



## **MURUJUGA ABORIGINAL CORPORATION**

### **SUBMISSION TO THE JOINT STANDING COMMITTEE ON NORTHERN AUSTRALIA**

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

**August 2020**

## **1. Introduction**

### Acknowledgement

1.1 The Murujuga Aboriginal Corporation pay our respects to the Elders and Traditional Custodians, past present and emerging, of the Murujuga Land and Sea Country on whose behalf we make this Submission to the Australian Parliament.

1.2 We also pay our respects to the Elders, past present and emerging, of the Ngunnawal custodians of the land on which the Australian Parliament meets.

### The Murujuga Aboriginal Corporation

1.3 Murujuga Aboriginal Corporation (MAC) is made up of members from five Traditional Owner and custodian groups: the Ngarluma, the Mardudhunera, the Yaburara, the Yindjibarndi, and the Wong-Goo-Tt-Oo. MAC's mission is to preserve and protect its landholdings for future generations and to enrich and support the welfare of its members, now and into the future. MAC recognises that it is in a unique situation. MAC brings together these five language groups, each with their own dynamics, to pave the way for future generations, to work together for Country, and to respect cultural lore, heritage, and traditions.

1.4 MAC was incorporated on the 19th April 2006 and is the approved body corporate for the Burrup and Maitland Industrial Estates Agreement (BMIEA). MAC administers the implementation of contractual obligations under the terms of the BMIEA.

1.5 Following a long struggle for Native Title recognition, the three Contracting Parties comprising the Ngarluma-Yindjibarndi (1994), Yaburara Mardudhunera (1996), and the Wong-Goo-Tt-Oo (1998) received land entitlements and financial benefits in return for surrendering their native title rights and interests over the Burrup. This was documented in the BMIEA.

1.6 As MAC is not a Prescribed Body Corporate (PBC) for the purposes of native title, it does not receive royalties. Instead, MAC holds the freehold title to Murujuga National Park which adjoins the industrial land. The WA Government has allocated various areas for infrastructure and industrial development on the Burrup Peninsula.

### Murujuga the place

1.7 Murujuga is the language name for the entirety of the area which encompasses the Burrup Peninsula and the off-shore islands of the Dampier Archipelago, which should not be confused with the Dampier Peninsula in WA's Kimberley region.

1.8 Murujuga National Park is the 100th national park in Western Australia. It is famous for its ancient rock art or petroglyphs. More than forty thousand years ago, the Yaburara people of Murujuga commenced pecking the surface of the rocks, thereby creating the petroglyphs that we see today. These differ from rock paintings called 'pictographs' that are not found at Murujuga.

1.9 Unlike other rock art sites around the world, the petroglyphs of Murujuga are still highly relevant to the contemporary Aboriginal people of Murujuga, who today live in cities and towns such as Karratha, Roebourne, Wickham and even Perth, WA. Murujuga's rock art is also of continuing importance to archaeologists, scientists, scholars and other researchers who continue to add new finds to the more than one million petroglyphic images already recorded. Murujuga was the first national park in Western Australia to be co-managed, with MAC sharing responsibilities for the park with the Department of Biodiversity, Conservation and Attractions (DBCA).

1.10 In August 2018, MAC and the State Government signed an agreement to pursue World Heritage Listing for Murujuga. It is hoped that global recognition of the region's cultural significance will drive tourism in the area and assist in the preservation of the rock art collection, for future generations. To further this objective, the Murujuga Rock Art Strategy (2019) was ratified by the WA Government in November 2019. A Partnership Agreement between MAC and the Department of Water and Environmental Regulation was also signed at that time.

1.11 Aboriginal heritage sites as well as adjoining lands are co-managed by MAC, the WA Department of Planning, Lands and Heritage (DPLH) and DBCA, through the Parks and Wildlife Service. A designated DBCA-Parks and Wildlife Service Ranger Liaison Officer works closely with the MAC Rangers who are located at the Murujuga Land and Sea Unit (MLSU). The MLSU is tasked with managing the land and waters of Murujuga National Park. The Murujuga National Park Management Strategy, together with the Murujuga Cultural Management Plan, provide a model and framework for efficient and effective co-management arrangements between MAC and the WA Government.

## **2. Scope of this Submission**

2.1 MAC members grieve for the destruction of the caves and of the evidence of 40,000 years of Aboriginal presence in that place, and share the sorrow of our Puutu Kunti Kurrama and Pinikura brothers and sisters. There are many members of MAC who have family links to the Traditional Owners of the Juukan Gorge site, and many of these MAC members would have some knowledge of, and views regarding, the circumstances which have led to the destruction of the rock caves at that place.

