

Western Australian Government submission to the Joint Standing Committee on Northern Australia inquiry into the destruction of Indigenous heritage sites at Juukan Gorge

The Western Australian Government welcomes the opportunity to make a submission to the Joint Standing Committee on Northern Australia's inquiry into the destruction of Indigenous heritage sites at Juukan Gorge.

Australian Aboriginal culture is one of the oldest continuing cultures in the world and dates back at least 60,000 years. Aboriginal heritage is central to the health and vitality of Aboriginal communities and provides an essential link to their past, present and future, and it must be appropriately recognised, managed and protected.

The Department of Planning, Lands and Heritage (Department) is the State's lead agency for Aboriginal cultural heritage, and administers the *Aboriginal Heritage Act 1972* (Act) in Western Australia.

The recent destruction of the rock shelters in the Juukan Gorge of the Pilbara region is devastating for all parties involved and was clearly avoidable.

The following addresses the Inquiry's Terms of Reference.

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

The responsibility for the administration of the Act resides with the Minister for Aboriginal Affairs. The Act also establishes the Aboriginal Cultural Material Committee (ACMC). ACMC members are drawn from various parts of Western Australia and are people who, in the opinion of the Minister, have "special knowledge, experience or responsibility" that will assist the ACMC in its role. Section 39(1)(a) of the Act provides that one of the functions of the ACMC is "to evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons".

The Act is now almost 50 years old. It was the first in Australia to recognise Aboriginal cultural sites and objects of significance and to make specific provision for traditional use. Many changes have taken place since the Act was written, both in perceptions of Aboriginal cultural heritage and in the recognition of the relationship between Aboriginal people and their heritage and culture. The Act does not reflect Aboriginal community aspirations regarding management of their heritage or support an efficient and culturally appropriate land use decision-making process.

The primary purpose of any Aboriginal cultural heritage legislation must be the protection and preservation of Aboriginal heritage. The current Act only provides that heritage is preserved on behalf of the whole community without proper recognition of any special interest in the Aboriginal community.

One of the Act's greatest weaknesses is that it does not expressly provide for consultation with Aboriginal people in the identification, management and protection of their heritage. Ensuring the views of Aboriginal people are heard relies on the APMC's procedural fairness processes with respect to the Aboriginal people who may be affected by a decision. Consultation and decision-making processes need to ensure they involve the 'right people speaking for country' as a lack of certainty can result in both the right views not being heard and land use projects experiencing delays and potentially becoming unviable.

The Act is also restricted in its application to those places determined to be of significance and importance, and not Aboriginal cultural heritage generally. The Registrar of Aboriginal Sites maintains a Register of all sites and places to which the Act applies. While the Act is generally interpreted as providing 'blanket' protection for all Aboriginal sites in Western Australia, regardless of whether they are registered or not, inclusion of those places and objects on the Register of Aboriginal Sites and Objects gives rise to an inaccurate perception that only places on the Register have a protected status. The entry of a place on the Register does not have any legal effect.

The Register of Aboriginal Sites and Objects is reflective of the information provided by external sources and may not be a reliable source of information about the location of Aboriginal heritage. Some Aboriginal people are unwilling to have their most important places entered on the Register for fear it will encourage unwanted visitors or facilitate their destruction.

The penalties for offences under the Act do not reflect modern day Western Australia and are very low in comparison to other Australian States and Territories. The prosecution of offences in breach of the Act currently suffers because of a 12-month limitation period. This restricts comprehensive investigations being conducted in remote parts of the State. The Act is also not supported by a strong enforcement or compliance regime.

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

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

In order to achieve protection, conservation and management of Aboriginal cultural heritage in Western Australia, and to provide a clear framework that enables land users to manage Aboriginal heritage, a fundamental shift away from the current Act is required.

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

The Department is aware that Rio Tinto has an agreement with the Puutu Kunti Kurrama and Pinikura Native Title Group (PKKP) for managing heritage and have consulted with PKKP Traditional Owners about this project, including undertaking archaeological and ethnographic surveys.

