



National
Native Title
Tribunal



Commonwealth, State and Territory Heritage Regimes: summary of provisions for Aboriginal consultation

A report prepared for the New South Wales
Aboriginal Land Council

Research Section
National Native Title Tribunal
December 2010

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Background to this Report

The New South Wales Aboriginal Land Council (NSWALC) is the peak Aboriginal representative body in New South Wales. This report was produced by the Research Section of the National Native Title Tribunal at the request of NSWALC to provide a comparative summary of provisions for Aboriginal consultation under Commonwealth, State and Territory cultural heritage legislation and government administrative processes.

The report presents a summary for each jurisdiction, with each summary divided into three sections. The first section provides a general overview and background of the relevant statutes in the jurisdiction which relate to Aboriginal cultural heritage. The next section focuses on specific provisions within that legislation, and also administrative processes where relevant, relating to the identification and consultation of appropriate Indigenous parties. The third section summarises various published views and commentaries about the heritage regime in that jurisdiction, again focussing on the provisions dealing with Aboriginal consultation. Also provided in the report, by way of introduction, is a brief background and overview of cultural heritage conservation in Australia.

It should be noted that this report is based solely on publicly and readily available material. It is intended to provide a general summary only, and should not be seen as being definitive or comprehensive. Time and resources have not permitted any consultations or extensive analysis of the issues by the authors. Some of the information in this report has been drawn from a research report prepared by the National Native Title Tribunal in 2009 which provides an overview of Indigenous cultural heritage systems in Victoria, Queensland and the Northern Territory.¹

The National Native Title Tribunal has no view as to the merits or otherwise of the cultural heritage regimes in different jurisdictions, and no critical evaluations or conclusions are made in this report as to the particular merits of the summarised published commentaries.

¹L Hayes, *Indigenous Cultural Heritage Schemes in Victoria, Queensland and the Northern Territory: an overview. A report prepared for the South Australia Native Title Resolution Negotiating Parties*, Research Section, National Native Title Tribunal, May 2009.

Heritage Protection in Australia: a brief overview

The purpose of this section is to provide a brief overview of the history of Indigenous heritage protection in Australia, in order to contextualise some of the specific Aboriginal consultation provisions which are in place under Commonwealth, State and Territory cultural heritage legislation.

Archaeology and 'relics' legislation

Modern-day Indigenous heritage protection schemes have their genesis in, amongst other things, the rise of Aboriginal activism in the 1960s and the use of Indigenous symbolism to drive these campaigns.² Despite increased awareness of Aboriginal rights, in that era Indigenous cultures continued to be viewed as relics of the past, and Indigenous people were seen as a dying race.

Heritage laws were passed in most Australian jurisdictions between 1967 and 1975. These laws ultimately became known as 'relics' Acts, either by title or definition. The first of these was South Australia's *Aboriginal and Historic Relics Preservation Act 1965*, shortly followed by Queensland's *Aboriginal Relics Preservation Act 1967*, and similar legislation in New South Wales (1970), Western Australia (1972), Victoria (1972) and Tasmania (1975). The Commonwealth's *Australian Heritage Commission Act 1975* differed in numerous respects due to jurisdictional issues, but was still product of a similar philosophy.

Running contrary to the era was the Northern Territory's *Aboriginal Sacred Sites Act (1979)*. As complementary legislation to the *Aboriginal Land Rights Act (1976)*, it was established for the sole purpose of protecting Aboriginal sacred sites. It created an agency to administer the Act, the Aboriginal Sacred Sites Protection Authority, as well as a governing Board comprised of members drawn mostly from the Aboriginal community. The significance and value of a sacred site was defined by the Aboriginal community. This Act was superseded by the current *Northern Territory Aboriginal Sacred Sites Act 1989*.

When the 'relics' legislation of this era was drafted, professional archaeologists, rather than the Indigenous community, were the principal interest group consulted. As a result, Aboriginal cultural heritage was defined largely in terms of its value to prehistory or antiquity, represented largely as objects and sites of archaeological importance.³ As numerous critics over the years have noted, however, these Acts essentially failed to

² R Ellis, 'Rethinking the paradigm: cultural heritage management in Queensland', Ngulaig, vol. 10, no. 8, 1994.

³ D Ritchie, 'Australian heritage protection laws: an overview', in J Finlayson and A Jackson-Nagano (eds), *Heritage and Native Title: anthropological and legal perspectives*, Canberra, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1996, p. 29.

reflect any real appreciation that heritage is as much a product of the present as it is of the past. Indeed, as David Ritchie noted, the

use of the word 'relic' and the use of the past tense in describing Aboriginal occupation of Australia preclude[d] the possibility of continuing significance of any such relic to contemporary Aboriginal peoples.⁴

This tendency was further demonstrated by the make-up of the committees and councils established under these Acts to consider Aboriginal heritage issues. On these committees archaeologists were established as the key authorities, with Indigenous people kept largely peripheral to the process.⁵ As one archaeologist later commented, the focus of heritage legislation of the past seems to have been 'to protect the *resource* of value to a particular profession, rather than the cultural heritage value to the people who created it'.⁶

Moving into the late 1970s and early 1980s, the importance of involving Aboriginal people in decisions about their own heritage gained increasing acceptance, and local communities and representatives began to be consulted and invited to participate in heritage studies and conservation programs.⁷ While the archaeological emphasis remained dominant, heritage professionals began to understand heritage in the context of the political and social struggles of Indigenous peoples; for example, by helping to legitimise claims of customary land tenure, and by engendering within the broader community a sense of the achievements and cultures of Indigenous peoples.

Despite this overall change in emphasis, the significance of heritage remained firmly set within the 'relics' model set by legislation. This approach was mirrored in non-Indigenous conservation frameworks; for instance, the pre-eminence of 'fabric' in the widely popular Burra Charter,⁸ first established in 1979. It 'provides guidance for the conservation and management of places of cultural significance (cultural heritage places), and is based on the knowledge and experience of Australia ICOMOS members'. Under the charter, 'fabric means all the physical material of the place including components, fixtures, contents, and objects'.⁹

However, over several revisions the Burra Charter has reflected developments in heritage philosophy, embracing the notion that significance in heritage lies in its

⁴ Ritchie, p. 29.

⁵ Ellis, p. 11.

⁶ A Ross, 'Understanding the difference between cultural heritage and native title', paper presented to course 'Certificate in the valuation of land subject to native title', 24-28 June 2002, University of Queensland, St Lucia Campus, p. 3.

⁷ Ellis, pp. 17-19.

⁸ Australia ICOMOS, *The Burra Charter (The Australia ICOMOS charter for places of cultural significance)*, <http://www.nationaltrust.com.au/burracharter.html> (viewed 5 August 2010). This Charter was adopted by Australia ICOMOS on 19 August 1979 at Burra, South Australia. The Charter has undergone several revisions since then.

⁹ Australia ICOMOS, *The Burra Charter*, article 1.3.

importance to people connected with it. Much of the revised content of the 1999 Burra Charter deals with the need to appreciate a broader range of significant heritage elements. Article 3 of the 1999 version now states that ‘conservation is based on a respect for the existing fabric, use, associations and meanings,’ while Article 12 stipulates that

*conservation, interpretation and management of a place should provide for the participation of people for whom the place has special associations and meanings, or who have social, spiritual or other cultural responsibilities for the place.*¹⁰

New approaches to heritage protection

By the mid 1980s, increased appreciation of Aboriginal cultures and beliefs prompted governments and heritage practitioners to reassess their understanding of Indigenous heritage. Some jurisdictions produced new or amended legislation which included some acknowledgement, at least in a few very specific categories, of the possibility of non-archaeological significance in Aboriginal heritage.

In South Australia, new Acts were established in 1979 and again in 1988. The second of these was the current *Aboriginal Heritage Act 1988*, which provides protection for archaeological sites and artefacts as well as objects and sites that are of ‘significance to Aboriginal tradition’.¹¹ In Queensland, the *Aboriginal Relics Preservation Act 1967* was updated by the *Aboriginal Relics Preservation Amendment Act 1976*, which was itself replaced a decade later by the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987*. The latter of these provided some recognition of areas that were significant to ‘humans for any anthropological, cultural, historic, prehistoric or societal reason’.¹² This allowed for some protection of items of non-archaeological significance, although it remained open to much interpretation.¹³

A pivotal event for new approaches to Indigenous heritage was the Commonwealth’s *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the ATSIHP Act). The limitations of existing State and Territory legislation had become increasingly evident during a spate of incidents in the 1970s and early 1980s, including the controversial oil-drilling of sacred sites at Noonkanbah Station in Western Australia in 1980. The intent of the ATSIHP Act was to provide a safety net for Aboriginal heritage where State and Territory regimes failed to provide appropriate protection. It explicitly covered items and places of significance to ‘Aboriginals or Islanders in accordance with their traditions’.¹⁴ However, according to the 1996 inquiry into the ATSIHP Act by Justice Evatt, the

¹⁰ Italics in original.

¹¹ *Aboriginal Heritage Act 1988* (SA), s. 3.

¹² *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld), s. 5.

¹³ Ross, p. 6.

¹⁴ Department of Aboriginal Affairs (Commonwealth), *Australian and Torres Strait Islander Heritage Protection Act 1984: A guide to how the Act works*, Australian Government Printing Office, Canberra, 1984, p. 11.

execution of the Act remained easily manipulated due to the ways in which Ministerial discretion was exercised and the lack of scope for proactive protection.¹⁵

Despite developments in some States, in other jurisdictions heritage legislation has changed little, although reviews of legislation and progress towards change are occurring in most circumstances. However, Western Australia's *Aboriginal Heritage Act 1972*, the Tasmanian *Aboriginal Relics Act 1975* and the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* all remain in force, largely in their original formats, despite several reviews and inquiries.

The Victorian Government attempted to introduce new legislation in the 1980s to replace its *Archaeological and Aboriginal Relics Preservation Act 1972*, but was prevented from doing so by the State Opposition's Upper House majority. The Government appealed to the Commonwealth for assistance, which, in response, amended the ATSIHP Act to include Part IIA, which provided specific protection for objects and places of particular significance to Aboriginal people in Victoria, in accordance with their traditions. This scheme remained in force until the recent enactment of the *Aboriginal Heritage Act 2006* (Vic).

In New South Wales, the *Heritage Act 1977* allows for Indigenous places to be nominated to the NSW Heritage Register if they are 'considered of high significance to the cultural heritage values of the community or to the Aboriginal peoples of NSW',¹⁶ but there has never been a specific Act dedicated to Indigenous heritage. Aboriginal heritage is also incorporated into sections dealing with archaeological materials in the *National Parks and Wildlife Act 1974*. This Act was amended by the *National Parks and Wildlife Amendment Act 2010* (see below).

Consultation models: *Ask First*

By the 1990s, despite the persistence of 'relics' legislation, processes and policies favouring consultation were typically implemented at government agency level. These were manifested mostly in the form of direct contact between relevant agencies and traditional owner groups, and consideration of their views when deciding permit / development applications. While not always satisfactory, these consultations established new expectations for how such relationships should work. These expectations also applied to developers, miners and other interests dealing with proposals affecting Indigenous heritage.

Involving Indigenous people in the management of their own heritage became a new standard of heritage best practice, encapsulated by the former Australian Heritage

¹⁵ E Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Canberra, Minister for Aboriginal and Torres Strait Island Affairs, 1996.

¹⁶ Department of Planning (New South Wales), *Nominating Aboriginal Items*, n.d., http://www.heritage.nsw.gov.au/06_subnav_01_1.htm (viewed 3 August 2010).

Commission in its publication *Ask First*.¹⁷ Essentially a guide for developers and other parties involved in activities affecting Indigenous heritage, it focused on

allowing the relevant Indigenous people to determine the significance of places in accordance with their culture before moving to achieving agreements between parties on how places and heritage values should be managed.¹⁸

The guide's principles state that all parties should acknowledge and accept that Indigenous people:

- are the primary source of information on the value of their heritage and how it is best conserved;
- must have an active role in any Indigenous heritage planning process;
- must have input into primary decision-making in relation to Indigenous heritage so they can continue to fulfil their obligations towards this heritage; and
- must control intellectual property and other information relating specifically to their heritage, as this may be an integral aspect of its heritage value.¹⁹

Native Title

The commencement of the *Native Title Act 1993* (Cwlth) triggered a completely new scenario for Aboriginal heritage issues. While mainly applicable to Crown land and some categories of leasehold, native title provided for recognition of Indigenous connection with traditional lands. Processes of mediation and negotiation between native title parties, governments and proponents such as mining companies were also established, affording some Indigenous people the ability to negotiate the identification and care of their own heritage on more equitable terms. While the relationship between native title and heritage remains a work in progress, governments, industries and Indigenous parties are working together, using native title or parallel processes as a means of safeguarding heritage. These processes go beyond area or site protection, incorporating a wide range of beneficial outcomes, for example, in terms of national parks and protected area management and promoting tourism through partnerships.

While this is an encouraging sign from an Indigenous perspective, there remains significant areas not subject to native title, as well as the critical question of identifying people who have the right to speak for country in such areas.

¹⁷ Australian Heritage Commission (AHC), *Ask First: a guide to respecting Indigenous heritage places*, Australian Heritage Commission, Canberra, 2002.

¹⁸ Australian Heritage Commission, p. 3.

¹⁹ Australian Heritage Commission, p. 6.

The development of heritage philosophies and the advent of native title have posed significant challenges for State and Territory Governments. According to Lee Godden:

[I]ndigenous people's cultural heritage ... is an area of law where the parameters are constantly shifting. One of the central issues is the degree of autonomy that Aboriginal and Torres Strait Islander peoples have in respect of their roles as custodians of that heritage.²⁰

Many reviews and inquiries have been undertaken into the respective Commonwealth, State and Territory Aboriginal heritage regimes. In the 2000s, Queensland, Victoria and the ACT have all implemented new dedicated Indigenous heritage legislation. In addition, current legislation is under review by the Commonwealth, Tasmanian, ACT, South Australian and Northern Territory Governments. As noted above, in New South Wales the *National Parks and Wildlife Act 1974* was recently amended.

²⁰ L Godden, 'Indigenous Heritage and the Environment: "Legal Categories are Only One Way of Imagining the Real"', *Environment and Planning Law Journal*, vol. 19, no. 4, 2002, p. 260.

Commonwealth Indigenous Heritage Legislation

General overview and background

The following Commonwealth Acts have direct relevance to the protection and conservation of Aboriginal and Torres Strait Islander heritage:

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (the ATSIHP Act)

The purposes of this Act are

the preservation and protection from injury or desecration 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.²¹

The Act allows for intervention where State or Territory laws cannot or do not provide effective protection. Under the Act the Minister may declare temporary or permanent protection orders on sites or objects of significance, supported by sanctions including fines and imprisonment. However, these powers have rarely been invoked.

The ATSIHP Act is currently under review by the Commonwealth Government.

Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act)

The objects of the EPBC Act include:

(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

(f) to recognise the role of indigenous people²² 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.²³

Heritage provisions under the EPBC Act were implemented in 2004, replacing the *Australian Heritage Commission Act 1975*. It provides for natural, historic and Indigenous places of various levels of significance to be recognised via National and Commonwealth Heritage Lists and the Register of the National Estate. The Minister's powers under the EPBC Act are applied to heritage places, with greater protection afforded to places of

²¹ ATSIHP Act, s. 4.

²² 'A person is an indigenous person if he or she is (a) a member of the Aboriginal race of Australia; or (b) a descendant of an indigenous inhabitant of the Torres Strait Islands' (EPBC Act, s. 363(4)).

²³ EPBC Act, s. 3(1)(d) (f) and (g).

national significance as well as those under Commonwealth ownership or control. The Australian Heritage Council is constituted under the EPBC Act, via the *Australian Heritage Council Act 2003*. Its primary role is to advise the Minister, with Indigenous interests represented by Indigenous members of that Council.

Protection of Movable Cultural Heritage Act 1986 (the PMCH Act)

The PMCH Act is '[a]n Act to protect Australia's heritage of movable cultural objects, to support the protection by foreign countries of their heritage of movable cultural objects, and for related purposes'.²⁴

The Act gives force in Australian law to the UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property. It regulates the export of significant cultural heritage objects, including significant Indigenous objects.

Movable cultural heritage of Australia is defined as 'objects that are of importance to Australia, or to a particular part of Australia, for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons' including:

objects relating to members of the Aboriginal race of Australia and descendants of the indigenous inhabitants of the Torres Strait Islands; and

objects of ethnographic art or ethnography.²⁵

Indigenous objects of Class A type cannot be exported, including human remains, sacred and secret ritual objects, burial objects, rock art and carved trees. Other Indigenous objects fall under Class B type, which can only be exported via permit. Permit applications are assessed by the Cultural Heritage Committee, which must include in its makeup one qualified person of Indigenous ancestry.

Identification and consultation of appropriate Indigenous parties

The ATSIHP Act

The only provision expressly requiring consultation with Indigenous parties in this Act is in relation to the discovery of Aboriginal remains.²⁶ A person who discovers anything

²⁴ Long title of the PMCH Act.

²⁵ PMCH Act, s. 7 (1)(b) and (c).

²⁶ 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 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

they have reasonable grounds to suspect to be Aboriginal remains must report the discovery to the Minister. Where the Minister receives a report, and is satisfied that it relates to Aboriginal remains, he or she must take reasonable steps to consult with any Aboriginal persons considered to have an interest in the remains, with a view to determining the proper action to be taken.²⁷

The EPBC Act

The following provisions require the Minister to identify and consult with appropriate Indigenous parties:

1. The Minister may enter into a *bilateral agreement*²⁸ if he or she has:
 - published a draft of the agreement;
 - invited people to make comments;
 - takes into account any comments made; and
 - considers ‘the role and interests of indigenous peoples in promoting the conservation and ecologically sustainable use of natural resources in the context of the proposed agreement, taking into account Australia’s relevant obligations under the Biodiversity Convention’.²⁹
2. The Minister may issue permits authorising the doing of certain things which would otherwise be breaches under the Act³⁰ if he or she is satisfied that *inter alia*:
 - the specified action is of particular significance to *indigenous tradition*³¹ and ‘will not adversely affect the survival or recovery in nature of the listed threatened species or listed threatened ecological community concerned’.³²

-
- 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)).

²⁷ ATSIHP Act, s. 20.

²⁸ A *bilateral agreement* is a written agreement between the Commonwealth and a State or a self-governing Territory that provides for protecting the environment; promoting the conservation and ecologically sustainable use of natural resources; ensuring an efficient, timely and effective process for environmental assessment and approval of actions or minimising duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (or vice versa); and is expressed to be a bilateral agreement (EPBC Act, s. 45(2)).

²⁹ EPBC Act, s. 49A.

³⁰ EPBC Act, ss. 207B, 196, 196A, 196B, 196C, 196D, 196E. See also s. 258 in relation to the EPBC Act, ss. 254, 254A, 254B, 254C, 254D or 254E.

- in making a decision on the application, the Minister must invite comment from any person and consider any comments made before issuing the permit.³³
3. If the Australian Heritage Council considers that a place might have *indigenous heritage value*³⁴ and is considering placing it on the National Heritage List the Council must:
- take all practicable steps to identify each Indigenous person who has rights or interests in all or part of the place; and
 - ‘take all practicable steps to advise each person identified that the Council is assessing whether the place meets any of the National Heritage criteria’; and
 - ‘give persons advised at least 20 business days to comment in writing’.³⁵

If the Australian Heritage Council considers that the place might have an *indigenous heritage value*; and

- there are Indigenous persons who have rights or interests in all or part of the place; and are neither owners nor occupiers of all or part of the place; and
- the Council is satisfied that there is a body, or there are bodies, that can appropriately represent those Indigenous persons in relation to those rights and interests;

the Council may satisfy the notice requirements in subsection (5) by giving the relevant information to that body or those bodies.³⁶

4. The Act establishes an Indigenous Advisory Committee whose function ‘is to advise the Minister on the operation of the Act, taking into account the significance of indigenous peoples’ knowledge of the management of land and the conservation and sustainable use of biodiversity’.³⁷

³¹ [*Indigenous tradition* is defined as the body of traditions, observances, customs and beliefs of indigenous persons generally or of a particular group of indigenous persons (EPBC Act, s. 201(4)).

