more about how *Dhawura Ngilan* would support legislative reform.

First Nations groups expressed support but sought additional information about some aspects of *Dhawura Ngilan* in an attempt to close any 'loopholes' that could arise through differing interpretations of the document by governments and Industry. They also wanted to understand what consistent implementation would mean. This prompted some exploration of themes of sovereignty and nation building. Some respondents felt that some of the work required to implement *Dhawura Ngilan* would need to be done after issues around sovereign decision-making had been addressed.

First Nations groups sought additional information about the definitions of 'heritage' used in the document, for example in what would be considered the definition of 'intangible heritage' and cultural significance of species. They also saw value in greater exploration of how 'significance' is defined – would the benchmark be significance to the Australian nation as a whole, or to the many First Nations groups that coexist on the Australian continent?

Business and investors are developing their own frameworks for best practice standards in the absence of clear guidelines in the current legislation. A number of Industry respondents pointed to the current *Dhawura Ngilan Business and Investor Initiative* project being undertaken in partnership with the Alliance as an important example of this. In their view, these frameworks are based on the principles of *Dhawura Ngilan* and would be their way of implementing the document. These respondents also supported additional funding for mapping and surveys, safeguarding heritage data,

ensuring the right Custodians are speaking for Country and have their voices heard, ensuring that heritage specialists and First Nations groups are working closely together, and having a specialised core of heritage protection staff.

Respondents also raised UNDRIP, including the need to increase general awareness of UNDRIP and how it should be implemented in an Australian context.

Overall, although all respondents considered *Dhawura Ngilan* to be very important, much more work is warranted to ensure its effective implementation.

**Question 7. What does Free, Prior and Informed Consent look like to you? How can Free, Prior and Informed Consent be achieved?**

**Context.** *Although this question was specifically asked during all consultations, the issue of Free, Prior and Informed Consent (FPIC) was discussed in response to many of the earlier consultation questions and was often raised by respondents prior to facilitators asking Question 7.*

To the facilitators one of the remarkable aspects of discussion of this theme was the absolute consensus, across all sectors and jurisdictions, that achievement of Traditional Owners' free, prior and informed consent with regards to matters affecting their cultural heritage was an objective that should at least be sought to be achieved. Most commonly the force of this objective was seen as associated with the moral (or perhaps expective) if not legal force of UNDRIP.

Beneath this consensus though was a divergence of views as to whether, while FPIC was an objective, whether it was a feasibly or mandatory one on all occasions

Discussion in consultation around this topic also explored all four aspects of "free", "prior", "informed" and "consent". In addition, as well, there was often particular exploration of the notion of 'ongoing consent' and the question of who should give (or withhold) the consent (the 'who speaks for Country' issue).

Exploration of the issue of "free" was often connected with the right of veto which was discussed by multiple respondents. Some respondents expressed the view that if there is no right of veto, a level of coercion is implied in a legislative scheme – meaning that consent cannot really be given. Industry representatives were also aware of this risk, stating concerns that sometimes they felt as if Traditional Owners were providing consent to avoid the risk of 'missing out' on opportunities. This could imply a level of coercion, meaning that consent cannot really be given and therefore the benefits of risk mitigation afforded by FPIC would not be achieved. The provisions of the NTA preventing the National Native Title Tribunal making a future act determination including conditions relating to royalties or royalty equivalents were often cited as an example of this.

Most frequently comment around "prior" consent that was made by First Nations Informants referred to an imposed requirement for decision making that conformed to project planning convenience rather than thoughtful and culturally appropriate decision making. Comment in this respect including discussion around the idea of Country mapping discussed below. Specifically, there was comment to the effect that provisions equivalent to that in the *Aboriginal Heritage Act 2006* (Vic.) to the effect that no project statutory approvals could be granted ***before*** the relevant cultural heritage approval was granted were seen as desirable. However, comment also extended to noting the desirability of a mind-set change where proponents considered cultural heritage matters and discussed these with Traditional Owners at a project inception stage before there was contemplation of statutory approvals.

The most frequent commentary around the question of “informed” consent that stemmed from First Nations informants went to the issue of project options. Informants reported that frequently when cultural heritage approvals were sought it was not in the context of having all project alternatives presented to them but rather the proposal as a *fait accompli* with their views being sought only as to appropriate monitoring and salvage arrangements. This, it was reported, did not satisfy the principle of informed consent in the view of First Nations Informants.

