GetUp!

SUBMISSION BY GETUP TO THE JOINT STANDING COMMITTEE ON NORTHERN AUSTRALIA INQUIRY INTO INQUIRY INTO THE DESTRUCTION OF 46,000 YEAR OLD CAVES AT THE JUUKAN GORGE IN THE PILBARA REGION OF WESTERN AUSTRALIA

FRIDAY 14 AUGUST, 2020

GetUp welcomes the opportunity to make a submission to this inquiry. This submission was prepared on behalf of GetUp by Greg McIntyre S.C. Additionally, almost 800 GetUp members wrote submissions which are collated in the Appendix.

ABOUT GETUP

By combining the power of one million members, movement partners and a central team of expert strategists, we work to have extraordinary impact on the issues that matter.

GetUp members come from every walk of life, coming together around a shared belief in fairness, compassion and courage. It is GetUp members who set our movement's agenda on the issues they care about, in the areas of Environmental Justice, Human Rights, First Nations Justice, Economic Fairness and Democratic Integrity. Our work is driven by our shared values, not party politics.

GetUp is an independent, not for profit community campaigning organisation, incorporated as a company limited by guarantee. GetUp receives no political party or government funding, and every campaign we run is entirely supported by voluntary donations. GetUp's purpose is set out in our constitution – to advance progressive public policy in Australia. We do this by empowering everyday people to have their say.

GetUp is also guided by a Statement of Independence, which defines us as an active values-led participant in our politics, independent from the control, direction or influence of political parties and politicians.

Our Statement of Independence is here:
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Executive Summary

This submission will show there is no legislative regime at a State or Commonwealth level which is effective to guarantee the protection of culturally and historically significant sites such as the caves at Juukan Gorge.

It is difficult to identify where the failure occurred to protect Indigenous cultural heritage at a federal level, and the EPBC Act offers inadequate protections.

We highlight that a disparity of power exists between Traditional Owners and mining companies, which is not addressed in current legislation, giving mining companies disproportionate power.

Clearly, new federal legislation is needed to protect both tangible and intangible Indigenous cultural heritage and that the Minister for Indigenous Affairs is the responsible Minister in relation to the statutory processes for Aboriginal and Torres Strait Islander heritage protection.

GetUp makes 15 recommendations detailing the type of legislation and action needed to prevent a repeat of Juuken Gorge.

Inquiry terms of reference

The Joint Standing Committee on Northern Australia (the Committee) is conducting an Inquiry with the following Terms of Reference:

a) the operation of the *Aboriginal Heritage Act 1972* (WA) and approvals provided under the Act;
b) the consultation that Rio Tinto engaged in prior to the destruction of the caves with Indigenous peoples;
c) the sequence of events and decision-making process undertaken by Rio Tinto that led to the destruction;
d) the loss or damage to the Traditional Owners, Puutu, Kunti Kurrama and Pinikura people, from the destruction of the site;
e) the heritage and preservation work that has been conducted at the site;
f) the interaction, of state Indigenous heritage regulations with Commonwealth laws;
g) the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;
h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;
i) opportunities to improve Indigenous heritage protection through the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**); and
j) any other related matters.

Indigenous cultural heritage

Justice Gordon examined the Aboriginal connection to land earlier this year in *Love v Commonwealth*, describing:

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

International obligations

The submission is underpinned by an acknowledgment of the importance of legal and policy responses which fully reflect Australia's acceptance of the United Nations Declaration on the Rights of Indigenous People[2] as a framework for recognising and protecting the rights of Indigenous Australians and noting that Article 31 of that Declaration provides that:

> *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*

The call for increased self-determination and the incorporation of 'free, prior and informed consent' for Aboriginal communities is gaining increasing support as our legislation evolves to better recognise and protect fundamental human rights.[3]

In addition, particularly pertinent to this Inquiry is Article 12(1) of the Declaration, which provides:

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

[1] *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3 at [363].
[2] GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) annex.
[3] See for example ^Law Council Submission to the EPBC Act review dated 20 April 2020.

The protection of Aboriginal cultural heritage values must include all aspects of values in the Burra Charter.[4] The Burra Charter sets out conceptual standards in the following defined concepts:

- *Cultural significance* means aesthetic, historic, scientific, social or spiritual value for past, present or future generations.
- *Conservation* means all the processes of looking after a place so as to retain its cultural significance.
- *Preservation* actions in relation to a heritage place which maintain a place in its existing state and prevent further deterioration.

Review of the Aboriginal Heritage Act 1972 (WA) ("**AHA WA**")

The submission is made in a context where the Western Australian Government is in the process of conducting a review of the AHA WA, which commenced with a consultation paper released on 9 March 2018.

The drafting process for the proposed new Aboriginal heritage legislation is underway. A final round of formal public consultation will be scheduled later this year. The Government has foreshadowed that the following elements will be included in the new legislation:

> Improved protection for Aboriginal heritage will be a key element of the new legislation, which will include:
>
> – An updated definition of what constitutes Aboriginal heritage, cultural landscapes and place based intangible heritage.
> – All Aboriginal heritage continues to be protected under the new Act.
> – Encourage agreements between Aboriginal people and land use proponents.
> – A new directory, to replace the Register of Aboriginal Places and Objects, which reflects the broader scope of heritage in the new legislation.
> – Offences and penalties brought into line with the Heritage Act 2018 and other modern legislation.
> – Extending the period within which enforcement action must be commenced to five years.[5]
> Better decision making will be a key element of the new legislation, which will include:
> – Early engagement by proponents giving Aboriginal people an active role in decisions about their heritage.
> – Alignment between Aboriginal heritage processes, Native Title requirements and other State and Federal regulations.
> – Greater transparency in decision-making with reasons for decisions to be published and the same rights of appeal available to Aboriginal people and land users.
> – A defined role for the Department of Planning, Lands and Heritage in providing early advice to all stakeholders regarding compliance with the new Act and the approvals pathway.

[4] The Australia International Council on Monuments and Sites (ICOMOS) Charter for the Conservation of Places of Cultural Significance, known as the Burra Charter, was first adopted at Burra in 1979. See https://australia.icomos.org/publications/burra-charter-practice-notes/.

[5] https://www.dplh.wa.gov.au/getmedia/2ed3bd98-fb2a-4d79-a859-26644dba7c85/AH-AHA-review-fact-sheet-Improved-Protection.

> – A Directory of Heritage Professionals to ensure heritage professionals are subject to greater rigour leading to consistent, high quality outcomes for Aboriginal parties and land use proponents.
> – The Minister for Aboriginal Affairs will retain overall responsibility for the Aboriginal heritage system, and may delegate certain decision-making powers to the new Aboriginal Heritage Council.[6]
>
> Aboriginal voices will be a key element of the new legislation, which will include: – Consultation with Aboriginal people required in the identification, management and protection of their heritage.
> – Requirement for an Aboriginal person to be the Chair of the Aboriginal Heritage Council. – Priority given to Aboriginal people for membership on the Aboriginal Heritage Council providing advice and strategic oversight of the Aboriginal heritage system.
> – The provision for local Aboriginal Heritage Services to identify the right people to speak for country and make agreements regarding Aboriginal heritage management and land use proposals in specific geographic areas, and support the implementation of existing agreements.
> – Protected Areas will no longer be vested with the Minister for Aboriginal Affairs.[7]

It is a commonly held view that '*[t]he Aboriginal Heritage Act 1972 (WA) was drafted at a time when there was no consultation with Indigenous peoples, and based on a Eurocentric, anthropologically grounded "museum mentality" that failed to understand that Indigenous heritage is living*'.[8]

There have been various amendments to the Act since it was first enacted.

In 1995 Dr Clive Senior conducted a review of the AHA WA. In the Executive Overview of his report, Dr Senior observed:

> There is a general recognition from all sides that the Act is not working satisfactorily. In recent years it has been the source of much conflict involving Aboriginal people, developers and government itself, often in prolonged and contested litigation. Procedural uncertainty must bear a large part of the responsibility for these disputes and in particular the uncertainty as to how Aboriginal sites are to be avoided and, if they cannot be avoided, what mechanisms should be used to resolve disputes.[9]

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[6] https://www.dplh.wa.gov.au/getmedia/88c4f24b-b290-4887-81dd-42ede660f5ee/AH-AHA-review-fact-sheet-Better-Decisions.

[7] https://www.dplh.wa.gov.au/getmedia/b489deb1-4301-4c34-a1a4-0386887e1b92/AH-AHA-review-fact-sheet-Aboriginal-Voices.

[8] Lauren Butterly, Ambelin Kwaymullina, Blaze Kwaymullina, 'Opportunity is There for the Taking: Legal and Cultural Principles to Re-start Discussion on Aboriginal Heritage Reform in WA', (2017) 91 ALJ 365.

[9] Senior, CM, 1995, '*Review of the Aboriginal Heritage Act 1995'.* WA Government, Perth, ix. See also Tracy Chaloner, '*The Aboriginal Heritage Act 1972: a clash of two cultures; a conflict of Laws',* Murdoch University December 2004 and Senior, C M 1992, 'Resource Development and Aboriginal Heritage Protection Under State Legislation: Recent Proposals' in *Resource Development and Aboriginal Land Rights Conference*, 28 August 1992. Centre for Commercial and Resources Law, The University of Western Australia and Murdoch University.

The Terms of Reference for the Senior Review were:

- maintain the broad principles underlying the Act;
- update the exiting provisions to reflect the needs and expectations of Aboriginal people and the broader community in the 1990s; and
- address deficiencies in the Act which have been identified as a source of frustration to government, Aboriginal people and industry, including:
    - paternalistic provisions which reflect a 1960s approach
    - administrative processes are not clear
    - little guidance for developers as to compliance with the Act prior to beginning development
    - procedure to apply for consent to use land are outdated and provide no certainty or time limits
    - unequal rights to appeal under s 18
    - the Act does not expressly bind the Crown
    - no dispute mechanism.

Those deficiencies remain, although the High Court made it clear in *Bropho v Western Australia*[10] that an inference is to be drawn that the AHA WA binds the Crown.

In May 2000, the Government announced that the AHA WA was to be redrafted "with the intention that it will repeal and replace the *Aboriginal Heritage Act 1972*".[11] The draft was to be released publicly for comment prior to its introduction into Parliament. With change in government in February 2001 the redraft was never made public.[12]

Most recently, amendments to the Act were proposed through the introduction of the *Aboriginal Heritage Amendment Bill 2014* (WA) in 2014. The proposed amendments include the following key changes.