³² EPBC Act, s. 201(3)(b)(i).

³³ EPBC Act, s. 201(5).

³⁴ [*Indigenous heritage value* is defined as a place means a heritage value of the place that is of significance to indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history (EPBC Act, s. 528).

³⁵ EPBC Act, s. 324JH(5).

³⁶ EPBC Act, s. 324JH(7).

³⁷ EPBC Act, ss. 505A and 505B.

The PMCH Act

The Act establishes the National Cultural Heritage Committee³⁸ whose functions include advising the Minister in relation to the Act and consulting and co-operating with appropriate authorities of the Commonwealth, States and Territories, and other organisations, associations and persons, on matters related to its functions.³⁹

The Committee consists of 10 people, one of whom is nominated by the Minister for Aboriginal Affairs and must be a person of the Aboriginal race of Australia or a descendant of an indigenous inhabitant of the Torres Strait Islands.⁴⁰

Regulations made under the PMCH Act prescribe a list (the National Cultural Heritage Control List) of categories of objects that constitute the movable cultural heritage of Australia which are subject to export control.⁴¹

Views on the Commonwealth heritage regime

The ATSIHP Act has been the focus of some criticism. A comprehensive review of the Act was undertaken in 1996 by the Hon Dr Elizabeth Evatt AC. The Review, which received nearly 70 submissions and involved extensive consultations around Australia, identified a number of issues and problems with the Act.

One of the concerns expressed by some Aboriginal respondents to the Review related to the Act lacking any express requirement to consult with Indigenous parties:

No obligation to make a declaration

2.33 Aboriginal people are critical of the Act because the power to protect areas and objects is discretionary. The Minister is not obliged to act, even if an area is of significance to Aboriginal people. He/she can revoke a declaration without any express requirement to consult the parties. The Act does not specify criteria which, when established, confer a right to a declaration.⁴²

Further:

Role of Aboriginal people is not recognised

8.13 The current approach fails to recognise a special role for Aboriginal people in determining the question whether a site is of particular significance. It is, in this regard, inconsistent with minimum standards under which Aboriginal people would be closely involved in the evaluation of sites. Developing the law along those lines would be a way

³⁸ PMCH Act, s. 15.

³⁹ PMCH Act, s. 16.

⁴⁰ PMCH Act, s. 17 (1) and (1A).

⁴¹ PMCH Act, s. 8.

⁴² Evatt, p. 15. Emphasis in original.

of incorporating Aboriginal values into the legal system, and would be consistent with the ALRC report on recognition of Aboriginal customary law.⁴³

Concerns about Indigenous consultation were illustrated in a submission quoted in the Review prepared by the Foundation for Aboriginal and Islander Research Action:

The many aspects of Indigenous cultural heritage requires [*sic*] consultation and negotiation with relevant owners and elders. It also requires appropriate cultural practices and beliefs to be considered during the visitation and discussion of sacred sites. The dispersion of Aboriginal and Torres Strait Islander society (a direct result of European control and domination) has meant that considerable time can be taken up during consultations in ensuring that all relevant people are involved in the process. As the Act relates specifically to Aboriginal and Torres Strait Islander culture, it is essential that aspects of these cultures are recognised under the heritage [*sic*] Protection Act.⁴⁴

Consideration of the submissions led to 'the conclusion by the Review that there should be minimum standards for the planning and development process', two of which were as follows:

An effective consultation/negotiation process between developers and relevant Aboriginal communities should be facilitated by an independent Aboriginal heritage body.

The consultation/negotiation process should have the objective of agreeing on work area clearance.⁴⁵

On the proposal for an 'independent Aboriginal-controlled heritage body', the Review elaborated:

6.18 The Guidelines developed by the Interaction Working Party recognise the claim of Aboriginal people to be involved in site assessment and proposed that there be an independent Aboriginal-controlled heritage body with responsibility for site evaluation and for the administration of the Act:

High level of involvement of Aboriginal custodians in the administration of the Act and decisions affecting sites. In particular:

The body responsible for evaluation and recording sites to be independent.
Control of the body by Aboriginal custodians
Information provided to it shall be on a confidential basis.

The need for Aboriginal heritage bodies has been described in this way:

⁴³ Evatt, p. 114. Emphasis in original.

⁴⁴ Evatt, p. 150.

⁴⁵ Evatt, p. 88.

An essential part of any scheme is the creation of an authoritative body able to evaluate applications from Aboriginal people to have their sites officially recognised ... [and] to provide advice on the significance of a disputed cultural area ... Such a body must therefore have credibility, both with Aboriginal custodians and the Government.⁴⁶

The Review also recommended the following:

ASSESSMENT BASED ON ABORIGINAL INFORMATION

8.6 Where an assessment of significance of an area or site has to be made, it should be based on information provided by and consultations with the relevant Aboriginal community, communities or individuals and on any anthropological reports or information provided with their consent.⁴⁷

Another of the Review's recommendations reflected an emphasis on consulting with all Indigenous people who possessed potential links to a site:

10.113 The Review considers that there is a particular need to ensure that all Aboriginal people who may have links with the area on [*sic*] question have an opportunity to provide any comments they have on issues of significance to the agency. One means of doing this is to require notification of a range of community groups including legal services, land councils, ATSIC offices and so on. Provision should be made for such notification to occur.

RECOMMENDATION:

10.36 The Act should provide for particular community groups in each State/Territory to be prescribed for the purpose of the obligation to notify interested persons.⁴⁸

An additional issue concerning consultation which was raised in the submissions to the Review was the question of who should be authorised to apply for heritage protection. Some respondents, such as Conzinc Riotinto Australia, argued that

[a]n application should only be able to be made to the Minister by an Aboriginal custodian or custodians or persons duly authorised on their behalf. The Minister should be required to be satisfied that the application is made by or with the consent of the traditional custodian.⁴⁹

In assessing this submission, the Review 'accept[ed] that the views of any custodians will be important in assessing issues of significance', but it did 'not consider that the possibility of disagreement among Aboriginal people should be used to prevent easy access to the Act, including by non-custodians'. Consequently, it did 'not accept the need for limits on who can make applications under the Act', and recommended 'that the

⁴⁶ Evatt, p. 83.

⁴⁷ Evatt, p. 126.

⁴⁸ Evatt, p. 193.

⁴⁹ Evatt, p. 182.

current requirements in relation to applications for protection under the Act be retained'.⁵⁰

The Evatt Review was itself the subject of a later inquiry by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund. The Committee produced two reports, the first of which stated that it 'is concerned to ensure that the more knowledgeable members of indigenous communities are consulted'.⁵¹ The second report elaborated that 'the Committee is strongly supportive of the principle of meaningful indigenous involvement in relevant decisionmaking [*sic*] ... and endorse[s] indigenous involvement in the registration and management of heritage sites'.⁵²

However, in spite of the extensive recommendations put forward in the Evatt Review, the proposed changes did not receive the support of the Parliament, and the legislation was not amended.

Since 2009 the ATSIHP Act has once again been under review:

On 3 August 2009 the Minister for the Environment, Heritage and the Arts invited written submissions on proposed reforms to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The Australian Government is proposing to reform this Act to improve Indigenous heritage protection laws nationally. The Act could be substantially amended or replaced.⁵³

To this end, the Government released a discussion paper outlining proposals for possible reforms, with one of the aims of the review being:

Ensure that Indigenous Australians will have the best opportunities to protect their heritage. Developers would be encouraged to meet Indigenous traditional custodians early, when planning new activities that could affect a traditional area or object, to try to reach agreement on heritage protection. Existing processes, such as native title processes, would be used to secure agreements on heritage protection. Where agreement cannot be reached between parties, governments would continue to make decisions about protection. In doing so, governments would be required to consider the views of traditional custodians and to make balanced decisions based on best practice standards.

⁵⁰ Evatt, p. 182.

⁵¹ Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Eleventh Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: *The Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, April 1998, para 7.41, http://aph.gov.au/Senate/committee/ntlf_ctte/completed_inquiries/1996-99/report_11/report/index.htm (viewed 29 July 2010).

⁵² Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Twelfth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: *The Aboriginal and Torres Strait Islander Heritage Protection Bill 1998*, May 1998, para 3.20, http://aph.gov.au/Senate/committee/ntlf_ctte/completed_inquiries/1996-99/report_12/report/index.htm (viewed 29 July 2010).

⁵³ Department of the Environment, Water, Heritage and the Arts (Commonwealth), *Reform of Indigenous heritage protection laws*, <http://www.environment.gov.au/heritage/laws/indigenous/lawreform/index.html> (viewed 27 July 2010).

Traditional custodians would be able to ask a court or other tribunal to review adverse decisions.⁵⁴

In addition:

Standards could improve the extent to which Indigenous heritage is protected by requiring:

- **Appropriate consultation and opportunities to reach agreements:** Indigenous people who have traditional responsibilities for heritage are best placed to advise on the manner of protecting their traditional areas and objects. Laws can provide ways to identify the traditional custodians or their representatives (for example by establishing Indigenous heritage bodies) and enable project proponents to meet them to resolve issues.
- **Independent assessments based on the advice of Indigenous people:** Government decisions about whether to protect heritage are based on expert advice. As experts on the traditional importance of areas and objects, the traditional custodians would need to have an opportunity to identify and assess possible impacts on those areas and objects. Decisions should be made after considering the assessment.⁵⁵

The paper also identified one of the main weaknesses of the current Act:

Any Indigenous person or their representative can apply for protection, even if they are not traditional custodians of the area or object in question. This is unfair and can undermine the entitlements of traditional custodians to negotiate agreements about access to land.⁵⁶

In response, the discussion paper proposed that

Traditional custodians' legal entitlements and special knowledge ... [should] be acknowledged in the legislation. The reformed legislation could build on existing processes, such as land rights and native title processes.⁵⁷

The paper recommended that, 'if legally recognised traditional custodians exist, only they can seek Commonwealth protection'.⁵⁸

⁵⁴ Department of the Environment, Water, Heritage and the Arts (Commonwealth), *Indigenous heritage law reform discussion paper*, Canberra, 2009, p. 3,

<http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/discussion-paper/pubs/discussion-paper.pdf> (viewed 28 July 2010). Emphasis in original.

⁵⁵ Department of the Environment, Water, Heritage and the Arts (Commonwealth), *Indigenous heritage law reform discussion paper*, p. 17. Emphasis in original.

⁵⁶ Department of the Environment, Water, Heritage and the Arts (Commonwealth), *Indigenous heritage law reform discussion paper*, p. 5.

⁵⁷ Department of the Environment, Water, Heritage and the Arts (Commonwealth), *Indigenous heritage law reform discussion paper*, p. 5.

⁵⁸ Department of the Environment, Water, Heritage and the Arts (Commonwealth), *Indigenous heritage law reform discussion paper*, p. 23.

The Government received 76 written submissions to the Review, several of which address proposals relating to consultation.⁵⁹ The submissions reveal a wide range of views about the proposals. Some submissions were supportive of the idea that only traditional custodians can seek Commonwealth protection. For example, the Government of Western Australia stated that it

supports the move to clarify who may apply for heritage protection under the ATSIP Act. Traditional custodians have already undergone a clear and transparent statutory process to be recognised as the area's traditional custodians. The *Native Title Act 1993* (Cth) effectively determines the identity of native title holders and stipulates rights accorded to them.⁶⁰

Similarly, the North Queensland Land Council agreed that a weakness in the current ATSIHP Act is 'that any Indigenous person can apply for declarations protecting heritage, even if they are not traditional owners of the area in question'.⁶¹ Accordingly, it submitted

that only traditional owners for the particular country concerned can speak for that country.

The Commonwealth should seek information from the appropriate traditional owners through Native Title Representative Bodies, Native Title Services or Land Council's [*sic*] who have the knowledge, experience and skills to know the rightful traditional owners for the country, area or object.

We note the Department's suggestion that where traditional owners have been recognised as native title holders, only those individuals using their representative organisations and processes, could apply for heritage protection on their lands.⁶²

Conversely, several submissions disagreed with, or pointed to flaws in, the Government's proposal. For example, Dr Janet Hunt of the Centre for Aboriginal Economic Policy Research provided the following response:

The intent of this proposal (5) is clearly to better reflect traditional law and custom in Aboriginal and Torres Strait Islander societies in which only certain people with

⁵⁹ Copies of the submissions can be viewed at the Department of the Environment, Water, Heritage and the Arts website: <http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/submissions/l-brown.pdf> (viewed 4 August 2010).

⁶⁰ Western Australian Government, Western Australian Government Submission: Indigenous Heritage Law Reform – Possible Reforms to the Legislative Arrangements for Protecting Traditional Areas and Objects, n.d., p. 3, <http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/submissions/wa-gov.pdf> (viewed 4 August 2010).

⁶¹ North Queensland Land Council, Submission to Indigenous Heritage Law Reform – Discussion August 2009, 6 November 2009, p. 3, <http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/submissions/l-brown.pdf> (viewed 4 August 2010).

⁶² North Queensland Land Council, p. 4.

traditional connection to country speak for country. As a general principle, this is something to uphold, but there are many issues which it raises, and which need to be considered in more depth before such a proposal is adopted uncritically.

The paper states that many Indigenous people have gained formal legal recognition of their traditional entitlements to be custodians of their lands. However, what it does not state is that some of these legal processes may be insufficient in relation to Aboriginal law and custom, and in any case, **many Aboriginal people have not gained any legal recognition of what may be quite legitimate claims because there has been no process for them to do so with no likelihood of legal success.** Nor does the Discussion Paper indicate how matters would be dealt with in such situations.

In particular, in many parts of the country, and particularly in south eastern Australia, Native Title [*sic*] has been extinguished, so there is no possible legal process to determine who the native title holders are. In other cases, such as the Yorta Yorta people in Victoria, the current proposal would exclude them, since they are not 'legally recognised traditional custodians' under native title law. Their native title claim was unsuccessful, yet their traditional custodianship is well recognised and is acknowledged by the Victorian Government through an agreement relating to co-operative management of certain parts of their lands and waters along the River Murray, notably the Barmah State Park and State Forrest (Seidl & Heteyey 2004).

Where no successful native title determination has been made or where no land rights legislation which specifically recognises and empowers traditional custodians in relation to their cultural heritage is in place, it is unclear from this proposal how these Indigenous people would be able to protect their cultural heritage.

For example, in the Northern Territory, land rights legislation empowers traditional custodians, but in NSW, it does not. These land rights regimes are quite different, with different consequences; in NSW the land rights regime gives no legal definition of or recognition to traditional owners.

Whilst it may be desirable to work with appropriate legislative determinations of traditional ownership where they exist, the fact is that they are not universal in their coverage across Australia and a legitimate mechanism for establishing the rightful people to speak for country and its cultural heritage is needed in other areas if this proposal is to be effective in protecting cultural heritage across the whole country.⁶³

⁶³ J Hunt, Submission to DEWHA Indigenous Heritage Law Reform Discussion Paper August 2009, November 2009, p. 2, <http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/submissions/j-hunt-centre-aboriginal-economic-policy-research.pdf> (viewed 4 August 2010). Emphasis in original.

Indigenous Heritage Protection in Victoria

General overview and background

The first dedicated Aboriginal heritage legislation in Victoria was the *Archaeological and Aboriginal Relics Preservation Act 1972*. This Act provided so-called blanket protection for all 'relics' and remains relating to the Aboriginal occupation of Victoria. The Act was administered by the Victoria Archaeological Survey (VAS) under Aboriginal Affairs Victoria (AAV), but the overall responsibility for decision-making lay with the Minister for Aboriginal Affairs. Under the authority of the Act, VAS compiled and maintained a register of Aboriginal relics; reporting the discovery of such relics was mandatory.

However, over a long period of operation, numerous issues and controversies arose with regard to the Act and its processes. Among the key issues identified were the under-representation of Aboriginal interests in decision-making, unclear and inconsistent processes, a dearth of accountability measures, and an overall emphasis on the destruction, rather than conservation, of heritage.⁶⁴

Increasing pressure on the Victorian Government in the early 1980s led to a significantly re-worked Act being brought before Parliament. Stymied by an Opposition majority in the Upper House, the Government turned to the Commonwealth Government, which wrote special clauses into its own legislation as Part IIA of the ATSIHP Act to address the Victorian situation. This expedient provided Victorian Aboriginal communities with the opportunity to request emergency, temporary or other declarations if they regarded specific aspects of their heritage as being under threat. It also allowed the Minister to compulsorily acquire any Aboriginal cultural property if that heritage proved irreplaceable and no other option for its preservation could be found.

In 2005 the Victorian Government announced plans for new heritage legislation, which would become the *Aboriginal Heritage Act 2006*.

Identification and consultation of appropriate Indigenous parties

Aboriginal Heritage Council

Part 9 of the *Aboriginal Heritage Act 2006* establishes the Aboriginal Heritage Council (the Council). The Council comprises 11 members, appointed by the responsible Minister, each of which must be an Aboriginal person, who

- a) has, and can demonstrate, traditional or familial links to an area in Victoria; and

⁶⁴ Department for Victorian Communities (Victoria), *Aboriginal Heritage Bill - Exposure Draft: Summary of Proposals*, 2005, [http://www.mav.asn.au/CA256C320013CB4B/Lookup/AAVPresentation231105/\\$file/AAVPresentation231105.pdf](http://www.mav.asn.au/CA256C320013CB4B/Lookup/AAVPresentation231105/$file/AAVPresentation231105.pdf) (viewed 3 August 2010).

- b) is resident in Victoria; and
- c) in the opinion of the Minister, has relevant experience or knowledge of Aboriginal cultural heritage in Victoria.⁶⁵

The function of the Council is to advise the Minister regarding cultural heritage matters, the significance of heritage items, protective and conservation measures, management of sensitive information, and the application of standards to people working in the heritage field. It may also make recommendations to the Minister and the Secretary of the Department⁶⁶ on the exercise of its functions.

In addition to these functions, the Council is responsible for assessing applications from groups wishing to become registered Aboriginal parties and for promoting public awareness of Aboriginal cultural heritage.⁶⁷

Registered Aboriginal parties

Under the Act the key parties for Indigenous consultation are identified as registered Aboriginal parties. The Act defines these parties:

- a) in relation to a cultural heritage management plan, a registered Aboriginal party that is registered for the area to which the plan relates;
- b) in relation to a cultural heritage agreement, a registered Aboriginal party that is a party to the agreement;
- c) in relation to a cultural heritage permit, a registered Aboriginal party that, under section 39, provides advice to the Secretary on the application for the permit;
- d) in relation to an interim or ongoing protection declaration or an application for that declaration, a registered Aboriginal party for the area—
 - (i) in which the Aboriginal place to which the declaration or application relates is located; or
 - (ii) from which the Aboriginal object to which the declaration or application relates originated;
- e) in any other case, a registered Aboriginal party that the Secretary is satisfied is a relevant registered Aboriginal party in the circumstances of that case'.⁶⁸

⁶⁵ *Aboriginal Heritage Act 2006* (Vic), s. 131(3).

⁶⁶ The Secretary is responsible for a large number of functions under the Act. Amongst them: protection of Aboriginal cultural heritage, maintenance of the Aboriginal Heritage Register, approval of cultural heritage management plans (CHMPs), and manage the enforcement of the Act (*Aboriginal Heritage Act 2006* (Vic), s. 143).

⁶⁷ *Aboriginal Heritage Act 2006* (Vic), s. 132.

⁶⁸ *Aboriginal Heritage Act 2006* (Vic), s. 4.

Registered Aboriginal parties are consulted over a wide range of matters, these largely being in relation to permits, Cultural Heritage Management Plans (CHMPs) and heritage agreements. Their functions are specified in section 148 of the Act:

- a) to act as a primary source of advice and knowledge for the Minister, Secretary and Council on matters relating to Aboriginal places located in or Aboriginal objects originating from the area for which the party is registered;
- b) to advise the Minister regarding, and to negotiate, the repatriation of Aboriginal cultural heritage that relates to the area for which the party is registered;
- c) to consider and advise on applications for cultural heritage permits;
- d) to evaluate and approve or refuse to approve cultural heritage management plans that relate to the area for which the party is registered;
- e) to enter into cultural heritage agreements;
- f) to apply for interim and ongoing protection declarations;
- g) to carry out any other functions conferred on registered Aboriginal parties by or under this Act.