2.2 However, we do not feel it is our place to speak publicly about the specific circumstances of the Juukan Gorge case, as set out in the Committee Inquiry's Terms of Reference (a) to (e). Instead, this Submission seeks to address the broader issues of Western Australian State and Commonwealth legislative and administrative frameworks for the protection of Indigenous cultural heritage, as set out in the Inquiry Terms of Reference (f) to (j), below.

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

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

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

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

(j) any other related matters.

2.3 This Submission outlines MAC experience with the various State and Commonwealth legislative frameworks which aim to identify, conserve, manage and protect Indigenous cultural heritage sites and objects. We will then set out in paragraphs 7.1-7.8 a number of improvements MAC believes should be made to these frameworks, based on MAC experience over many years.

### **3. MAC experience with the Commonwealth EPBC Act**

#### **National Heritage List**

3.1 In 2004 the area then known as the Dampier Archipelago was one of the first places in Australia to be nominated for National Heritage listing under the new Commonwealth Heritage legislation (the newly inserted Chapter 5, Part 15, Division 1A of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)).

3.2 In 2007 the then-Minister for the Environment and Water, the Hon Malcolm Turnbull decided to list the Dampier Archipelago on the National Heritage List (NHL), as meeting 5 of the criteria for NH Listing (see Australian Heritage Database entry [http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place\\_detail;place\\_id=105727](http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;place_id=105727)).

The place is described as

“... the magnificent Dampier Archipelago in Western Australia, where the striking red earth of the Burrup Peninsula meets the blue Indian Ocean, rock engravings thought to number in the millions and other significant sites are helping us learn more about our Indigenous heritage.

Made up of islands, reefs, shoals, channels and straits, and covering a land area of around 400 square kms, the Burrup Peninsula is 27 kms long and four kms wide. Many important native plants, animals and habitats are found in the area.

The Archipelago was formed 6-8000 years ago when rising sea levels flooded what were once coastal plains. The underlying rocks are amongst the oldest on earth, formed in the Archaean period more than 2400 million years ago.

This is a sacred place, home to Indigenous Australians for tens of thousands of years. Ngarda-Ngarlie people say ancestral beings created the land during the Dreamtime, and the spirits of Ngkurr, Bardi and Gardi continue to live in the area. They have left their mark in features like the Marntawarrura, or 'black hills,' said to be stained from the blood of the creative beings.

This place of beauty is also home to one of the most exciting collections of rock art in Australia. The richness and diversity of this art is remarkable, with sites ranging from small scatters to valleys with literally thousands of engravings.

Sites types include quarries, middens, fish traps, rock shelters, ceremonial sites, artefact scatters, grinding patches, stone arrangements and engravings. Engravings are the most numerous type of site, with images potentially numbering in the millions. Large concentrations are found on inland plateaus, steep valley inclines bordering waterways and on rock platforms next to the ocean. Created by pecking, pounding, rubbing and scratching, the engravings provide a fascinating insight into the past."

3.3 See the attached Map 1 for the boundaries of the NHL place. As a consequence of this decision to list on the NHL, the Burrup Peninsula and off-shore islands effectively became a Matter of National Environmental Significance (MNES) under the EPBC Act, subject to the requirements for protection, conservation and management as set out in the Act, including penalties for taking actions which significantly impact on the listed values of the place (s.15B, EPBC Act). These requirements post-date some Commonwealth approvals relevant to the Burrup Peninsula; Woodside Petroleum had begun assessments for gas treatment plants as early as 1978, and had approvals for the Karratha Gas Plant-North West Shelf operations under the *Environment Protection (Impact of Proposals) Act 1974* (EPIP Act), the predecessor of the EPBC Act.

### Conservation Agreements

3.4 Further to the decision to NH list the place, the Commonwealth also negotiated two Conservation Agreements in relation to the protection of National Heritage values of the Burrup Peninsula and associated islands, with the two primary corporations undertaking industrial development and operations adjacent to the NHL place, ie Woodside Energy Ltd in relation to the Pluto LNG processing development (this CA publicly available at <http://www.environment.gov.au/system/files/pages/4b63db66-1d8e-4427-91d1-951aff442414/files/ca-woodside.pdf>) and Hamersley Iron Pty Ltd/Dampier Salt Ltd, later Rio Tinto Pty Ltd, in relation to iron ore rail and port transport operations at Dampier (CA publicly available at <http://www.environment.gov.au/system/files/pages/4b63db66-1d8e-4427-91d1-951aff442414/files/ca-hamersley.pdf>). These Conservation Agreements have operated since 2007, about a year after MAC was incorporated, and the parties to the

Agreements are the two companies and the Commonwealth, MAC was not a party to these Agreements.