- A more streamlined process of **assessment** of places and objects was proposed by enabling the CEO of the Department of Aboriginal Affairs (**DAA**) to carry out assessments relating to Aboriginal Sites for the purposes of section 5 and 6 of the Act, protected areas under section 19 of the Act, and Aboriginal cultural material under section 40 of the Act.
- The **section 18 approvals** process was to be amended to allow any person to make an application, rather than just the owner of the land. The CEO would also be able to fast-track approvals by:
    - declaring that there does not appear to be an Aboriginal site on the land, which will act as a defence to a charge under section 17 of the Act; and
    - granting an expedited permit with or without conditions where the site will not be adversely affected by the activity.
- A **register of declarations and permits** was to be established to record all current and historical approvals.

[10] (1990) 171 CLR 1.

[11] Western Australia Hansard, 2000: Question 1013

[12] Tracy Chaloner, '*The Aboriginal Heritage Act 1972: a clash of two cultures; a conflict of Laws',* Murdoch University December 2004.

- Measures to strengthen **compliance and enforcement** were to be introduced, including substantially higher penalties, extension of time to prosecute offences, power to issue infringement notices and power for the courts to issue remediation orders.[13]

New regulations were proposed to:

- assist the CEO to identify Aboriginal places and objects by the creation of additional criteria for the evaluation of the importance and significance of Aboriginal places and objects;
- enable the DAA to recover costs for services, such as processing approval applications; and
- improve the quality of information on the Register of Aboriginal Sites and Objects (currently Register of Places and Objects) and the Register of Declarations and Permits.

The 2014 Bill proved controversial and the State Government received strong feedback that Aboriginal people had not been properly consulted on the proposed changes. There was a petition to Parliament with more than 1,600 signatures requesting further consultation with the WA Indigenous community; a rally on the steps of Parliament House with more than 60 traditional owners and elders representing each region of Western Australia (some travelling vast distances to be present in Perth); and the issues were formally raised by a WA Indigenous land council (Kimberley Land Council) at the United Nations Permanent Forum on Indigenous Issues in New York. Then there was an intervening event.[14] Ultimately, the 2014 Bill did not proceed through Parliament before the change of Government in 2017.

There has been an attempt to deal with identified deficiencies in the AHA WA by the Aboriginal Cultural Materials Committee ("ACMC") adopting Guidelines. In July 2013, the ACMC adopted new guidelines in relation to section 5 of the AHA, which included public release of a document titled Section 5 of the *Aboriginal Heritage Act 1972* (WA) ('Section 5 Guidelines'). The Guidelines listed criteria that would be taken into account when determining whether a place is a sacred, ritual or ceremonial site which were additional to the criteria specified in section 39 of the AHA WA as follows:

> • The meaning of 'site' is narrower than 'place'.
> • For a place to be a sacred site means that it is devoted to a religious use rather than a place subject to mythological story, song or belief.
> • For a sacred site associated with Travelling Ancestors: - There are stories and songs that celebrate the activities of ancestral figure(s) - Either there are events which occurred to the ancestral figure at that place; or - The ancestral figure left some mark or thing that has form: eg a spring or rock formation.
> • For sacred sites associated with figures or powers, the place is associated with a figure or a power which belongs to the country or was always there.

The Supreme Court of Western Australia in *Robinson v Fielding*[15] concluded that the guidelines adopted by the ACMC for the determination of what is an Aboriginal site under the AHA WA were inconsistent with the definition of 'Aboriginal site' in the AHA WA. This decision contradicted the approach the Registrar of Aboriginal Sites and ACMC had been

[13] Brad Wylenko, https://www.claytonutz.com/knowledge/2014/june/changes-to-wa-s-aboriginal-heritage-laws-open-for-comment.
[14] Butterly *et al, ibid* 366-7.
[15] [2015] WASC 108.

taking to Aboriginal Sites, which had seen 22 sites removed from the Register. This approach, as determined by the Guidelines, threatened to leave any sacred site not associated with ritual or ceremonial activity unprotected by the AHA. It also removed from such sites the requirement under the AHA that the Minister for Aboriginal Affairs could conclude that it is in the community interest to excavate, destroy, damage, conceal or alter the site.[16] The *Robinson* decision caused the government to reconsider the content of the Guidelines and their application to the assessment of sites.

Approvals under the AHA WA

The key provisions of the AHA WA relating to approvals are sections 17 and 18 of the Act. Section 17 creates a general prohibition against alteration of an Aboriginal site:

> ***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*[17] *or the consent of the Minister under section 18.*

The prohibition in s 17 is then made capable of being over-ridden by s 18 of the AHA WA, which provides as follows:

> ***18. Consent to certain uses***
>
> *(1) For the purposes of this section, the expression the owner of any land includes a lessee from the Crown, and the holder of any mining tenement or mining privilege, or of any right or privilege under the Petroleum and Geothermal Energy Resources Act 1967, in relation to the land.*
> *(1a) A person is also included as an owner of land for the purposes of this section if —*
> *(a) the person —*
> *(i) is the holder of rights conferred under section 34 of the Dampier to Bunbury Pipeline Act 1997 in respect of the land or is the holder's nominee approved under section 34(3) of that Act; or*
> *(ii) has authority under section 7 of the Petroleum Pipelines Act 1969 to enter upon the land; or*
> *(b) the person is the holder of a distribution licence under Part 2A of the Energy Coordination Act 1994 as a result of which the person has rights or powers in respect of the land; or*

[16] McIntyre, G, 'Aboriginal Heritage: The Rainbow Serpent - When Guidelines Misguide', *Indigenous Law Bulletin* May / June, Volume 8, Issue 18 I 3

[17] Section 16 empowers the Registrar of Aboriginal Sites to authorise the excavation and removal of things from a site upon the recommendation of the Aboriginal Cultural Materials Committee. The section is relevant to action taken to protect cultural material at a site.

> *(c) the person is the holder of a licence under the Water Services Act 2012 as a result of which the person has rights or powers in respect of the land.*
>
> *(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.*
> *(4) Where the owner of any land has given to the Committee notice pursuant to subsection (2) and the Committee has not submitted it with its recommendation to the Minister in accordance with that subsection the Minister may require the Committee to do so within a specified time, or may require the Committee to take such other action as the Minister considers necessary in order to expedite the matter, and the Committee shall comply with any such requirement.*
>
> *(5) Where the owner of any land is aggrieved by a decision of the Minister made under subsection (3) he may apply to the State Administrative Tribunal for a review of the decision.*
>
> *[(6) deleted]*
>
> *(7) Where the owner of any land gives notice to the Committee under subsection (2), the Committee may, if it is satisfied that it is practicable to do so, direct the removal of any object to which this Act applies from the land to a place of safe custody.*
>
> *(8) Where consent has been given under this section to a person to use any land for a particular purpose nothing done by or on behalf of that person pursuant to, and in accordance with any conditions attached to, the consent constitutes an offence against this Act.*
> *(emphasis added)*

The Committee referred to in the section is the ACMC, which is established under s 28 of the AHA WA. It is described in that section as an 'advisory body', the members of which 'shall be selected from amongst persons, whether or not of Aboriginal descent, having special knowledge, experience or responsibility which in the opinion of the Minister will assist the Committee in relation to the recognition and evaluation of the culturally significance of matters coming before the Committee'.

The ACMC has as one of its primary functions –

> *to evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons.*[18]

The AHA WA s 39 specifies that –

> *(2) In evaluating the importance of places and objects the Committee shall have regard to —*
> *(a) any existing use or significance attributed under relevant Aboriginal custom;*
> *(b) any former or reputed use or significance which may be attributed upon the basis of tradition, historical association, or Aboriginal sentiment;*
> *(c) any potential anthropological, archaeological or ethnographical interest; and*
> *(d) aesthetic values.*
>
> *(3) Associated sacred beliefs, and ritual or ceremonial usage, in so far as such matters can be ascertained, shall be regarded as the primary considerations to be taken into account in the evaluation of any place or object for the purposes of this Act.*
>
> *It is to be noted that this statutory regime –*
>
> *(a) does not mandate any obligation or process by which to take into any account any view of any Aboriginal custodian of any place or object which the AHA WA is intended to protect;*
> *(b) does not provide any process for any devolution of the advisory processes to the Minister to the vast regional areas of the State of Western Australia;*
> *(c) does not provide for any process by which Aboriginal people with custodial responsibility for places or objects, in accordance with traditional law and customs have any statutory right of appeal or review of a decision under s 18 to consent to alteration of a site or dealing with an object which would otherwise be an offence under s 17; and*
> *(d) does not provide any mechanism for withdrawal or variation of a consent under s 18 if circumstances have changed or new information is obtained following the granting of consent which may have been capable of altering the Minister's view as to the proper balance to be reached between the ACMC's recommendation as to the 'importance and significance' of a site and the 'general interest of the community'.*

Those deficiencies in the AHA WA have had a significant part to play in the events which lead to the destruction of the caves at Juukan Gorge in the Pilbara.

In 2013, Rio Tinto received Ministerial consent to destroy or damage the Juukan cave site under section 18 of the AHA WA.

However, in a 2014 report by archaeologist Dr Michael Slack to Rio Tinto it was confirmed that the site known as Juukan-2 (Brock-21) cave was rare in Australia and unique in the Pilbara.

"The site was found to contain a cultural sequence spanning over 40,000 years, with a high frequency of flaked stone artefacts, rare abundance of faunal remains, unique stone tools, preserved human hair and with sediment containing a pollen record charting thousands of years of environmental changes," Dr Slack wrote.

[18] AHA WA s 39(1)(a).

"In many of these respects, the site is the only one in the Pilbara to contain such aspects of material culture and provide a likely strong connection through DNA analysis to the contemporary traditional owners of such old Pleistocene antiquity."

Dr Slack and his team removed 7,000 artefacts from the caves in 2014 and the executive summary states: "The results of the excavations at Brock-21/Juukan-2 are of the highest archaeological significance in Australia."[19]

There is no provision in the AHA WA which would allow the Minister to take into account the information acquired after the consent was given in 2013 and reverse the consent given. Additionally, if the Puutu Kunti Kurrama and Pinikura (PKKP), who are the custodians of the area had wished to provide information to the ACMC or the Minister to prevent the consent being given in 2013 or appeal that decision once it was given there is no process under the AHA WA for them to do that.

What Aboriginal custodians have typically been required to do in order to participate in the processes under the AHA WA is to mount challenges by way of judicial review applications to overturn administrative decisions which are directed to issues of decisions made beyond the jurisdiction of the decision-maker, after establishing that the Aboriginal person has a sufficient special interest in the subject matter of the decision to establish standing in the Court.[20].