To become the registered Aboriginal party for an area, a group, as a body corporate, must apply to the Council. It must also outline the area and the relationship of the applicants to the area, as well as its interests and expertise in cultural heritage issues. If the applicant is a group for which a determination of native title has been made, the Council must approve its application and no other applications from any other groups can be approved with respect to that area.⁶⁹

Native title determinations aside, the Council must take into account a number of factors, including: whether the applicants are a native title party for the area;⁷⁰ the nature of any native title agreements in the area; whether the applicants represent people with traditional or familial links to the area; and the group's interest and expertise in the heritage of the area.⁷¹ It is also possible for more than one body to be registered as an

⁶⁹ *Aboriginal Heritage Act 2006* (Vic), s. 151(2).

⁷⁰ An entity's status as a 'native title party' for an area can help determine its status as a registered Aboriginal party under the *Aboriginal Heritage Act*. The Act defines a native title party somewhat broadly, to include:

- registered native title holders;
- registered native title claimants;
- someone who was previously a registered native title claimant but whose claim was unsuccessful,
- provided there is no other registered native title claimant or native title holder in the area;
- former native title claimants who have surrendered native title as part of a native title agreement;
- former native title holders whose native title has been surrendered, compulsorily acquired or otherwise extinguished (*Aboriginal Heritage Act 2006* (Vic), s. 6(1)).

The person is regarded as a native title party for the entire extent of the area that was claimed, regardless of subsequent findings.

⁷¹ *Aboriginal Heritage Act 2006* (Vic), s. 151(3).

Aboriginal party for an area, provided the Council is satisfied that the parties will not hinder the operations of the Act or each other. In such circumstances, each party has exactly the same roles and responsibilities, and must each be consulted with regard to applications and so forth.⁷²

In relation to cultural heritage permits, if there is a registered Aboriginal party for an area to which the permit pertains, that Aboriginal party must be given a copy of the application. They must respond within 30 days, advising the Secretary of their non-objection, non-objection if certain conditions are met, or objection to the permit being granted.⁷³

Similarly, registered Aboriginal parties must be given notice of the preparation of a CHMP and provided with the opportunity to advise whether or not they wish to evaluate the plan.⁷⁴ There must also be ongoing consultation with the registered Aboriginal party during the preparation of the plan, and the registered Aboriginal party may assess the final plan and advise whether or not it approves.⁷⁵

Where there is no registered Aboriginal party for an area, the plan is assessed by the Secretary, who 'must consult with, and consider the views of, any Aboriginal person or Aboriginal body that the Secretary considers relevant'.⁷⁶ If the Secretary is the sponsor of the CHMP, then the Council may determine whether or not the plan should be approved.⁷⁷

A registered Aboriginal party must also be one of the parties to a cultural heritage agreement, and such an agreement cannot take effect until each registered Aboriginal party for the area has provided their written consent.⁷⁸

Traditional or familial links

In several parts of this Act, reference is made to Aboriginal people with 'traditional or familial' links to an area that have an interest, responsibility or authority for heritage places, objects or remains. Such people may or may not be members of or associated with registered Aboriginal parties. Section 7 of the Act defines this phrase in these contexts.

With regard to an area, people are regarded as having traditional or familial links if they are 'an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area', and have 'responsibility under Aboriginal tradition' or are members of families with responsibilities for heritage places in that area. The same principles are applied to human remains and secret and sacred objects.

⁷² *Aboriginal Heritage Act 2006* (Vic), s. 153.

⁷³ *Aboriginal Heritage Act 2006* (Vic), s. 39(1).

⁷⁴ *Aboriginal Heritage Act 2006* (Vic), ss. 54-55.

⁷⁵ *Aboriginal Heritage Act 2006* (Vic), s. 63(1).

⁷⁶ *Aboriginal Heritage Act 2006* (Vic), s. 65(3).

⁷⁷ *Aboriginal Heritage Act 2006* (Vic), ss. 65-66.

⁷⁸ *Aboriginal Heritage Act 2006* (Vic), ss. 69(2), 72.

Views on the Victorian heritage regime

The *Aboriginal Heritage Act 2006* has been in force for just over three years,⁷⁹ making it somewhat difficult to gather a great deal of meaningful information about its overall performance. However, some published views are available. Aboriginal social justice group ANTaR (Australians for Native Title and Reconciliation) has identified a number of overall concerns with regard to the legislation, largely relating to the placement of non-Indigenous, non-traditional owner entities in positions of authority in making decisions about Indigenous heritage. The following issues were noted among its concerns:

- CHMP sponsors may appeal non-approval of their plans to VCAT,⁸⁰ which is not an Aboriginal body and lacks the local knowledge and expertise of Traditional Owners.
- The Aboriginal Heritage Council is only an advisory body, and as such, has no direct authority in terms of heritage decision making.
- The membership of the Council is determined by the Minister alone, rather than by Indigenous groups, which overrides Aboriginal peoples' rights to 'appoint their own representatives and ensure that the council comprises the foremost experts on Aboriginal cultural heritage'.
- There is no distinction between Traditional Owners and historical people in terms of who may apply to be a registered Aboriginal party.
- Requiring that registered Aboriginal parties be incorporated entities with formal structures and reporting arrangements may place excessive constraints on some Aboriginal groups with limited resources, and make them vulnerable in the need to rely on government assistance.
- There is significant potential for the system to cause intra-Indigenous conflict.
- There is a lack of certainty for developers, due to the potential need to deal with several individual Aboriginal groups during the application process.⁸¹

An in-depth critique of the legislation has been made by non-Indigenous heritage lawyer Leonie Kelleher, who claimed that the process of creating registered Aboriginal parties essentially excludes some Aboriginal people from the process:

⁷⁹ The Act commenced operation on 28 May 2007.

⁸⁰ Victorian Civil and Administrative Tribunal.

⁸¹ Australians for Native Title and Reconciliation, *Protecting Cultural Heritage Legislation in Victoria*, n.d., <http://www.antarvictoria.org.au/culturalheritage/> (viewed 4 August 2010).

Aboriginal people must apply for registration! If unregistered they are not a compulsory part of the process. No appeal exists against registration refusal. A RAP must be a body corporate.

As of 13 February 2008, only four RAPs existed,⁸² applying to only a small part of Victoria and silencing Aboriginal voice over the balance of the State. A media release dated 9 May 2007 told Indigenous communities it is "Time to Step Up". The weary, the jaded and the disillusioned may find this just more whitefella government demanding they jump through yet another hoop.

The only person not required to 'step up' and prove credentials is a successful native title holder. Linking heritage with native title legislation grossly ignores the many criticisms of the highly fraught native title process. There is no reason why native title parameters should govern Indigenous heritage protection.⁸³

Kelleher also criticised the way that the Act places final decision-making about cultural heritage permits in the hands of the Secretary, essentially a 'non-Indigenous senior public servant', whereas:

Aboriginal people are silenced by having no right to appeal the Secretary's decision. By contrast, the developer can seek VCAT review. The parties to a developer's review exclude an interested Aboriginal person or knowledge holder, but include a RAP (if existing) and the Secretary.⁸⁴

In relation to the formation of CHMPs, Kelleher noted that traditional Aboriginal approaches to heritage are also marginalised. She argued that Aboriginal people are silenced by the general omission of oral history as a method to assist with the preparation of CHMPs and that the Act 'clearly contemplates the possibility of completing even the most complex assessment without asking for or listening to Aboriginal peoples' stories about heritage in the relevant location.⁸⁵

Kelleher also asserted a similar argument of silencing Indigenous voices in regard to the way that CHMPs were structured by the Act:

A CHMPlan is "a written report, prepared with the assistance of a cultural heritage advisor". This advisor must:

- be "appropriately qualified in a discipline relevant to the management of Aboriginal cultural heritage, such as anthropology, archaeology or history; or

⁸² The Aboriginal Affairs Victoria web site states that, as at August 2010, there are currently nine registered Aboriginal parties:

<http://www.aboriginalaffairs.vic.gov.au/web7/AAVMain.nsf/allDocs/RWP81CE52EC216D5CBBCA2574DA00268098> (viewed 4 August 2010).

⁸³ L Kelleher, 'Story telling: silence and voice – hope, trust, knowledge – reflections on Aboriginal heritage legislation', paper delivered to the Annual Conference of the Australian Sociological Association, University of Melbourne, December 2008, p. 11.

⁸⁴ Kelleher, p. 12.

⁸⁵ Kelleher, p. 13.

- have “extensive experience or knowledge in relation to the management of Aboriginal cultural heritage”.

Again the Act silences the Indigenous voice. The very method prescribed by the Act for protection of culturally significant heritage ‘steals it away’ from Aboriginal people, into the hands of ‘experts’, more likely than not non-Indigenous. Again ascertaining oral history is not mandatory even when the ‘expert’ is non-Indigenous. In contrast with the permit process, the consultant is not even compelled to consult with the RAP, let alone a relevant Aboriginal knowledge holder.

It is hard to see how any “truthful” cultural heritage assessment could possibly be made without consultation with knowledgeable Aboriginal people, unless the area has already been extensively considered and stories fully documented and reference made to these.⁸⁶

⁸⁶ Kelleher, p. 13.

Indigenous Heritage Protection in Queensland

General overview and background

The current Queensland regime was the first dedicated State Indigenous heritage protection system developed in the native title era. Both the *Aboriginal Cultural Heritage Act 2003* (the ACH Act) and the complementary *Torres Strait Islander Cultural Heritage Act 2003* (TSICH Act) came into force in April 2004.⁸⁷

Queensland's new legislation was a product of several years of close consultation with the Indigenous community, largely through the Queensland Indigenous Working Group (QIWG) and other industry stakeholders.

Prior to 2004, Queensland's Indigenous heritage had been protected under a succession of 'relics' Acts, starting with the *Aboriginal Relics Preservation Act 1967*, amended in 1976. This was replaced by the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (the Cultural Record Act).

The ACH Act and the TSICH Act form the overall basis of Queensland's Indigenous heritage protection scheme. Other statutes do have some active effects, including the *Nature Conservation Act 1992*, which provides for the 'cultural and natural resources' of a national park or protected area to be protected from damage, destruction or removal,⁸⁸ and so covers 'places or objects that have anthropological, archaeological, historical, scientific, spiritual or sociological significance or value, including such significance or value under Aboriginal tradition or Island custom'.⁸⁹

Identification and consultation of appropriate Indigenous parties

Consultation and the duty of care

Consultation with relevant Indigenous parties is a significant element of the ACH Act. From a conservation and protection point of view, one of the most important elements is the role that involving Indigenous parties in consultation, participation and agreements plays within the overall process of cultural heritage assessments. Given that the purpose of a cultural heritage assessment is to determine if there are features of cultural heritage significance, and if so, how best to manage the proposed action so that harm is minimised, proponents are obliged to contact the relevant Aboriginal parties to seek:

- a) Advice as to whether the feature constitutes Aboriginal cultural heritage; and

⁸⁷ The TSICH Act is essentially identical to the ACH Act, and thus reference to one should be regarded as inclusive of the other.

⁸⁸ *Nature Conservation Act 1992* (Qld), s. 61.

⁸⁹ *Nature Conservation Act 1992* (Qld), Schedule Dictionary.

- b) If it does, agreement as to how best the activity may be managed to avoid or minimise harm to any Aboriginal cultural heritage.⁹⁰

However, where agreement cannot be reached, the duty of care⁹¹ remains. As a consequence, the proponent can seek alternatives beyond agreements with Aboriginal parties, such as through the development of a CHMP. While this could be viewed as offering proponents the opportunity to bypass consultation processes, CHMPs also require the sponsor to invite the relevant Aboriginal party to contribute to the plan.⁹² The duty of care guidelines also state that the 'views of the Aboriginal Party for an area are key in assessing and managing any activity likely to excavate, relocate, remove or harm Aboriginal Australian cultural heritage'.⁹³

Importantly, as noted earlier, agreement-making with Indigenous groups is a key method for meeting the duty of care under section 23(3)(a)(i).

Aboriginal party for an area

The Act provides a chain of preferences as to who should be the Aboriginal party consulted for an area, drawing heavily on the native title process. Where the Act refers to an 'Aboriginal party for the area', it means in the first instance, a 'native title party for an area'.⁹⁴ Within this definition, a hierarchy of potential native title parties is outlined:

- (1) Each of the following is a *native title party* for an area—
- (a) a registered native title claimant for the area;
 - (b) a person who, at any time after the commencement of this section, was a registered native title claimant for the area, but only if—
 - (i) the person's claim has failed, but there is no other registered native title claimant for the area, and there is not, and never has been, a native title holder for the area; or
 - (ii) the person has surrendered the person's native title under an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements; or
 - (iii) the person's native title has been compulsorily acquired or has otherwise been extinguished;

⁹⁰ Government of Queensland, *Duty of Care Guidelines*, item 5.16, 16 April 2004, http://www.derm.qld.gov.au/cultural_heritage/pdf/duty_of_care_guidelines.pdf (viewed 3 August 2010).

⁹¹ Section 23(1) of the ACH Act states that a person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage (the cultural heritage duty of care).

⁹² ACH Act, s. 93.

⁹³ *Duty of Care Guidelines*, item 7.1.

⁹⁴ ACH Act, s. 35(1).

- (c) a registered native title holder for the area;
- (d) a person who was a registered native title holder for the area, but only if—
 - (i) the person has surrendered the person's native title under an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements; or
 - (ii) the person's native title has been compulsorily acquired or has otherwise been extinguished.

(2) If a person would be a native title party under subsection (1)(b) but the person is no longer alive, the native title party is instead taken to be the native title claim group who, under the Commonwealth Native Title Act, authorised the person to make the relevant native title determination application.⁹⁵

Native title claim boundaries generally include considerable areas where native title is extinguished or not claimable, particularly in relation to freehold land. However, the Act states that the entire perimeter of a native title claim area – regardless of extinguishment and exclusions – forms the boundary of the area for which a native title group is also an Aboriginal party under the Act:

The native title party is an “Aboriginal party” for the whole area included within the outer boundaries of the area in relation to which the application was made under the Commonwealth Native Title Act for a determination of native title, regardless of the extent of the claimant's claims in relation to any particular part of the whole area.⁹⁶

If no native title party exists for an area, an Aboriginal party, for the purposes of the Act, can be defined as an Aboriginal person with specific cultural knowledge, and who either has some traditional responsibility for the area or belongs to a relevant clan or kin group for the area.⁹⁷

The Act also provides for the creation of an ‘Aboriginal cultural heritage body’ for an area. Its function is to help identify persons with the appropriate cultural knowledge and responsibilities to qualify as Aboriginal parties for the purposes of the Act.⁹⁸

Aboriginal cultural heritage bodies

Where there is no native title party for an area, others with the appropriate status and knowledge may be identified:

- (7) If there is no native title party for an area, a person is an *Aboriginal party* for the area if—

⁹⁵ ACH Act, s. 34.

⁹⁶ ACH Act, s. 35(3).

⁹⁷ ACH Act, s. 35(7).

⁹⁸ ACH Act, s. 36.

- (a) the person is an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area; and
- (b) the person—
 - (i) has responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area; or
 - (ii) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area.⁹⁹

Aboriginal cultural heritage bodies are appointed by the Minister, upon application. After deliberation and consultation, the legislation generally allows for only one cultural heritage body for a given area.

Agreement making

Up to a point, due to the degree of the Act's emphasis on agreement-making as a method of meeting the duty of care, not much had changed from the last five or six years of the Cultural Record Act. During that time agreements featuring CHMPs were being developed at the initiative of Aboriginal groups, largely out of frustration at the failings of the incumbent legislation.¹⁰⁰

A strong model of agreement-making has developed in Queensland, both within and beyond the native title context. A now-common form of non-native title agreement in Queensland is known as a Cultural Heritage Investigation and Management Agreement (CHIMA), or alternatively, a Cultural Heritage Management Agreement (CHMA). Such agreements are frequently used in large projects, and are made between Indigenous representative groups, such as native title claimants, and larger companies and government agencies. The agreements essentially set out the protocols on how each party will act in respect to each other, as well as what each party will bring to the table in terms of how heritage issues will be addressed.

For example, a 2005 CHIMA struck between the Wakka Wakka people and the Queensland Gas Company covered all mining tenements in the Surat Basin. It offered strong protection of Wakka Wakka heritage sites; and the additional bonus for the company was cited as a 'strengthening [of the company's] relationship with the Western Wakka Wakka people for the long term'.¹⁰¹ Another CHIMA, between the Gangulu people of the Dawson and Callide Valleys and Anglo Coal, covered three mines in the area. It employs a work area clearance model, which provides zoning maps to the

⁹⁹ ACH Act, s. 35(7).

¹⁰⁰ L Godwin, 'Legislation, agreements and cultural practices', paper presented to 10th annual conference on Cultural Heritage and Native Title, Brisbane, 29 September 2003, p. 4.

¹⁰¹ 'QGC seals heritage agreement', *Minebox Daily News*, 17 May 2005.

company indicating the activities permitted or prohibited in each zone.¹⁰² On a smaller scale, a CHMA was negotiated between the Jinibara people and the Queensland Department of Main Roads in 2006 when a burial cave was discovered within the vicinity of a road-construction area. The CHMA outlined how the protection of the cave would be managed during road construction; this was written into the contract documentation, thus enabling the department and its contractors to meet their duty of care.¹⁰³

Views on the Queensland heritage regime

After approximately six years of operation, Queensland's new Indigenous heritage regime has probably only now had sufficient time in which to allow observers to build a measured opinion of its strengths and weaknesses. At the time of drafting, the ACH and TSICH Acts were highly anticipated by Indigenous people as a means of creating a conduit to authority and ownership over their own heritage. Proponents saw it as a means of creating certainty and consistency in the process. It was also significant as the first major piece of Indigenous heritage legislation in the native title era. According to commentators Ben Boer and Graeme Wiffen, the provisions in the Queensland statutes 'are the most explicit of any Australian jurisdiction in upholding concepts of self-determination and respect for traditional laws and customs'.¹⁰⁴

However, the legislation has attracted some criticism. One of the most vocal critics of the legislation from the outset was the Queensland Indigenous Working Group (QIWG), a reference group established by the Queensland Government to assist in the development of its Indigenous policies. Commenting on the consultation draft of the Bill (to which only minor amendments were eventually made), the QIWG stated:

The Queensland Indigenous Working Group (QIWG) wants to make it clear to Aboriginal people that we do not support this new Bill. This Bill fails to respect Aboriginal cultural heritage and Aboriginal people. It puts the power in the hands of the Government and its bureaucracy and maintains the role of Aboriginal people to the minimalist involvement possible.¹⁰⁵

The QIWG had concerns that the duty of care provisions provided little formal protection, and was 'little more than a formalisation of the risk management strategies that most major development proponents already adopt under the current legislation [the Cultural Record Act]'.¹⁰⁶ In addition, the QIWG also objected to:

- the ownership of heritage – other than a few categories – being vested in the Crown;

¹⁰² Godwin, p. 15.

¹⁰³ R Jones, 'Heritage Burial Cave', *Queensland Roads*, edition 4, September 2007, pp. 49-51.

¹⁰⁴ B Boer and G Wiffen, *Heritage Law in Australia*, Oxford University Press, Melbourne, 2006, p. 290.

¹⁰⁵ Queensland Indigenous Working Group (QIWG), 'The proposed Queensland Aboriginal Cultural Heritage Bill 2002: no progress – no respect', briefing paper produced by QIWG, n.d., p. 2.

¹⁰⁶ Queensland Indigenous Working Group, p. 3.