The issue of what constituted consent was the subject of many views. It was inevitably connected to the issue (touched upon above) as to whether consent meant veto or something lesser or different. Industry representatives and government Informants reported seeking clarity about how ‘consent’ is defined, asking whether it is an indication of non-objection, or something further. First Nations Informants were clear that the right to consent necessarily comprehended the right to consent *or not*. Many industry and government Informants focussed upon the procedural aspects of consent in preference to a focus on what happened in the event Traditional Owners simply said “no”. Some consultation explored the concept of a relativity between the identified significance of cultural heritage and the nature of the “consent” required to interfere with it.

First Nations informants often expressed frustration at the refusal of Industry and government to refuse to accept that some cultural heritage was simply of too great a significance to be interfered with at all. At times this was described as religious discrimination. In this context, provisions of existing cultural heritage legislation relating to (variously described) “protected areas” where reported as largely ineffective by First Nations informants. These informants noted both the rarity of declarations under these provisions and the fact that, inevitably, decisions made under these provisions were made by ""he Minister” and not Traditional Owners.

Most respondents recognised that FPIC means an ongoing relationship, consequently discussing what it therefore might mean if consent is withdrawn. Industry representatives supported FPIC as an important risk mitigation tool, however they were conscious that the ability to withdraw consent was an additional risk for them to consider. Some respondents considered that good systems of governance, such as a treaty or agreement directly addressing how FPIC would be managed, could be useful.

Practicalities of meeting with Traditional Owners were also discussed. Suggestions included having translators for meetings/communications and engaging online when Traditional Owners cannot meet in person due to ill health and other issues that might otherwise prevent engagement.

Industry Informants did express concern around the commercial implications of the concept of ‘free’ and the implications of ‘ongoing’ consent for project certainty. They raised concerns about the possibility of withdrawing consent, what this might mean for them, and how they could mitigate that risk. Global industry companies have been relying on international company policies, due to the lack of clarity within Australian legislation and policy.

Many First Nations respondents discussed the incongruency between Aboriginal and Torres Strait Islander peoples’ cultural views about who has the cultural authority to speak for Country, and Western notions of seeking consent from the majority. It was raised that the various legislations impose Western understandings, which tend to focus on democratic representation rather than on cultural authority. Both Aboriginal and Torres Strait Islander representatives and industry representatives were concerned about the risks and associated lack of certainty in relation to this theme. This included concerns about consent, and who has the authority to provide free, prior and informed consent. The lack of clarity about who speaks for Country was seen as partly being caused

by the interaction between different pieces of legislation (e.g. Native Title, Land Rights and heritage legislations). This results in decisions being made by people who do not have the cultural authority to make those decisions, causing community tensions and destruction of cultural heritage. Gaps in knowledge about cultural heritage were also seen as a significant risk that can lead to inappropriate development approvals, exacerbating tensions and disagreements. Some respondents felt that developers sometimes take advantage of the complexities about who speaks for Country, choosing to consult with certain Traditional Owners and not others depending on the desired outcome of consultations. It was suggested by some respondents that these issues could be addressed by focusing on nation building, for which there is a documented, evidence-based process. These respondents felt that if community governance can be addressed, then the rest would follow.

Repatriation and Indigenous Cultural and Intellectual Property (ICIP) were also key themes relating to FPIC. Repatriation and the interactions between repatriation laws and heritage laws were raised by multiple groups. This related both to artefacts and objects, and to the repatriation of human remains. Different groups expressed different preferences for artefact storage. Some groups want to keep artefacts on Country in their original location, others want them to be protected elsewhere rather than be disturbed. Provision of adequate space to house artefacts was raised as an important issue. One example raised about inappropriate repatriation laws was that current NSW legislation lists the Crown as the owner of Aboriginal ancestral remains. Responses discussing ICIP are addressed under Question 10.

Overall, and similar to the outcomes from other consultation questions, all respondents supported FPIC as an important concept that could provide clear guidance and risk mitigation opportunities, however they sought clarity about what it means and how it would be implemented.