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) ("**ATSIHP Act**")

In the absence of a State Act effective to protect a heritage site it is open for an Aboriginal person or group to apply to the Commonwealth Minister responsible for the ATSIPH Act to protect a 'significant Aboriginal area'. The ATSIPH Act provides as follows:

> 9(1) Where the Minister:
>
> (a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or
>
> (b) desecration; and

[19] https://www.abc.net.au/news/2020-06-05/rio-tinto-knew-6-years-ago-about-46000yo-rock-caves-it-blasted/12319334.

[20] Examples of such cases are: Bropho -v- State of WA & WADC (1990) 171 CLR 1; Culbong -v- SECWA (1989) Supreme Court WA, SC WA Lib No 7944 (Franklyn J.); Bodney -v- Trustees of Museum (1989) Supreme Court WA, SC WA Library No 7959 (Franklyn J.); Van Leeuwin -v- Dallhold Investments (1990) 71 LGPR 348, Supreme Court WA, (1989) LGPR SC WA Lib No 8542 (9.10.90 Walsh J.) SCWA Lib No 7811 (30.8.89, Ipp J.) SCWA Lib No 8609 (20.11.90 Ipp J.); Bropho -v- Minister for Aboriginal Affairs, Minister for Environment & Ors (1990) Supreme Court of WA - Wallwork J; Watson ex parte Bropho (1992) SCWA (Wallwork J); Robinson v Fielding [2015] WASC 108, Chaney J; Abraham v Collier, Minister for Aboriginal Affairs [2016] WASC 269; Woodley v Minister for Aboriginal Affairs [2009] WASC 251, [38].

(b) is satisfied:

(i) that the area is a significant Aboriginal area; and

(ii) that it is under serious and immediate threat of injury or desecration;

he may make a declaration in relation to the area.

(2) Subject to this part, a declaration under subsection (1) has effect for such period, not exceeding 30 days, as is specified in the declaration.

(3) The Minister may, if he is satisfied that it is necessary to do so, declare that a declaration made under subsection (1) shall remain in effect for such further period as is specified in the declaration made under this subsection, not being a period extending beyond the expiration of 60 days after the day on which the declaration under subsection (1) came into effect.

10(1) Where the Minister:

(a) receives an application made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified area from injury or desecration;

(b) is satisfied:

(i) that the area is a significant Aboriginal area; and

(ii) that it is under threat of injury or desecration;

(c) has received a report under subsection (4) in relation to the area from a person nominated by him and has considered the report and any representations attached to the report; and

(d) has considered such other matters as he thinks relevant;

he may make a declaration in relation to the area.

(2) Subject to this part, a declaration under subsection (1) has effect for such period as is specified in the declaration.

(3) Before a person submits a report to the Minister for the purposes of paragraph (1)(c), he shall:

(a) publish, in the Gazette, and in a local newspaper, if any, circulating in any region concerned, a notice:

(i) stating the purpose of the application made under subsection (1) and the matters required to be dealt with in the report;

(ii) inviting interested persons to furnish representations in connection with the report by a specified date, being not less than 14 days after the date of publication of the notice in the Gazette; and

(iii) specifying an address to which such representations maybe furnished; and

(b) due consideration to any representations so furnished and, when submitting the report, attach them to the report.

(4) For the purposes of paragraph (1)(c), a report in relation to an area shall deal with the following matters:

(a) the particular significance of the area to Aboriginals;

(b) the nature and extent of the threat of injury to, or desecration of the area;

(c) the extent of the area that should be protected;

(d) the prohibitions and restrictions to be made with respect to the area;

(e) the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than
the Aboriginal or Aboriginals referred to paragraph(1)(a);
(f) the duration of any declaration;
(g) the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness
of any remedies available under any such law;
(h) such other matters (if any) as are prescribed.

The ATSIHP Act is intended to operate concurrently with State and Territory legislation operating in the same field. Section 7(1) specifically provides as follows:

7 Application of other laws

(1) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

There is no impediment to the ATSIHP Act powers under s 9 and 10 being exercised where State legislation has been applied to a site. In *Re Robert Bropho v Robert Tickner and Bluegate Nominees Pty Ltd*[21] Wilcox J found that building work was being undertaken which would soon irretrievably (except at great cost) damage the site which the applicant sought to protect and preserve. He concluded that the Commonwealth Minister had fallen into error of law in rejecting the applicant's claims for declarations under s 9 and s.10 of the ATSIHP Act. He was of the view that the fact that the Western Australian Minister had exercised power under the AHA WA was no impediment to the Commonwealth Minister's obligation to exercise the powers under the ATSIHP Act, saying -

> The Minister placed reliance on the Western Australian Act. But, by the time he made his decision, the Western Australian Minister had already consented under s.18 of that Act to the development proceeding. It was irrational to rely upon the Western Australian Act to ensure the protection and preservation of the site. Plainly, it would not.[22]

The Minister appealed the decision of Justice Wilcox, but the Full Court of the Federal Court in *Tickner v Bropho*[23] dismissed the appeal and took the analysis of the application of the ATSIHP Act further. Chief Justice Black noted that the ATSIHP Act was 'described in the then Minister's second reading speech (H of R Deb. 9.5.84 p 2133) as beneficial legislation, remedying social disadvantage of Aboriginals and Islanders, and of having the effect, by preserving and protecting an ancient culture from destructive processes and of enriching the heritage of all Australians'.[24] He said -

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

[21] [1993] FCA 25; (1993) 40 FCR 165.
[22] At [43].
[23][1993] FCA 306; 114 ALR 409.
[24] At [38].

30. The long title of the Act is: "An Act to preserve and protect places, areas and objects of particular significance to Aboriginals, and for related purposes." The purposes of the Act are spelt out in s. 4. They are:
"...the preservation and protection from injury of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition."

44. If, as I have concluded, the Act requires the Minister to consider whether an area that is the subject of a valid application is a significant Aboriginal area and whether it is under threat of injury or desecration, I consider that it must also be concluded that there is, in all such cases, an obligation to obtain a report under s. 10(4) and to consider the report and any representations attached to it. The provisions of s. 10(1)(b) and s. 10(1)(c) are closely linked, in that the report referred to in s. 10(1)(c) inevitably bears directly upon the questions the Minister is required to address by virtue of s. 10(1)(b), as well as upon matters going to the exercise of his discretion. Also, the information to be provided to the Minister by the report and its attachments has an important quality by reason of the requirements of s. 10(3) for publication and the inviting of representations from interested persons. ...

Justice Lockhart added:

44.The purpose of the Act, as its own title and s. 4 make clear, is to preserve and protect from injury or desecration areas and objects in Australia and within Australian waters that are of particular significance to Aboriginals in accordance with Aboriginal tradition. It would be an unreasonable and extraordinary construction of s. 10 that the Minister, upon receipt of an application by or on behalf of an Aboriginal or a group of Aboriginals pursuant to s. 10 of the Act, seeking the preservation or protection of a specified area from injury or desecration, could defeat the purpose of the Act by omitting to consider or determine the vital matters referred to in s. 10(1)(b) or (c) and thereby in effect to ignore the application.

45.There is no question that the Minister has a discretion whether or not to make a declaration under s. 10; but it is a discretion which must be exercised after the matters specified in paragraphs (b) and (c) have been considered. It is only then that the balancing process which the Act requires the Minister to engage in will be satisfied, balancing on the one hand the considerations of significance of the area to the Aboriginal people and the threat of injury or desecration of the area and on the other hand any other matters which may be considered relevant. There is no warrant against the Minister for failing to go through the statutory exercise which s. 10 demands.

And Justice French agreed, saying -

54..... the Minister cannot refuse a declaration without considering the competing interests using the procedures for which the Act has provided. That is, in my opinion, a proper implication having regard to the statutory purpose and the policy which is apparent from the language of the Act and the background to its enactment.

Effectiveness of ATSIHP Act

There is, in theory at least, sufficient legislative authority at a Commonwealth level to protect significant Aboriginal areas.

The reason for the failure to protect the Juukan Gorge site, given the statutory power of protection under the ATSIHP Act, on the face of it, is difficult to identify. It is reported that the federal Indigenous Affairs Minister, Hon Ken Wyatt MP, says he received an 11th hour call from lawyers for the PKKP advising him of the risk and asking for advice, and that he advised them to seek an injunction under federal heritage legislation.[25]

A nuance which the PKKP and their advisers would have had to appreciate in the emergent circumstances with which they were faced is that the Minister responsible for the ATSIHP Act in the present Government is not the Minister for Indigenous Affairs, but the Minister for Heritage, Hon. Sussan Ley MP. It was to her that a s 9 application under the ATSIHP Act would have been required to be made.

The State Minister responsible for the AHA WA, Hon Ben Wyatt MLA had no power to intervene or overturn a s 18 AHA decision consenting to the destruction of the site which the then Minister, Hon Peter Collier made in 2013, apparently unaware of the significance of the site.

The ATSIHP Act, like the AHA WA, is commonly regarded as having been ineffective in achieving its declared objective.

Court decisions related to the ATSIHP Act have re-affirmed the ultimate discretionary power in the Minister to determine whether to protect a place, what significance to place upon it and how its value is to be weighed against other proprietary and pecuniary interests.[26]

Between October 1995 to June 1996, Elizabeth Evatt AC independently reviewed the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.[27] This review was requested after the Kumarangk (Hindmarsh Island) cases.[28] The report produced 58 recommendations to amend the legislation which have continued to be used as suggested amendments to the Act decades later. The motivation for review was multifactorial:[29]

- Aboriginal People did not feel in control in administering the Act. The only provision expressly requiring consultation with Indigenous parties in this Act is in relation to the discovery of Aboriginal remains.[30] There was no process to field or negotiate further

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[25] https://www.theguardian.com/australia-news/2020/may/30/juukan-gorge-rio-tinto-blasting-of-aboriginal-site-prompts-calls-to-change-antiquated-laws.

[26] *Wamba Wamba Local Aboriginal Land Council and Murray River Regional Aboriginal Land Council v The Minister Administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 and Murrays Downs Golf & Country Club Limited* [1989] FCA 210; *Tickner v Chapman,* [1995] FCA 1726.

[27] Elizabeth Evatt, Parliament of Australia, *'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.'* (Report no. 170 of 1996, July 1996).

[28] Culvenor, Clare. 'Commonwealth heritage Protection Legislation'. 5(3) *Indigenous Law Bulletin* 17. (2000). p 1.

[29] Elizabeth Evatt, Parliament of Australia, *'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.'* (Report no. 170 of 1996, July 1996). p.11-16.