- the lack of an Indigenous counterpart to the Queensland Heritage Council, an independent authority established under the *Queensland Heritage Act 1992* to oversee non-Indigenous heritage;
- the absence of any allowance for 'access for traditional custodians to culturally significant sites, even if that site is located on Crown land';
- Final decision-making powers resting with the Minister in terms of significance, recording of cultural information and dispute resolution;
- Weaknesses in the duty of care process which allow for proposals to be pushed through without adequate agreement from Aboriginal groups; and
- The absence of any forum or provision for Aboriginal parties to lodge grievances regarding the conduct of studies and CHMPs, or to request stop orders or investigations of breaches.¹⁰⁷

The concerns of the QIWG were mirrored by heritage professionals such as Dr Luke Godwin. Godwin suggested that there is a 'gulf that exists between the aims and principles of this legislation, and the mechanism it sets in place to operationalise certain aspects'.¹⁰⁸ Godwin also argued that the legislation was largely aimed at facilitating development, with a distinct lack of 'proactive strategies guaranteed by the Government for the management of cultural places outside of development imperatives'.¹⁰⁹

From a different perspective, law firm Corrs Chambers Westgarth released an overview of the Act for the mining and exploration sectors. Its view was that the new legislation would 'significantly increase the level of protection afforded to Indigenous cultural heritage, and impose substantially tougher penalties for breaches'.¹¹⁰ It also argued that a reduced emphasis on 'fabric' as an indication of heritage significance would render it 'significantly more difficult (or perhaps impossible) for an explorer to identify areas or items of cultural heritage without input from local indigenous people'.¹¹¹ It concluded that the completion of a heritage survey prior to undertaking physically intrusive activities 'may become the only viable option' to avoiding 'potentially serious implications of taking any other course of action'. The bottom line was likely to be 'an additional burden on a project (both in terms of time and cost) at the early exploration stages when the project is least able to bear them'.¹¹²

Susan Shearing, from Macquarie University's Centre for Environmental Law, was more positive in her assessment of the ACH Act:

¹⁰⁷ Queensland Indigenous Working Group (QIWG), pp. 3-4.

¹⁰⁸ Godwin, p. 2.

¹⁰⁹ Godwin, p. 5.

¹¹⁰ Corrs Chambers Westgarth, *Queensland Mining*, 29 October 2003, p. 1.

¹¹¹ Corrs Chambers Westgarth, p. 3.

¹¹² Corrs Chambers Westgarth, p. 3.

The mechanisms for consulting Aboriginal parties under the ACH Act clearly provide greater scope for indigenous involvement in identification, management and protection of their heritage than those afforded under the CR Act. As Davie argues:

There is a clear commercial imperative for mining and petroleum companies and other developers to have a pre-arranged method of dealing with Aboriginal cultural heritage issues which arise during the life of the projects concerned, from the commencement of exploration activities through to project development, construction, operation, maintenance and eventual decommissioning, demolition and site rehabilitation. By their very nature, items and places of Aboriginal cultural significance cannot always be known in advance.¹¹³

However, Shearing also observed the following:

[N]otwithstanding concerns which Aboriginal people may have concerning the impact of a proposed activity on their cultural heritage, ultimately decisions as to whether the provisions of a CHMP will operate to avoid or minimise harm to such heritage are made by the Chief Executive or the Minister. In view of the strong emphasis upon respect for and recognition of indigenous peoples in the protection and management of their cultural heritage in s 5 of the ACH Act, it is suggested that the legislation should expressly direct decision makers to have regard to those principles in exercising their powers under the Act.¹¹⁴

Shearing also expressed concern that the duty of care guidelines might not 'provide sufficient certainty as to the standards required in order to discharge the duty of care under section 23'.¹¹⁵ There is a danger, she suggested, that the guidelines do not take a sufficiently precautionary approach and may be interpreted as permissive:

Of particular concern is the assessment of the risk of harm to the different categories of cultural heritage as stated in the DOC Guidelines. As outlined above, the DOC Guidelines state that the first four categories of activities are 'generally unlikely to harm' Aboriginal cultural heritage and that it is 'reasonable and practicable' that the activities proceed without further cultural heritage assessment. It is certainly conceivable that the proponent of such an activity might consider that such statements have the practical effect of exempting a range of activities from the requirements of the Act, irrespective of the actual risk of harm.¹¹⁶

Margaret Stephenson, lecturer from the School of Law at the University of Queensland, published an in-depth critique of the legislation in a 2006 issue of the *Journal of South*

¹¹³ S Shearing, 'One step forward: recent developments in Australian State and Territory Indigenous cultural heritage laws', *Macquarie Journal of International and Comparative Environmental Law*, vol. 3, no. 1, 2006, pp. 61-62, quoting C Davie, 'Aboriginal cultural heritage: emerging from the shadows of native title', *AMPLA Yearbook*, 2004, p. 510.

¹¹⁴ Shearing, p. 62.

¹¹⁵ Shearing, p. 52.

¹¹⁶ Shearing, p. 52.

Pacific Law.¹¹⁷ Stephenson welcomed the legislation as an important breakthrough for Indigenous heritage in the sense that the definition of ‘significance’ in both Acts is largely dependent on what Indigenous people define as significant, with no particular thresholds or standards of proof required:

Thus, it is for traditional owners to say what is significant and important to them. In this respect, the *Cultural Heritage Acts* do not allow land users to decide the question of significance. With the focus on Indigenous concepts of significance the *Cultural Heritage Acts* depart from Eurocentric concepts of cultural heritage and property.¹¹⁸

Stephenson also highlighted several areas of concern. One of these was in relation to the consultation processes built into the Act. Designating native title parties as Aboriginal parties for an area

effectively excludes anyone who does not have or is not a part of a native title claim group or an Indigenous cultural heritage body. It also means that the native title applicants ... will ultimately exclusively represent the native title claim groups.¹¹⁹

In this way, she noted, especially with regard to providing consent to removing, relocating or damaging Indigenous cultural heritage, ‘being either a registered native title claimant or ... native titleholder is critical to having authority under the Acts’.¹²⁰ This, argued Stephenson, has had the effect of encouraging the combining of native title and cultural heritage processes, with the inclusion of ‘the same parties in both native title and cultural heritage processes ... streamlining ... negotiations in both areas’.¹²¹

Since 2008, Queensland’s Department of Environment and Resource Management¹²² (DERM) has been undertaking a review of the ACH and TSICH Acts.¹²³ In September 2008, DERM released a review paper and sought public submissions on:

- whether the legislation has done what it set out to do—that is, recognise, protect and conserve Aboriginal and Torres Strait Islander cultural heritage;
- what is working well, and why; and
- what can be improved, and how.

Dr Annie Ross, on behalf of the Australian Archaeological Association (AAA), prepared a submission for the Review, making four key points about the efficacy of the regime:

¹¹⁷ M Stephenson, ‘Queensland’s Indigenous cultural heritage legislation: a critique’, *Journal of South Pacific Law*, vol. 10, no. 2, 2006, pp. 1-28.

¹¹⁸ Stephenson, p. 4.

¹¹⁹ Stephenson, p. 11.

¹²⁰ Stephenson, p. 11.

¹²¹ Stephenson, p. 12.

¹²² In 2008 the Department was known as the Department of Natural Resources and Water.

¹²³ See Department of Environment and Resource Management (Queensland), *Indigenous cultural heritage acts review*, October 2009, <http://www.nrw.qld.gov.au/factsheets/pdf/land/1178.pdf> (viewed 3 August 2010).

1. Duty of Care/The Duty of Care Guidelines do not allow for identification and assessment of significant intangible heritage, nor the assessment of buried and potentially very old and important heritage remains.
2. Identifying Indigenous Parties/The use of Native Title as the basis for identifying Indigenous Parties is flawed and requires modification to ensure that all traditional owners with a connection to country are able to participate in heritage management.
3. Significance assessment and CHMPS/The separation of significance assessment from the CHMP process is not acceptable as best practice cultural heritage management.
4. Database and Register management/The processes for placing heritage onto the Database or Register will not ensure adequate planning information is available, nor will they allow for the recognition of Indigenous living heritage.¹²⁴

In all, the Department received some 69 submissions,¹²⁵ and in November 2009 it released a document summarising key issues and draft recommendations arising from those submissions. The document contains a section which deals with 'Native title parties, Aboriginal and Torres Strait Islander parties, and cultural heritage bodies'. Outlined here are a number of key issues which were raised in the submissions:

- recognising the 'last standing claim' as the native title party can produce perceived unfair outcomes where:
 - claims have been struck out in close succession
 - native title parties are no longer engaged in the native title process and therefore cannot demonstrate the continued relevance of their exclusive procedural rights
- the meaning of a 'failed' claim is unclear
- there are practical difficulties where Aboriginal or Torres Strait Islander parties are minors
- the capacity, resources and performance of cultural heritage bodies are variable, and at times poor.

Note: Generally, submissions acknowledged that linking the Acts to native title processes is an efficient and fair approach—making use of a robust system for identifying the correct people for country and avoiding duplication.¹²⁶

Amongst the draft recommendations put forward by DERM were:

¹²⁴ Queensland Archaeological Association Inc., *Queensland Indigenous Heritage Acts Review*, 6 March 2009, <http://www.australianarchaeologicalassociation.com.au/node/3820> (viewed 3 August 2010).

¹²⁵ Aside from the submission of Dr Ross, these submissions were not available to the authors of this report.

¹²⁶ Department of Environment and Resource Management (Queensland), *Indigenous Cultural Heritage Acts Review: Key issues and draft recommendations*, November 2009, p. 15.

http://www.derm.qld.gov.au/cultural_heritage/pdf/ichar_key_issues_draft_rec.pdf (viewed 3 August 2010).

6. Amend the Acts to:

- consider all native title claims that have not been determined to be 'failed' claims, for the purposes of the Acts
- recognise the last standing 'failed' native title claim as the Aboriginal or Torres Strait Islander party for an area:
 - where the claim has passed a registration test under the Native Title Act 1993
 - for a period of 12 months from the date it 'failed'
- require Aboriginal and Torres Strait Islander parties to be at least 18 years old
- provide for the option of a standard fee for services provided by cultural heritage bodies.¹²⁷

The Department explained the objectives of these recommendations:

The recommendations aim to:

- ensure links to the Native Title Act do not produce unfair outcomes
- recognise sound native title claims are often withdrawn, reorganised and resubmitted, and provide time for this to occur without a loss of procedural rights under the Acts
- improve the capacity and income stability of cultural heritage bodies, consequently increasing the levels of service they provide
- ensure the process for identifying Aboriginal and Torres Strait Islander parties is as simple as possible.¹²⁸

It should be noted that DERM's website indicates that '[t]he submissions received are currently being reviewed, and it is expected that the recommendations will be finalised by late 2010'.¹²⁹

¹²⁷ Department of Environment and Resource Management (Queensland), *Indigenous Cultural Heritage Acts Review: Key issues and draft recommendations*, p. 16.

¹²⁸ Department of Environment and Resource Management (Queensland), *Indigenous Cultural Heritage Acts Review: Key issues and draft recommendations*, pp. 15-16.

¹²⁹ See Department of Environment and Resource Management (Queensland), *Legislation and guidelines*, http://www.derm.qld.gov.au/cultural_heritage/legislation/index.html (viewed 23 July 2010).

Indigenous Heritage Protection in the Northern Territory

General overview and background

The Aboriginal heritage protection scheme in the Northern Territory differs from some of the other jurisdictions. For one, it is essentially covered by two separate, independent Acts, one which covers archaeological remains and another which addresses sacred sites. Then there is the influence on heritage protection by the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (the Land Rights Act). This Act provides Aboriginal people with a high degree of autonomy in terms of governing access to and development on declared Aboriginal Freehold land, which currently comprises just over 50% of the jurisdiction. It also has the ability to issue or deny permits for access and works in the vicinity of sacred sites. All of this is conducted under the authority of one of the four Land Councils¹³⁰ that exist in this jurisdiction. Putting the Land Rights Act to one side, the remainder of this summary is largely restricted to legislation enacted by the Northern Territory Government.

Because Indigenous heritage is addressed by two separate statutory approaches, the *Heritage Conservation Act 1991* (the Heritage Conservation Act) and the *Northern Territory Aboriginal Sacred Sites Act 1989* (the Sacred Sites Act), each Act will be addressed separately below.

The Heritage Conservation Act has been under review by the Northern Territory Government since 2002; an 'exposure draft' of a bill for new Northern Territory heritage legislation has recently been released.

Identification and consultation of appropriate Indigenous parties

The Heritage Conservation Act

The Heritage Conservation Act features little scope for consultation with Indigenous groups, apart from section 29(2), which relates to interim conservation orders that apply to the discovery of archaeological objects:

The Minister or the Minister's delegate shall not permit an action in relation to an archaeological object prescribed for the purposes of Part 6 which is sacred according to Aboriginal tradition unless he or she has sought and taken into account the advice, if any, of the Aboriginal Areas Protection Authority established by the *Northern Territory*

¹³⁰ The Anindilyakwa Land Council; Central Land Council; Northern Land Council and the Tiwi Land Council.

Aboriginal Sacred Sites Act given after consultation with those Aboriginals it considers to be the traditional owners of the object.¹³¹

This requirement is complemented by the role of the Heritage Council, which must have at least one member of the Aboriginal Areas Protection Authority in its membership.¹³²

The Sacred Sites Act

By contrast, the Sacred Sites Act places significant emphasis on the identification of, and consultation with, the custodians of sacred sites.

Membership of the Aboriginal Areas Protection Authority is drawn from a pool of nominated custodians of sacred sites from across the Northern Territory. The very first listed function of the Authority under the Act is

to facilitate 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.¹³³

In addition, where an application for an Authority Certificate is received, the Authority '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'.¹³⁴

Identification of the appropriate custodians is undertaken by the Authority, which can be achieved via the site registration process outlined earlier.

While the Authority must consult with affected custodians, the Act also allows for certificate applicants to request, via the Authority, the opportunity to meet with and consult with custodians directly. One outcome from such conferences may be an agreement between custodian and applicant, which can form and inform the conditions placed upon the certificate granted by the Authority.¹³⁵

The legislation also has a general requirement that the Minister and the Authority, when making a decision regarding a sacred site in relation to the Act, 'shall take into account the wishes of Aboriginals relating to the extent to which the sacred site should be protected'.¹³⁶

¹³¹ *Heritage Conservation Act 1991* (NT), s. 29(2).

¹³² *Heritage Conservation Act 1991* (NT), s. 8(1)(d).

¹³³ *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s. 10(a).

¹³⁴ *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s. 20.

¹³⁵ *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s. 22(1).

¹³⁶ *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s. 42.

Views on the Northern Territory heritage regime

The Heritage Conservation Act has attracted some controversy since its inception. With regard to sacred sites, there has been some overall confusion borne from the perceived duplication between the Commonwealth's Land Rights Act and the Territory's Sacred Sites Act. The following extract from Robert Levitus' chapter in *Customary Land Tenure and Registration in Australia and Papua New Guinea*, demonstrates the degree of tension between the two:

The common policy origin of land rights and sites protection ... enshrines an underlying difference in the nature of the land interest being recognised. The recognition of a sacred site has different implications depending on whether it is on land claimable by Aborigines or elsewhere. On claimable land, sacred sites are fundamental to the process of proving traditional ownership, because the members of the claimant group have to demonstrate that they have spiritual affiliations to, and exercise spiritual responsibility for, sites on the land (ALRA Section 3(1)). Recognition of such attachments in a successful land claim thus founds a legal property right. On land that is not available for claim, such attachments found rights of lesser extent which ... importantly include a right of entry and a right to deny entry to others.

The land registration regimes administered by the NLC [Northern Land Council] and Sites Authority thus contrast in significant respects, including the areas of land involved, the Aborigines with whom they must consult, and the range of issues on which they are required to consult. Generally, the NLC assists in claiming and managing areas of land, while the Authority assists in the protection of particular places of religious significance, mostly of much smaller size. However, the Authority's charter extends across the entire Northern Territory, while the NLC is restricted to unalienated Crown land with respect to its land claim function, and Aboriginal land for its other functions (subject to an important exception to be mentioned later). The NLC must have regard to the wishes of those identified as traditional owners, while the Authority consults with the site custodians, again a generally more limited group. The NLC must consult regarding the full range of land use purposes bearing upon Aboriginal land, while the Authority specifically manages requests for site registration from the custodians, and requests for site access from others. In summary, then, the laws under which these two authorities operate allow the registration of indigenous land interests of different extent and according to different criteria, and require each organisation to seek instructions from different categories of Aboriginal authority.¹³⁷

In 2002 the Northern Territory Government announced that it would undertake a review of the Heritage Conservation Act. In so doing, it acknowledged some of the weaknesses of the existing Act:

¹³⁷ R Levitus, 'Laws and strategies: the contest to protect Aboriginal interests at Coronation Hill', in J Weiner and K Glaskin (eds), *Customary Land Tenure and Registration in Australia and Papua New Guinea: anthropological perspectives*, Canberra, ANU E-Press, 2007, pp. 250-251, http://epress.anu.edu.au/apem/customary/mobile_devices/ch12.html (viewed 3 August 2010).

While the Heritage Conservation Act has conserved many important heritage places, the legislation is now out of date. Therefore, it is time to review the Heritage Conservation Act with the aim of developing a better system of heritage protection ...

The current Act has a number of fundamental problems. These include:

- Costly and time consuming administrative processes;
- The Act does not protect all significant aspects of the Northern Territory's heritage;
- There are limited avenues for appeal of a decision;
- There can be confusion over some interpretations and terminology; and
- Ministerial consent is required to perform routine maintenance on heritage places.
- These are just some of the issues with the current Act that this review hopes to resolve.¹³⁸

One of the identified objectives of the review was to ensure that the new Heritage Act would '[e]ngage Aboriginal people in the management of natural and cultural heritage'.¹³⁹

Following extensive public consultations, an 'exposure draft' of a bill for new Northern Territory heritage legislation was released in February 2010. The draft bill provides for an expanded Heritage Council, with an increased Indigenous membership:

In appointing members, the Minister must, as far as practicable, ensure at least 2 of the appointed members are of Aboriginal descent.¹⁴⁰

At the time of writing this report there are no plans by the Northern Territory Government to review and update the Sacred Sites Act.¹⁴¹ According to the Aboriginal Areas Protection Authority:

[a]ppropriate consultation and opportunities to reach agreements are well established under the *Sacred Sites Act*. The issue of an Authority Certificate entails a process of agreement making that ensures that the wishes of custodians are reflected in conditions imposed for the protection of sacred sites. In the event that such conditions impose unworkable restrictions on development a proponent can seek a variation to their

¹³⁸ Department of Resources, Environment, The Arts and Sport (Northern Territory), *Review of the Heritage Conservation Act*, n.d., <http://www.nt.gov.au/nreta/heritage/manage/review.html> (viewed 27 July 2010).

¹³⁹ Department of Infrastructure, Planning and Environment (Northern Territory), *Review of the Heritage Conservation Act 1991. Briefing Notes*, 17 November 2003, p. 3, <http://www.nt.gov.au/nreta/heritage/manage/pdf/briefingnotes.pdf> (viewed 3 August 2010).

¹⁴⁰ Heritage Bill 2009 (NT), s. 122(4).

¹⁴¹ Personal communication with the Department of Resources, Environment, The Arts and Sport (Northern Territory), 30 July 2010.

certificate and can request a conference with custodians. Usually both processes entail the provision of information about the proposed development by the developer for the consideration of custodian. In the event of incompatibility between sacred site protection and development, a proponent can ultimately seek Ministerial review ... This allows the Minister to fully consider the matter and decide whether to issue a Minister's Certificate in relation to the proposed development. However, the *Sacred Sites Act* has a range of offences that protect sacred sites from damage and discretion, and its primary concern is the protection of sacred sites.¹⁴²

¹⁴² Aboriginal Areas Protection Authority, Submission in response to the Discussion Paper: Indigenous heritage law reform Aboriginal and Torres Strait Islander Heritage Protection Act, December 2009, p. 26, <http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/submissions/aapa.pdf> (viewed 4 August 2010).