3.5 These Conservation Agreements are made under Part 14 of the EPBC Act, which provides:

**305 Minister may enter into conservation agreements**

- (1) The Minister may, on behalf of the Commonwealth, enter into an agreement (a *conservation agreement*) with a person for the protection and conservation of all or any of the following:

...

- (c) the National Heritage values of a National Heritage place; ...

3.6 As is clear from these Departmental lists of all Conservation Agreements undertaken through the EPBC Act (set out at para 3.3 above), the Conservation Agreements relating to Murujuga are in a unique situation. Of the 36 Conservation Agreements ever made under the EPBC Act, the two referred to above operating for Murujuga are the only two undertaken solely for protecting the National Heritage listed values of a place; the other 34 Agreements relate to threatened species or ecological communities, for instance.

3.7 The Agreements set out different accountability and governance mechanisms for each of the companies, and were based on different amounts of the 'Net Benefit Funds' available through each Agreement (and the companies have maintained that these amounts are commercial-in-confidence). The Net Benefits Funds were determined through the initial negotiations between the Commonwealth and the companies, and are not tied to production levels, investment levels or profits, as would be the case if MAC was a PBC and in receipt of royalty payments. Instead, under the Agreements MAC has been expected to approach the two companies seeking project-based and time-limited funding.

3.8 In MAC's view, these Agreements focussed on the identification and physical conservation of the millions of petroglyphs found on Murujuga lands, including on the islands. The NHL boundaries do not include the sea areas surrounding the peninsula or islands. Nor do the Agreements specifically refer to the potential impact of industrial emissions on the rock art, as this issue is primarily the jurisdiction of the WA State Government.

3.9 There is no doubt that the existence and operation of these Conservation Agreements has resulted in the identification, conservation, management, protection and presentation of the NHL values of the place now known as Murujuga. Net Benefit Funds have supported the University of WA Archaeology Field Schools, the Murujuga Land and Sea Ranger Unit pilot and ongoing operations, as well as MAC projects and community development activities. While in the early years the companies acted quite independently in funding activities, in recent years and with the active encouragement of MAC and the Commonwealth Department they have

taken a more collaborative approach both with each other and with WA State agencies and other companies operating on the Peninsula. There has also been a move to greater collaboration between all parties with an interest in the co-existence of industry development with the outstanding cultural values of Murujuga, particularly with the signing of the Deep Gorge Statement between the CA parties in 2017 and the establishment of the broad-based Deep Gorge Working Group (now known as the Ngajarli Working Group).

### Review of the Conservation Agreements

3.10 The Conservation Agreements stipulate that they will be reviewed every five years, and the second review was undertaken in 2019. This was timely as the initial allocation of Net Benefit Funds are almost exhausted. With the agreement of the companies and the Commonwealth, this review was undertaken by Ms Anthea Tinney, a former Deputy Secretary of the Commonwealth Environment Department responsible for the 2007 negotiation of the Conservation Agreements.

3.11 While MAC is aware that the Review has been completed and provided to the CA parties, MAC has not seen a copy of the final Tinney Report. MAC expects that Ms Tinney would have set out useful recommendations for updating the Agreements, supporting transparent accountability and governance frameworks, and for expanding the framework of CA parties to include MAC, WA State Government agencies and other companies operating on Murujuga. This is relevant to the later section of this Submission, where MAC sets out possible areas for reform of cultural heritage protections.

### Approvals processes

3.12 As referred to above, the Murujuga Conservation Agreements were negotiated and put in place at the time Woodside Energy was undergoing the environmental assessment and approvals processes under the EPBC Act for the Pluto LNG processing facility adjacent to the National Heritage listed place. Woodside had pre-existing approvals under the EPIP Act for the Karratha Gas Plant/North West Shelf facility, and those approvals relate to an expected life of the NW Shelf resource and of the Gas Plant which is due to expire in the next decade.

3.13 In 2019 Woodside lodged four EPBC Act referrals for further development of off-shore resources and of on-shore pipeline and processing facilities, including an extension of life and upgrade of the Karratha Gas Plant (KGP) facility. This is the first time that the KGP facility and its operations will be assessed and considered under the EPBC Act, including its impact on the National Heritage values of the listed place. NHL values is the sole controlling provision for the assessment process currently underway for the KGP referral, meaning for the first time the KGP's physical and emissions impact on the Murujuga rock art will form part of the Commonwealth's responsibilities.

3.14 In response, Woodside is factoring into its long-term investment scoping how it can limit its impact on the National Heritage values of the place, including limiting development to the current physical footprint (which resulted in significant disturbance to the rock art in the 1980's) and committing to significant reductions to current levels of emissions from the KGP facility through technology improvements and the siting of power generation.