**Question 8. What does local decision-making look like in relation to cultural heritage management? Are you aware of any best practice decision-making models or standards?**

**Context.** *This question was utilised by informants to explore not only the First Nations' decision-making processes under current legislation but also what the principle of free, prior and informed consent should look like in operation. To this extent the conversations regarding this question and question 7 often flowed into each other in a single discourse. In this report of these discussions, we have attempted to separate out the two intermingled themes as far as possible. The report of discussions against this question will focus on informants' comments on current local cultural heritage decision making.*

***Identity***

This was an issue of great magnitude but also great concern to almost all informants. In essence most Informants saw this question as exploring the issue of who *does* and who *should* 'speak for Country'. It was a matter that was explored by all Informants - First Nations Peoples, academics, state government, industry, and statutory authorities.

It was also an issue where there was marked differences between jurisdictions. In the Northern Territory with its reliance on structures under the *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth) and the areas of Victoria where a Registered Aboriginal Party had been appointed informants advised it was the certainty around who spoke for Country that was one of the pillars of the strengths of these regimes. This is not to say that there were not some sections of the First Nations Peoples that

questioned the representative nature of even these structures.[3] However, overwhelmingly, informants reported that these jurisdictions had overcome key challenges in the identification of who speaks for Country.

Informants in other jurisdictions reported that a lack of clarity around the identity of who speaks for Country had a number of negative consequences:

- (correct) Traditional Owners being denied the opportunity to make decisions regarding their cultural heritage and the consequences that flow from this (both in terms of the cultural heritage and the Traditional Owners).
- The significance of aspects of cultural heritage not being fully appreciated in decision making.
- Project approval delays while the identity of the appropriate Traditional Owners is determined.
- Conflict within Indigenous communities stemming from project approvals.
- Unprincipled proponents attempting to manipulate the selection of Traditional Owners involved in consultations or agreements.

Frequently the cause of the lack of clarity around the identity of who speaks for Country was reported as stemming from conflicting legislative structures. That is to say that, for example, under the Commonwealth's NTA a future act process requires the agreement (or at least involvement) of certain First Nations Peoples (generally determined native title holders or registered native title claimants). However, under state Indigenous Cultural Heritage legislation different First Nations Peoples were to be consulted in addition or in the alternative. Some informants reported this situation could be even more complex where state or territory land rights or land grant legislation attributed status to a potentially further different group of First Nations Peoples.

Notable in this regard were informants from various First Nations People's organisations, legal professional bodies, academics industry, some state governments and some statutory authorities that emphasised that the thorough and independent processes around the making of a native title determination by the Federal Court demanded the conclusion that a Prescribed Body Corporate under the NTA (where it existed) was the appropriate institution representative of those entitled to speak for Country. Industry informants in particular noted that not only was this viewed as the most legitimate conclusion, it was also the most practical as it avoided the likelihood of 'dual regulation' where agreement or consultation processes would have to be undertaken simultaneously with more than one First Nations group.

A number of proponents of this view also suggested that those that sought to question the legitimacy of the PBC in this regard were attempting to 'pick and choose' which First Nations groups would be involved in decision making.

***Resources***

A further but distinct issue was that of the resources available to Traditional Owners to support their involvement in decision making. This was the case whether the involvement in decision making was through the PBC or other organisational entity. All Informants felt the level of resources available was less than desirable. Particularly First Nations Informants reported this lack of resourcing undermined any suggestion that current decision making involved genuine free, prior, and informed consent.

[3] Although most criticism in this regard seemed to centre around the issue of Martang Pty Ltd in Victoria and overlooked that this company had subsequently lost its RAP status (see the *Additional Comments* by Senator Thorpe in the Final Report).

The issue of resources in this respect involved several aspects. One aspect was that without adequate resources to participate in decision making the quality of the decision making was affected. This could affect decision making in two respects. First, approvals may be given where they should not because of a lack of opportunity to undertake comprehensive enquiry. Second, approvals may be refused where they may not necessarily have been, based on an application of the 'precautionary principle'.

The second aspect goes more to issues of respect and principle. First Nations Informants reported instances of proponents expecting them to undertake "clearance work" for no or minimal remuneration, that no other personnel on the project team would be subject to these expectations, and that the benefit of the project would not be shared by the Traditional Owners. These informants reported feeling of being "held hostage" to the care and responsibility for their cultural heritage. They either put up with the conditions of their participation in clearance or their cultural heritage would be destroyed. Aside from issues of basic respect, there are also issues of principle involved.