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

On 15 October 2013, a Section 18 Notice was submitted by Hamersley Iron Pty Ltd (Rio Tinto) for the development and ongoing mining of Pit One, construction and operation of supporting infrastructure, as part of the expansion of the Brockman Mining Project. There were six potential Aboriginal sites on the land. Two rock shelters were determined to meet section 5(a) of the Act, being Brock-20 (ID 22298) and Brock-21 (ID 22299). PKKP was consulted by Hamersley Iron regarding the submission of the Notice and archaeological and ethnographic surveys were undertaken.

The Notice was considered by the Aboriginal Cultural Material Committee (ACMC) at their meeting on 11 December 2013. The ACMC recommended consent be granted.

On 31 December 2013, the then Minister for Aboriginal Affairs, Hon Peter Collier MLC, granted consent.

In 2008 the rock shelters at Juukan Gorge were test excavated under a Section 16 permit. Dr Michael Slack excavated the shelters alongside PKKP representatives. A one metre by one metre test pit was dug in both sites where small deposits of charcoal were discovered and subsequently dated. The dating in Brock-20 resulted in dates of 90, 290, 760, 26,640 and 32,950 years ago. The dating in Brock-21 resulted in dates of 400, 17,000 and 22,000 years ago.

In mid-2014, prior to any impact, Hamersley Iron undertook a salvage excavation led by Dr Slack along with PKKP representatives. These excavations determined an occupation date of 46,000 years ago for Brock-21.

The final report for the excavations (dated 2018) was provided to the Department when it was requested in May 2020.

Department representatives met with PKKP advisers on 19 May 2020. No PKKP Traditional Owners were present. The meeting was requested by the advisers in relation to an unrelated matter. Shortly before the meeting, Department staff were informed by the advisers that they wished to also discuss a matter relating to the Brockman mine. At the end of the meeting, the PKKP advisers sought confirmation of their understanding of the Section 18 Consent issued for the Brockman mine in 2013, including confirmation that such consents cannot be revoked. Department officers confirmed this was the case.

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;

The Western Australian Government understands that materials and tangible evidence from the area of objects connected with traditional cultural life have been appropriately salvaged and recorded. At the request of the PKKP people, over 7,000 artefacts have been stored securely to be repatriated to a suitable location identified by PKKP at an appropriate time.

f) the interaction, of State Indigenous heritage regulations with Commonwealth laws;

The Act precedes the *Native Title Act 1993* (NTA) and is not aligned with Native Title processes or principles. It does not recognise the heritage outcomes resulting from agreements made under the NTA between land use proponents and Native Title holders.

The Commonwealth is responsible for protecting Indigenous heritage places that are nationally or internationally significant, or that are situated on land that is owned or managed by the Commonwealth. This protection operates under the *Environment Protection and Biodiversity Conservation Act 1999*.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) can protect areas and objects that are of particular significance to Aboriginal people. The ATSIHP Act allows the Commonwealth Environment Minister, on the application by an Aboriginal person or group of persons, to make a declaration to protect an area, object or class of objects from a threat of injury or desecration.

The ATSIHP Act provides that the Environment Minister shall not make a declaration in relation to an area, object or objects located in a State, unless the Minister has consulted with the appropriate Minister of that State as to whether there is, under a law of that State, effective protection of the area, object or objects from the threat of injury or desecration. The Western Australian Government considers that the protection mechanisms created under the Act meet these requirements including the processes for permitting interference with Aboriginal sites and offence provisions for unauthorised interference.

Despite this, as noted above, the Western Australian Government considers the Act to be outdated, not reflective of Aboriginal community aspirations and, as detailed below, requires replacement with modern legislation. It is consistent with the purpose of the ATSIHP Act in relation to objects and areas of this special kind, together with the special nature of the power conferred on the Commonwealth Minister and the severe consequences to non-applicant parties with interests in the area over which any protection order is sought, that the decision to make a declaration is to be exercised at the highest level and with the restraint that great responsibility imposes.¹

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;

¹ *Tickner v Chapman* (1995) 57 FCR 451 at pp.462 and 477 (per Burchett J).

Since its introduction, the Act has been the subject of various reviews. None of these have resulted in major amendments despite significant changes in the legal, social and environmental circumstances surrounding the preservation and protection of Aboriginal cultural heritage.