3.15 Woodside Energy is currently undertaking the formal Environmental Impact Assessment process (as required under Part 8 of the EPBC Act) for these referrals, most relevantly for MAC in relation to the proposed extension of life for the NW Shelf facility adjacent to the NHL listed place. While MAC has been consulted by Woodside during this ongoing process, MAC would welcome further and better engagement with Woodside over the next 6 months, in order to ensure the best scientific information and traditional knowledge is available to Woodside for the Environment Impact Assessment process, and ultimately to be considered by the Minister in making her decision regarding approval and conditioning of Woodside's proposals. MAC is committed to long-term, respectful and collaborative working relationships with all of our partners on Murujuga country.

3.16 MAC also strongly believes that this assessment and approval process provides Woodside with an excellent opportunity to re-establish and reinforce a strong and collaborative working relationship with the Traditional Owners of the Country on which their substantial investments are proposed. The recent tragic incidents at Juukan Gorge serve to remind all large corporations operating on Aboriginal land and sea country of the importance of paying ongoing attention to strengthening their social licence to operate on that country.

3.17 MAC also has experience with EPBC assessment and approvals processes in relation to other companies who have sought to develop industrial facilities on Murujuga country. MAC has for a number of years had positive engagement with YARA Australia in relation to its fertiliser and Technical Ammonium Nitrate plants operating on Murujuga country, including in relation to assessment, conditions and monitoring emissions. MAC is also engaged with Perdaman Group in relation to their proposed fertiliser plant and their assessment process is currently underway. There are also a number of other proposals for development in the vacant leases remaining across the peninsula, and MAC hopes and expects that those companies will constructively engage with MAC as the representative of the Traditional Custodians of this special and sensitive place.

#### **4. Nomination of Murujuga for World Heritage listing**

4.1 In 2018 MAC, on behalf of the five Traditional Owner and custodian groups, together with the Premier of WA co-signed a letter to the Commonwealth Government initiating the process of nominating Murujuga country for World Heritage listing. Following the successful example of the Budj Bim Cultural Landscape listing



in 2019, the Murujuga nomination is being led by the Traditional Custodians of the five groups. The inclusion of Murujuga on Australia's World Heritage Tentative List was supported by all States and Territories and by the Australian Government, and in January 2020 the Australian Government lodged this addition to the Tentative List with the World Heritage Committee.

#### 4.2 The Tentative List Submission begins with these words:

The Traditional Custodians of Murujuga, the Ngarluma, Yindjibarndi, Yaburara, Mardudhunera and Wong-Goo-Tt-Oo groups, collectively referred to as *Ngurra-ra Ngarli*, have taken the lead in proposing the Murujuga Cultural Landscape for inclusion on Australia's World Heritage Tentative List. *Ngurra-ra Ngarli*, represented by the Murujuga Aboriginal Corporation, have prepared this Tentative List Submission in partnership with the Western Australian Government and with the support of the Australian Government.

4.3 If this nomination is to be successful it will need to directly address the development pressures on the Outstanding Universal Values (OUV) of the Murujuga country, and how those pressures are to be managed in future. Inscription on the World Heritage List would add MNES grounds under the EPBC Act, and generally speaking the protections available are the same as for the NH Listing already in place for Murujuga.

4.4 However the specific nature of protections will depend on the nature of the OUV set out in the final WH Nomination Dossier and the boundaries of the place as nominated. As the protections offered by the EPBC Act directly relate to avoiding "significant impact on the listed values of the place", the specific values set out in the listing are critically important. There are some aspects of the Tentative List (TL) Submission which are different to the 2007 National Heritage listing, such as the scientific understanding of the origins and meanings of artworks, the timelines for inundation and revealing of coastlines, and the WH TL Submission contains reference to the 1868 Flying Foam Massacre which the NHL listing does not.

4.5 Similarly, while the 2007 NHL boundaries are a starting point for determining WH place boundaries, there is a significant amount of scientific and other work that needs to take place in order to determine where the OUV of the place are situated. The issue of WH boundaries is a complex and sensitive issue for all parties, for MAC and the Circle of Elders, for State and Commonwealth agencies and regulators, and for industries currently operating on Murujuga country or seeking to be so in future.

## 5. MAC experience with other Commonwealth ICH protection legislation

5.1 MAC has had limited interaction with other Commonwealth Indigenous cultural heritage legislation to date, although this may change in future.

### Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSHPA)

5.2 In MAC's view, the protections available under the ATSIHP Act are more relevant for places which are not listed, and therefore protected, under the EPBC Act arrangements. As Murujuga has been NH listed since 2007, and is also undergoing a nomination process for WH listing, there has not to date been a need for MAC or the Murujuga community to consider action under the ATSIHP Act.