That principle extends also to First Nations organisations. Indigenous Cultural Heritage is important not just to Traditional Owners but also to the (Anglo-Australian) "state". This is the basis of statutory protection around Indigenous Cultural Heritage. Such legislation is not a 'favour' to Traditional Owners but a manifestation of state priority. Thus, when a Traditional Owner organisation participates in a cultural heritage assessment (howsoever described) it is carrying out a statutory function on behalf of the state and should be resourced as would any other state apparatus. Unfortunately, Informants (from all sectors) reported that this principle was not applied in practice. In the context of PBCs, Informants reported similar shortcomings in situations when a PBC was exercising statutory functions under the NTA.

The final aspect of the interaction of local decision making that was raised by Informants in response to this question went to the issue of Country mapping (or Cultural mapping). The issue that was raised here, again by all sectors was that cultural heritage processes were reactive, rather than proactive. Identification of affected cultural heritage was undertaken in response to a project proposal. There was consensus amongst Informants that a preferable approach was for comprehensive Country mapping occur as soon as possible. After this mapping, project proposals could be developed informed by an awareness of cultural heritage sensitivities. Informants reported that if a process of Country mapping could take place removed from the pressures of project approvals and potential interference from other parties then the process of local decision making would occur in a more effective and inclusive manner.

Informants also frequently noted additional benefits to Indigenous cultural life and the cultural awareness of the broader community from the Country mapping approach. Some First Nations Informants noted the importance of developments in data security mechanisms in recent times. This meant that concerns that had been expressed by some First Nations Peoples some decades ago regarding the misuse of cultural information produced from Country mapping were of questionable relevance today.

Despite the broad consensus in support the benefits of a Country mapping approach, Informants reported that it was rarely adopted. The reason provided was inevitably a lack of resources. First Nations groups themselves did not have the resources to adopt the approach generally and, in the absence of resources from proponents, it was reported that governments were inevitably too short-sighted to fund the process.

The issue of Country mapping is discussed further below in response to question 10.

**Question 9. How could all levels of government work with First Nations people to address the power imbalance in decision-making on cultural heritage matters?**

All First Nations respondents felt that government Ministers should not have the final decision-making powers on cultural heritage matters. For many respondents, this sentiment extended to other related decisions such as appointments to heritage councils and other advisory bodies and decisions about regulation, penalties and compliance for heritage and other relevant environmental matters. The political nature of Ministerial decision-making was discussed by First Nations respondents as a problematic concept, as issues such as political and economic influence, time pressures and poor understanding of heritage issues could create power imbalances against First Nations peoples. Industry representatives expressed their support for government as the ultimate decision maker on cultural heritage matters, and also requested more transparency about how decisions are made.

Themes identified as useful for addressing power imbalance in decision-making included administration, agreement making, resourcing, the influence of local government, and benchmarking (including the role of heritage registers).

Agreement making and resourcing were related themes contributing to power imbalance in decision-making. Governments seek consultation with Aboriginal and Torres Strait Islander peoples through various organisations, and consider various other agreements that these organisations make with proponents as part of their decision-making processes. However, resourcing for these organisations is generally poor and greatly affects their ability to engage with these processes. Some respondents felt that under-resourcing these organisations whilst relying on them for advice leads to unstable management, resulting in activity being undertaken without approval from Traditional Owners. When approvals cannot be sought from the appropriate organisation, they are sought instead from state or territory departments.

While most industry representatives indicated that they did not overly engage with local governments, First Nations respondents expressed frustration and concern about their relationship with governments at the local level. They stated that local planning schemes, including local heritage registers, local development approvals and local environmental protections did not adequately address Aboriginal and Torres Strait Islander heritage. Respondents who discussed this issue felt that local governments did not have adequate systems in place to protect cultural heritage. Interconnections between planning and environmental legislation at the local level were raised, and the need for local governments to have their own cultural heritage policies.