Indigenous Heritage Protection in Western Australia

General overview and background

Western Australia's heritage system is largely determined by three separate Acts, the *Aboriginal Heritage Act 1972* (WA) (AH Act), the *Environmental Protection Act 1986* (WA) (EP Act) and the *Museum Act 1969* (WA). The most significant of these is the AH Act, which applies to places and objects of archaeological and anthropological relevance, but also to sacred, ritual or ceremonial places 'of importance and special significance to persons of Aboriginal descent'.¹⁴³ The Minister responsible for the Act receives advice from the Aboriginal Cultural Material Committee (ACMC), at least one member of which must have expertise in Aboriginal heritage. However, decisions on the protection, disturbance or destruction of Aboriginal sites or objects rest with the Minister alone, 'having regard to the general interest of the community'.¹⁴⁴

Under the EP Act, the Environmental Protection Authority (EPA) recognises Aboriginal heritage, particularly in relation to social use of the environment (for example, traditional hunting); cultural heritage can therefore be protected via the same mechanisms by which it protects the natural environment.¹⁴⁵ Part IV of the Act requires any proposal with the potential to have a significant impact on the environment to undergo an Environmental Impact Assessment (EIA). If heritage is determined to be a 'relevant environmental factor' proponents can be requested to address it as part of the EIA process.

The *Museum Act 1969* requires the WA Museum Trustees to 'make and preserve ... collections representative of the Aborigines of the State'.¹⁴⁶

The West Australian system has been the subject of considerable criticism and controversy, not least because of the potential impacts on heritage by the State's substantial resource extraction industry. One of the results of these difficulties has been the implementation of solutions outside the auspices of the Act, for example with the adoption of Standard Heritage Agreements, operating largely under the future act processes of the *Native Title Act 1993* (Cwlth).¹⁴⁷

¹⁴³ *Aboriginal Heritage Act 1972* (WA), s. 5.

¹⁴⁴ *Aboriginal Heritage Act 1972* (WA), s. 18(3).

¹⁴⁵ Environmental Protection Agency (Western Australia), *Guidance for the Assessment of Environmental Factors (in accordance with the Environmental Protection Act 1986): Assessment of Aboriginal Heritage*, Perth, 2004, p. 2, http://www.epa.wa.gov.au/docs/1026_GS41.pdf (viewed 3 August 2010).

¹⁴⁶ *Museum Act 1969* (WA), s. 9. As the Act is not relevant to the consultation issue, it not analysed in this report.

¹⁴⁷ See for example N Green, 'The Yamatji/Pilbara Standard Heritage Agreement and its implications for consultant archaeologists', paper presented to the inaugural North-West Cultural Resource Management Workshop, Australian Association of Consulting Archaeologists, 8 April 2004.

Identification and consultation of appropriate Indigenous parties

Aboriginal Heritage Act 1972 (the AH Act)

The AH Act does not provide for direct consultation between land owners who make an application under section 18 of the Act to use land on which sites or objects may be located, and Aboriginal people who have an interest in those sites and objects. It is within the power of the relevant minister, under section 9 of the Act, to confer traditional custodianship of such sites and/or objects, and in so doing confer the powers of the minister on the traditional custodians. This power may be revoked at any time.¹⁴⁸ As of February 2009 this power had never been invoked.¹⁴⁹

It is the Aboriginal Cultural Heritage Committee (ACMC), an advisory body established by section 28 of the Act, which considers such applications and makes recommendations to the minister as to whether the application should be granted. The minister must make a decision, taking into account the 'general interests of the community',¹⁵⁰ about whether to refuse or consent to the application. It is open to the minister to place conditions on the use of the land where consent is granted.¹⁵¹

The ACMC is made up of eight members, appointed and ex-officio, one of whom must be a 'person recognised as having specialised experience in the field of anthropology related to the Aboriginal inhabitants of Australia ...'.¹⁵² This person is appointed by the Minister following consultation with 'persons responsible for the study of anthropology' at West Australian universities.¹⁵³ The other appointed ACMC members are

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 cultural significance of matters coming before the Committee ...¹⁵⁴

The ex-officio members of the committee comprise: a senior public servant in the Department of Aboriginal Affairs, 'an authorised land officer' in the Department of Regional Development and Lands, and a representative of the WA Museum.¹⁵⁵

The functions of the ACMC under section 39(1) of the AH Act are:

¹⁴⁸ *Aboriginal Heritage Act 1972 (WA)*, s. 9.

¹⁴⁹ G O'Dell, 'Aboriginal Heritage Act 1972 (WA): guidelines for parties of interest', *Native Title News*, G Hiley, M McKenna and G Denisenko (eds), vol. 9, issue 2, May 2009, p. 16.

¹⁵⁰ *Aboriginal Heritage Act 1972 (WA)*, s. 18(3).

¹⁵¹ *Aboriginal Heritage Act 1972 (WA)*, s. 18(3)(a).

¹⁵² *Aboriginal Heritage Act 1972 (WA)*, s. 28(3).

¹⁵³ *Aboriginal Heritage Act 1972 (WA)*, s. 28(3).

¹⁵⁴ *Aboriginal Heritage Act 1972 (WA)*, s. 28(4).

¹⁵⁵ *Aboriginal Heritage Act 1972 (WA)*, s. 29.

(a) to evaluate on behalf of the community the importance of places and objects alleged to be associated with Aboriginal persons;

(b) where appropriate, to record and preserve the traditional Aboriginal lore related to such places and objects;

(c) to recommend to the Minister places and objects which, in the opinion of the Committee, are, or have been, of special significance to persons of Aboriginal descent and should be preserved, acquired and managed by the Minister;

[(d) deleted]

(e) to advise the Minister on any question referred to the Committee, and generally on any matter related to the objects and purposes of this Act;

(ea) to perform the functions allocated to the Committee by this Act; and

(f) to advise the Minister when requested to do so as to the apportionment and application of moneys available for the administration of this Act.

When evaluating the importance of sites and objects, the committee must 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.

Section 39(3) of the Act specifies that:

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.

The Act also establishes the office of the Registrar of Aboriginal Sites, to which an officer of the Department is appointed as Registrar. The principal function of the Registrar is to administer the operations of the ACMC.¹⁵⁶ The Act also states that '[a]ll communications required by this Act to be made to or by the minister or the committee may be made through the Registrar'.¹⁵⁷

¹⁵⁶ *Aboriginal Heritage Act 1972 (WA)*, s. 37(1) and (2).

¹⁵⁷ *Aboriginal Heritage Act 1972 (WA)*, s. 37(4).

Section 18 land use application Guidelines

Whilst the AH Act does not provide for direct consultation by proponents with Aboriginal people affected by a section 18 land use application, the assistance Guidelines for applicants do. They state that, in addition to application details - which include the intended use of the land and a summary of potential effects of that use on Aboriginal sites and/objects - the application should provide a '[s]ummary of applicant consultation with relevant Aboriginal people and other stakeholders'. Notice of a section 18 application should:

- describe the process used to consult with relevant Aboriginal people. This should describe the manner in which Aboriginal people were selected for consultation and should include justification for the inclusion and the omission of particular groups/individuals;
- provide details of comments by Aboriginal people about the proposal; and
- describe the outcome of consultation with relevant Aboriginal people, including any issues or requests raised.

If a heritage survey report has been commissioned and more detailed explanations are included in the report it is only necessary to include a summary of the consultation process with the Aboriginal community and its outcomes within the notice.

- include a list of stakeholders consulted in the process of developing the notice, such as key Aboriginal organisations, Government agencies (including DIA), local government and other key stakeholders about the project; and
- in particular, provide details about any previous consents under Section 18 of the Act, e.g. a copy of a Ministerial letter outlining the conditions of a previous Section 18 consent.¹⁵⁸

The result of this quite detailed requirement is that an application placed before the ACMC has been informed by direct consultation between the proponent and the relevant Aboriginal people. This administrative process effectively circumvents the limitations of the Act.¹⁵⁹ However, the fact that consultation is an essential element of the application

¹⁵⁸ Department of Indigenous Affairs (Western Australia), *Section 18 Notice Guidelines*, item 7, n.d., <http://www.dia.wa.gov.au/en/Section-18-Applications/Heritage-management/Applications/Application-to-use-land-s18/Section-18-Guidelines/Summary-of-applicant-consultation-with-relevant-Aboriginal-people-and-other-stakeholders/> (viewed 26 July 2010).

¹⁵⁹ Various WA government agencies have produced consultation guidelines, e.g. Department of Water (Western Australia), *Aboriginal Heritage and Native Title Guidelines for On-Ground Works*, March 2008, <http://swcatchmentscouncil.com/uploads/File/ACEG-D-04-a-%20Mar%2008.pdf> (viewed 3 August 2010). The Department of Industry and Resources has produced guidelines titled *Working with Aboriginal communities: a practical approach*, 2004.

Guidelines, such consultations must not operate so as to provide the Aboriginal party with the power of veto over the relevant land-use project.¹⁶⁰

Environmental Protection Act 1986 (the EP Act)

In 2004 the Environmental Protection Authority (EPA)¹⁶¹ published *Guidance for the Assessment of Environmental Factors (in accordance with the Environmental Protection Act 1986): Assessment of Aboriginal Heritage*. The Guidance Statement, which was developed in consultation with the Department of Indigenous Affairs, explains what elements the EPA will consider when assessing a proposed development where Aboriginal heritage is deemed to be a 'relevant environmental factor'.¹⁶² The Statement notes that:

The broad definition of environment in the EP Act clearly encompasses the physical environment including heritage matters ... Given the overlap with the *Aboriginal Heritage Act 1972* (AH Act), the EPA has developed this guidance to reduce duplication of requirements for information and to make them as complementary as possible.

Section 3 of the EP Act defines the term "environment" as follows:

"environment", subject to subsection (2), means living things, their physical, biological and social surroundings, and interactions between all of these."

Subsection 3(2) of the EP Act provides:

For the purposes of the definition of "environment" in subsection (1), the social surroundings of man are his aesthetic, cultural, economic and social surroundings to the extent that those surroundings directly affect or are affected by his physical or biological surroundings.

The term "environment" in relation to social surroundings has to relate to a specific place which has a physical entity and relates to a person who may be affected by the proponent's activity (Supreme Court, 26 March 1996).¹⁶³

The crucial aspect to the EP Act and its interaction with the AH Act is that, under section 5 of the EP Act, '[w]henever a provision of [the EP Act] or of an approved policy is inconsistent with a provision contained in, or ratified or approved by, any other written

¹⁶⁰ The case of *Re Minister for Indigenous Affairs; ex parte Woodley* [No 2] [2009] WASC 296 concerned the wording of a recommendation provided to the minister by the ACMC in relation to an application to disturb a site of significance. The recommendation included a provision stipulating that consultation between the parties be to the satisfaction of the Aboriginal party. The wording of this recommendation was altered by staff at the Department of Indigenous Affairs, without reference to the committee, to read 'to the satisfaction of the Registrar (of Aboriginal Sites)'. The minister, in evidence before the court, made it clear that he would not have acquiesced to such a condition of grant of permission to disturb the site in question as worded in the original recommendation. He stated that 'I am concerned to avoid giving an Aboriginal group an effective veto which allows it, in effect, to hold the applicant [for permission to use land] to ransom by refusing to be satisfied' (paras 19, 21, 24, 31).

¹⁶¹ See Part II of the *Environmental Protection Act 1986* (WA).

¹⁶² Environmental Protection Agency (Western Australia), p. 1.

¹⁶³ Environmental Protection Agency (Western Australia), p. 2.

law,' the EP Act prevails. Thus, whereas the AH Act does not provide for direct consultation with relevant Aboriginal people whose country may be subject to a development proposal, the EP Act does where 'relevant environmental factors' are present.

Where it is determined, through a formal assessment, that Aboriginal heritage is a relevant environmental factor in a development proposal, the proponent is expected to supply the EPA with 'a report on the implementation of the proposal in relation to resulting changes to physical and biological attributes of the environment which may impact on the heritage significance of those attributes to Aboriginal people'.¹⁶⁴ The Guidance Statement provides a list of actions that may assist the proponent to satisfy EPA prerequisites:

- Consult with staff of the DIA and review any site records (desk-top review) in accordance with the AH Act.
- Undertake an Aboriginal heritage survey (if it is noted from a desk-top review that an adequate survey has not been undertaken for an area to be developed) which should include both consultation with appropriate Aboriginal people, which may include an anthropological survey, and, if necessary, an archaeological survey.
- Inform the relevant Aboriginal people about details of the proposed development, including potential environmental impacts.
- Consult with relevant Aboriginal people to enable them to make known to the proponent their concerns in regard to environmental impacts as they affect heritage matters.
- Demonstrate that any concerns raised by Aboriginal people have been adequately considered by the proponent in its management of environmental impacts, and any changes as a result of this process are made known to the relevant Aboriginal people.¹⁶⁵

Views on the Western Australian heritage regime

Boer and Wiffen have provided the following perspective on Western Australian heritage legislation:

As with the legislation in some of the other Australian jurisdictions, the Western Australian [heritage] legislation is somewhat behind the practical administrative and institutional framework that operates in Western Australia covering Aboriginal matters.¹⁶⁶

¹⁶⁴ Environmental Protection Agency (Western Australia), p. 4.

¹⁶⁵ Environmental Protection Agency (Western Australia), p. 5.

¹⁶⁶ Boer and Wiffen, p. 303.

The Act came under some heavy criticism in the report of the Aboriginal Land Inquiry, which was carried out by Paul Seaman, QC on behalf of the State Government and published in 1984. This Inquiry, part of which was established to review the operation of the AH Act, concluded the following:

The Aboriginal Heritage Act has always given absolute control over Aboriginal sites to the Minister of the day ... Following the 1980 amendments the Aboriginal Heritage Act has a simple operation in relation to sites. The government of the day can decide on the interests of the broader community what Aboriginal sites should be destroyed or damaged, no matter how sacred or important or special their significance to Aboriginal people may be. Aboriginal people have no right to be heard on the topic, although private property owners may appeal to the Supreme Court if the Minister will not authorise a disturbance.¹⁶⁷

He continued:

The system of sites registration upon which the Act relies is, in my view, quite inappropriate to protect places of significance to traditional Aborigines. [There is a] danger of reliance upon a register, when there is no machinery to ensure that proper steps have been taken to consult Aboriginal people with traditional links to the area about their sites ...¹⁶⁸

In 1995 another review of the AH Act was carried for the Western Australian Government by Perth lawyer Dr Clive Senior. Similar to the Seaman Inquiry report, the Senior report identified a need for better consultation with Aboriginal people:

The underlying objective of our recommendations is to promote early and widespread consultation with 'the relevant Aboriginal people'. To promote certainty and procedural fairness in the management and protection of Aboriginal heritage, this expression should be understood to include all Aboriginal people and organisations with a special interest in or responsibility for the relevant area. It is contemplated that the RHOs¹⁶⁹ will play an important part in identifying and contacting the relevant individuals and organisations and providing the AHPA¹⁷⁰ with sufficient material to enable that body to make a fair and informed decision. If all relevant people are consulted at an early stage it should obviate later challenges from Aboriginal people claiming a right to be consulted.¹⁷¹

However, the recommendations relating to consultation which were put forward in both the Seaman and Senior reviews were not accepted by the WA Government.

There has been little recent commentary on the regulation of Aboriginal heritage in Western Australia. Graham O'Dell, writing in *Native Title News* in 2009, observed that the

¹⁶⁷ P Seaman, *The Aboriginal Land Inquiry*, Government Printer, Western Australia, September 1984, paras. 8.15-8.16.

¹⁶⁸ Seaman, para 8.30.

¹⁶⁹ Regional Heritage Offices.

¹⁷⁰ Aboriginal Heritage Protection Authority.

¹⁷¹ CM Senior, *Review of the Aboriginal Heritage Act 1972: Final Report*, Minter Ellison Northmore Hale Lawyers, Perth, 30 June 1995, pp. 90-91.

Act in its current form denies Aboriginal people the opportunity to influence the process of Aboriginal heritage protection. He stated that

it is only through consultation with Aboriginal people that the full extent of what construes Aboriginal heritage can be established.

Not to include Aboriginal people more directly in the process of Aboriginal heritage protection is to perpetuate the patronising effect of European influence. Those using the land for non-Aboriginal purposes cannot truly state that they are respectful of Aboriginal heritage if they fail to include Aboriginal people in the identification and preservation of Aboriginal cultural objects and sites.¹⁷²

David Ritter, a prominent Perth lawyer with considerable experience in Indigenous land rights and native title law, observed, in a 2006 article, that:

The AHA ... does not create or recognise rights in cultural heritage vested in Indigenous people and neither does it impose any positive obligation on developers of land to engage with traditional landowners with a view to protecting areas of significance.¹⁷³

Ritter stated that, as a result, the Act denies traditional land owners the right to have any input into the preservation of their heritage.¹⁷⁴

In an earlier article, Ritter, whilst acknowledging that the AH Act 'establishes a regime of sorts for the protection of heritage', emphasised that the regime 'was not enforceable by Aboriginal people themselves'. He went on to state that the Act 'does not create a right to have Aboriginal heritage protected', and that, as a result, the legislation 'creates nothing more than an illusion of rights – it is a deception, a chimera'.¹⁷⁵

¹⁷² O'Dell, p. 17.

¹⁷³ D Ritter, 'Many Bottles for Many Flies: Managing Conflict over Indigenous People's Cultural Heritage in Western Australia', *Public History Review*, vol. 13, 2006, p. 129.

¹⁷⁴ Ritter, 'Many Bottles', pp. 132-133.

¹⁷⁵ D Ritter, 'Trashing heritage: dilemmas of rights and power in the operation of Western Australia's heritage legislation', in C Choo and S Hollbach (eds), *History and Native Title*, Centre for Western Australian History, University of Western Australia (Studies in Western Australian History 23), 2003, p. 199.

Indigenous Heritage Protection in Tasmania

General overview and background

Protection of Aboriginal heritage in Tasmania falls under the auspices of the *Aboriginal Relics Act 1975*, which provides blanket protection¹⁷⁶ for Aboriginal sites and objects pre-dating European arrival.¹⁷⁷ The Act therefore does not acknowledge ongoing Aboriginal culture in Tasmania. Long-term criticism of the legislation, directed at its archaeological focus and inconsistency of approach, has led to several reviews, and terms of reference have been set to explore possible new legislation.¹⁷⁸

Other relevant legislation includes the *Aboriginal Lands Act 1995*, which was established 'to promote reconciliation ... by granting to Aboriginal people land of historic or cultural significance'.¹⁷⁹ The *Nature Conservation Act 2002*, and the *National Parks and Reserves Management Act 2002* are addressed below.

Identification and consultation of appropriate Indigenous parties

The Aboriginal Relics Act 1975

There is very limited capacity for the identification and consultation of appropriate Indigenous parties under the *Aboriginal Relics Act 1975*. The Act establishes the Aboriginal Relics Advisory Council whose role is to advise and make recommendations to the Minister and Director of National Parks and Wildlife.¹⁸⁰

The Council consists of five members, only one of whom must be of Aboriginal descent.¹⁸¹ A person of Aboriginal descent is defined as 'any person who has wholly or partly descended from the original inhabitants of Australia'.¹⁸² There is therefore no requirement that the sole Indigenous member of the Council be of Tasmanian descent, and since three members of the Council constitute a quorum at any meeting¹⁸³ the

¹⁷⁶ Section 9 of the Act, however, provides for a permit to destroy or disturb relics may granted by the Director of the Aboriginal Relics Advisory Council.

¹⁷⁷ The definition of 'relic' in s. 2(4) of the *Aboriginal Relics Act 1975* (Tas) states that 'no object made or created after the year 1876 shall, for the purposes of this Act be treated as a relic ...'. This definition appears to be predicated on the assumption that no 'relics' as defined in the Act would be made after 1876, the year Truganini died.

¹⁷⁸ Department of Primary Industries, Parks, Water and Environment (Tasmania), *Aboriginal Heritage: Terms of Reference*, n.d., http://www.tahl.tas.gov.au/ab_terms.html (viewed 3 August 2010).

¹⁷⁹ Preamble to the *Aboriginal Lands Act 1995* (Tas).

¹⁸⁰ *Aboriginal Relics Act 1975* (Tas), s. 3.