5.3 However, it is worthwhile noting that, as the EPBC and ATSIHP Acts are completely separate pieces of legislation, there is no statutory bar to MAC, or indeed any Aboriginal person, making application for a protection Declaration in relation to a listed place. MAC understands that, if such a valid application were to be made, the relevant Commonwealth Minister would be legally bound to consider it.

### Underwater Cultural Heritage Act 2018 (UCH Act)

5.4 Following Parliamentary passage of the UCH Act the definition of underwater cultural heritage objects to be protected was broadened from historic shipwrecks to any objects of human origin:

#### **15 Meaning of *underwater cultural heritage***

- (1) *Underwater cultural heritage* means any trace of human existence that:
  - (a) has a cultural, historical or archaeological character; and
  - (b) is located under water.
- (2) For the purposes of subsection (1), a trace of human existence includes:
  - (a) sites, structures, buildings, artefacts and human and animal remains, together with their archaeological and natural context; and ...

5.5 While this legislation is too recent to have been tested, MAC understands that this definition clearly includes objects of Indigenous cultural heritage which are now on the seabed floor, including rock art. However, while the UCH definitions have been broadened to include Indigenous cultural heritage material, there remains an important discrepancy in the treatment of non-Indigenous heritage items, such as shipwrecks and aircraft, and the treatment of Indigenous heritage material found underwater.

5.6 Shipwrecks and aircraft underwater are automatically protected under s.16:

#### **16 Underwater cultural heritage that is automatically protected**

- (1) The following articles are protected underwater cultural heritage:
  - (a) all remains of vessels that have been in Australian waters for at least 75 years;
  - (b) every article that is associated with a vessel, or the remains of a vessel, and that has been in Australian waters for at least 75 years;
  - (c) all remains of aircraft that have been in Commonwealth waters for at least 75 years;

- (d) every article that is associated with an aircraft, or the remains of an aircraft, and that has been in Commonwealth waters for at least 75 years.

5.7 In contrast, under s.17, Indigenous cultural heritage material is only protected once the Minister is satisfied that it is of heritage significance and declare it so by notifiable instrument. Clearly, protection of Indigenous material is not automatic, and is only put in place **if** someone requests the Minister to do so, **if** the Minister is satisfied that it is of heritage significance, and **if** the Minister makes the necessary legislative instrument.

## 17 Underwater cultural heritage that may be declared to be protected

- (1) The Minister may, by notifiable instrument, declare an article covered by the table in subsection (5) to be protected underwater cultural heritage if the Minister is satisfied that the article is of heritage significance.

Note: For matters the Minister must have regard to when deciding whether an article is of heritage significance, see section 22.

...

- (5) The following table sets out the articles that may be declared under subsection (1).

Articles that may be declared		
Item	This kind of article:	If the article:
1	The remains of a vessel	Is in, or has been removed from, Australian waters
2	An article associated with a vessel, or the remains of a vessel	Is in, or has been removed from, Australia waters
3	The remains of an aircraft	Is in, or has been removed from, Commonwealth waters
4	An article associated with an aircraft, or the remains of an aircraft	Is in, or has been removed from, Commonwealth waters
5	An article of underwater cultural heritage that is not otherwise covered by an item in this table	Is in Commonwealth waters

5.8 The Act establishes a criminal offence of conduct which will directly or indirectly disturbs, damages or removes the object.

## 30 Conduct having an adverse impact on protected underwater cultural heritage prohibited without a permit

- (1) A person contravenes this subsection if:
- (a) the person engages in conduct; and
  - (b) the conduct has, will have or is likely to have an adverse impact on protected underwater cultural heritage.

- (2) Conduct has an ***adverse impact*** on protected underwater cultural heritage if the conduct:
- (a) directly or indirectly physically disturbs or otherwise damages the protected underwater cultural heritage; or
  - (b) causes the removal of the protected underwater cultural heritage from waters or from its archaeological context.

5.9 These recent protections for Indigenous cultural heritage objects on the sea floor introduce new protections for items not otherwise covered by, for instance, the EPBC Act because NHL boundaries cover only the land areas of the place. Indigenous cultural heritage in sea country is relevant to the Traditional Custodians of Murujuga because there are already a number of gas pipelines coming ashore at Murujuga, proposals for more to be laid, and dredging occurs in shipping channels servicing the Port of Dampier.

5.10 Recent publication by the Deep History of Sea Country project (Flinders and WA Universities) have set out important archaeological discoveries they have made in the Murujuga Sea Country. Stone tools and other evidence of long-term human habitation have been found in areas that were once 160km from the coastline, and which were inundated at the last Ice-Age melt and are now up to 25 metres underwater, making this evidence of human activity at least 8500 years old. These discoveries are reported at

<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0233912>, and constitute the oldest underwater evidence of human habitation related to the Australian continent.

