



National
Native Title
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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

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Background to this Report

The Government of South Australia released a briefing paper in December 2008 for a proposed review of the *Aboriginal Heritage Act 1988*, with view to establishing a new Aboriginal heritage regime. This briefing paper notes that, since the Act was passed in 1988, considerable changes have occurred in the field of Indigenous heritage issues. These changes include: the inception of native title, new legislation in other jurisdictions, the SA government's Native Title Claims Resolution process, and the 'widespread use of agreements negotiated directly between Aboriginal people and land developers about heritage and related matters.'¹

The scoping paper notes that the review will be 'underpinned by the following Guiding Principles':

- Recognising Aboriginal custodianship of cultural heritage;
- Creating a strong framework for long term protection and management of Aboriginal heritage;
- Enabling Aboriginal negotiation of agreements about heritage;
- Embedding Aboriginal heritage considerations into the development and land management process;
- Creating timely and efficient processes;
- Creating certainty for all parties;
- Complementing the *Native Title Act 1993* (Cth).²

This scoping paper has the attention of the working group of the South Australia Native Title Resolution Negotiating Parties (SANTR NPs), which is considering preparing a joint position paper to be provided to the State's Department of Premier and Cabinet in relation to this process.

The purpose of this research report is to assist the SANTR NPs to examine their position by way of background information on approaches to Indigenous heritage protection or conservation in other jurisdictions. At the request of the negotiating parties, this report focuses specifically on three separate regimes: those of Victoria, Queensland and the Northern Territory. Within these analyses, the following issues have been examined specifically in relation to each jurisdiction:

¹ Government of South Australia, 2008, *Review of the Aboriginal Heritage Act 1988: scoping paper*. http://www.premcab.sa.gov.au/pdf/aha_review_scoping_paper.pdf (accessed 24 April 2009).

² *ibid.*, p. 2.

- General overview and background
- Definitions and categories of heritage covered
- Protective and conservation measures (including “duty of care” measures and processes for authorising or permitting works)
- Institutional, decision making and administrative arrangements
- Storage and ownership of information and material culture (including the maintenance of databases / registers and access / confidentiality provisions)
- Identification and consultation of appropriate Indigenous parties
- Integration of native title issues
- Published responses to, views on and reviews of the workings of these regimes.

It should be noted here, however, that these analyses are based on desktop research; the time and resources have not permitted any consultations or extensive micro-analysis of the issues. Furthermore, some working knowledge of native title processes, including their interaction with heritage issues, is assumed; this paper focuses specifically on State and Territory legislation and statutory processes.

Prior to these analyses, however, this report offers a brief background and overview of Indigenous heritage conservation in Australia by way of context.

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, which contextualises some of the reforms evident in recent regime changes, such as those in Queensland and Victoria.

Early heritage protection models

Archaeology and 'Relics' legislation

Modern-day Indigenous heritage protection schemes have their genesis in, among other things, the rise of Aboriginal activism in the 1960s and the use of Indigenous symbolism to drive these campaigns.³ 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

³ Ellis, R, 1994, 'Rethinking the paradigm: cultural heritage management in Queensland.' *Ngulaig* 10(8).

archaeological importance.⁴ As numerous critics over the years have noted, however, these Acts essentially failed to 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.’⁵

This 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.⁶ 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.’⁷

Moving into the late 1970s and early 1980s, the importance of involving Aboriginal people in making 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.⁸ 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,⁹ first established in 1979.

⁴ Ritchie, D, 1996. ‘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, p. 29.

⁵ *ibid.*

⁶ Ellis, *op. cit.* p. 11.

⁷ Ross, A. 2002, ‘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.

⁸ Ellis, *op. cit.* pp. 17-19.

⁹ *Australia ICOMOS Charter for the Conservation of Places of Significance*. The full text of the Burra Charter is available at <http://www.icomos.org/australia/burra.html>. The charter has undergone several revisions since 1979.

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

New approaches to heritage protection

By the mid 1980s, increased understanding of Aboriginal cultures and beliefs prompted governments and heritage practitioners to reassess their understanding of Indigenous heritage. Some jurisdictions produced new or amended legislation, including 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.’¹⁰ 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.’¹¹ This allowed for some protection of items of non-archaeological significance, although it remained open to much interpretation.¹²

A pivotal event for new approaches to Indigenous heritage, at least in theory, 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

¹⁰ *Aboriginal Heritage Act 1988* (SA), s. 3

¹¹ *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld), s.5.