Another key theme was benchmarking and the role of heritage registers. As discussed elsewhere, a number of First Nations respondents expressed their concerns about providing cultural information to government heritage registers due to lack of culturally safe information management practices amongst other issues. It was also raised that the Western notions of ‘thresholds’ of significance does not apply to Aboriginal and Torres Strait Islander peoples’ cultural views. Several respondents discussed that all heritage is important to Aboriginal and Torres Strait Islander peoples, and it cannot be rated as having different levels of significance. However, development approvals are granted on the basis that some heritage is more significant or representative than other heritage, justifying ongoing destructions. Separate, but related to, the cultural incongruency of ‘significance’, was the issue of lack of recognition of Aboriginal and Torres Strait Islander heritage generally that many respondents raised. Respondents highlighted that because Aboriginal and Torres Strait Islander heritage is often not included on heritage registers, either because communities choose not to share their cultural information or because this heritage is simply not recognised, those benchmarks of significance considered by various levels of government are not based on accurate data. It is not

known how much heritage has been destroyed, nor is it known how representative the heritage is that remains. Additionally, heritage registers' focus on physical places and objects, rather than on key aspects of Aboriginal and Torres Strait Islander heritage such as cultural landscapes and intangible heritage, means that no accurate record has been made. This means that First Nations peoples cannot contribute to balanced decision-making, as they do not have accurate evidence on which to base their advice, or with which to put forward an evidence-based argument against destruction. Although respondents indicated that addressing these issues would help address this power imbalance, they demonstrated that the scale of the problem is so large that it is difficult to consider how any meaningful change could be made in time to prevent extensive destruction of heritage.

**Question 10. Are there any other priorities around First Nations cultural heritage that you would like to raise, e.g. policy or administrative improvements, concerns around climate change, repatriation and sacred artefacts, or Indigenous Cultural Intellectual Property?**

***Context.*** *This question sought to draw from participants responses on any issues not raised through other questions, to ensure there was space for all issues to be raised. Although the question contains examples of areas in which participants may like to make a further comment, and these examples featured heavily in responses, participants were encouraged to raise anything of concern or interest.*

In order to cover the breadth of responses, we record the feedback received under the headings below:

***Repatriation***

Repatriation, being the return of ancestral remains or sacred objects, were raised by multiple First Nations groups, along with its interactions with cultural heritage laws.

Of particular concern was that many groups spoke to the inadequacy and uncertainty of funding in relation to the repatriation of human remains. Multiple jurisdictions spoke of such remains being kept in storage, often in morgues but often in improvised storage such as cold storage units, as the volume of remains and inadequacy of funding, meant it was not possible to carry out the research and make the necessary arrangements to return them to their descendants.

In addition to these practical problems, it was also noted that legislation in some jurisdictions established the Crown as the owner of substantial numbers of Aboriginal ancestral remains (for instance s 83 *National Parks and Wildlife Act 1974* (NSW)).

Multiple groups raised issues relating to the slowness of some institutions in returning sacred objects, and noted that even where institutions were willing, there was generally little funding available for First Nations group to store them in appropriate conditions. Different groups expressed different preferences for artefact storage. Some groups want to keep artefacts on Country in their original location, others want them to be protected elsewhere rather than be further disturbed.

***Cultural Heritage Registers and ICIP***

In relation to ICIP, many Aboriginal and Torres Strait Islander respondents expressed concerns about how their information is stored and accessed. They wanted more clarity about what their information is used for. In some cases, groups did not want governments to know where their sites were, and therefore did not want their sites registered at the local, state or national level. They wanted to better understand the role of heritage registers before releasing their information for storage on external registers. Some groups maintained their own internal registers because of their concerns about releasing information for storage on external registers. Some respondents would like Commonwealth

agencies to become culturally safe, with the ability to store data and information safely and securely. ICIP issues about ethnobotanical information (such as bush foods and bioprospecting) were raised by several respondents. Issues discussed included how this information is protected and paid for, and how recording this information would fit within existing heritage registration systems. The integrity of heritage consultants was discussed by some respondents, including how they manage information provided to them.

***Administrative improvements***

In relation to administrative improvements, the key issue raised by First Nations respondents was the importance of education for both Aboriginal and Torres Strait Islander peoples, and for Australians generally.

Informants repeatedly argued that there should be clear guidance available about the steps and processes that people can undertake to protect heritage under current legislative regimes. Additionally, the difficulties faced by Aboriginal and Torres Strait Islander peoples as they try to care for their heritage under current legislative regimes should be made more widely known. Examples of issues that Australians could be made more aware of include Aboriginal and Torres Strait Islander peoples' trauma when legislation that should protect their heritage is interpreted in ways that facilitate destruction, and the way that organisational structures and groupings of government departments can sometimes facilitate an administrative environment that lacks communication between relevant policy areas and thus adversely affects the potential protections offered by existing legislation.