5.11 These important discoveries highlight the continuing disparity in the UCH Act between the automatic protection of non-Indigenous objects underwater, such as shipwrecks and aircraft, and the conditional protection of Indigenous cultural heritage found underwater. We currently have a situation in Australia where a shipwreck that is 75 years old is given automatic protection, but to protect an Aboriginal site that is 7,000 years old the Minister must be asked to do so, and must be satisfied that it is “of heritage significance”.

5.12 As the authors of this study point out, this discrepancy in the Australian legislation’s treatment of Indigenous and non-Indigenous archaeological material is in contrast to those countries that have signed the 2001 *UNESCO Convention on the Protection of the Underwater Cultural Heritage* (which protects all categories of UCH sites over 100 years old), and member states of the European Union, which are required to include submerged landscape archaeology in environmental impact assessments in advance of offshore industrial development.

## **6. MAC experience with WA Indigenous cultural heritage protection legislation**

6.1 The primary piece of Indigenous cultural heritage protection legislation in Western Australia is the Aboriginal Heritage Act 1972 (AHA). In relation to heritage places, Section 5 states:

### **5. Application to places**

This Act applies to —

- (a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;
- (b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;
- (c) any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;
- (d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.

6.2 Section 17 establishes offences of damaging or destroying any Aboriginal site, and these offences apply irrespective of whether those sites have been registered.

### **17. Offences relating to Aboriginal sites**

A person who —

- (a) excavates, destroys, damages, conceals or in any way alters any Aboriginal site; or
- (b) in any way alters, damages, removes, destroys, conceals, or who deals with in a manner not sanctioned by relevant custom, or assumes the possession, custody or control of, any object on or under an Aboriginal site,

commits an offence unless he is acting with the authorisation of the Registrar under section 16 or the consent of the Minister under section 18.

6.3 Section 18 establishes a power for the Minister, acting on the advice of the Aboriginal Cultural Material Committee, to consent to actions regarding Aboriginal sites that would otherwise be offences against the Act.

## 18. Consent to certain uses

...

- (2) Where the owner of any land gives to the Committee notice in writing that he requires to use the land for a purpose which, unless the Minister gives his consent under this section, would be likely to result in a breach of section 17 in respect of any Aboriginal site that might be on the land, the Committee shall, as soon as it is reasonably able, form an opinion as to whether there is any Aboriginal site on the land, evaluate the importance and significance of any such site, and submit the notice to the Minister together with its recommendation in writing as to whether or not the Minister should consent to the use of the land for that purpose, and, where applicable, the extent to which and the conditions upon which his consent should be given.
- (3) Where the Committee submits a notice to the Minister under subsection (2) he shall consider its recommendation and having regard to the general interest of the community shall either —
  - (a) consent to the use of the land the subject of the notice, or a specified part of the land, for the purpose required, subject to such conditions, if any, as he may specify; or
  - (b) wholly decline to consent to the use of the land the subject of the notice for the purpose required,and shall forthwith inform the owner in writing of his decision.

...

6.4 MAC has estimated that there are approximately 6000 identified cultural heritage sites on Murujuga country. Only a fraction of these have been registered with the Department of Aboriginal Affairs (now the Department of Land, Planning and Heritage) under the provisions of the AHA. The attached map 2 illustrates the AHIS Registered Sites. The high density of sites within the industrial leases (Woodside's Pluto and NW Shelf Projects, and Rio Tinto leases) reflects the intensive surveys carried out prior to development, rather than the actual archaeological signature in the area.

6.5 In MAC's experience, the existence or operation of the AHA has not prevented damage to, or the destruction or removal of, sites or cultural objects. While heritage surveys undertaken as part of industrial developments proposals have served to document sites and objects already known to our Traditional Custodians, it has often been the case that these survey results have simply facilitated the removal of petroglyphs as part of site works for gas processing plants or rail-lines. For instance, during the construction of Woodside's NW Shelf facilities during the 1980's, 1,828 pieces of rock art were removed from their cultural context and stored in a fenced compound for some 30 years – these were only returned to places agreed by

Traditional Owners in 2014. The operation of the 1972 AHA did not prevent the removal of these objects from their cultural sites, nor the damage that occurred to some during their collection and storage.