¹² Ross, *ibid.* p.6.

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.'¹³ However, according to the 1996 inquiry into the ATSIHP Act by Justice Evatt, the 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.¹⁴

Despite progress in some states, in other jurisdictions heritage legislation has changed little, although reviews of legislation and progress towards change are occurring in most circumstances. For example, Western Australia's *Aboriginal Heritage Act 1972* and the Tasmanian *Aboriginal Relics Act 1975* both remain in force, largely in their original formats, despite several recent reviews and inquiries.

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',¹⁵ 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*.

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 Victorian 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*.

Consultation models: 'Ask First'

By the 1990s, despite the persistence of 'relics' legislation, processes and policies favouring consultation were typically implemented at agency level. These were manifested mostly in the form of direct contact between heritage agencies and

¹³ Department of Aboriginal Affairs (Commonwealth), 1984, *Australian and Torres Strait Islander Heritage Protection Act 1984: A guide to how the Act works*. Australian Government Printing Office, Canberra. p.11.

¹⁴ Evatt, E., 1996, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. Canberra, Minister for Aboriginal and Torres Strait Island Affairs.

¹⁵ http://www.heritage.nsw.gov.au/06_subnav_01_1.htm (accessed 1 April 2009).

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 Commission in its publication *Ask First*.¹⁶ 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.'¹⁷

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.¹⁸

Native Title

The commencement of the *Native Title Act 1993 (Cth)* (the NTA) triggered a completely new scenario, however. 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

¹⁶ Australian Heritage Commission (AHC), 2002, *Ask First: a guide to respecting Indigenous heritage places*. Canberra, Australian Heritage Commission.

¹⁷ AHC, *ibid.*, p.3.

¹⁸ AHC, *ibid.* p.6.

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 remain significant areas not subject to native title, as well as questions of identifying people who have the right to speak for country in such areas.

The development of heritage philosophies and the advent of native title have posed significant challenges for state and territory governments. However, despite reviews and inquiries in most jurisdictions, only Queensland and Victoria have implemented new dedicated Indigenous heritage legislation, while the Commonwealth has addressed heritage across the board via the *Environment Protection and Biodiversity Conservation Act 1999* and the *Australian Heritage Council Act 2003*.¹⁹

Both Tasmania and South Australia are currently reviewing their heritage legislation.

Indigenous heritage protection in Australia: a brief snapshot

This section provides a brief summary of the current regimes in force in other Australian jurisdictions as of early 2009. Analysis of the systems in Queensland, Victoria and the Northern Territory will be provided in the main body of the report.

Commonwealth

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

This Act was designed to provide intervention where state or territory laws cannot or do not provide for effective protection. Under the Act the Minister may

¹⁹ The Australian Capital Territory's *Heritage Act 2004* is also relatively recent, covering historic, natural and Aboriginal heritage. See below for further information.

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.

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

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 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

This 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. 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 be exported only via permit. Permit applications are assessed by the Cultural Heritage Committee, which must include in its makeup one qualified person of Indigenous ancestry.

Native Title Act 1993

While not a dedicated heritage Act, heritage outcomes have been negotiated and determined under the Act via Indigenous Land Use Agreements and the Future Act regime.

Australian Capital Territory

Aboriginal heritage in the Australian Capital Territory is covered by the *Heritage Act 2004*, which covers natural and historic heritage as well. 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'.²⁰ 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'; the Act also provides for consultation with 'Representative Aboriginal Organisations.'²¹

New South Wales

The *National Parks and Wildlife Act 1974* provides blanket protection for Aboriginal 'places and objects and features' in New South Wales. Although largely archaeological in focus, the Act also allows for Aboriginal Places to be gazetted as areas of special significance to Aboriginal communities.

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 value, based on criteria establishing a place as having 'high significance to the cultural heritage values of the community or to the Aboriginal peoples of NSW.'²² The NSW Heritage Council makes decisions on the inclusion of nominated Aboriginal items based on recommendations from an Aboriginal Heritage Advisory Panel.