¹⁸¹ *Aboriginal Relics Act 1975* (Tas), s. 4.

¹⁸² *Aboriginal Relics Act 1975* (Tas), s. 2.

¹⁸³ *Aboriginal Relics Act 1975* (Tas), s. 6(3).

capacity for the Act to provide the identification and consultation of appropriate Indigenous parties must be assessed as extremely limited.

The Aboriginal Lands Act 1995, enacted some twenty years later, has as its long title '[a]n Act to promote reconciliation with the Tasmanian Aboriginal community by granting to Aboriginal people certain parcels of land of historic or cultural significance'. The Act provides for the establishment of the Aboriginal Land Council of Australia (the Council)¹⁸⁴ which consists of 8 Aboriginal persons¹⁸⁵ elected by Aboriginal persons¹⁸⁶ entitled to be on the Aboriginal Land Council of Tasmania Electors Roll.¹⁸⁷

The functions of the Council are:

- a) to use and sustainably manage Aboriginal land and its natural resources for the benefit of all Aboriginal persons;
- b) to exercise, for the benefit of all Aboriginal persons, the Council's powers as owner of Aboriginal land;
- c) to prepare management plans in respect of Aboriginal land;
- d) to use and sustainably manage any other land in which the Council acquires an interest;
- e) (such other functions as are imposed on it by or under this Act or any other Act.¹⁸⁸

The Council:

- must perform its functions for the benefit of all Aboriginal persons and in the interests of reconciliation with the broader Tasmanian community;
- in its use and management of Aboriginal land and its natural resources, must have regard to the interests of local Aboriginal communities;
- may do all things necessary or convenient for or in connection with, or incidental to, the performance of its functions and, in particular, has power, subject to this Act, to acquire, hold, dispose of and otherwise deal with property, both real and personal;

¹⁸⁴ *Aboriginal Lands Act 1995* (Tas), s. 5.

¹⁸⁵ Members are to be elected by eligible electors: two to represent each of the southern, northern and north-west regions and one to represent each of the Flinders Island and the Cape Barren Island groups (*Aboriginal Lands Act 1995* (Tas), s. 6).

¹⁸⁶ An Aboriginal person is a person of Aboriginal ancestry who self-identifies as an Aboriginal person and is recognised as such by members of the Aboriginal community. The onus of proving that a person satisfies these requirements lies on the person asserting Aboriginality (*Aboriginal Lands Act 1995* (Tas), s. 3A).

¹⁸⁷ A person is entitled to be on the Roll if they are an Aboriginal person, resides in the relevant electoral area and is 18 years of age (*Aboriginal Lands Act 1995* (Tas), s. 9).

¹⁸⁸ *Aboriginal Lands Act 1995* (Tas), s. 18(1).

- may nominate a local Aboriginal group in respect of any area of Aboriginal land; [and]
- may delegate any of its functions or powers to any Aboriginal group which, or Aboriginal person who, the Council considers appropriate.¹⁸⁹

The Council must involve a local Aboriginal group¹⁹⁰ or a local Aboriginal person in the management of Aboriginal land after considering the following factors:

- the extent to which a local Aboriginal group or person has an association or connection with the land;
- the extent to which a local Aboriginal group or person has the desire and capacity to manage the land;
- the importance of the land to all Aboriginal persons.¹⁹¹

Other legislation

Nothing in the *Nature Conservation Act 2002* (the NC Act) precludes *Aboriginal cultural activity*¹⁹² by an *Aboriginal person*¹⁹³ on *Aboriginal land*,¹⁹⁴ provided the activity is not likely, in the opinion of the Minister, to have a detrimental effect on fauna and flora and is consistent with the Act.¹⁹⁵ However, the NC Act does not expressly provide for consultation with Aboriginal people in relation to any matters dealt with under the Act.

Under the *National Parks and Reserves Management Act 2002* (the NPRM Act) the Minister may establish the Conservation Management Trust to be the managing authority for conservation areas, nature recreation areas and regional reserves for which there is a management plan.¹⁹⁶

The Trust may consist of a number of people appointed by the Minister representing certain specified groups. The list of potential persons includes 'a person nominated by the Aboriginal Land Council of Tasmania', but there is no express requirement that any of the potential persons listed be members.¹⁹⁷ The management objectives for national parks, state reserves, nature reserves, game reserves, conservation areas, nature recreation areas, regional reserves and historic sites expressly include encouraging 'cooperative management programs with Aboriginal people in areas of significance to

¹⁸⁹ *Aboriginal Lands Act 1995* (Tas), s. 18 (2)–(6).

¹⁹⁰ 'local Aboriginal group' is defined as an Aboriginal group nominated by the Council for an area of Aboriginal land (*Aboriginal Lands Act 1995* (Tas), s. 3).

¹⁹¹ *Aboriginal Lands Act 1995* (Tas), s. 31.

¹⁹² *Aboriginal cultural activity* is defined as the activity of hunting, fishing or gathering undertaken by an Aboriginal person for his or her personal use based on Aboriginal custom of Tasmania as passed down to that Aboriginal person (s. 73(1) NC Act).

¹⁹³ *'aboriginal person'* has the same meaning as in the *Aboriginal Lands Act 1995* (NC Act, s. 73(1)).

¹⁹⁴ *'aboriginal land'* has the same meaning as in the *Aboriginal Lands Act 1995* (NC Act, s. 73(1)).

¹⁹⁵ NC Act, s. 73(2).

¹⁹⁶ NPRM Act, s. 31(1), 92.

¹⁹⁷ NPRM Act, s. 33 and in particular s. 33(f).

them in a manner consistent with the purposes of reservation and the other management objectives'. There are however no express requirements for consultation with Aboriginal people.¹⁹⁸

Views on the Tasmanian heritage regime

According to Boer and Wiffen:

The *Aboriginal Relics Act 1975*, like some of the legislation in other jurisdictions, takes an old-fashioned archaeological view of Aboriginal heritage matters. It was described in a recent review as 'out-of-date', and it was stated that new legislation will need to be based on a policy of enfranchisement of the Aboriginal community in the management of its heritage.¹⁹⁹

The limitations of the *Aboriginal Relics Act 1975* are acknowledged by the Government of Tasmania:

The Aboriginal Relics Act 1975 provides blanket protection for Aboriginal objects and sites created prior to 1876, but there is no recognition of recent and continuing Aboriginal heritage and little uniformity in how the legislation is enforced. Other major areas of concern include ... [i]nappropriate processes to involve the Aboriginal community in the management of its heritage ...

The result is an approach to Aboriginal heritage management in Tasmania that doesn't serve the interests of Aboriginal people or meet the requirements of sustainable economic development.²⁰⁰

Since 2005 the Act has been under review by the State Government, which has involved extensive community consultations. The first round of consultations, conducted by the Tasmanian Aboriginal Heritage Legislation Project (TAHLP), included meetings with a range of key stakeholder organisations, such as the Aboriginal community, industry, planning and conservation groups. TAHLP's summary bulletin of these meetings states that there were a number of key points about which the participants agreed. Relevant issues to this report include:

- Aboriginal heritage in Tasmania requires more effective protection, with direct involvement of the Tasmania Aboriginal people and recognition of their cultural values ...
- Co-operation between the Aboriginal community, land owners and users be encouraged, building on existing networks

¹⁹⁸ NPRM Act, Schedule 1 (1. to 6.).

¹⁹⁹ Boer and Wiffen, p. 296.

²⁰⁰ Department of Primary Industries, Parks, Water and Environment (Tasmania), *Worth Protecting: A Certain Future - Ending Decades of Confusion*, n.d., http://www.tahl.tas.gov.au/wp_certainfuture.html (viewed 3 August 2010).

- Discussion [should be] facilitated on issues to minimise conflict by seeking early resolution ...²⁰¹

The bulletin also contains a more detailed summary of the issues raised during the consultations, presented in table form. The following individual concerns were listed under the heading 'Empowerment for Aboriginal people':

- 2.1 More involvement of Aboriginal people must be built in to legislation
- 2.2 Significance and treatment of heritage should be a matter for Aboriginal community
- 2.3 Role of Aboriginal community is to protect and manage heritage
- 2.4 Aboriginal community should be involved in appointing Aboriginal people to any AH council
- 2.5 Emphasise local involvement in assessment and management
- 2.6 Maximise opportunity for Aboriginal community to talk directly with stakeholders²⁰²

Three other points were raised specifically in relation to the issue of consultation with Aboriginal people about heritage matters:

- 8.7 Effective representation of Aboriginal people in decision making ...
- 10.6 Aboriginal community decision making powers must be provided by legislation
- 10.7 Aboriginal representation in decision-making needs to be adequately provided²⁰³

Similar feedback was reflected in TAHLP's summary of the responses it received during subsequent consultations:

The main concerns expressed at consultation meetings were that the current legislation does not provide a clear process and that the Aboriginal community is not adequately represented in the assessment and management of heritage. Failures in both these areas result in inadequate protection for Aboriginal heritage, resulting in damage and destruction. Without a clear process the legislation becomes inaccessible to many people,

²⁰¹ Tasmanian Aboriginal Heritage Legislation Project, *Information Bulletin: Summary of Round One Consultations: Meetings with Peak Stakeholder Representative Organisations*, Hobart, 18-21 July, 2005, p. 3 <http://www.tahl.tas.gov.au/media/resources/TAHL%20-%20Round%20One%20Consultation%20Summary.pdf> (viewed 28 July 2010). Additional suggestions were put forward in TAHLC's second bulletin, which summarised the results of subsequent consultation sessions. See Tasmanian Aboriginal Heritage Legislation Project, *Information Bulletin: Summary of Consultation Meetings: Regional Forums*, 24-27 October, 2005, <http://www.tahl.tas.gov.au/media/resources/TAHL%20-%20Regional%20Forum%20Consultation%20Summary.pdf> (viewed 28 July 2010).

²⁰² Tasmanian Aboriginal Heritage Legislation Project, *Information Bulletin: Summary of Round One Consultations*, p. 8.

²⁰³ Tasmanian Aboriginal Heritage Legislation Project, *Information Bulletin: Summary of Round One Consultations*, pp. 10-11.

including those who would remain ignorant of their obligations and the ways they could protect Aboriginal heritage. Without Aboriginal community involvement in assessment of values and decision-making for culturally appropriate management, the breadth of protection intended by legislation is not being delivered effectively or efficiently.²⁰⁴

The Tasmanian Government's main proposal for increasing the role of Indigenous people in the protection of Aboriginal heritage is the creation of a new Aboriginal Representative Body:

The proposed new Tasmanian Aboriginal heritage legislation will include provisions for an Aboriginal Representative Body to provide leadership for all Tasmanians in the protection of Aboriginal heritage. It is recognised that there are many functions and powers associated with managing Aboriginal heritage that can only be performed appropriately by Aboriginal people. For this reason, membership of the proposed Aboriginal Representative Body would be drawn solely from the Tasmanian Aboriginal community.

This body will fill a gap that has existed since the failure of an Advisory Council created under the *Aboriginal Relics Act 1975*. While this council was meant to advise on the protection of Aboriginal heritage, it has not met the needs of decision-makers and planners seeking to manage Aboriginal heritage, and it does not provide an independent voice for the Aboriginal community. As a consequence, the council has not been convened since the 1980s.

In the meantime, the Tasmanian Aboriginal Land and Sea Council (TALSC), a Tasmanian Aboriginal community organisation, has provided independent advice to government, planners and landowners on how to protect Aboriginal heritage. The proposed Aboriginal Representative Body will continue this work, formalising and providing support for current practices within a defined legislative framework. TALSC has been tentatively put forward by an Aboriginal community working group as the appropriate organisation to become the Aboriginal Representative Body.²⁰⁵

This proposal is based on the assumption that a new Representative Body would bring a range of benefits not currently being realised under the *Aboriginal Relics Act 1975*:

The proposed Aboriginal Representative Body is principally a body set up to assist the Aboriginal community in their continuing efforts to protect and manage their heritage. That is why it must comprise solely Aboriginal people and be in a position to exercise a wide range of functions and powers, covering a multitude of activities taking place today across Tasmania.

²⁰⁴ Tasmanian Aboriginal Heritage Legislation Project, *Answers to Questions taken on Notice during Consultations in November and December 2007*, p. 2, <http://www.tahl.tas.gov.au/media/resources/Answers%20to%20Questions%20Taken%20on%20Notice%20at%20Consultation%20in%20November%20and%20December%202006.pdf> (viewed 2 August 2010).

²⁰⁵ Tasmanian Aboriginal Heritage Legislation Project, *New Tasmanian Heritage Legislation Consultation Package*, November 2006, Information Sheet 6, <http://www.tahl.tas.gov.au/media/resources/Consultation%20Package.pdf> (viewed 2 August 2010).

Under existing legislation, any member of the Tasmanian community about to embark on any activity with the potential to disrupt Aboriginal heritage faces a potentially confusing array of information and advisory sources, including individuals, bodies and business units, both government and non-government.

Navigating this labyrinth through the development application, approval and planning process is confusing and time consuming. For example, it is not unusual to require approvals from local council as well as the relevant State Government Minister, acting on the advice of the Director of National Parks and Wildlife Service, with supporting advice from other branches of the government and the Aboriginal community.

New Tasmanian Aboriginal heritage legislation will consolidate these activities and streamline the process, with the Aboriginal Representative Body becoming the comprehensive source of advice on all matters relating to Aboriginal heritage.

The Aboriginal Representative Body will guide proponents through the approvals process for Aboriginal heritage, providing access to relevant information for informed decision-making and playing an active role in any negotiations that may be required.

By linking with other approvals and planning processes, the Aboriginal Representative Body will ensure clarity and certainty for anyone dealing with Aboriginal heritage.²⁰⁶

The consultation phase of the Government's review has now ceased and new Aboriginal heritage legislation is currently being drafted.²⁰⁷

²⁰⁶ Tasmanian Aboriginal Heritage Legislation Project, *New Tasmanian Heritage Legislation Consultation Package*. The Package includes additional information about the structure, functions and powers of the proposed Representative Body. See also feedback on this proposal made during the public consultations phase, published in Tasmanian Aboriginal Heritage Legislation Project, *Information Bulletin June 2007: Revised Edition*, March 2008, pp. 15-20, <http://www.tahl.tas.gov.au/media/resources/Consultation%20Package.pdf> (viewed 2 August 2010).

²⁰⁷ Personal communication with Aboriginal Heritage Tasmania, 27 July 2010.

Indigenous Heritage Protection in South Australia

General overview and background

South Australia was the first jurisdiction in Australia to enact legislation designed to protect Aboriginal heritage: the *Aboriginal and Historic Relics Preservation Act 1965*. Section 3 of the Act defined 'relics' as being 'any trace, remains or handiwork of an Aboriginal but does not include any handiwork made by an aboriginal for the purpose of sale'.

The current South Australian system is based around the *Aboriginal Heritage Act 1988* (AHA).²⁰⁸ This Act protects 'all Aboriginal sites, objects and remains in South Australia that are of significance to Aboriginal tradition, archaeology, anthropology and/or history'.²⁰⁹ The Aboriginal Heritage Branch, working under the Department of Premier and Cabinet, administers the Act on behalf of the Minister for Aboriginal Affairs and Reconciliation, and maintains a Register of Aboriginal Sites and Objects.

In December 2008 the South Australian Government announced plans for a review of the Act and implementation of new legislation that would account for the native title context, changed perceptions of heritage and Aboriginal South Australians' 'aspirations for greater participation in decision making about heritage'.²¹⁰

Identification and consultation of appropriate Indigenous parties

Aboriginal Heritage Act 1988 (the AHA)

The responsible Minister has the function of protecting and preserving Aboriginal places and objects, and to conduct, direct or assist research into Aboriginal heritage.²¹¹ The Department of Aboriginal Affairs and Reconciliation (DAARE) is a State Government department which supports the portfolio responsibility of the Minister for Aboriginal Affairs and Reconciliation. The Aboriginal Heritage Branch, working under the Department of Premier and Cabinet, administers the AHA on behalf of the Minister for

²⁰⁸ A successor to the *Aboriginal and Historic Relics Preservation Act 1965* (SA), the *Aboriginal Heritage Act* was introduced in 1979 but not enacted.

²⁰⁹ Department of the Premier and Cabinet (South Australia), *Overview: The Aboriginal Heritage Act 1988*, March 2007, <http://www.premcab.sa.gov.au/pdf/heritageact/01overview.pdf> (viewed 3 August 2010).

²¹⁰ Department of the Premier and Cabinet (South Australia), *Review of the Aboriginal Heritage Act 1988: SCOPING PAPER*, December 2008, p. 2, <http://www.aboriginalaffairs.sa.gov.au/resources/AHA%20Scoping%20Paper%20pdf%20version.pdf> (viewed 30 July 2010).

²¹¹ AHA, s. 5.

Aboriginal Affairs and Reconciliation.²¹² In carrying out these functions the Minister is required to consider the Aboriginal Heritage Committee's recommendations.²¹³

Identification of Aboriginal heritage appears as a joint effort of the Minister and the Aboriginal Heritage Committee, which was established under Part 2 of the AHA. The Committee should be comprised of Aboriginal people from all parts of the State, and of equal gender numbers, to represent the interests of Aboriginal people in regard to protection and preservation of Aboriginal heritage.²¹⁴ The Committee should advise the Minister on making entries in the Register of Aboriginal Sites and Objects (also called the Central Archives)²¹⁵, on measures that should be taken to protect or preserve Aboriginal sites, objects or remains, on the appointment of inspectors, on Aboriginal heritage agreements (not defined) and on any other matters in relation to the administration of the Act and the protection and preservation of Aboriginal heritage. The Committee also carries out any other functions assigned by the AHA or the Minister.²¹⁶

Section 6(2) and (3) of the AHA provide that the Minister must, when requested by traditional owners of a site or object, delegate the Minister's powers under sections 21, 23, 29 and 35, to the traditional owners. These provisions relate to excavating for the purpose of uncovering Aboriginal sites, objects or remains or disturbing or controlling dealings with such things and the divulging of information contrary to Aboriginal tradition.

Section 9 of the AHA establishes the Central Archives (see above) for entries described sufficiently to enable sites or objects to be identified, where the Minister has determined them to be Aboriginal sites and objects as defined in the AHA. The Register is maintained by the Minister for Environment and Heritage who normally acts on the advice of the Aboriginal Heritage Committee.²¹⁷ The Central Archives with over 6600 entries is available electronically on the Heritage Sites Database.²¹⁸

The Minister is required to take reasonable steps to consult before making a determination under the AHA in regard to whether a site or object can be conclusively presumed to be an Aboriginal site or object before it is entered on the Register. Parties to be consulted are the Committee, any Aboriginal organisation, traditional owners or other Aboriginal persons the Minister believes has a particular interest in the matter.²¹⁹ The Minister is directed by section 13(2) that:

²¹² Department of the Premier and Cabinet (South Australia), *Overview*.

²¹³ AHA, s. 5(1).

²¹⁴ AHA, s. 7.

²¹⁵ AHA, s. 9.

²¹⁶ AHA, s. 8(1)(b).

²¹⁷ Legal Services Commission of South Australia, *Handbook: Register of Aboriginal Sites and Objects*, n.d., <http://www.lawhandbook.sa.gov.au/ch18s06s11.php>, (viewed 3 August 2010).

²¹⁸ Department of the Premier and Cabinet (South Australia), *Overview*.

²¹⁹ AHA, s. 13.

When determining whether an area of land is an Aboriginal site or an object is an Aboriginal object, the Minister must accept the views of the traditional owners of the land or object on the question of whether the land or object is of significance according to Aboriginal tradition.²²⁰

The AHA provides for the Minister to appoint inspectors who have powers under the AHA²²¹ to enter any land for the purpose of: inspecting Aboriginal sites or objects or sites or objects that may be Aboriginal sites and objects; for determining if the AHA provisions have been contravened or complied with; to determine if an Aboriginal heritage agreement is being complied with; and to prevent offences against the AHA. Traditional owners of an Aboriginal site or object may, by written submission, advise the Minister that they oppose an inspector being appointed to exercise powers in relation to a site or object.