6.6 In contrast to the above negative view of the AHA, MAC has recently engaged with the AHA and the EPBC Act in relation to our proposal (funded under the Commonwealth's Australian Heritage Grants program) to construct a boardwalk structure at the Ngajarli viewing area (previously known as Deep Gorge). This is one of the most sensitive, yet accessible, areas of Murujuga, and our boardwalk proposal is designed to manage the visitor pressures on the site, and to educate the visitors to the cultural features and sensitivity of the place. Both legislative frameworks enabled us to progress this proposal while avoiding or mitigating impacts on the cultural values of the place.

6.7 More broadly, MAC shares the view of many Aboriginal community organisations in Western Australia that this legislation has not operated to effectively protect Aboriginal heritage places in this State. Section 18 consents have been relied on by landholders and industries to circumvent any need to consider more sensitive approaches to undertaking works, or indeed any need to properly sit down with Traditional Custodians to explore mutually acceptable outcomes.

6.8 By contrast, MAC is aware of a number of examples where the Commonwealth ATSIHP legislation has been the catalyst for mediation processes being undertaken, including using mediation powers under s.13(3) of that Act. While far from perfect, this legislation can at least be used to bring all parties to table to see if there is a mutually acceptable agreement possible, particularly one where Aboriginal cultural sites and objects can be protected and conserved, and where traditional access to those sites and objects can be preserved for Traditional Custodians and community.

6.9 The WA State Government has announced a reform process to replace the AH Act aiming to "improve protection for Aboriginal heritage including an updated definition of what constitutes Aboriginal heritage, cultural landscapes and place-based intangible heritage, encouraging agreements between Aboriginal people and land use proponents". MAC supports this reform process being modelled on best-practice from other jurisdictions, such as Victorian Aboriginal heritage protection legislation and practice standards currently being developed by the Heritage Chairs and Officials of Australia and New Zealand.

## **7. MAC views on potential reforms at the Commonwealth and State levels**

7.1 As noted above at paras 6.5-6.9, MAC strongly believes that the WA Aboriginal Heritage Act is not achieving its objective of protecting Aboriginal cultural heritage sites and objects. MAC supports the current reform process if it establishes effective protections based on best practice and standards from other jurisdictions, and provides an incentive for landholders and industry to sit and talk with Traditional

Owners in a respectful and collaborative way, with the objective of reaching mutually-acceptable agreements regarding our cultural heritage.

7.2 MAC supports a comprehensive reform process to Commonwealth Indigenous cultural heritage protection frameworks, including strengthening the efficiency and effectiveness of the EPBC Act and ATSIHP Act protections. These reforms should be grounded in the fundamental principle of Free, Prior and Informed Consent, with an incentive for all parties to negotiate and mediate disputes in a respectful and equal context.

7.3 As noted above at paras 5.4-5.12, MAC is very concerned at the disparity in the Underwater Cultural Heritage Act between the automatic protection of non-Indigenous heritage underwater, and the conditional protection of Indigenous cultural heritage. This disparity should be addressed through amendment to the legislation, prior to Australia's ratification of the *UNESCO Convention on the Protection of the Underwater Cultural Heritage*.

7.4 The reform processes outlined in paras 7.1-7.3 above should be undertaken with further priority to be given to the streamlined mutual operations of State/Territory and Commonwealth statutory frameworks, using the in-principle standards being developed by the Indigenous Heritage Chairs and Officials of Australia and New Zealand.

7.5 As noted at para 3.15, the current Woodside assessment/approval process for NW Shelf facilities provides an important opportunity for the Commonwealth Government, Woodside and Rio Tinto to update, extend and fund the existing Conservation Agreements relating to the Murujuga National Heritage Listed place. This updating of the CAs should take account of the findings of the Tinney Report, and should extend CA relationships to other industries now operating on Murujuga country, and to WA State Government agencies. Clearly, the Traditional Owners of Murujuga Country (as represented by MAC) should be sitting down at the same table as a party to the CAs.

7.6 MAC believes that there has been insufficient use of Conservation Agreements in the protection of Indigenous cultural heritage places. The Conservation Agreement mechanism may provide a useful model for addressing issues such as those which arose at Juukan Gorge and many other Indigenous cultural sites around Australia. There would need to be a separate statutory framework established to allow for the use of CAs for places not listed under the EPBC Act (as is the case for Juukan Gorge).

7.7 While MAC strongly supports the legislation framework and administrative reforms set out at paras 7.1-7.6 above, these would be ineffectual in bringing about real change and real protection if there is a failure to properly resource and skill the agencies and regulators charged with administering the legislation. It is in the



interests of all parties, Aboriginal Traditional Owners and communities, land users and industries, for this legislation in all jurisdictions to be resourced adequately and administered by skilled and respectful regulators.