South Australia

The current South Australian system is based around the *Aboriginal Heritage Act 1988*. This Act protects 'all Aboriginal sites, objects and remains in South Australia that are of significance to Aboriginal tradition, archaeology, anthropology and/or history'.²³ The Aboriginal Heritage Branch, working under the Department of Premier and Cabinet, 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

²⁰ Environment ACT, 2005, *Aboriginal Heritage Legislation: how is Aboriginal heritage protected?* Information Sheet published at http://www.tams.act.gov.au/_data/assets/pdf_file/0015/13443/actheritagelawisaboriginalheritagprotected.pdf, accessed 3 April 2009.

²¹ *ibid.*

²² http://www.heritage.nsw.gov.au/06_subnav_01_1.htm (accessed 06/04/2009).

²³ Aboriginal Heritage Branch 2007, *Overview: the Aboriginal Heritage Act 1988*. Adelaide, Aboriginal Affairs and Reconciliation Division, Department of Premier and Cabinet.

Australians' 'aspirations for greater participation in decision making about heritage.'²⁴

Tasmania

Protection of Aboriginal heritage in Tasmania falls under the auspices of the *Aboriginal Relics Act 1975*, which provides blanket protection for Aboriginal sites and objects pre-dating European arrival. Long-term criticism of the legislation, largely focusing on its archaeological focus and inconsistency of approach, has led to several reviews, and terms of reference have been set to explore possible new legislation.²⁵

Western Australia

Western Australia's heritage system is largely determined by three separate Acts, the most significant of which is the *Aboriginal Heritage Act 1972*, 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.'²⁶ 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.'²⁷

Under the *Environmental Protection Act 1986*, the Environmental Protection Authority (EPA) recognises Aboriginal heritage, particularly in relation to social use of the environment (e.g. traditional hunting) and can implement Indigenous heritage protection of heritage via conservation of the natural environment.²⁸ Part IV of the Act requires any proposal with 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.

²⁴ Department of the Premier and Cabinet (SA), 2008, *Review of the Aboriginal Heritage Act 1988: scoping paper*. Adelaide, South Australian Government.

²⁵ http://www.tahl.tas.gov.au/ab_terms.html (accessed on 06/04/2009).

²⁶ *Aboriginal Heritage Act 1972* (WA), s. 5.

²⁷ *ibid.* s. 18(3).

²⁸ Environmental Protection Agency (WA), 2004, *Guidance for the Assessment of Environmental Factors (in accordance with the Environmental Protection Act 1986: Aboriginal heritage)*. Perth, Environmental Protection Authority, p. 2.

The *Museum Act 1969* (requires the WA Museum Trustees to 'make and preserve ...collections representative of the Aborigines of the State.'²⁹

The WA system has been the subject of considerable criticism and controversy, not least because of the potential impacts on heritage of 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, with the adoption of Standard Heritage Agreements, operating largely under the Future Act processes of the Native Title Act.³⁰

²⁹ *Museum Act 1969* (WA), s.9.

³⁰ For example, see Green, Nicholas, 2004, '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

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.³¹

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 Victorian Government turned to the Commonwealth Government, which wrote special clauses into its own legislation as Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to address the Victorian situation. Along similar lines as the overall, Australia-wide, theme of that Act, it 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*.

³¹ Department for Victorian Communities, 2005, 'Aboriginal Heritage Bill Exposure Draft – summary of proposals'.
[http://www.mav.asn.au/CA256C320013CB4B/Lookup/AAVPresentation231105/\\$file/AAVPresentation231105.pdf](http://www.mav.asn.au/CA256C320013CB4B/Lookup/AAVPresentation231105/$file/AAVPresentation231105.pdf) (accessed on 06/04/2009).

Definitions and categories of heritage covered

The *Aboriginal Heritage Act 2006* (the AH Act,) covers Aboriginal Cultural Heritage, which it defines as 'Aboriginal places, Aboriginal objects and Aboriginal human remains.'³²

This definition of an Aboriginal place is a relatively broad one, which states that the viewpoint of Aboriginal people determines what can be defined as Aboriginal heritage:

For the purposes of this Act, an Aboriginal place is an area in Victoria or the coastal waters of Victoria that is of cultural heritage significance to the Aboriginal people of Victoria.³³

Furthermore, an 'area' can mean a wide variety of things, including land, water, natural formations or landscapes, archaeological sites, and areas surrounding these. It can also refer to a building or structure,³⁴ a type of item normally addressed by the *Heritage Act 1995*, which covers historic heritage.