Before issuing any directions restricting access to sites, objects or remains pursuant to section 24, the Minister must give notice to the owner and occupier, the Committee, any relevant Aboriginal organisation, a representative of the traditional owners and any other Aboriginal persons with an interest in the matter. There is no requirement to consult, rather the Minister must give due consideration to any representations.²²²

Part 3 Division 6 of the AHA introduced Aboriginal Heritage Agreement (AH Agreement) provisions which provide for the Minister to enter into an agreement with the owner of land on which an Aboriginal site, object or remains is situated. AH Agreements may provide for protection and preservation of Aboriginal objects, sites and remains.²²³ Before entering into an AH Agreement the Minister must take all reasonable steps to consult with the Committee, any Aboriginal organisation, traditional owners or other Aboriginal persons the Minister believes have a particular interest in the matter.²²⁴

In addition, traditional owners of an Aboriginal site or object, or their representatives, are to be given an opportunity to become parties to the agreement.²²⁵ AH Agreements made pursuant to Part 3 Division 6 are to be registered on the title of the land.²²⁶

Maralinga Tjarutja Land Rights Act 1984

The *Maralinga Tjarutja Land Rights Act 1984* sets out broad functions of ascertaining the opinions of traditional owners in relation to the management, use and control of the lands, seeks to give effect to those wishes and opinions and to protect the interests of traditional owners in relation to the land.²²⁷ The Council of Maralinga Tjarutja, in

²²⁰ See also Aboriginal Heritage Agreements, s. 37A, below.

²²¹ AHA, ss. 15 and 16.

²²² AHA, s. 13(9).

²²³ AHA, s. 37B. See s. 37B(2)(a) to (f) for items that may be included.

²²⁴ AHA, s. 37A.

²²⁵ AHA, s. 37A(6).

²²⁶ AHA, s. 37C.

²²⁷ *Maralinga Tjarutja Land Rights Act 1984* (SA), s. 5(1).

exercising the functions, must consult with the traditional owners and act in all other respects as may be determined by the Council, having regard to the customs of the traditional owners.²²⁸ Section 29 of the Act requires the Commissioner for Highways to consult with Maralinga Tjarutja before commencing road works.

Section 16 provides that Maralinga Tjarutja may compile a Register of Sacred Sites, recording the whereabouts of the site, 'the boundaries of the site; or where a site is known to exist but has not been identified with particularity, the boundaries of the area within which it is known to exist'. The manner of the keeping of the register by Maralinga Tjarutja is required to be in a manner Maralinga Tjarutja consider appropriate to prevent disclosure of its contents without their authority.

Section 23 provides for the interaction of the Act and the Mining and Petroleum Acts. Section 23(3) provides that before a mining tenement is granted in pursuance of the Mining Act or the Petroleum Act in relation to the lands, the Minister 'will afford Maralinga Tjarutja a reasonable opportunity to make submissions relating to the conditions subject to which the tenement should be granted'.

Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981

The *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* sets out the powers in section 6(1) as broad functions of ascertaining the opinions of traditional owners in relation to the management, use and control of the lands, seeks to give effect to those wishes and opinions, and to protect the interests of traditional owners in relation to the land. The requirement for consultation is well defined in section 7:

Anangu Pitjantjatjara Yankunytjatjara shall, before carrying out or authorising or permitting the carrying out of any proposal relating to the administration, development or use of any portion of the lands, have regard to the interests of, and consult with, traditional owners having a particular interest in that portion of the lands, or otherwise affected by the proposal, and shall not carry out the proposal, or authorise or permit it to be carried out, unless satisfied that those traditional owners—

- a) understand the nature and purpose of the proposal; and
- b) have had the opportunity to express their views to *Anangu Pitjantjatjara Yankunytjatjara*; and
- c) consent to the proposal.

The *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* does not provide for a register of sacred sites.

²²⁸ *Maralinga Tjarutja Land Rights Act 1984 (SA)*, s. 8.

Petroleum and Geothermal Energy Act 2000

This Act embraces both consultation with people directly affected by activities and native title holders. Among the objects of the Act are:

- (3) (e) to establish appropriate consultative processes involving people directly affected by regulated activities and the public generally.²²⁹

Section 4 includes in the definition of 'owner of land':

- (g) a person who—
- (i) holds native title in the land; or
 - (ii) is the registered representative of claimants to native title within the meaning of the Native Title (South Australia) Act 1994 ...

An environmental impact report, required as part of a proposal under the Act, must 'take into account cultural, amenity and other values of Aboriginal and other Australians insofar as those values are relevant to the assessment'.²³⁰

Views on the South Australian heritage regime

Boer and Wiffen have argued that,

[u]ntil the Queensland legislation of 2003, the South Australian *Aboriginal Heritage Act 1988* gave more legal recognition and control to Aboriginal people in and over their cultural property than in any other Australian jurisdiction ... [T]his legislation appears to fetter the Minister's discretion, and underlines the philosophy of the Act concerning Aboriginal control of their heritage.²³¹

Over the last decade numerous discussion papers have proposed a re-evaluation of the AHA.²³² As noted above, in 2008 the Government of South Australia announced a review:

A number of changes have been made to South Australian policy and legislation that have affected Aboriginal heritage legislation since the *Aboriginal Heritage Act 1988*, including the enactment of the *Native Title Act 1993* and the introduction of legislation that takes an integrated approach to land management and use.

²²⁹ *Petroleum and Geothermal Energy Act 2000* (SA), s. 3.

²³⁰ *Petroleum and Geothermal Energy Act 2000* (SA), s. 97(2)(a).

²³¹ Boer and Wiffen, pp. 293-294.

²³² See for example the papers listed on page 1 of Antakirinja Matu-Yankunytjatjara Native Title Claim Group, Discussion Paper Relating to the Aboriginal Heritage Act 1988 (SA), 2009, http://www.aboriginalaffairs.sa.gov.au/resources/AHA%20Submissions/09_Antakirinja%20Matu-Yankunytjatjara%20Native%20Title%20Claim%20Group%20AHA%20Submission.pdf (viewed 5 August 2010). These papers were not available to the authors of this report.

A need for reform has been expressed by Aboriginal people and industry groups. The final form of new heritage legislation will be decided following extensive consultation, robust debate and careful analysis.²³³

To this end, the Government set out the context and guiding principles of the Review in a scoping paper. One of these principles, the recognition of Aboriginal custodianship of cultural heritage, was acknowledged as one of the weaknesses in the AHA:

Recognition of Aboriginal peoples' rights in and responsibilities for heritage is essential for effective protection and certainty for all parties. Recognition operates on two levels:

- Recognition in legislation that Aboriginal people are the owners and custodians of their heritage and the keepers of traditional knowledge; and
- Recognition of particular groups and individuals as 'traditional owners' who have the authority to 'speak for country'.

While the AHA accords a strong role for traditional owners in consultations about determinations, authorisations and Heritage Agreements, it does not specifically recognise Aboriginal people as the owners and/or custodians of their heritage. In particular, Aboriginal people are not recognised as the owners of ancestral remains and sacred objects.

The AHA does not provide for any process of recognition or accreditation of regional or local groups. While the Act refers to the role of Aboriginal organisations in mandatory consultations, and in the keeping of local archives, there is no process in the Act for the establishment or recognition of 'local groups' or any guidance that sets out the basis upon which local organisations should be regarded as 'having a particular interest'. As a result, there is no consistency about who gets consulted and on what basis.

New legislation should include a clear process for recognition of local and/or regional Aboriginal groups, so that the other Guiding Principles can be properly supported. A system that sets standard criteria, processes for recognition and processes for the resolution of disputes will provide transparency and certainty for all parties, and more especially for Aboriginal people.²³⁴

In addition, the scoping paper suggested that although the AHA provides mechanisms for dealing with Aboriginal heritage,

[c]entral to these processes ... is the decision making role of the Minister, limiting the capacity for direct negotiation or discussion between Aboriginal parties and land users and managers ... Consistent with the recognition of the rights in and responsibilities for

²³³ Department of the Premier and Cabinet (South Australia), *Review of the Aboriginal Heritage Act 1988*, n.d., <http://www.aboriginalaffairs.sa.gov.au/aha/introduction.html> (viewed 27 July 2010).

²³⁴ Department of the Premier and Cabinet (South Australia), *Review of the Aboriginal Heritage Act 1988: SCOPING PAPER*, p. 8.

the management and protection of Aboriginal heritage, there is a need to have a system that supports Aboriginal people to negotiate with authority.²³⁵

The Government received several submissions to its review. The Joint²³⁶ Submission on the Review of the Aboriginal Heritage Act, 1988, makes a case for 'Registered Local Aboriginal Organisations' (RLAOs) to be recognised in an amended Act:

All Parties²³⁷ agree that the Act should recognise and register Local Aboriginal Organisations for all areas of the State. The Parties endorse the statement in the Scoping Paper to this effect (paragraph 4.2, page 8):

"New legislation should include a clear process for recognition of local and/or regional Aboriginal groups, so that the Guiding Principles can be properly supported."

All Parties also agree in principle that the RLAO for an area should be:

(a) the native title holders (or registered native title body corporate) in any area where there has been a determination of native title;

(b) the registered native title claimants in any area where a registered claim or claims has been made; or

(c) the Aboriginal parties, if other than those referred to in (a) and (b) above, to a registered ILUA for that area;

(d) in other areas, an incorporated body which is representative of the local Aboriginal community, determined by the Independent Authority in consultation with that community including the traditional owners, and those with knowledge and interests, in the relevant area e.g. this might include Aboriginal people that have lived in that area for a substantial amount of time or have genealogical connections to the country.

Although the Joint Heritage Committee supported the approach to the identification of RLAOs in principle, it recognised the potential for conflict between native title and heritage groups 'in regard to land affecting activities and Heritage protection and management on their land'.²³⁸

²³⁵ Department of the Premier and Cabinet (South Australia), *Review of the Aboriginal Heritage Act 1988: SCOPING PAPER*, pp. 9-10.

²³⁶ The State Aboriginal Heritage Committee and the Aboriginal Congress of South Australia Inc (represented by their Joint Aboriginal Heritage Committees), and Local Government Association of SA, Inc, SA Chamber of Mines and Energy, SA Farmers Federation, SA Native Title Services Ltd and Wildfish Fisheries SA Inc.

²³⁷ To the submission.

²³⁸ State Aboriginal Heritage Committee and the Aboriginal Congress of South Australia Inc (represented by their Joint Aboriginal Heritage Committees), and Local Government Association of South Australia, and South Australian Chamber of Mines and Energy Inc., and South Australian Farmers Federation, and South Australian Native Title Services Ltd and Wildfish Fisheries SA Inc., Joint Submission on the Review of the Aboriginal Heritage Act, 1988, 30 October, 2009, p. 12,

http://www.aboriginalaffairs.sa.gov.au/resources/AHA%20Submissions/21_The%20State%20Aboriginal%20

The other Parties also recognise the possibility of these practical issues and propose that they are best addressed internally within communities through instruments such as memoranda of understanding between native title groups and heritage groups. The Independent Authority should be given the function of facilitating these arrangements and, if necessary, arranging mediation between these parties.

The other Parties have a strong preference for there to be one RLAO for any area, but recognise that there will necessarily be a transition period in relation to areas where there is more than one registered native title claim.

All Parties to the Joint Submission strongly supported the position that native title holders (or a prescribed native title body corporate), or registered native title claimants, should constitute the RLAO for the area. Any other outcome would be 'strongly opposed'. Of particular concern to All Parties was the possibility that the resources industry would be required to negotiate with both native title parties under the Native Title Act and other parties under the Aboriginal Heritage Act about the same matter. All Parties to the Joint Submission were of the view that this was 'clearly an untenable position for the industry and an undesirable one for the Indigenous community'.²³⁹

The March 2009 Aboriginal Heritage Discussion Paper for the Review of the South Australian Aboriginal Heritage Act 1988, prepared by the Joint Aboriginal Heritage Committees and others, was 'a product of our discussions over two years about the good and bad elements of the current Aboriginal Heritage Act and the ways that we think it can be improved'.²⁴⁰ One of the negative aspects of the Act identified by the Committees was:

the definition of traditional owner and provisions relating to, for example, consulting with traditional owners has not provided adequate certainty or direction in terms of identifying the right people to speak for Aboriginal Heritage.²⁴¹

The following extract from the paper relates to approaches to Aboriginal consultation about heritage:

[Heritage%20Committee%20and%20the%20Aboriginal%20Congress%20of%20South%20Australia%20Inc%20AHA%20Submission.pdf](#) (viewed 5 August 2010).

²³⁹ State Aboriginal Heritage Committee and the Aboriginal Congress of South Australia Inc (represented by their Joint Aboriginal Heritage Committees), and Local Government Association of South Australia, and South Australian Chamber of Mines and Energy Inc., and South Australian Farmers Federation, and South Australian Native Title Services Ltd and Wildfish Fisheries SA Inc., Joint Submission on the Review of the Aboriginal Heritage Act, 1988, 30 October, 2009, pp. 12-13,

http://www.aboriginalaffairs.sa.gov.au/resources/AHA%20Submissions/21_The%20State%20Aboriginal%20Heritage%20Committee%20and%20the%20Aboriginal%20Congress%20of%20South%20Australia%20Inc%20AHA%20Submission.pdf (viewed 5 August 2010).

²⁴⁰ Joint Aboriginal Heritage Committees on behalf of the State Aboriginal Heritage Committee and the Aboriginal Congress of South Australia Inc., Aboriginal Heritage Discussion Paper for the Review of the South Australian Aboriginal Heritage Act 1988, March 2009, p. 2,

http://www.nativetitlesa.org/fileadmin/user_upload/ntsa/documents/Joint_Aboriginal_Heritage_Discussion_Paper_FINAL.pdf (viewed 5 August 2010).

²⁴¹ Joint Aboriginal Heritage Committees, p. 10.

At present in South Australia, individuals are consulted as *traditional owners* and no regional body or organisation is recognised as the sole body to be consulted on Aboriginal Heritage matters in that region. This has at times led to some uncertainty as to who should or shouldn't be consulted.

By comparison, in the new Victorian Aboriginal Heritage Act the only person who can negotiate on Aboriginal Heritage matters is a body corporate (i.e., an incorporated organisation, association or corporation) known as a "Registered Aboriginal Party", which may include a Native Title party.

In Queensland, Aboriginal Heritage protection negotiations can only be conducted by an "Aboriginal Party" which is the Native Title body corporate, or if there is none the 'traditional owners' for the area.

The options for a new Aboriginal Act include:

a. Individuals (e.g., Traditional Owner, Custodian, Tribal Owner, Owner)

OR

b. Registered Aboriginal Local Organisations (e.g., Body Corporate).

The Joint Heritage Committees agree that Registered Local Aboriginal Organisations (e.g., Body Corporate) should be recognised and registered as the contact point for Heritage decision making processes.

The Registered Local Aboriginal Organisations must be responsible for identifying the right people (e.g., traditional owners, custodians, native title claimants/holders) to participate in any decisions made in regard to Aboriginal Heritage.²⁴²

Referring to the potential for conflict between native title and heritage groups, the Joint Committees agreed

that the gap between Native Title and Aboriginal Heritage must be bridged. A consultation process must be developed which ensures that Aboriginal Heritage issues and the related native title issues arising from any proposed land use are dealt with jointly by the same people or groups. This involves having a clear mechanism in the new Act to bring Native Title and Aboriginal Heritage issues together.

As discussed above, a key element that needs to be considered in this review is defining in the Act how Aboriginal people should be identified as being the right people to be consulted.

Options that might be considered include:

a. definitions of individuals who have an interest:

- Traditional Owner

²⁴² Joint Aboriginal Heritage Committees, p. 12.

- Custodian
- Tribal Owner

b. various organisations which represent traditional owners/custodians:

- Heritage Committees
- Registered Native Title Claim Groups
- Claim Groups who have Authorised Heritage Committees
- Local Arrangements
- Body Corporate

In considering definitions to facilitate approaches to individuals (a), the Joint Heritage Committees have identified the need to consider:

- i. whether the current definition of traditional owner has meant that the right people are notified and involved in making decisions about Aboriginal Heritage?
- ii. whether continuation of this approach of consulting individuals/traditional owners will succeed in bringing Native Title and Aboriginal Heritage together?

In considering whether to move toward an organisational/body corporate identification and notification process (as is the case in Victoria and Queensland), the Joint Heritage Committees have identified the need to consider:

- i. How to ensure that these organisations appropriately consult with relevant traditional owners/custodians or the 'right people'?
- ii. How to bring Native Title and Aboriginal Heritage groups together?

The Joint Heritage Committees recommend that Registered Local Aboriginal Organisations (e.g., Body Corporate) be recognised and registered as the contact point for Aboriginal Heritage decision making processes (either existing or new).

The Registered Local Aboriginal Organisations shall be responsible for advising the Authority on identifying the right people (e.g., traditional owners, custodians, tribal owners, native title claimants/holders) to participate in any decisions made in regard to Aboriginal Heritage.

A process needs to be developed to ensure that any potential conflict between Aboriginal Heritage and Native Title is resolved in the registration of Registered Local Aboriginal Organisations for specific regions. The Authority has a potential role to play in this process to ensure that Registered Local Aboriginal Organisations are inclusive of all Aboriginal people with interests in Aboriginal Heritage and Native Title.

Guidelines and Protocols also need to be developed to ensure that Registered Local Aboriginal Organisations fulfil their responsibilities under the Aboriginal Heritage Act and importantly to the community.²⁴³

Other submissions received in response to the South Australian Government's Review of the AHA emphasised deficiencies in the consultation process, and by extension, identification of those to be consulted, under the present Act.

The submission from the Provincial Cities Association of South Australia referred to the uncertainty about who should be consulted as being a 'fundamental vice'²⁴⁴ of the existing AHA. This has, according to the submission, led to problems for councils and for private developers. The primary questions asked by the Association in the consultation context are:

How does one know if you are dealing with the "correct" traditional owner? How can a binding and enforceable agreement be reached and legally enforced?²⁴⁵

Dr Mike Smith, Senior Research Fellow at the National Museum of Australia and Adjunct Professor at the Australian National University, in his submission to the Review of the AHA, observed that the current Act 'makes no explicit provision for managing the scientific values of archaeological sites or objects, or for consultation with scientific stakeholder groups'.²⁴⁶ He stated that, in effect, not all sites may be exclusively traditional; there may be some 'where both scientific and community values need to be taken into account'; there may be others that are primarily scientific. Smith proposed that section 13²⁴⁷ of the AHA be broadened to include archaeological and scientific groups.²⁴⁸

The Adjahdura Narungga Heritage Group (Aboriginal Traditional owners of Cape Yorke Peninsula) commented on the Traditional versus Non-Traditional owners' issue:

It must be recognised that there is a difference between Traditional Owners with cultural knowledge of their country and Non-Traditional Owners. In the past Non-Traditional owners have had too much to say on cultural and heritage issues that they know very little about. The direct descendants of the Traditional owners of the country are the true

²⁴³ Joint Aboriginal Heritage Committees, pp. 19-20.

²⁴⁴ Provincial Cities Association of South Australia, Review of the Aboriginal Heritage Act (SA) 1988: Preliminary submission of the Provincial Cities Association, Upper Northern and Eyre Peninsula Councils, 24 September 2009, p. 3, http://www.aboriginalaffairs.sa.gov.au/resources/AHA%20Submissions/19_Provincial%20Cities%20Association%20of%20SA%20AHA%20Submission.pdf (viewed 5 August 2010).

²⁴⁵ Provincial Cities Association of South Australia, p. 3.

²⁴⁶ M Smith, Submission to the first round of consultations - October 2009, p. 1, http://www.aboriginalaffairs.sa.gov.au/resources/AHA%20Submissions/18_Mike%20Smith%20AHA%20Submission.pdf (viewed 5 August 2010).

²⁴⁷ Section 13, 'Consultation on determinations, authorisations and regulations'.

²⁴⁸ Smith, p. 4.