7.8 As a specific matter, MAC will be seeking guarantees from all industry partners for unrestricted Traditional Owner access to all cultural sites across Murujuga land and sea country. MAC understands that Health and Safety standards need to be understood and adhered to, especially where flammable or explosive materials are involved, and we will continue to maintain trusting working relationship in order to ensure access to sites. While the current limited public access through Rio Tinto rail corridors has had the positive consequence of protecting important sites from vandalism damage or removal, MAC will be approaching Rio Tinto to negotiate improved access arrangements.

7.9 Finally, MAC thanks the Committee for the opportunity to make this Submission to the Committee's *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*.

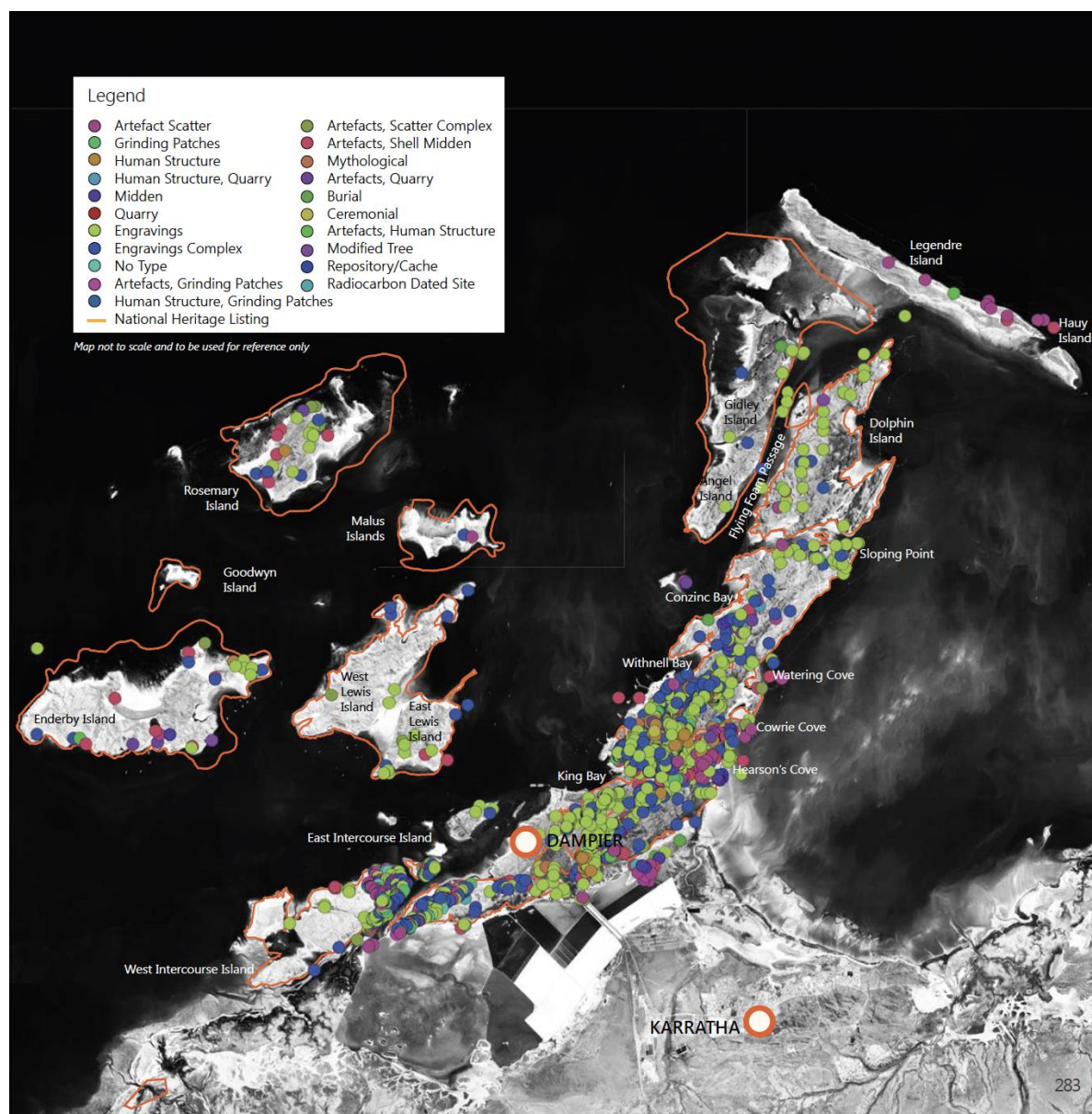
Map 1



National Heritage Listed Boundaries

Source: Murujuga Cultural Heritage Plan, p. 275

Map 2



Registered Aboriginal Heritage Sites, WA *Aboriginal Heritage Act 1972*

Source: Murujuga Cultural Heritage Plan, p. 283