The Victorian Act defines Aboriginal objects by their relationship to the pre- and post-contact Aboriginal occupation of Victoria. These include items that have been excavated from an Aboriginal place – that have 'cultural heritage significance to the Aboriginal people of Victoria.'³⁵

Aboriginal human remains are defined as 'the whole or part of the bodily remains of an Aboriginal person' with a few exceptions relating to cemeteries and human tissues covered by other laws.

Given these definitions, the overall objectives of the AH Act are identified as follows:

- (a) to recognise, protect and conserve Aboriginal cultural heritage in Victoria in ways that are based on respect for Aboriginal knowledge and cultural and traditional practices;
- (b) to recognise Aboriginal people as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;
- (c) to accord appropriate status to Aboriginal people with traditional or familial links with Aboriginal cultural heritage in protecting that heritage;
- (d) to promote the management of Aboriginal cultural heritage as an integral part of land and natural resource management;

³² *Aboriginal Heritage Act 2006* (Vic), s. 4(1).

³³ *ibid*, s. 5(1).

³⁴ *ibid*, s. 5(2).

³⁵ *ibid*, s. 4(1).

- (e) to promote public awareness and understanding of Aboriginal cultural heritage in Victoria;
- (f) to establish an Aboriginal cultural heritage register to record Aboriginal cultural heritage;
- (g) to establish processes for the timely and efficient assessment of activities that have the potential to harm Aboriginal cultural heritage;
- (h) to promote the use of agreements that provide for the management and protection of Aboriginal cultural heritage;
- (i) to establish mechanisms that enable the resolution of disputes relating to the protection of Aboriginal cultural heritage;
- (j) to provide appropriate sanctions and penalties to prevent harm to Aboriginal cultural heritage.³⁶

Protection and conservation measures

The AH Act and Regulations provide clear directions about obligations and procedures relating to the discovery, identification, protection and conservation of Aboriginal heritage. In development contexts, it approaches conservation issues via obligations to consult with Aboriginal parties about the treatment of heritage and, where warranted, preparations of Cultural Heritage Management Plans. Financial penalties are applicable for non-compliance with these requirements.

Discovery, disturbance and restitution

A person is obliged to report the discovery of an Aboriginal object or place to the Secretary.³⁷ Failure to do so can result in a fine of up to 60 penalty units for an individual and 300 for a corporate body.

Flowing on from this, it is an offence to knowingly perform an act that harms Aboriginal heritage. Penalties here depend on whether the act was performed deliberately, recklessly or negligently.³⁸ Furthermore, under section 28, it is also an offence to knowingly act in a way that is *likely* to harm Aboriginal heritage. However, it is not an offence to disturb or harm the place or object if the act is undertaken according to an approved heritage permit or plan, or 'in accordance

³⁶ *ibid*, s. 3.

³⁷ *ibid*, s. 24(2). 'Secretary' refers to the Secretary of the department responsible for administering the Act, currently the Secretary for Victorian Communities.

³⁸ *ibid*, s. 27.

with Aboriginal tradition,' or undertaken in response to an emergency.³⁹ If these defences do not apply, then, in addition to any convictions, a court may order the perpetrator to pay the costs of repairing, restoring or rehabilitating the heritage and its surrounding area.⁴⁰

The Act also places restrictions on activities related to cultural heritage, making it illegal to carry out an excavation seeking to uncover Aboriginal heritage or undertake scientific study of an Aboriginal heritage item (either *in situ* or by removal) except under the terms of a cultural heritage permit, or in accordance with or in preparation of a cultural heritage management plan.⁴¹ The same restrictions apply to removing such items from the State or conducting a commercial sale / purchase of such.