Many respondents felt that the lack of clarity and difficult nature of legislative administration contributes to power imbalance, and that there needs to be more Indigenous people working in heritage regulatory bodies.

***Climate change and Environmental factors***

First Nations informants raised multiple environmental issues that they felt were having, or were likely to have, an impact on First Nations cultural heritage issues. These included things like water management, species management, forest management and biodiversity as key areas that affect intangible cultural heritage when they are poorly managed.

Climate change and sustainability were critical to this discussion, both for future management, and damage currently occurring due to extreme weather events. Respondents felt better understanding was needed about the intersection between climate impacts and heritage protection, and the two issues needed to be better incorporated. This discussion linked back to the need to be more proactive to better manage heritage. Several respondents discussed that due to the urgent nature of emergency responses after extreme events such as flood or fire, heritage which may have already been damaged during an event could be inadvertently additionally damaged due to poor planning and understanding, and inadequate consultation, during response. Lack of effective water policy was raised by several respondents, as water management affects so many interlinked environmental issues. Overall, respondents indicated that an overall deeper understanding of about heritage values and cultural landscapes would lead to better environmental outcomes.

## Analysis and issues for Further Consultation

The consultations reported above have identified a wide range of matters about which there is a broad, if not universal, consensus. These matters include:

- The need for Commonwealth legislative reform.
- The desirability of maintaining state and territory regimes that are sensitive and adaptable to local conditions.
- The belief that there is a need to ensure that these state and territory regimes maintain an acceptable standard of protection for Indigenous Cultural Heritage – accreditation.
- The desirability of ensuring that the overall legislative structure coordinates various legal obligations (for example native title, cultural heritage, planning, and environmental).
- The need to recognise the unique role of the Commonwealth in some areas (intangible heritage and movable cultural heritage for example).
- The need for a 'paradigm shift' away from ICH regimes that are focussed on "managed destruction" to ones focussed on protection and celebration.
- The need for a greater appreciation by governments, proponents and in legislation of both intangible heritage and the intangible aspects of tangible heritage.
- The importance of ensuring consideration of ICH at the earliest possible opportunity, ideally before project conception (i.e., Country mapping).
- The importance of ensuring that approval processes are commensurate with the significance of impact on ICH.
- The central role of effective, well-resourced enforcement mechanisms.
- The importance of First Nations Peoples making decisions about their own cultural heritage in all its manifestations– FPIC.
- The importance of First Nations Peoples having sufficient resources to give effect to these decisions.

These matters about which a broad consensus has been identified in themselves provide an important foundation for the design of any future legislative initiative by the Commonwealth. However, they also point to a number of areas where further consultation is necessary with First Nations Peoples to ensure the legitimacy of any future legislation and with other stakeholders to ensure the viability of any legislative proposals. These are set out below. Under each heading are several questions discussion of which would facilitate clarification of the necessary detail needed to inform any legislative proposal.

**Legislative Model**

- If there is to be a system of "accreditation" of state legislation that satisfies Commonwealth defined standards:
    - Who or what will form the 'accreditation authority'?
    - If the accreditation authority is to be a new statutory body comprised of First Nations Peoples, how (by who) is the membership of this body to be determined?
    - What are the consequences of a state or territory regime being determined to **not** satisfy the accreditation statement in whole or in part?
    - In the event a state or territory regime is not accredited will a 'default' Commonwealth regime apply? Will there be the ability to determine a 'make good' period?
    - If a state or territory regime is accredited, will the Commonwealth regime play any further role (for example 'last resort' appeals)?
    - Is accreditation to be determined on 'the face' of state or territory legislation or will the accreditation authority be able to look at administrative and operational matters

(for example regulations and other delegated instruments, staffing and other resources)?
- Is accreditation 'once off' or subject to ongoing or cyclical review?

**Standards**

- If the "standards" approach is to be utilised:
  - Are standards to be enforceable (accreditation model) or are they to be advisory (e.g., 'name and shame' model)?
  - Are the standards 'best practice' or 'minimum'?
  - Are the standards to be in conformity with UNDRIP and other international instruments? (And if so, which instruments are relevant?).
  - If the standards are not to be informed by international norms, what will be the reference point?