[30] Under the Act Aboriginal is defined as meaning a member of the Aboriginal race of Australia and includes a descendant of the indigenous inhabitants of the Torres Strait Islands. Aboriginal remains are defined as • the

questions on cultural heritage and no commitment to ensuring Aboriginal people had access to, or management of, the sites after declarations were made.[31]

- The administration of the minerals industry became difficult to manage. Whilst no mining project had been stopped by the Act,[32] industry authorities with approved projects under state legislation were delayed by commonwealth applications which led to financial strains.[33]
- The application process was deemed ineffective due to "delays, litigation and cost for the applicants and other affected parties".[34] The delays often resulted in the destruction and injury of areas and objects.[35]
- The legislation was deemed ineffectual as few areas, from 1984 to January 1996, had protective declarations made. Between the allotted time frame, 4 out of 49 applications for requested declarations of protection were approved.[36] Of those four, two were overturned by the High Court[37] and one was revoked.[38]
- The Commonwealth Act was incongruent with states and territories legislation which led to complicated uses of the Act. However, ineffective state and territory legislation on Aboriginal heritage resulted in the Act providing the dominant form of heritage protection.[39]
- States and territories struggled to negotiate with the commonwealth law due to a resistance to commonwealth intervention.[40]
- The ministers' decision was discretionary which concerned Indigenous applicants.[41]
- In requiring the disclosure of information on the significance of the heritage site or item, cultural obligations were being breached.[42] Indigenous customary law and practices of hierarchies of knowledge concerning age, gender and kinship connection includes

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whole or part of the bodily remains of an Aboriginal, but does not include a body or the remains of a body buried in accordance with the law of a State or Territory or buried in land that is, in accordance with Aboriginal tradition, used or recognized as a burial ground; or • an object made from human hair or from any other bodily material that is not readily recognizable as being bodily material; or • a body or the remains of a body dealt with or to be dealt with in accordance with a law of a State or Territory relating to medical treatment or post-mortem examinations. Aboriginal tradition is defined as the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships (ATSIHP Act, s. 3(1)).

[31]Aboriginal and Torres Strait Islander Commission, 'Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures.' *Australian Indigenous Law Reporter* 1(1) (1996). p.79.

[32] Evatt, *ibid*, p 13.

[33] Association of Mining and Exploration Company, *Submission Paper 48* (1995). p.6.

[34] Evatt, *ibid*, p 12.

[35] *Robert Tickner v Robert Bropho* (1993) 114 ALR 409.

[36] Evatt, *ibid*, p 11.

[37] Evatt, *ibid*, p 11; *Wilson v Minister for Aboriginal & Torres Strait* 1996) 189 CLR; *Douglas v Tickner* [1994] FCA 1066.

[38] Evatt, *ibid*, p 12.

[39] Williams, George. "Race and the Australian Constitution: From Federation to Reconciliation" 38(4) Osgoode Hall Law Journal 6 (2000): 653-4.

[40] Evatt, *ibid*, p 14.

[41] Goldflam, Russell. "Between a Rock and a Hard Place: The Failure of Commonwealth Sacred Sites Protection Legislation" 3 (74) *Aboriginal Law Bulletin* (1995): 14.

[42] *Wamba Wamba Local Aboriginal Land Council v Minister Administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (1989) 23 FCR 239 at 247-248.

> restricted access to certain knowledge.[43] Requiring applicants to disclose restricted information to claim significance meant Indigenous cultural obligations were disregarded.[44]

In August 2009, the Federal Minister for the Environment, Heritage and the Arts, Hon Peter Garrett proposed major reforms to the Act in discussion paper 'Indigenous Heritage Law Reform' because "The ATSIHP Act has not proven to be an effective means of protecting traditional areas and objects"[45] As stated in the paper, "93% of approximately 320 valid applications received since the Act commenced in 1984 have not resulted in declarations."[46] The proposed amendments introduced new definitions, stating an object or area must have "a use or function" or "is the subject of a narrative" under traditional laws and customs, and "is protected or regulated under traditional laws and customs" [47] Concerns were raised that protections would be limited if "there is a lack of physical evidence or because the area is of more contemporary significance."[48]

The proposed changes also included a new system of accreditation for state or territory heritage protection laws. Where heritage protection laws in states and territories were deemed effective by the federal minister, the laws would become 'accredited'.[49] The effect would be applications be referred back to respective states or territories to be considered by their accredited legislation, and emergency declarations to the federal minister could not be made.[50] This would minimise federal participation and ensure federal decisions would not override state or territory laws. It is noted that the "proposed changes [were] not designed to allow Aboriginal people to make final decisions regarding their cultural heritage. The final decision would be made by the relevant government department, agency or Minister."[51] The discussion paper also proposed that only "legally recognised traditional custodians"[52] were able to make a declaration under the Act, where previously any Aboriginal or Torres Strait Islander person could. The discussion paper states, "Where there are no Indigenous

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[43]Evatt, *ibid*, p 48.
[44] Graeme Neate. "Indigenous Land Law and Cultural Protection Law in Australia: Historical Overview and some Contemporary Issues", Paper delivered to ATSIC-AGS Legal Forum 18 May 1995, p 53.
[45] Department of Environment and Heritage, '*The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making*', August 2009. p 4.
[46] Department of Environment and Heritage, '*The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making*', August 2009. p 4.
[47] Lenny Roth, 'Aboriginal cultural heritage protection: proposed reforms' (Media Release, November 2015), p1.
[48] Department of Environment and Heritage, '*The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making*', August 2009. Proposal 2.
[49] New South Wales Aboriginal Land Council, Submission to the Department of Environment Water Heritage and the Arts , *Respect and Protect- Submission in response to the discussion paper: Indigenous heritage law reforms*, September 2009. p 11.
[50]Department of Environment and Heritage, '*The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making*', August 2009. Proposal 2.
[51] New South Wales Aboriginal Land Council, Submission to the Department of Environment Water Heritage and the Arts , *Respect and Protect- Submission in response to the discussion paper: Indigenous heritage law reforms*, September 2009. p 11.
[52] New South Wales Aboriginal Land Council, Summary of key proposed changes to the Federal Aboriginal and Torres Strait Islander Heritage Protection Act 1984, (online factsheet, retrieved 27 May 2020)

people who clearly have a statutory responsibility for the land…any Indigenous person could apply for protection."[53]

Another proposal introduced a new offence if "secret sacred objects"[54] or "personal remains"[55] were displayed publicly. The exception to this offence was if the display was permitted by Aboriginal and/or Torres Islander people accordance with laws and customs, or if the remains were "voluntarily donated under Commonwealth, state or territory laws or possibly if the object was imported into Australia for exhibition by a public museum or gallery".[56] From 1984, the Minister for Aboriginal and Torres Strait Islander Affairs was responsible for administering the ATSIHP Act and was assisted by the Aboriginal and Torres Strait Islander Commission. However, independent of legislative amendments, from December 1998, the responsibility was then transferred to the Minister for the Environment who administers the Act through Environment Australia.

The Aboriginal and Torres Strait Islander Heritage Protection Bill 1998

In 1998 a bill of amendments was announced, as the ATSIHP Act had been the subject of a re-drafted version after the Evatt Review, but that version had, until then not be introduced to Parliament.[57] The bill introduced requirements for applicants to prove that protection was in the 'national interest' and that applicants had exhausted all state or territory remedies.[58] No Indigenous Heritage Advisory Board was Instituted.[59] Requiring the exhaustion of state or territory remedies, where those legislative measures were deemed unsatisfactory,[60] was believed to "waste valuable time and resources…risking the desecration of a significant area or object".[61]

The national interest test was considered too high a threshold for a last resort legislative measure[62] and 'national interest' was not defined in the bill.[63] Consensus on the bill and

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[53] Department of Environment and Heritage, '*The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making*', August 2009. Proposal 5.
[54] Department of Environment and Heritage, '*The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making*', August 2009. Proposal 3.
[55] Department of Environment and Heritage, '*The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making*', August 2009. Proposal 3.

[56]Department of Environment and Heritage, '*The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making*', August 2009. Proposal 3.
[57] Bills Digest Service (Cth), *Bills Digest No. 47 Aboriginal and Torres Strait Islander Heritage Protection Bill 1998* (Digest No. 47 of 1998, 1 December 1998).
[58] Department of Environment and Heritage, '*The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making*', August 2009. Proposal 8; Clare Culvenor. 'Commonwealth Heritage Protection Legislation'. (2000) 5(3) *Indigenous Law Bulletin* 17.
[59] Australian Human Rights Commission, *Native Title Report 2000: Chapter 4: Indigenous heritage* (Report 2000, 23 February 2001).
[60] Williams, George. "Race and the Australian Constitution: From Federation to Reconciliation" 38(4) Osgoode Hall Law Journal 6 (2000): 653-4.
[61] Department of Environment and Heritage, '*The Aboriginal and Torres Strait Islander Heritage Protection Act 1984: Guide to purposes, applications and decision-making*', August 2009. Proposal 8. Clare Culvenor. 'Commonwealth Heritage Protection Legislation'. (2000) 5(3) *Indigenous Law Bulletin* 17.
[62] Commonwealth, *Parliamentary Debates'', Senate, 22 November 1999 (Senator Cooney).*
[63] Clare Culvenor. 'Commonwealth Heritage Protection Legislation'. (2000) 5(3) *Indigenous Law Bulletin* 17.

various amendments between the House of Representatives and the Senate could not be reached. Two commonwealth parliamentary committees - the Parliamentary Joint Committee on Native Title and the Indigenous Land Fund and the Senate Legal and Constitutional (Legislation) Committee - were formed to decide on the validity of the Evatt Recommendations. Both committees suggested the bill introduce the Evatt.

Environmental Protection and Biodiversity Act 1999 (Cth) ("**EPBC Act**")

The EPBC Act is the principal piece of Commonwealth legislation that addresses the environmental impacts from development at the Commonwealth level. Importantly, the Act is the vessel through which the Commonwealth upholds its obligations as signatory to a significant number of international treaties.

It is important to recognise that, other than impacts or potential impacts on Commonwealth land or waters, the EPBC Act does not regulate the "environment" in a broad sense. This is the domain of State and Territory legislation. Rather, the focus of the EPBC Act is on the regulation of matters of national environmental significance (**MNES**). At the moment, MNES are:

- listed threatened species and communities
- listed migratory species
- Ramsar wetlands of international importance
- Commonwealth marine environment
- world heritage properties
- national heritage places
- the Great Barrier Reef Marine Park
- nuclear actions
- a water resource, in relation to coal seam gas development and large coal mining development.[64]

The EPBC Act includes in its objects at s 3 –

> (c) to provide for the protection and conservation of heritage; and
> (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
> (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and
> (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
> (g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

64 https://www.environment.gov.au/epbc/publications/significant-impact-guidelines-11-matters-national-environmental-significance.