Cultural heritage permits

Application must be made to the Secretary for a permit in order to:

- (a) disturb or excavate any land for the purpose of uncovering or discovering Aboriginal cultural heritage;
- (b) carry out scientific research on an Aboriginal place (including the removal of Aboriginal objects from that place for the purpose of that research);
- (c) carry out an activity that will, or is likely to, harm Aboriginal cultural heritage;
- (d) buy or sell an Aboriginal object;
- (e) remove an Aboriginal object from Victoria.⁴²

Permits cannot be granted for proposals relating to human remains or sacred objects, or for matters which require a cultural heritage management plan (see below).

Before deciding whether or not to grant the application, the Secretary is required to show it to the registered Aboriginal party for the area to which the permit pertains (also see below).⁴³ The Aboriginal party then has a period of 30 days within which to notify the Secretary whether or not it objects to the proposed action, or that it has no objection provided certain conditions are met.⁴⁴ They

³⁹ *ibid*, s. 29. The Act defines 'Aboriginal tradition' as 'the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people; and any 'such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships', *ibid*, s. 4.

⁴⁰ *ibid*, s. 31.

⁴¹ *ibid*, s. 34.

⁴² *ibid*, s. 36(1).

⁴³ *ibid*, s. 38.

⁴⁴ *ibid*, s. 39(1).

may also request further information or the opportunity to inspect the heritage item to which the application pertains.⁴⁵

If the registered Aboriginal party objects to the granting of the permit application, then the Secretary must refuse to grant the permit. Even where advice from an Aboriginal party is not available, the Secretary must weigh up the likely impact of the action and possible mitigation measures before granting the permit.⁴⁶

Cultural heritage management plans

A cultural heritage management plan (CHMP), for the purposes of the AH Act, is an assessment of the cultural heritage values of an area, resulting in a written report outlining the results of that assessment and an account of identified measures and policies to 'manage and protect the Aboriginal cultural heritage identified in the assessment.'⁴⁷ Section 43 of the Act briefly sets out the general procedures for a CHMP, while section 44 provides an account of the people who may sponsor the undertaking of a CHMP. This list includes the Secretary, a municipal council, a registered Aboriginal party or their representative, or a proponent of an action or their representative.

While a CHMP may be undertaken voluntarily by any of the above, it is mandatory for proponents to have a CHMP prepared if it is required under Regulations, requested by the Minister in relation to a planned activity, or if proposed works require the preparation of an Environmental Effects Statement under the *Environmental Effects Act 1978*.⁴⁸

The Aboriginal Heritage Regulations 2007 (the Regulations) provide further information about the circumstances in which a CHMP is required, and the standards required for preparation thereof, as referred by section 48(a) of the Act.

Notwithstanding the other triggers for a CHMP identified in the Act, the Regulations state that a CHMP must be prepared where a proposed activity is a 'high impact activity' and is located within an area 'of cultural heritage sensitivity.'⁴⁹

⁴⁵ *ibid*, s. 39(3).

⁴⁶ *ibid*, ss. 40, 41.

⁴⁷ *ibid*, s. 42.

⁴⁸ *ibid*, ss. 46-49.

⁴⁹ Aboriginal Heritage Regulations 2007 (Vic), s. 6.

The Regulations also provide a list of activities exempt from requiring CHMP, including: the small-scale construction of dwellings plus ancillary works, such as maintenance, gardening; installing swimming pools, fences, water tanks and so forth; and the installation of utility services and other minor works.⁵⁰

The Regulations identify an extensive list of areas of cultural heritage sensitivity, upon which proposed high impact activities require a CHMP. These include:

- Registered cultural heritage places
- Current and past waterways
- Ancient lakes
- Declared Ramsar wetlands
- Coastal land
- Parks
- High plains (including Koo Wee Rup Plain)
- Greenstone outcrops
- Stony rises
- Volcanic cones
- Caves
- Lunettes
- Dunes
- Sand sheets

Each of the categories contains its own specific set of definitions, but in most circumstances, parts of these areas are excluded as areas of cultural sensitivity if they have been subjected to extensive ground disturbance.⁵¹

The Regulations also spell out what activities are regarded as 'high impact'. A summary of these would be too extensive to repeat here, but they include: significant ground disturbance in relation to the construction of a variety of major building types; construction of certain types of infrastructure and higher density dwellings; and use of land for extraction industries, like quarrying and timber production.⁵²

⁵⁰ *ibid*, ss. 9-19.