**Giving Effect to FPIC**

- Any new legislation (or legislative standards) will need to be clear about what it means to ensure Free, Prior and Informed Consent:
  - *How* is 'the Right People to speak for Country' (the "representative institution" – UNDRIP Art, 32.2) determined?
  - *Who* is determining this? Is it done at a state level (by who?) by a national authority? (So, for example, if state legislation is accredited, would this include approval of the state process for appointment of the "representative institution"?)
  - How can legislation ensure that appointment of a representative institution is "by the relevant First Nations Peoples themselves and in accordance with their own procedures" (UNDRIP Art 18)?
  - If a PBC exists, should it "speak for country" in its determination area?
  - If a PBC does not "speak for country" under ICH legislation what impact does this have on coordination with native title legislation?
  - What procedure should be adopted when there is no accepted representative institution?
  - How are adequate resources for the "representative institution" to be ensured?
  - What does "consent" in the context of cultural heritage approvals look like?
  - Does the consent requirement mean that First Nations Peoples can refuse to authorise ***any*** interference with their cultural heritage? If the right is more limited, when is a right to refuse enlivened?
  - Should legislation require that affected First Nations Peoples are informed of ***all*** proposals to interfere or damage their cultural heritage. If not, then what is the criteria for a requirement to inform affected First Nations Peoples? For example should a requirement to inform only arise when there is a risk of significant interference with cultural heritage?
  - How can *free*, *prior*, and *informed* consent be supported by legislation?
  - How can "ongoing consent" be incorporated into cultural heritage approvals while still providing proponents with necessary certainty?

**Legislation Content**

- Aside from legislative models there are some matters of content that need to be included in any new legislation (both Commonwealth and state/territory)

- How best can early consideration of ICH issues and Country Mapping be built into legislation to ensure we move from 'managed destruction'?
- How can Commonwealth legislation best serve First Nations' needs around Intangible Indigenous Cultural Heritage and movable cultural heritage?
- How can ICH legislation best coordinate with other legislation particularly native title but also project focussed legislation such as environment and planning laws?
- What rules should govern the management of and access to any 'cultural heritage register' created?

**Matters Beyond Legislation**

- Improving Indigenous Cultural Heritage Protections ids about more than new legislation.
  - How can First Nations Peoples be empowered to protect their cultural heritage in the face of threats such as climate change?
  - What non-legislative measures can governments and civil society take to ensure the celebration of Australia's Indigenous cultural heritage by the broader community?
  - How can First Nations Peoples be empowered to strengthen and thrive in their culture?
  - How can we achieve greater global recognition of the importance, value and wonder of Australia's Indigenous cultural heritage?

## Conclusion and Next Steps

The Stage 1 consultation process has shown the broad and willing consensus around the need for improvement of Indigenous Cultural Heritage protections in this country. It has also shown the urgency that First Nations Peoples see in achieving this goal. It has shown their desperation, sadness, and anger that day by day aspects of their cultural heritage, and of the country's cultural heritage, is being impaired and even destroyed without legislative protection and often without even thought.

The Stage 1 consultation has also shown that across First Nations Peoples and their organisations, state and territory governments, statutory authorities, industry and industry peak bodies, academics and specialised professionals there is a shared understanding around many of the changes that are necessary to address this situation.

This Directions Report has been able to articulate many aspects of that shared understanding. However the Stage 1 consultations have also identified many areas that need further exploration and discussion. This is the task of the Stage 2 consultations. The discussions that took place in the Stage 1 consultations have enabled the Partnership to define and clarify these areas in need of further exploration. Those matters have been set out as fully as possible in the previous section of this Report.

These issues will now be incorporated into a Stage 2 Options Paper which will form the basis of the Stage 2 Discussions. A draft of this Options Paper is an Appendix to this Directions Report. It may be that as a result of the State 2 Discussions there can be no broad consensus reached as to the shape of any legislative and other reform. It may be that such consensus can be reached.

Irrespective of whether consensus is reached or not, the Stage 2 Consultation Process will provide an outcome that will enable the partnership to put before the Government a concrete proposal that has the broad support of First Nations Peoples. It will also ensure that the partnership is in a position to fully inform Government of the views of non-Indigenous stakeholders as to how they think Indigenous Cultural Heritage should be protected.