It is important to note from the above that the focus of the EPBC Act is the protection of the natural environment and its component parts. Moreover, the focus is on those aspects of the environment that are of national (or international) significance.[65]

While the EPBC Act may have a role in the protection of indigenous heritage (as noted below), the primary source of protection of Aboriginal heritage is best dealt with by the Commonwealth through the robust application of legislation specifically directed to Aboriginal and Torres Strait Islander heritage protection.

The EPBC Act's role in indigenous heritage protection should focus on nationally and globally significant areas that are included on the National and World Heritage lists and where those heritage areas have indigenous heritage values.

Once example of the role of the EPBC Act and the Commonwealth in this regard is the protection of the ancient rock art that exists on the Dampier Archipelago including the Burrup Peninsula (Murujuga) in the Pilbara region of Western Australia.

The Dampier Archipelago is located adjacent to major gas and chemical facilities operated by a range of companies and the iron ore and salt export operations owned by Rio Tinto. The area was included on the National Heritage List in 2007 primarily for the indigenous heritage values stemming from the rock art and rock placements. It is now the subject of a World Heritage List nomination.

Chapter 4 of the EPBC Act enables a process of environmental impact assessment and Commonwealth Ministerial approval of an action that could have a significant impact on one or more MNES. The person proposing to take the action must consider whether or not the action proposed has the potential to have a significant impact on National Heritage values and, if so, refer the proposed action to the Commonwealth Minister for assessment and approval.

Significant Impact Guidelines state that an action is likely to have a significant impact on the National Heritage values of a National Heritage place if there is a real chance or possibility that it will cause:

- one or more of the National Heritage values to be lost
- one or more of the National Heritage values to be degraded or damaged
- one or more of the National Heritage values to be notably altered, modified, obscured or diminished.[66]

In the context of the Dampier Archipelago, this means that any company proposing to operate in an area, or proposing to alter their existing operations, adjacent to the Dampier Archipelago and the rock art must consider the potential impact that their proposed action may have on the indigenous heritage value that is protected by the EPBC Act. Relevantly, it

[65] Although some would argue that the protection of water resources in relation to large coal mine or coal seam gas development does not meet this criteria.
[66] https://www.environment.gov.au/heritage/management/referrals/what-is.

is the values that are protected – not merely physical objects within the formal boundaries of the listed area. This means that activities outside the boundary of the listed place that may have a significant impact on the values within the boundary can be regulated by the EPBC Act.

In terms of the Inquiry's Terms of Reference paragraph (i) and the opportunities to improve indigenous heritage protection through the EPBC Act, there are two avenues available.

Firstly, indigenous heritage can only be protected by the EPBC Act once it has been identified. Investment in strategic or large-scale assessment of areas of indigenous heritage that could qualify for National Heritage listing should be undertaken to proactively identity those areas that are worthy of protection under the EPBC Act (in addition to protection under the ATSIHP Act). Sharing of data between State and Territory regulators and the Commonwealth Department of Agriculture, Water and the Environment will support this.

Secondly, once indigenous heritage areas have been listed and attract the protection of the EPBC Act, the Act must be rigorously applied and enforced. The recent report of the Australian National Audit Office on the referral, assessment and approval of actions under the EPBC Act[67] concluded that the Department of Agriculture, Water and the Environment's administration of referrals, assessments and approvals of controlled actions under the EPBC Act is not effective. The Department must address the issues raised in this report.

The EPBC Act has sufficient enforcement tools within it to ensure, in theory, that the values of indigenous heritage areas that are included on the National (or World) Heritage Lists are protected from harm. These tools have been used in the past[68]. It is critical that sufficient human and financial resources are allocated to the Department's compliance and enforcement functions to ensure that persons or companies who fail to uphold the provisions of the EPBC Act or the conditions attaching to the approvals issued to them under the Act are held to account.

Protection of Movable Cultural Heritage Act 1986 (Cth) ("**PMCA Act**")

The PMC Act plays a limited and specific role in protecting Aboriginal Heritage. It includes it in the operation of the Act with the following definition:

> ***7 Movable cultural heritage of Australia***
>
> (1) A reference in section 8 to the movable cultural heritage of Australia is a reference to objects that are of importance to Australia, or to a particular part of Australia, for ethnological, archaeological, historical, literary, artistic, scientific or

[67] Auditor-General Report No.47 2019–20 Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999 (25 June 2020)
[68] In February 2010, cement producer Holcim Australia was required to give an enforceable undertaking for the purposes of section 486DA of the EPBC Act following an incident in late 2008 where work at the company's quarry at Nickol Bay was alleged to have damaged part of the Dampier Archipelago National Heritage place. Holcim was required to spend at least $280,000 in improvements to its management practices and enter into cultural heritage agreements with three Aboriginal groups in the area.

technological reasons, being objects falling within one or more of the following categories:

(b) objects relating to members of the Aboriginal race of Australia and descendants of the indigenous inhabitants of the Torres Strait Islands;
(c) objects of ethnographic art or ethnography;

The PMCH Act operates by establishing National Cultural Heritage Control list (s 8) and controls the export of objects on that list and provides that objects exported without a permit or certificate are liable to forfeiture (s 9). So it may have an impact in preventing Aboriginal Cultural objects leaving the country, but does not otherwise protect cultural heritage.

Native Title Act 1993 (Cth) ("**NTA**")

The Aboriginal and Torres Strait Islander Social Justice Commissioner in the *Native Title Report 2000*[69] ("NTR") conveniently summarises the role which the NTA plays in protecting Aboriginal Heritage, which is encapsulated in the procedural rights under the NTA. The strongest of those is the 'right to negotiate' in relation to a 'future act'. As the NTR reports:

> The right to negotiate(51) is designed to provide native title claimants or native title holders with the most comprehensive procedural rights where mining rights and certain compulsory acquisitions of native title rights are proposed.
>
> Section 39 of the NTA is a pivotal provision in the right to negotiate process. When negotiations under s 31(1)(b) have not resulted in an agreement, s 39 provides criteria upon which the arbitral body can determine whether an act may or may not be done and, if it may be done, whether conditions should be imposed.
>
> Subparagraph 39(1)(a)(v) provides the criterion dealing with the protection of Indigenous heritage:
>
> (1) In making its determination, the arbitral body must take into account the following:
> (a) the effect of the act on: .
> (v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions.
>
> To date, the determinations of the National Native Title Tribunal (NNTT) in its capacity as an arbitral body (where the parties have not consented to the determination) are not encouraging where the protection of Indigenous heritage is concerned.
>
> In Western Australia, the grant of a mining lease or exploration licence contains an endorsement drawing the grantee party's attention to the provisions of the *Aboriginal Heritage Act 1972* (WA). The NNTT has tended to defer the protection of Indigenous heritage to the grant condition imposed by the Government leaving it to be dealt with under

[69] Chapter 4: Indigenous Heritage
https://humanrights.gov.au/our-work/native-title-report-2000-chapter-4-indigenous-heritage

the *Aboriginal Heritage Act 1972* (WA) and the *Commonwealth Heritage Act*. The reasoning behind this approach is stated in the Waljen decision:[70] (52)

> *The Aboriginal Heritage Act* has been considered and explained in Tribunal determinations relating to the expedited procedure. An endorsement drawing the lessee's attention to its provisions is included on all mining leases...
>
> In earlier decisions, the Tribunal has found that generally, but not always, the protections offered by the *Aboriginal Heritage Act* are adequate to ensure that there is not likely to be the interference with sites referred to in s.237(b) on the basis of grantee parties acting lawfully. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) also provides for the use of emergency and permanent declarations to protect significant Aboriginal areas which are under a threat of injury or desecration.

Each case will have to be considered on its merits depending on the evidence, but on the face of it, looking at this criterion alone, there is no reason for the Tribunal to conclude that this legislative regime would necessarily be ineffective in protecting sites.(53)

The NNTT has adopted this view despite its reservations about the *Aboriginal Heritage Act 1972* (WA) when considering objections to the expedited procedure under s 32 of the NTA. In making determinations as to whether the expedited procedures should apply to a grant under the *Mining Act 1978* (WA) the NNTT has consistently found that once the existence of a significant area or site on the area subject to the proposed grant is established, irrespective of the existence of the *Aboriginal Heritage Act 1972* (WA), the expedited procedure should not apply. The reasons for those decisions is the possible operation of section 18 of the *Aboriginal Heritage Act 1972* (Cth) which gives the minister and registrar of aboriginal sites the discretion to permit interference with areas or sites of significance.[71] (54) This reasoning does not appear to have been as persuasive in NNTT decisions regarding s 39 of the NTA, such as in the matter of Waljen.

The NTR has set out a detailed critique of the capacity of the NTA, as amended in 1998, to protect Aboriginal heritage, which commences as follows:

> The capacity of the NTA to protect Indigenous culture is limited in three ways.
> - The extinguishment of native title through the confirmation provisions in Division 2B of Part 2 of the amended NTA;
> - The denial and erosion of procedural rights by the amendments to the NTA. The amendments to the NTA have substantially reduced the procedural rights available to native title holders in relation to a broad range of future acts now covered by Division 3 of Part 2; and
> - The reliance in the NTA upon inadequate protection provided in Commonwealth, State and Territory heritage legislation. Where the protection of Indigenous heritage and native title coincide under the NTA the protection of Indigenous heritage is

[70] *State of Western Australia and Thomas & Ors (Waljen) and Austwhim Resources NL, Aurora Gold (WA) Ltd* (1996) 133 FLR 124; also located online at www.nntt.gov.au/determin.nsf/area/

[71] See, for example, *Dann (No.2)(Unggumi Ngarinyin)/Western Australia/GPA Distributors*, (Unreported, NNTT) WO95/19, 10 June 1997, Sumner C.J. and *Brownley (Bibila Lungkutjarra People)/Western Australia/ Aberfoyle Resources Ltd.*, (Unreported, NNTT) WO98/907, 4 November 1999, Lane, Mrs P.; both online at www.nntt.gov.au/determin.nsf/area/homepage.

diverted to inadequate Commonwealth, State and Territory Indigenous heritage legislation.[72]

The NTR details deficiencies of the NTA as follows:

Denial of procedural rights

The amended NTA provides no procedural rights to native title holders in relation to a range of future primary production activities and acts giving effect to the renewal, re-grant, re-making or extension of certain leases, licences, permits or authorities. The effect of this denial of procedural rights is extensive, covering the agricultural land of Australia where native title continues to exist. In these instances, the protection of Indigenous heritage is left exclusively to Commonwealth, State and Territory legislative regimes of Indigenous heritage protection. The relevant sections of the NTA are:

- s 24GB: primary production activity (35) or associated activity (other than forest operations, horticultural activity or aquacultural activity or, where a non-exclusive pastoral lease is to be used agricultural purposes (36)), on non-exclusive agricultural and non-exclusive pastoral leases granted on or before 23 December 1996;
- s 24IC: the renewal, re-grant, re-making or extension of leases, licences, permits or authorities granted on or before 23 December 1996, or a renewal re-grant etc under s 24IC or a lease etc created under s 24GB, 24GD, 24GE or 24HA.