Traditional owners of the country. Genealogy should be used to identify Traditional owners and Non-Traditional owners of a particular country.²⁴⁹

On the matter of consultation, the Group put forward the argument that:

[w]hen government officers consult through section 23²⁵⁰ submissions or any other form – information given by Aboriginal traditional owners with cultural knowledge should not be swept aside and should be taken notice off [sic] – more respect should be shown for their knowledge. On our country we have little of our heritage left intact – it is so important for us to protect what is left and consultation must be meaningful not just lip service.²⁵¹

The Department for Transport, Energy and Infrastructure (South Australia) submitted a number of issues for consideration in the review. The following points reflect a familiar theme that also emerged in some of the other submissions:

- **Clarification of who can speak for heritage** – Currently, there is no recognition of who can speak for heritage, whether that is a heritage group or Native Title Group and there is no guarantee that an agreement with one group can not be challenged under the Act. Clarification of this aspect would provide greater certainty to the process.
- **Recognition of Agreements with heritage groups** – Currently, proponents may enter into Agreements with heritage groups regarding management of heritage issues. However, these currently have no recognition under the Act and Section 12 and 23 processes may still be required. It would provide greater certainty if, where an Agreement has been reached, this could be recognised under the Act. Where appropriate, this would obviate the need for a section 12 or 13 process, including where a site may be uncovered during construction.²⁵²

In February 2010 the South Australian Government provided an update about its review of the AHA:

Consultations have been held in local and regional centres across South Australia. The results have been compiled and analysed, with a position paper to be released by the government.

²⁴⁹ Adjahdura Narungga Heritage Group, Review of the Aboriginal Heritage Act: OPEN SUBMISSION, 30 October 2009, p. 2,

http://www.aboriginalaffairs.sa.gov.au/resources/AHA%20Submissions/12_Adjahdura%20Narungga%20Heritage%20Group%20AHA%20%20Submission.pdf (viewed 3 August 2010).

²⁵⁰ Section 23, 'Damage etc to sites, objects or remains'.

²⁵¹ Adjahdura Narungga Heritage Group, p. 3.

²⁵² Department for Transport, Energy and Infrastructure (South Australia), Submission on Review of Aboriginal Heritage Act, 3 November 2009, Appendix 1,

http://www.aboriginalaffairs.sa.gov.au/resources/AHA%20Submissions/04_Department%20for%20Transport,%20Energy%20&%20Infrastructure%20AHA%20Submission.pdf (viewed 3 August 2010). Emphasis in original.

Further consultations will then be undertaken, out of which draft legislation will be developed. The list of future consultation dates and locations for the State will be contained on the forthcoming consultations schedule.²⁵³

²⁵³ Department of the Premier and Cabinet (South Australia), *Review of the Aboriginal Heritage Act 1988*.

Indigenous Heritage Protection in the Australian Capital Territory

General overview and background

Aboriginal heritage in the Australian Capital Territory is covered by the *Heritage Act 2004*, which replaced the *Heritage Objects Act 1991*. The *Heritage Act 2004* covers the identification and protection of Indigenous, natural and historic heritage, places and objects.

The Act allows for the registration and conservation of places and objects

of particular significance to Aboriginal people because of Aboriginal tradition and/or history, including contemporary history, of Aboriginal people. Aboriginal tradition includes tradition, observance, custom or belief.²⁵⁴

The registration details required for a place or object are, amongst others, the name, a description and location of the object or place and a statement about the significance of the place or object.²⁵⁵ The Act provides for the establishment of a Heritage Register to identify Aboriginal places and objects of heritage significance.²⁵⁶ It requires unregistered Aboriginal places to be reported.²⁵⁷

Also under the Act, heritage matters are considered by the ACT Heritage Council, membership of which includes one member of the Aboriginal community and 'other expert members include the disciplines of Aboriginal culture, Aboriginal history, and archaeology'.²⁵⁸

The *Heritage Act 2004* is currently under review. The ACT Government issued a discussion paper in March 2010, submissions to which closed in May. The review period is expected to last six months.²⁵⁹

²⁵⁴ Department of Territory and Municipal Services (ACT), *Aboriginal Heritage Legislation: how is Aboriginal heritage protected?*, Information sheet no. 7, 9 March 2005, http://www.tams.act.gov.au/_data/assets/pdf_file/0015/13443/actheritagelegislationhowisaboriginalheritageprotected.pdf (viewed 3 August 2010).

²⁵⁵ *Heritage Act 2004* (ACT), s. 12.

²⁵⁶ *Heritage Act 2004* (ACT), s. 20.

²⁵⁷ *Heritage Act 2004* (ACT), s. 51.

²⁵⁸ *Heritage Act 2004* (ACT), s. 17.

²⁵⁹ Department of Territory and Municipal Services (ACT), *The Heritage Act Review Discussion Paper*, March 2010, http://www.tams.act.gov.au/_data/assets/pdf_file/0009/185940/Heritage_Act_2004_Review_Discussion_Paper.pdf (viewed 5 August 2010).

Identification and consultation of appropriate Indigenous parties

The *Heritage Act 2004* provides for extensive identification of, and consultation with, Indigenous parties over a range of issues. These include:

- **heritage guidelines:** The Council may make heritage guidelines in relation to the conservation of the *heritage significance*²⁶⁰ of places or objects including '*Aboriginal places and objects*'.²⁶¹ If any proposed guidelines relate to an '*Aboriginal place*' or '*object*' the Council must give a copy of the required consultation notice in relation to the proposed guidelines to each '*representative Aboriginal organisation*'.²⁶² The Council must then consider any comments made by a *representative Aboriginal organisation* before the end of the consultation period.²⁶³
- **representative Aboriginal organisations:** The Minister decides which organisations will be *representative Aboriginal organisations*²⁶⁴ and may declare criteria for making these decisions. Before declaring any criteria however, the Minister must consult Aboriginal people whom the Minister is satisfied have a traditional affiliation with land and the Council.²⁶⁵ The Minister must invite expressions of interest from entities willing to be declared a representative Aboriginal organisation.²⁶⁶
- **provisional registration on the heritage register:** Before deciding whether to provisionally register an *Aboriginal place* or *object*, the Council must consult, and consider the views of, each *representative Aboriginal organisation*.²⁶⁷
- **cancellation of registration:** If a proposal is made to cancel the registration of an *Aboriginal place* or *object* the Council must consult, and consider the views of, each *representative Aboriginal organisation* before making a decision.²⁶⁸
- **discovery of Aboriginal objects:** It is an offence if a person discovers, and has reasonable grounds to suspect it is, an *Aboriginal place or object*, and fails to take

²⁶⁰ 'Heritage significance' is defined as a place or object that satisfies certain criteria, including (c) it is important as evidence of a distinctive way of life, taste, tradition, religion, land use, custom, process, design or function that is no longer practised, is in danger of being lost or is of exceptional interest; (d) it is highly valued by the community or a cultural group for reasons of strong or special religious, spiritual, cultural, educational or social associations (e) it is significant to the ACT because of its importance as part of local Aboriginal tradition (*Heritage Act 2004* (ACT), s. 10.)

²⁶¹ *Heritage Act 2004* (ACT), s. 25(1).

²⁶² A *representative Aboriginal organisation* is an entity declared to be so under s. 14(1). The Minister may declare criteria for deciding whether an entity should be declared to be a representative Aboriginal organisation (*Heritage Act 2004* (ACT), s. 14(3)).

²⁶³ *Heritage Act 2004* (ACT), s. 26(4).

²⁶⁴ *Heritage Act 2004* (ACT), s. 14(1).

²⁶⁵ *Heritage Act 2004* (ACT), s. 14(2). The term 'traditional affiliation' is not defined in the Act.

²⁶⁶ *Heritage Act 2004* (ACT), s. 14(5).

²⁶⁷ *Heritage Act 2004* (ACT), s. 31.

²⁶⁸ *Heritage Act 2004* (ACT), s. 45.

reasonable steps to report the discovery to the Council as soon as practicable.²⁶⁹ As soon as practicable after a discovery is reported the Council must consult with each representative Aboriginal organisation and decide whether the place or object is to be provisionally registered.²⁷⁰

- **declaration of restricted information:** The Council may declare particular information about the location or nature of a place or object to be restricted information if it is satisfied, on reasonable grounds, that public disclosure of the information would be likely to have a substantial adverse effect on the heritage significance of the place or object.

Before making a declaration in relation to an Aboriginal place or object, the Council must consult, and consider the views of, each representative Aboriginal organisation about the proposed declaration. The Council must also use its best endeavours to give a copy of the declaration to each *interested person*²⁷¹ in relation to the place or object.

- **repository for Territory-owned Aboriginal objects:** The Minister must ensure that each *Aboriginal object* is kept in a suitable repository for the conservation of Aboriginal objects. Before declaring that a place is a suitable depository the Minister must consult, and consider the views of, the Council and each *representative Aboriginal organisation*.²⁷²

Views on the ACT heritage regime

The terms of reference for the ACT Government's review of the Heritage Act state that its scope includes 'consultation processes and mechanisms with the Aboriginal community'.²⁷³ Chapter four of the Government's discussion paper, under the heading 'Aboriginal and European Archaeological Heritage', includes the following issues for review:

- What role(s) should the Aboriginal community play in the assessment and management of Aboriginal heritage?
- How should members of Aboriginal communities be identified and chosen to participate in any heritage management processes?

²⁶⁹ *Heritage Act 2004* (ACT), s. 51(1). Section 51(2) outlines what constitutes 'reasonable steps' to report the discovery. Section 51 does not apply to (a) a registered place or object; or (b) a person who has a traditional Aboriginal affiliation with the land where the place or object was discovered.

²⁷⁰ *Heritage Act 2004* (ACT), ss. 53 and 13.

²⁷¹ *Interested persons* include an owner; occupier; a lessee or sublessee; an architect or designer of a building or structure of a place or the owner; a person in possession or maker of an object (*Heritage Act 2004* (ACT), s. 13(1)). If a place or object is an *Aboriginal place or object* interested persons include a *representative Aboriginal organisation* and the person who reported a discovery under s. 51 (*Heritage Act 2004* (ACT), s.13(2)).

²⁷² *Heritage Act 2004* (ACT), s. 115.

²⁷³ Department of Territory and Municipal Services (ACT), *The Heritage Act Review*, p. 24.

- What mechanisms could be used to support fair and effective Aboriginal participation in heritage assessment and management?

At the time of writing, few submissions to the review were publically available. One submission which was examined, prepared by Australia ICOMOS,²⁷⁴ states that, in reference to chapter four of the discussion paper:

The Act should support the right of Aboriginal people to determine the cultural significance of Aboriginal cultural heritage.

Any processes developed to consult with Aboriginal communities on matters of cultural heritage should be developed with the full participation of Aboriginal communities. Aboriginal consultation processes should then be supported materially by the ACT government.²⁷⁵

²⁷⁴ The International Council on Monuments and Sites.

²⁷⁵ Australia ICOMOS, Submission on the Review of the *ACT Heritage Act 2004*, Discussion Paper, March 2010, 14 May 2010, p. 2, http://australia.icomos.org/wp-content/uploads/AI-submission_Review-of-the-ACT-Heritage-Act-2004_14-May-2010.pdf (viewed 5 August 2010).

Indigenous Heritage Protection in New South Wales

General overview and background

The *National Parks and Wildlife Act 1974* (NPW Act) is the principal Act through which protection for 'Aboriginal objects and places'²⁷⁶ in New South Wales is provided. Although largely archaeological in focus, the Act also allows for Aboriginal places to be gazetted as areas of special significance to Aboriginal communities. The NPW Act was amended by the *National Parks and Wildlife Amendment Act 2010*, the majority of the provisions of which commenced on 1 October 2010.

The *Heritage Act 1977* also provides some recognition for Aboriginal heritage via the State Heritage Register. The Register includes various places and objects of Indigenous and non-Indigenous cultural heritage of value to the people of NSW. The NSW Heritage Council makes decisions on the inclusion of nominated Aboriginal items based on recommendations from an Aboriginal Heritage Advisory Panel.²⁷⁷

The *Aboriginal Land Rights Act 1983* established the New South Wales Aboriginal Land Council (NSWALC) and Local Aboriginal Land Councils (LALCs).²⁷⁸ The Act requires these entities to 'take action to protect the culture and heritage of Aboriginal persons in the council's area,' and to promote awareness of this culture and heritage in the community.²⁷⁹ The LALCs may have a place in identifying persons who might have a right to be consulted in relation to activities under the NPW Act (see below).

Identification and consultation of appropriate Indigenous parties

Amongst the factors²⁸⁰ that the Director-General of the Department of Environment, Climate Change and Water (DECCW) must consider in making determinations regarding Aboriginal heritage impact permits²⁸¹ are:

- (f) the results of any consultation by the applicant with Aboriginal people regarding the Aboriginal objects or Aboriginal place that are the subject of the permit (including any

²⁷⁶ Part six of the Act.

²⁷⁷ See Department of Planning (New South Wales), *Aboriginal Heritage*, n.d., http://www.heritage.nsw.gov.au/06_subnav_01.htm#unit (viewed 2 August 2010).

²⁷⁸ LALCs were established as the elected representatives for Aboriginal people in NSW.

²⁷⁹ See Department of Environment, Climate Change and Water (New South Wales), *Aboriginal cultural heritage consultation requirements for proponents 2010*, April 2010, <http://www.alc.org.au/media/43239/1004%20deccw%20community%20consultation%20requirements.pdf> (viewed 3 August 2010).

²⁸⁰ Mandated by section 90K of the NPW Act (as amended).

²⁸¹ An 'Aboriginal heritage impact permit' is a permit to disturb, damage or destroy an Aboriginal object or place. Permits are issued by the Director General of the Department for Environment, Climate Change and Water.

submissions made by Aboriginal people as part of a consultation required by the regulations),

(g) whether any such consultation substantially complied with any requirements for consultation set out in the regulations ...

The amended Act therefore brings community consultation requirements out of the policy realm and into statute, by way of regulation.²⁸² Section 90N of the Act provides that:

The regulations may make provision for or with respect to the following:

(a) consultation that must be undertaken in relation to an application or proposed application that relates to an 'Aboriginal heritage impact permit' (including the nature, extent and timing of the consultation),

(b) the persons, or classes of persons, who must be so consulted (including but not limited to Aboriginal people with a cultural association with the object or land concerned),

(c) the opportunity of persons, or classes of persons, so consulted to make submissions as part of the consultation.

The NPW Regulation²⁸³ specifies that a process of community consultation be undertaken before a person makes an application for an Aboriginal heritage impact permit. This process is detailed in Regulation 80C. Clause 80C(1) outlines the requirement for proponents to carry out a community consultation process prior to making an application for an Aboriginal heritage impact permit. Clauses 80C(2) and 80C(3) provide the process by which Aboriginal persons who may have an interest in the area the subject of the proposal are to be identified.

If the proposed activity is in an area where a native title determination exists, notice of the proposed activity should be given to the registered native title body corporate for the area; if there is no body corporate, the native title holders should be notified.²⁸⁴

In areas where native title is not an issue, efforts must be made to identify Aboriginal persons who may have knowledge of places or objects in the area of the proposed activity. Clause 80C(2)(a) lists a number of bodies or persons where such information may be sourced, namely the Department,²⁸⁵ the relevant LALC, the Registrar appointed under the *Aboriginal Land Rights Act 1983*, the relevant local council, the National Native

²⁸² However, the submission by the Environmental Defender's Office NSW to the DECCW on the consultation draft of the NPW Bill 2009 (July 2009) made the recommendation at page 3 that, 'given the importance of effective consultation, these requirements should be found in the Act itself, not in the regulations'. See http://www.edo.org.au/edonsw/site/pdf/subs09/090713npw_amend.pdf (viewed 3 August 2010).

²⁸³ The National Parks and Wildlife Regulation 2009, made under the *National Parks and Wildlife Act 1974*.

²⁸⁴ By contrast, see the Queensland and Victorian legislation in relation to native title parties and consultation status.

²⁸⁵ Department of Environment, Climate Change and Water.

Title Tribunal, NTSCORP Limited and the relevant catchment management authority. Under clauses 80C(2)(b) and 80C(2)(c), Aboriginal people thus identified must be given notice of the proposed activity, and such notice must also be published in the newspaper(s) local to the area of the proposed activity. Clause 80C(4) of the regulations require that the notice contain the following information:

- (a) the name and contact details of the proposed applicant,
- (b) a brief overview of the proposed activity that may be the subject of an application for an Aboriginal heritage impact permit, including the location of the proposed activity,
- (c) an invitation to Aboriginal people who hold knowledge relevant to determining the cultural heritage significance of Aboriginal objects and Aboriginal places in the area in which the proposed activity is to occur to register an interest in a process of community consultation with the proposed applicant regarding the proposed activity,
- (d) a statement that the purpose of community consultation with Aboriginal people is to assist the proposed applicant in the preparation of an application for an Aboriginal heritage impact permit and to assist the Director-General in his or her consideration and determination of the application,
- (e) a closing date for the registration of such interests (being a date that is at least 14 days after the date the notice was given or published).

Once Aboriginal parties with an interest in the relevant area have been identified and registered, the applicant must provide them with detailed information about the proposed activity. A record of registered Aboriginal people must be forwarded to DECCW and the LALC: 80C(5).

Clause 80C(6) requires the proponent to:

- (a) provide the registered Aboriginal parties with a proposed methodology to be used in the preparation of the cultural heritage assessment report to be submitted with the application (as referred to in clause 80D), and
- (b) give those parties a reasonable opportunity (being at least 28 days after the date of providing the proposed methodology) to make submissions (whether written or oral) on the proposed methodology.

During consultation on the methodology, the proponent must seek information on whether there are any objects or places of cultural value to Aboriginal people in the proposed activity area: 80C(7).

Clause 80C(8) requires the proponent to give 'each registered Aboriginal party the opportunity to make submissions to be used in the preparation of the proposed methodology of the cultural heritage assessment report ...', and to:

- (a) provide a copy of a draft of the cultural heritage assessment report to the registered Aboriginal parties, and

(b) give those parties a reasonable opportunity (being at least 28 days after the date of providing the draft report) to make submissions (whether written or oral) on the draft report.

If a proponent applies to vary the impact permit and such variation will result in 'significant harm' to Aboriginal objects or/and places, the Director-General may require the applicant to carry out further consultation to the degree that the Director-General considers appropriate in the circumstances: 80E.

Views on the NSW heritage regime

As the amended NPW Act only commenced on 1 October 2010, no published commentary could be found at the time of writing.²⁸⁶ However, Independent member of the NSW Legislative Assembly Ms Clover Moore's response to the Second Reading Speech on the National Parks and Wildlife Bill 2010 might be regarded as relevant:

I share a number of concerns about the bill with environmental and Aboriginal groups. Aboriginal heritage impact permits are issued to allow disturbance, damage or destruction to Aboriginal cultural heritage and, alarmingly, according to the New South Wales Aboriginal Land Council they have led to the widescale [*sic*] destruction of Aboriginal heritage. While I welcome the new addition in the bill of factors that the director general will have to consider when assessing applications for Aboriginal heritage impact permits, including cultural significance of the object or place and the outcome of consultation with Aboriginal people, I share concern that economic interests that favour damage to heritage are included. Economic interests should not continue to override cultural arguments for protection.

While proponents will be able to make submissions to the director general following notice of intention to refuse an application for an Aboriginal heritage impact permit, the same opportunity will not be given to Aboriginal communities when the director general intends to approve an application that will result in the loss of their heritage. This is blatantly unfair and favours big corporations over local communities. There is strong community concern that the current legislation is failing to protect Aboriginal cultural heritage and instead is regulating its destruction.²⁸⁷

²⁸⁶ December 2010.

²⁸⁷ Second Reading Speech. Response by Ms Clover Moore MLA, 21 April 2010.

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Re Minister for Indigenous Affairs; ex parte Woodley [No 2] [2009] WASC 296.



National Native Title Tribunal



For more information about native title and services of the Tribunal please contact the National Native Title Tribunal, GPO Box 9973 in your capital city or **Freecall 1800 640 501**. Information is also available at www.nntt.gov.au .

The National Native Title Tribunal has offices in Adelaide, Brisbane, Cairns, Darwin, Melbourne, Perth and Sydney.