⁵¹ *ibid*, ss. 20-38.

⁵² *ibid*, ss. 42-54.

The Regulations also provide a prescription of standards and procedures in connection with the preparation of a CHMP. The minimum standard is a desktop assessment, featuring a Register search, characterisation of the geographical area, and a review of previously published reports and documents relating to the cultural history and Indigenous occupation of the area.⁵³ A 'standard' assessment is subsequently required if the desktop study shows that it is 'reasonably possible that Aboriginal cultural heritage is present in the activity area.'⁵⁴ A standard assessment may include collection of oral testimony, but largely involves surface survey of the area for evidence of Aboriginal heritage, with very minimal ground disturbance and 'in accordance with proper archaeological practice.'⁵⁵ A complex assessment is required if there is likely to be cultural heritage present and there is no other way of determining its nature, extent or significance; it may involve the archaeological excavation or sampling of an area by an appropriately qualified person.⁵⁶

The results of the assessments are then considered in the preparation of the CHMP. A prescribed schedule for the preparation of a CHMP is provided in the Regulations at Schedule 2.

Audits and stop orders

Part 6 of the AH Act provides the Minister with powers to conduct audits of activities subject to the conditions of cultural heritage permits or CHMPs if the Minister believes that there has been, or is likely to be, a contravention of those conditions, or if the impact of the activity is likely to be greater than anticipated at the time of those conditions being determined. The audit report may identify any apparent contraventions and make a number of recommendations, including amendment to the original conditions of the permit or CHMP, or any other necessary actions. The Minister may subsequently add to or amend the conditions of a permit or the recommendations of a CHMP to ensure compliance.

Alternatively, the Minister may issue a 'stop order' if satisfied that the activity being carried out is harming or likely to harm Aboriginal heritage and that the only means of preventing that harm is to cease the activity.⁵⁷

Compulsory acquisition

⁵³ *ibid*, s. 57.

⁵⁴ *ibid*, s. 58(1).

⁵⁵ *ibid*, s. 59(5).

⁵⁶ *ibid*, s. 61.

⁵⁷ *ibid*, s. 88.

Section 31 of the AH Act allows the Minister to compulsorily acquire land containing Aboriginal cultural heritage of 'such cultural heritage significance to Aboriginal people that it is irreplaceable', provided that no alternative arrangement is practicable for the care of the place. The Crown may also make a grant of land upon or within which Aboriginal heritage is present, to any registered Aboriginal party, or any other Aboriginal person or body, under section 32.

Cultural heritage agreements

In addition to the protection procedures discussed above, the AH Act also allows for the development of cultural heritage agreements, which the Act defines simply as 'an agreement between 2 or more persons relating to the management or protection of Aboriginal cultural heritage.'⁵⁸ These agreements can address issues such as the protection, maintenance, conservation, and use of heritage places and objects, as well as allow Aboriginal people access and use rights to those places and objects. However, an agreement cannot include activities for which a permit or CHMP is required.⁵⁹ Parties to an agreement may include the Secretary, land-owners and managers, but must also include at least one registered Aboriginal party.

Protection declarations

Part 7 of the Act provides the Minister with the power to make an interim protection declaration over a place or object if satisfied of 'the importance of maintaining the relationship between Aboriginal people and the place or object.'⁶⁰ The declaration may have effect for up to 3 months, with a maximum 3 months extension possible. Ongoing protection orders may also be made, based on the same criteria.

Administrative arrangements

The Minister

The ultimate position of authority under the AH Act is that of the Minister responsible for its administration, which is currently the Minister for Aboriginal Affairs. While the Minister has numerous direct responsibilities, significant roles

⁵⁸ *Aboriginal Heritage Act 2006* (Vic), s. 68(1).

⁵⁹ *ibid*, s. 68(3).

⁶⁰ *ibid*, s. 96.

may also be delegated to the Secretary of Aboriginal Affairs or any other representative of Aboriginal Affairs Victoria. The Minister has a direct role in issues such as negotiating the safekeeping of human remains, compulsory acquisitions, ordering CHMPs, audits and stop work notices, proclaiming protection orders and appointing inspectors and members of the Aboriginal Heritage Council.