The last attempt to reform the Act in 2011 was not well received. Aboriginal people and other stakeholders did not support the proposed changes. In addition to criticism that there was insufficient consultation undertaken on the proposed amendments, there was also strong concern that Aboriginal people were not involved in the proposed heritage decision-making processes.

The Western Australian Government recognises the need for change. In March 2018 the Minister for Aboriginal Affairs, the Hon Ben Wyatt MLA, announced the launch of the review of the Act. Following the announcement, a Consultation Paper was published that sought views on the effectiveness of the Act, any gaps in the legislation, and ideas on what modernised legislation should set out to do and how it should operate in the interests of all stakeholders.

During an eight-week consultation period, over 550 people participated in more than 40 workshops held around the State. More than 130 submissions were received. Several proposals on what a new Aboriginal heritage act should do were identified through stakeholder feedback and presented in a Discussion Paper that was released in March 2019. The Discussion Paper set out a statement of intent for new Aboriginal heritage legislation, a brief rationale, key proposals and discussion points.

A second phase of consultation was then undertaken with more than 500 people attending information sessions and workshops throughout the State. Over 70 submissions were received. The proposals gained sufficient stakeholder support to progress to the drafting of new legislation rather than amending the current Act.

The Aboriginal Cultural Heritage Bill 2020 (Bill) will be the culmination of the review, and extensive consultation with Aboriginal people across Western Australia, as well as industry and other stakeholders. Informed by the feedback received in the two phases of consultation, the Bill will address the shortcomings of the current Act by introducing new features that reflect contemporary Aboriginal cultural heritage management principles and practice.

The Bill will present a transformative, contemporary and respectful vision for the management of Aboriginal cultural heritage in Western Australia.

The current Act has a limited definition of Aboriginal heritage, with no definition of cultural landscapes or intangible heritage. The Bill will have an updated definition of what constitutes Aboriginal heritage, and recognition of cultural landscapes that better reflect a living culture that is central to the wellbeing of Aboriginal people.

Unlike the current Act, the Bill will provide for the management of Aboriginal ancestral remains and secret and sacred objects, which are of utmost importance to Aboriginal people.

The Bill will establish a new directory to replace the Register of Aboriginal Sites and Objects which will include all identified Aboriginal cultural heritage, including the listings on the current Register and the heritage places lodged with the Department.

The Bill will ensure real and meaningful consultation with Aboriginal people is required in the identification, management and protection of their heritage.

As noted above, the Act establishes the ACMC, which is responsible for evaluating the importance and significance of sites. While several of the current members are Aboriginal, there is no requirement for ACMC members to be Aboriginal people.

The Bill will establish the Aboriginal Cultural Heritage Council (Council) to provide strategic oversight of the Aboriginal heritage system in Western Australia. There will be a requirement for the Chair to be an Aboriginal person, and members selected based on their skills and experience, with a preference for the appointment of Aboriginal people.

The Council will promote public awareness, understanding and appreciation of Aboriginal cultural heritage in Western Australia; have a role in endorsing Aboriginal Cultural Heritage Management Plans (Plans); and inform standards and guidelines on matters relating to Aboriginal cultural heritage.

Under the Bill, Aboriginal people will be responsible for evaluating the importance and significance of their heritage sites.

The Bill will provide for Local Aboriginal Cultural Heritage Services – local incorporated Aboriginal bodies – to ensure that relevant Aboriginal knowledge holders are consulted, to make agreements regarding Aboriginal heritage management and land use proposals in specific geographic areas, and to support the implementation of existing agreements.

Under the current Act, land users are required to seek the consent of the Minister for Aboriginal Affairs via a Section 18 Notice for any activities where impact to a site of importance and significance is unavoidable. While not required, the ACMC ensures that consultation has occurred and that the views of Traditional Owners are sought regarding impacts to the heritage on the land. The current Section 18 approvals process is the same irrespective of the type and level of impact proposed for a site.