Reduction of procedural rights
In relation to certain other government or commercial activities that may impair native title, the amendments to the NTA have reduced the procedural rights of native title holders from those available to holders of freehold title (the freehold test) to a mere right to be notified and a right to comment.

The procedural rights of native title holders are reduced to a right to comment in relation to the following acts:

- s 24GB: the exceptions (forest operations, horticultural activity or aquacultural activity or native title holders, where a non-exclusive pastoral lease is to be used agricultural purposes) to the total denial of procedural rights of native title holders where primary production activity or associated activity occur on non-exclusive agricultural and non-exclusive pastoral leases granted on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;(37)
- s 24GD: grazing on, or taking water from, areas adjoining or near to freehold estates, non-exclusive agricultural and non-exclusive pastoral leases granted on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;(38)
- s 24GE: cutting and removing timber and extracting and removing sand, gravel rocks, soil or other resources from non-exclusive agricultural and non-exclusive pastoral leases granted on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;(39)

[72] https://humanrights.gov.au/our-work/native-title-report-2000-chapter-4-indigenous-heritage

- s 24HA: the management and regulation (including through the grant of leases, licences and permits) of surface and subterranean water, living aquatic resources and airspace attract, for native title holders, a right to be notified and a right to comment;(40)
- s 24IB and s 24ID: the grant of freehold estate or the right of exclusive possession over land or waters pursuant to a right created by an act on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;(41)
- s 24JA and s 24JB: the construction or establishment of public works on land reserved, proclaimed, dedicated etc for a particular purpose on or before 23 December 1996 or on leases granted to a statutory authority of the Commonwealth, State or Territory on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment;(42)
  and
- s 24JA and s 24JB: the creation of a plan of management for land reserved, proclaimed, dedicated etc. for a particular purpose on or before 23 December 1996 or for leases granted to a statutory authority of the Commonwealth, State or Territory on or before 23 December 1996 attract, for native title holders, a right to be notified and a right to comment.(43)

In addition, through the introduction of s 24KA, the amended NTA modifies the procedural rights of native title holders available under the freehold test in relation to acts providing facilities for services to the public. Where the construction of public facilities (44) occurs on land covered by a non-exclusive agricultural or non-exclusive pastoral lease, the procedural rights of native title holders are the same as those of the lessee.(45) The procedural rights afforded to a lessee are unlikely to secure the protection of Indigenous heritage and again, the responsibility for the protection of Indigenous heritage will fall upon Commonwealth, State and Territory legislative regimes. This is recognised in s 24KA(1)(d), which requires that laws of the Commonwealth, a State or a Territory make provision in relation to the preservation or protection of significant Indigenous areas, or sites.

The effect of this reduction of procedural rights is extensive, effectively covering all the following kinds of lands and waters over which native title continues to exist: parts of Australian agricultural land, surface and subterranean water, airspace, reserved land, dedicated land and leases granted to statutory authorities. The right to comment is unlikely to secure the protection of Indigenous heritage, particularly where the decision maker is free to ascribe minimal weight to such comments. In these instances, the responsibility for the protection of Indigenous heritage will fall upon Commonwealth, State and Territory heritage legislation.

The NTA provides for Indigenous Land Use Agreements ("ILUAs") between native title parties and those who may wish to do something affecting native title. ILUAs can cover a range of issues including future acts that are to be done; the surrender of native title rights and interests; the relationship between native title rights and interests and other rights and interests; compensation; or other matters such as cultural heritage, employment and economic development opportunities. As at 31 December 2015, there were 1038 registered ILUAs in Australia.[73]

[73] https://aiatsis.gov.au/sites/default/files/products/native_title_information_handbook/native_title_information_handbook_2016_national.pdf.

Disparity of power

There is a significant disparity of power between Aboriginal and Torres Strait Islander people seeking to protect their cultural heritage and miners and developers applying to Governments for approval to engage in economic activities and the legislative process presently available do little to redress that.

As Tony McAvoy SC has said, referring to the impact of the ILUA process on native title rights, including the cultural heritage embedded in them –

> the native title system "embeds racism" and puts traditional owners under "duress" to approve mining developments or risk losing their land without compensation…the native title system … coerces Aboriginal people into an agreement. It's going to happen anyway. If we don't agree, the native title tribunal will let it go through, and we will lose our land and won't be compensated either. That's the position we're in…[74]

Associate Professor Kate Galloway, commenting on the present matter under Inquiry, put it this way -

> Since the tragic and intentional destruction of the Juukan Gorge caves, it has been revealed that BHP is set to blast up to 40 significant Aboriginal sites in the Pilbara. Like Rio Tinto, it has the same ministerial permission to destroy places that are recognised as significant. When questioned about the approval, Ben Wyatt the WA Minister for Aboriginal Affairs flagged that the Act would soon be amended to replace the existing process. While this gives some hope of positive reform of such an egregious failure to uphold the Act's very purpose, of concern however, he indicated that the impending reforms would 'reinforce the need for land users to negotiate directly with traditional owners.'
>
> One of the challenges for traditional owners is that the law situates their interests in culturally significant sites in between native title processes and cultural heritage. At the moment, where a native title claim is made or determined, traditional owners have a right to negotiate under the *Native Title Act 1993* (Cth). This gives them a seat at the table with miners, and the scope to negotiate an Indigenous land use agreement (ILUA). ILUAs generally provide for benefits to be delivered to the native title holders—such as guaranteed jobs, or payments. The terms of ILUAs are confidential and once in place the terms are fixed. Importantly, native title holders cannot refuse permission for miners to use land. All they can do is try to gain some benefits in exchange for an otherwise guaranteed right of use. The miner has the upper hand.
>
> In addition to the terms of ILUAs remaining confidential, they frequently contain provisions preventing native title holders from speaking publicly about action taken by the miners. The BHP proposals are a case in point. Traditional owners were not permitted under their ILUA from speaking out about the sites. The Guardian revealed that despite this prohibition their

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74 https://www.theguardian.com/australia-news/2018/jul/19/native-title-system-embeds-racism-australias-first-indigenous-silk-says.

archaeologist had written to the WA department to notify it that they did not support the continued destruction of the significant cultural landscape.

It is telling then that the Minister, Ben Wyatt, said that he is 'cautious about governments interfering in private negotiations by registered native title holders'. Although the ILUA system is established under Commonwealth, not state, law, the sketched proposals for the WA cultural heritage reforms reflect the ILUA process, involving yet more consultation between miners and traditional owners—but without any substantive rights. The only reason there are 'private negotiations' is because that is all the state provides. The Minister's suggestion uses negotiation to privatise cultural heritage protection. As the state makes itself responsible for cultural heritage under the Act, leaving protection to a private negotiation process abnegates the very responsibility the state has undertaken.

Native title holders thus fall into a liminal space between multiple processes none of which affords them substantive rights to protect their country. On the one hand, although native title is a property right, it excludes mining rights leaving native title holders with a right to negotiate that falls well short of property as we understand it. On the other hand, although Aboriginal interests in the cultural landscape are inherent in its declaration as cultural heritage, cultural heritage law brings that landscape within the purview of the state, not traditional owners. Further, even with amendments to WA cultural heritage law that give a concession to involving traditional owners in cultural heritage through negotiation, a right to negotiation again falls short of substantive rights to protect the land—while letting the state off the hook for taking action that would actually prevent destruction of significant sites.[75]

Conclusion

There is no legislative regime at a State or Commonwealth level which is effective to guarantee the protection of culturally and historically significant sites such as the caves at Juukan Gorge.

The Commonwealth has an international obligation in accordance with acceptance of the United Nations Declaration on the Rights of Indigenous People that 'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage' which it should embrace and proceed to reform, in cooperation with the states and territories, current laws for the protection of Aboriginal and Torres Strait Islander Heritage to make them effective, adopting the recommendations of the Evatt Report and employing processes which have proved effective under the EPBC Act.

What can be done

Introduction of a new Commonwealth Indigenous cultural heritage act

The ATSIHP Act has proved itself ineffective for a variety of reasons which have been detailed above.

[75] *A Cultural Heritage Stitch Up in WA*, Griffith News June 15, 2020 https://news.griffith.edu.au/2020/06/15/a-cultural-heritage-stitch-up-in-wa/.

It needs to be replaced with a new piece of legislation which has a number of different features which are detailed below.

Co-design by Indigenous representatives with government

If Aboriginal and Torres Strait Islander Heritage is to have as its central tenet, as it should, protection of culture, then it must firstly engage those to whom the culture belongs in the process of designing it, so that their aspirations for the protection of their culture are met and government plays its appropriate role, as a servant of the public, in putting that protection into place.

Protection of culture: tangible & intangible

The ATSIHP Act presently directs its attention to 'areas' and 'objects'. National ATSIHP legislation needs to adopt a broader concept of culture, including protection of both tangible and intangible elements of the contemporary and historical cultural landscape derived from post-contact events, history, and relationships to land and water, as well as being embedded in traditions and relationships that are derived from, or are part of a continuity of pre-contact society.

The *Aboriginal Heritage Act 2006* (Vic) ("**AHA Vic**"), for example, since 2016[76] has provided explicit protection (albeit limited) for intangible cultural heritage.[77] It includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge and any intellectual creation or innovation. Songlines, landscape and other intangible heritage are capable of protection and registration under that legislation.

No registration prerequisite

Unlike the EPBC Act, which to a significant extent relies upon registration of places, comprehensive Aboriginal Heritage legislation needs to operate without a prerequisite of registration, as the AHA WA and AHA Vic do.

Not all Aboriginal heritage places can or should be registered, for a variety of reasons:

- many Aboriginal and Torres Strait Islander people are averse to logging their sites on the database because:
  a. There is fear that the intellectual property attached to those locations will be abused;

  b. The publication of the sites will present an opportunity for damage to sites;

  c. Some Aboriginal parties or Torres Strait Islander parties maintain cultural practices around secrecy of certain sites;

[76] *Aboriginal Heritage Amendment Act 2016, No 11/2016* (VIC) which was assented to on 5 April 2016 and took effect from 1 August 2016.
[77] See sections 1(a), 3(k) 4(definitions), 12(aa) 37(3), 145(o), 145(1)(j), 145(1)(o) and Part 5A of the AH Act.

- There are large numbers of Aboriginal heritage sites which are only known to local communities or are of historical or archaeological significance which are only discovered by a contemporary survey of an area;

- Recording of sites is costly and time consuming. It often requires on-ground recording and management as well as time to prepare data in a suitable format for registration. Costs considerations for Aboriginal parties include:
    i. Accessing remote areas;
    ii. Paying experts to assist groups (ethnographers and archaeologists);
    iii. Paying for logistical support (vehicles, equipment, accommodation);
    iv. The remuneration of traditional knowledge holders of the cultural heritage.

Aboriginal cultural heritage must be protected irrespective of whether it is registered or not.

Aboriginal ownership

A significant deficiency in most Aboriginal heritage protection legislation is that it does not address in any direct way the ownership of Indigenous cultural heritage.

The ATSIHP Act does not address the question of ownership or custody of cultural heritage.

The AHA WA addresses ownership of cultural heritage only in the following indirect and qualified way –

> ***7 . Traditional use***
>
> (1)Subject to subsection (2), in relation to a person of Aboriginal descent who usually lives subject to Aboriginal customary law, or in relation to any group of such persons, this Act shall not be construed —
>
> (a) so as to take away or restrict any right or interest held or enjoyed in respect to any place or object to which this Act applies, in so far as that right or interest is exercised in a manner that has been approved by the Aboriginal possessor or custodian of that place or object and is not contrary to the usage sanctioned by the Aboriginal tradition relevant to that place or object;

The *Aboriginal Heritage Act 2006* (Vic) (pt 2) makes provision for the ownership and control of secret or sacred objects in the custody of the State by Aboriginal people who have a traditional or familial link with the object, but does not address ownership or control of Aboriginal places.

The *Aboriginal Cultural Heritage Act 2003* (Qld) is more comprehensive in addressing ownership of cultural heritage. It provides for Aboriginal cultural heritage to be owned and protected by Aboriginal people with traditional or familial links to the cultural heritage if it is comprised of any of the following—

(a) Aboriginal human remains;
(b) secret or sacred objects;
(c) Aboriginal cultural heritage lawfully taken away from an area[78].

The first part of the process of protection of Aboriginal and Torres Strait Islander cultural heritage ought to be identification of the Aboriginal or Torres Strait Islander persons who have traditional rights and obligations in relation to the cultural heritage in question and establish the right to speak for the cultural heritage element in question and how it is dealt with by others.

Recognition of local/regional decision-makers

A variety of approaches are in operation in State, Territory and Commonwealth legislation in relation to involvement of knowledgeable cultural custodians in decision-making about cultural heritage protection.

The ATSIHP Act does not address this issue.

The AHA WA does not directly address this issue. Section 28 of the AHA WA provides that the ACMC, which has the functions of evaluating the importance of places and objects,[79] recommending preservation of places and objects "of special significance to persons of Aboriginal descent"[80] and advising the Minister on matters relating to the objects and purposes of the Act[81] is to be "selected from amongst persons, whether or not of Aboriginal descent, having special knowledge, experience or responsibility which in the opinion of the Minister will assist the Committee in relation to the evaluation of the cultural significance of matters coming before the Committee".[82]

The *Aboriginal Heritage Act 1988* (SA) merges the issue of ownership of cultural heritage with place-based and object-based decision making by providing in the Act for recognition of a 'Recognised Aboriginal Representative Body' for—

(a) a specified area; or
(b) a specified Aboriginal site or sites; or
(c) a specified Aboriginal object or objects; or
(d) specified Aboriginal remains,

The *Aboriginal Heritage Act 2006* (Vic) has provision for Registered Aboriginal Parties.[83] Cultural heritage permits operate to permit harm of Aboriginal cultural heritage that would otherwise be unlawful.[84] The relevant RAP in relation to an application for a cultural heritage permit comprises an approval body which must decide to grant or refuse to grant

[78] Detailed provisions are set out in the *Aboriginal Cultural Heritage Act 2003* (Qld) sections 14-22.
[79] Section 39(1)(a).
[80] Section 39(1)(c).
[81] Section 39(1)(e).
[82] Section 28(4).
[83] *Aboriginal Heritage Act 2006,* (Vic) part 10.
[84] Pt 3, div 1.

a cultural heritage permit within 30 days of receiving an application.[85] A further 30 days is allowed if further information is sought.[86]

A cultural heritage permit authorising the applicant to do anything referred to in section 36(1)(c) to (e) must not be granted in respect of Aboriginal ancestral remains or an Aboriginal object that is a secret or sacred Aboriginal object.

Section 36(1) provides that –

> A person may apply to an approval body for a cultural heritage permit authorising the person to do one or more of the following—
> (a) disturb or excavate any land for the purpose of uncovering or discovering Aboriginal cultural heritage;
> (b) carry out research on an Aboriginal place or Aboriginal object, including the removal of an Aboriginal object from Victoria for the purposes of that research;
> (c) carry out an activity that will, or is likely to, harm Aboriginal cultural heritage;
> (d) sell an Aboriginal object;
> (e) remove an Aboriginal object from Victoria;
> (f) rehabilitate land at an Aboriginal place, including land containing burial grounds for Aboriginal ancestral remains;
> (g) inter Aboriginal ancestral remains at an Aboriginal place.

The *Aboriginal Cultural Heritage Act 2003* (Qld), s 36 provides for the registration of an Aboriginal Cultural Heritage Body for an area (which may be for a particular project) where the Minister is satisfied that the body has the capacity to identify Aboriginal parties for the area and native title parties or Aboriginal parties for the area agree, with the function of identifying Aboriginal parties for the area who are responsible for assessing the level of significance of areas and objects included in the study area that are or appear to be significant Aboriginal areas and significant Aboriginal objects.[87]

The *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) provides that there must be an Aboriginal Areas Protection Authority consisting of 12 members appointed by the Administrator, of who ten members shall be custodians of sacred sites appointed in equal number from a panel of 10 male custodians and 10 female custodians nominated by the Land Councils, which exist under the Aboriginal Land Rights (Northern Territory) Act 1976 . Its functions include –

(a) facilitating discussions between custodians of sacred sites and persons performing or proposing to perform work on or use land comprised in or in the vicinity of a sacred site, with a view to their agreeing on an appropriate means of sites avoidance and protection of sacred sites;
(b) carrying out research and keep records;
(c) establishing committees (including executive and regional committees), consisting of such members and other persons, as are necessary to enable it to carry out its functions;

[85] Section 40(3).
[86] Section 40(3A)-[3C).
[87] Section 53.

(d) examine and evaluate applications to carry out work on land.[88]

The Authority[89] must consult with the custodians of sacred sites on or in the vicinity of the land to which the application relates that are likely to be affected by the proposed use or work.

The AHA WA does not require the involvement of Aboriginal people in decision making.[90] It would be significantly improved if there were explicit requirements in the legislation for consultation with or involvement in decision making of Aboriginal people with knowledge about the relevant elements of cultural heritage under consideration in each instance. That can only be achieved in an appropriately systematic way by establishing regional bodies. Current knowledge and experience drawn from participation in native title processes suggests that there should at least be regional Culture and Heritage Committees for the following regions:

East Kimberley
West Kimberley
North Pilbara
South Pilbara
Murchison Gascoyne
Eastern Goldfields
Western Desert
South West.

There should be a Culture and Heritage Committee for regional areas in western Australia, composed of Aboriginal and Torres Strait Islander people with cultural knowledge of the region, with a capacity to engage expert advice and assistance appropriate to each decision to be made.

The ATSIHP Act has no process for Aboriginal and Torres Strait Islander people to make decisions about or be consulted about the protection of cultural heritage. It should be re-modelled, either in cooperation with State and Territory regimes or independently to devolve information gathering and decision making on cultural heritage protection to local and regional Indigenous decision-making bodies.

Cultural value determined by Custodians

The most significant reform which could be made to Aboriginal and Torres Strait heritage protection would be for Commonwealth, State and Territory legislation to accord to Indigenous people with the relevant local knowledge decision making powers for the assessment, protection and management of their cultural heritage.

[88] Under sections 19B.
[89] Under sections 19F.
[90] It is a matter for the Minister as to whom he will appoint to the ACMC on the basis of 'special knowledge, experience or responsibility which in the opinion of the Minister will assist the Committee in relation to the recognition and evaluation of the culturally significance' of sites or objects.

The legislation which comes closest to that aspiration is *Aboriginal Heritage Act 2006* (Vic). The key provisions of the AH Act (Vic) were summarised by Justice Kevin Bell in *Gunaikurnai Land and Waters Aboriginal Corporation v Aboriginal Heritage Council*.[91] It includes cultural heritage management plans,[92] a cultural heritage audit and stop orders.[93] The AH Act Vic also allows CHMPs to be prepared voluntarily.[94]

Under the AH Act (Vic) cultural heritage plans are a mechanism for assessing the nature of any Aboriginal cultural heritage in an area and making recommendations[95] for the protection and management of any such heritage that is identified.[96] A RAP may evaluate proposed plans (s 55)(1) and refuse to give its approval if it does not adequately address relevant specified matters (s 61).

At least one of the parties to a cultural heritage agreement must be a RAP (s 69(2)) and such an agreement cannot take effect without the consent of all RAPs for the relevant area (s 72(1)).

Under the AH Act (Vic) the preparation of a CHMP is mandatory:

a) where the Aboriginal Heritage Regulations require a plan;[97]
b) where the Minister directs the preparation of a plan;[98]
c) where an Environmental Effects statement is required under the Environmental Effects Act 1978 (Vic); [99]
d) where an impact management plan or comprehensive impact statement is required under the Major Transport Projects Facilitation Act 2009 (Vic);[100] and
e) where a certified preliminary Aboriginal heritage test (PAHT) has determined a CHMP is required.[101]

Similarly in Queensland, any land user can develop and seek approval for a Cultural Heritage Management Plan (CHMP) under the *Aboriginal Cultural Heritage Act 2003 (Qld)* and *Torres Strait Islander Cultural Heritage Act 2003 (Qld)*.

A CHMP is an agreement between a land user (sponsor) and Traditional Owners (endorsed party) developed under Part 7 of the Acts.