The Bill will establish a tiered land use approvals system encouraging proponents to undertake due diligence to determine if the proposal will impact Aboriginal cultural heritage. If a land use proposal will impact Aboriginal cultural heritage, then the type of approval will depend on the level of impact. For activities with medium to high people and develop a Plan for authorisation to proceed with the activity.

The Council will be able to approve Plans that can demonstrate informed consent, adequate Aboriginal consultation, and agreed management of impacts to Aboriginal cultural heritage.

Unlike Section 18 Notices, which do not allow new information to be considered, Plans will provide an avenue for contingency arrangements should new Aboriginal cultural heritage be discovered, or new information arises. The requirement for agreed Plans between Aboriginal groups and proponents reflects best practice heritage management and allows Aboriginal people to have an active role in the management of their heritage.

Where possible, the Western Australian Government has sought to align the Bill with NTA processes to avoid duplication and recognise heritage outcomes arising from agreements. It is the Western Australian Government's goal that Aboriginal people and industry will work together to have early conversations and reach agreements regarding the management of cultural heritage.

It is also recognised that, for a variety of reasons, this will regrettably not always be possible. In these cases, while it will not be the preferred option, the Bill will provide for a Government authorisation process to allow the undertaking of activity which will have a medium to high impact on Aboriginal cultural heritage. It is important to note that this will not be a process by which requirements relating to agreements can simply be avoided. Proponents will have to demonstrate they have made a serious and genuine attempt to engage the appropriate Aboriginal people regarding their cultural heritage.

Under the current Act, Aboriginal people have no right of appeal. The Bill proposes that Aboriginal people and land users will be afforded the same rights of appeal regarding decisions made.

The current Act has been criticised for lacking transparency, with no requirement for decisions to be published. The Bill improves openness and transparency in the management of Aboriginal heritage places. Decisions, and reasons for the decision, will be published.

The current Act makes no provision for stakeholders to obtain early advice from the Department. The Bill will define the role of the Department in providing early advice to stakeholders regarding compliance and the approvals pathway.

The Act also has weak penalties and a 12 month limitation period that restricts comprehensive investigations being conducted. The Bill will bring offences and penalties in line with the *Heritage Act 2018* and other modern legislation and there will be significantly higher penalties for offences. The current limitation period will be increased from 12 months to five years.

The Bill will introduce stop activity orders to prevent unauthorised impacts to Aboriginal cultural heritage. Stop activity orders may be required where there is an imminent risk of harm to the Aboriginal cultural heritage by a person acting without any approval or by acting outside an existing approval.

There will also be remediation orders to allow for remediation work to be undertaken to restore impacted Aboriginal cultural heritage to its original condition.

The current Act provides for the declaration of Aboriginal sites that are of outstanding importance to be Protected Areas and vests exclusive use of the land in the Minister for Aboriginal Affairs. Conferring Protected Area status on an area is a 'future act' under the NTA, which means formal processes of the NTA must be complied with before a declaration can be made. This has resulted in no Protected Areas declarations being made since the early 1990s. Further, the limits that Protected Areas impose on activities within their designated boundary make it difficult for Aboriginal people to actively manage and conserve these most significant of areas.

Under the Bill, Protected Areas will no longer be vested with the Minister for Aboriginal Affairs and will not trigger NTA provisions, which will enable active management by Aboriginal people, and provide opportunity for more places of outstanding importance to be declared Protected Areas.

- i) opportunities to improve Indigenous heritage protection through the *Environment Protection and Biodiversity Conservation Act 1999*; and**
- j) any other related matters.**

For more than two years, the Western Australian Government has been consulting with Aboriginal people, industry and other stakeholders regarding the review of the Act.

The clear message from Aboriginal people and industry stakeholders is that the current legislation is well past its use by date.

The Bill will represent a fundamental shift in the approach to, and protection of, Aboriginal heritage in Western Australia. It will be a modern piece of legislation with three key focus areas: Aboriginal voices, improved protection, and better decisions.

As the Bill has been drafted, the Western Australian Government has continued to consult with Aboriginal people, industry stakeholders and other key stakeholders.

Drafting the legislation has been a careful and considered process, balancing the views of all stakeholders. The Bill is intended to be introduced into Parliament in 2020.