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[91] [2016] VSC 569 at 16 – 24. This case was heard on 1 March 2016, with the decision handed down on 28 September 2016. Substantial amendments were made to the AH Act by the Aboriginal Heritage Amendment Act 2016 which was assented to on 5 April 2016 and commenced on 1 August 2016, however it would appear these amendments are not reflected in his Honour's summary.
[92] AH Act (Vic) pt 4.
[93] AH Act (Vic) pt 6.
[94] Section 45 of the AH Act (Vic).
[95] Following the 2016 amendments, the CHMP now contains "conditions" rather than "recommendations": see s 42(1)(b)(ii).
[96] Section 42)(1).
[97] Section 46(a) and 47 of the AH Act (Vic).
[98] Section 46(b) and 48 of the AH Act (Vic).
[99] Section 46(c) and 49 of the AH Act (Vic).
[100] Section 46(d) and 49A of the AH Act (Vic).
[101] Section 46(e) and 49B-49C of the AH Act (Vic).

The purpose of the plan is to manage activities to avoid or minimise harm to Aboriginal or Torres Strait Islander cultural heritage.

A CHMP must be developed and approved under Part 7 of the legislation when an environmental impact statement is required for a project.

However, any land user can voluntarily develop and seek to have a CHMP approved, even when there is no legal requirement to do so.[102]

If a regime similar to that under the AHA Act (Vic) and the Queensland Acts is to be adopted nationally in and in all State and Territory jurisdictions, funding and governance training for RAPS is necessary to ensure they have the means to adequately assess and protect cultural heritage.

Agreements

The Western Australian Minister for Aboriginal Affairs has been reported as saying that the 'best outcomes often arose when traditional owners and industry such as mining companies negotiated their own agreements for land use.'[103]

The *Traditional Owner Settlement Act 2010* (Vic) provides for the making of agreements between the State and traditional owner groups with respect to rights relating to land and interacts with the *Native Title Act 1993* (Cth).

The shortcoming of agreement making is that, if the traditional owners are approaching the negotiating table with the knowledge that in the history of Aboriginal heritage protection there is little evidence of mining companies or developers being refused permission by government to destroy heritage if there is an economic benefit to be gained from doing so, then they are not approaching a level negotiating table. The resulting agreements have no capacity for traditional custodians to say no to cultural heritage destruction. Typically, such agreements may provide for a process of site surveys of areas which are to be developed and site avoidance where that does not significantly impact on the economics of the development. However, such agreements also typically include provisions prohibiting the traditional custodians from objecting to or applications to government for approval to damage or destroy cultural heritage. Such provisions are binding on traditional custodians as the promise they are obliged to make in order to receive the financial benefits which are offered under the agreement.

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102 https://www.datsip.qld.gov.au/people-communities/aboriginal-torres-strait-islander-cultural-heritage/cultural-heritage-management-plans.

103 https://thewest.com.au/politics/state-politics/overhaul-of-unworkable-wa-aboriginal-heritage-laws-overdue-wyatt-ng-b88768154z.

Agreement making, if it is to have any true heritage protection role must include a capacity for traditional custodians to veto activity which adversely impacts cultural heritage. Any impasse arising from a veto should be ameliorated by a dispute resolution process, including a process of merits review by an independent tribunal of the decision-making process.

Assessment processes

It would be most efficient and effective for all parties concerned in protecting cultural heritage for bilateral agreements between Commonwealth and state/territory governments whereby the assessment material relied upon by one jurisdiction can be utilised by the other jurisdiction.

If cultural heritage protection is to be given its proper attention, cultural heritage issues must be dealt with early in a development assessment process, rather than as an afterthought as is often apparently the case under current regimes.

In an assessment process which requires a CHMP, as is recommended, it is important that the CHMP be approved prior to the grant of other statutory authorisations affecting the development of the land;[104]

It must also be mandated that it is illegal to harm Aboriginal cultural heritage without the appropriate approval mechanism such as an approved CHMP or cultural heritage permit process of the kind under the Victorian legislation.[105]

The efficacy of these provisions is limited by the qualification " that the prohibition only applies if the person knows, or ought reasonably to know, or is reckless as to whether, the cultural heritage is Aboriginal cultural heritage. This mirrors the AHA WA s 62, which provides a defence to a prosecution for an offence that the offender "did not know and could not reasonably have been expected to know, that the place or object to which the charge relates was a place or object to which this Act applied".

Independent merits review rights of development proponent

The AH Act Vic (Part 8) has a dispute resolution procedure in relation to cultural heritage management plans, and the sponsor of a cultural heritage management plan may apply to Victorian Commercial and Administrative Tribunal ("VCAT") for review of a decision of a registered Aboriginal party under section 63 to refuse to approve a plan.[106] The review is a

[104] As is the requirement of section 52(1) of the AH Act (Vic). See too definition of statutory authorisation at s 50.
[105] Sections 27-29 of the AH Act, but note s79G. See *Friends of the Surry Inc & Ors v Minister for Planning* [2012] VCAT 1106 at [27]. Ths would eliminate the less than satisfactory process under the AHA WA S 62 which provides a defence to a prosecution for an offence that the offender "did not know and could not reasonably have been expected to know, that the place or object to which the charge relates was a place or object to which this Act applied". if the person knows, or ought reasonably to know, or is reckless as to whether, the cultural heritage is Aboriginal cultural heritage.
[106] Section 116.

reconsideration of the matters which the matters which the RAP was obliged to consider[107] and the VCAT must consider avoidance and minimisation of harm to cultural heritage.[108]

Effective Aboriginal and Torres Strait Islander Heritage legislation should include a power of the Aboriginal party with custodial responsibility for cultural heritage to refuse to permit development impacting on cultural heritage, subject to a right of the proponent of a development to seek an independent merits review of such a decision.

Recognition of Indigenous loss and procedure for compensation

No current heritage legislation provides a mechanism for Aboriginal people or Torres Strait Islanders to receive compensation for damage of the cultural heritage connected to them.[109] Aboriginal and Torres Strait Islander Heritage legislation should include a mechanism for the traditional owners or custodians of heritage to initiate and be the beneficiaries of legal proceedings to provide a remedy for damage to and loss of cultural heritage by way of compensation or reparation.[110]

Variation of development approvals

A substantial deficiency in the AHA WA which has been brought into sharp relief by the circumstances leading to the destruction of the Juukan is that there was no power to review, revoke or alter the consent which had been given under the AHA WA to destroy the site even though a substantial time had elapsed since the consent was given and new information had emerged which may have justified a different decision being made. Aboriginal heritage legislation which contains a provision allowing for the authorisation of activity impacting upon heritage should include a provision which enables such permission, once given, to be amended or revoked, if the impact upon the Indigenous cultural heritage, or the significance of the Indigenous cultural heritage, is greater than was understood when the permission was granted.

Responsible Minister

One of the factors which contributed to what happened at Juukan Gorge was that, when the traditional custodians, the PKKP, became aware that the destruction of the site was

[107] Section 119.
[108] Section 120.
[109] By way of contrast, the *Aboriginal Cultural Heritage Act 2003* (Qld), s 148 and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld), s 148 provides compensation to the property owner to repair the damage caused by reason of anything done to protect heritage.

[110] There is provisions for a reparation order to be made in the vent of conviction of offence involving damage to heritage, but the remedy is not directly as a result of any capacity of the persons whose heritage has been damaged to prosecute a claim for reparation, e.g., AHA Vic, s 30.

imminent, they made representations, through their legal representatives with the Commonwealth Minister for Indigenous Affairs, Hon Ken Wyatt to do something to stop the destruction. It was not a surprising assumption to make that the Minister for Indigenous Affairs would have whatever power there was under the ATSIHP Act to protect Aboriginal heritage. However, it is the Minister for Environment and Heritage, Hon Susan Ley MP, who presently has that responsibility.

It would be reasonable to change that arrangement, so that the Minister for Indigenous Affairs is the responsible Minister in relation to the statutory processes for Aboriginal and Torres Strait Islander heritage protection. That would enhance the possibility that in emergency circumstances where Aboriginal Heritage is under threat any application for Ministerial intervention would, in the first instance, be made to the Minister which members of the public would more obviously expect to be the responsible Minister.

Summary of Recommendations

1. The primary source of protection of Aboriginal heritage is best dealt with by the Commonwealth through the robust application of legislation specifically directed to Aboriginal and Torres Strait Islander heritage protection.

2. Investment in strategic or large-scale assessment of areas of indigenous heritage that could qualify for National Heritage listing should be undertaken to proactively identity those areas that are worthy of protection under the EPBC Act (in addition to protection under the ATSIHP Act).

3. Data should be shared between State and Territory regulators and the Commonwealth Department of Agriculture, Water and the Environment to support assessment of areas of indigenous heritage that could qualify for National Heritage listing.

4. Once indigenous heritage areas have been listed and attract the protection of the EPBC Act, the Act must be rigorously applied and enforced.

5. A cultural heritage assessment regime similar to that under the AHA Act (Vic) and the *Queensland Aboriginal Cultural Heritage* Act and *Torres Strait Islander Cultural Heritage* Act should to be adopted nationally in all State and Territory jurisdictions.

6. Funding and governance training for Registered Aboriginal Parties is necessary to ensure they have the means to adequately assess and protect cultural heritage under a cultural heritage assessment regime similar to that under the AHA Act (Vic) and the *Queensland Aboriginal Cultural Heritage* Act and *Torres Strait Islander Cultural Heritage* Act.

7. Agreement making, if it is to have any true heritage protection role must include a capacity for traditional custodians to veto activity which adversely impacts cultural heritage. Any impasse arising from a veto should be ameliorated by a dispute resolution process, including a process of merits review by an independent tribunal of the decision-making process.

8. Cultural heritage protection must be dealt with early in a development assessment process.

9. A cultural heritage assessment process must require a Cultural heritage Management Plan.

10. A CHMP must be approved prior to the grant of other statutory authorisations affecting the development of the land.
11. It must be mandated that it is illegal to harm Aboriginal cultural heritage without the appropriate approval mechanism such as an approved CHMP or cultural heritage permit process of the kind under the Victorian legislation.

12. Aboriginal and Torres Strait Islander Heritage legislation should include a power of the Aboriginal party with custodial responsibility for cultural heritage to refuse to permit development impacting on cultural heritage, subject to a right of the proponent of a development to seek an independent merits review of such a decision.

13. Aboriginal and Torres Strait Islander Heritage legislation should include a mechanism for the traditional owners or custodians of heritage to initiate and be the beneficiaries of legal proceedings to provide a remedy for damage to and loss of cultural heritage by way of compensation or reparation.

14. Aboriginal heritage legislation which contains a provision allowing for the authorisation of activity impacting upon heritage should include a provision which enables such permission, once given, to be amended or revoked, if the impact upon the Indigenous cultural heritage, or the significance of the Indigenous cultural heritage, is greater than was understood when the permission was granted.

15. The Commonwealth Minister for Indigenous Affairs should be the responsible Minister in relation to Commonwealth statutory processes for Aboriginal and Torres Strait Islander heritage protection.