Aboriginal Heritage Council

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

- (a) has, and can demonstrate, traditional or familial links to an area in Victoria; and
- (b) is resident in Victoria; and
- (c) in the opinion of the Minister, has relevant experience or knowledge of Aboriginal cultural heritage in Victoria.⁶¹

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. They may also make recommendations to the Minister and the Secretary on the exercise of their 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.⁶²

The Secretary

The Secretary responsible for administering the Act – currently, the Secretary of the Department for Victorian Communities – has a variety of roles, functions and delegations. These are listed as:

- (a) to take whatever measures are reasonably practicable for the protection of Aboriginal cultural heritage;
- (b) to establish and maintain the Victorian Aboriginal Heritage Register;
- (c) to grant cultural heritage permits;
- (d) to approve cultural heritage management plans in the circumstances set out in section 65;

⁶¹ *ibid*, s 131(3).

⁶² *ibid*, s 132.

- (e) to develop, revise and distribute guidelines, forms and other material relating to the protection of Aboriginal cultural heritage and the administration of this Act;
- (f) to publish, on advice from the Council, appropriate standards and guidelines for the payment of fees to registered Aboriginal parties for doing anything referred to in section 60;
- (g) to publish standards for the investigation and documentation of Aboriginal cultural heritage in Victoria;
- (h) to manage the enforcement of this Act;
- (i) to collect and maintain records relating to the use by inspectors of their powers under this Act;
- (j) to facilitate research into the Aboriginal cultural heritage of Victoria;
- (k) to promote public awareness and understanding of Aboriginal cultural heritage in Victoria;
- (l) to maintain a map of Victoria which shows each area in respect of which an Aboriginal party is registered under Part 10, and to make the map freely available for inspection by the public;
- (m) to maintain a list of all Aboriginal parties registered under Part 10 that includes contact details for the parties, and to make the list freely available for inspection by the public;
- (n) to carry out any other function conferred on the Secretary by or under this Act.⁶³

Inspectors

Part 11 of the Act is entitled 'Enforcement'. Inspectors are appointed to monitor compliance with the Act, investigate suspected offences, implement stop-work orders and conduct audits.⁶⁴ Inspectors may enter and search premises with the landowner's consent, but they only have powers of seizure over some items if certain parts of the Act have been breached. They may also apply to a magistrate for a search warrant.

The Museums Board of Victoria

The Museums Board has some advisory capacities but largely acts as a custodian of cultural heritage and human remains on behalf of the State, and on behalf of Aboriginal people where requested (see information on storage and ownership below).

Dispute resolution

⁶³ *ibid*, s. 143(1).

⁶⁴ *ibid*, s. 159.

Disputes regarding the production of a CHMP may be referred to the Council for alternative dispute resolution, including an option for mediation, or to the Victorian Civil and Administrative Tribunal (VCAT).⁶⁵ Appeals regarding cultural heritage permits and protection declarations are heard directly by VCAT.⁶⁶

Storage and ownership of information and material culture

Human remains, secret & sacred objects

The Act provides for ownership of Aboriginal human remains by Aboriginal people with a 'traditional or familial link' to the remains, regardless of the identity of previous owners.⁶⁷ All Aboriginal remains in custody of the State are managed by the Museums Board, to which Aboriginal people can lodge a request for custody of said remains.

Similar ownership provisions exist at section 21 of the Act for items identified as 'secret or sacred' objects; that is, ownership is provided to those who have a 'traditional or familial link' with the object. For such objects in State custody, Aboriginal owners can apply to the State to either return the objects to them, or to continue to care for the objects on their behalf.

In the case of ownership of human remains and secret or sacred objects by non-State entities, the Act provides for Aboriginal people to either negotiate on their own behalf or request the Minister's assistance.

The Act makes no explicit reference with regard to ownership of Aboriginal heritage items that do not fall into the categories of human remains or sacred objects (e.g. archaeological remains).

Possession and ownership of Aboriginal heritage objects

The Act makes it an offence for a person to be knowingly in possession of an Aboriginal object, unless that person is acting in accordance with a cultural heritage permit, an approved agreement or CHMP, or another provision of the

⁶⁵ *ibid*, ss. 113, 116.

⁶⁶ *ibid*, ss. 121, 126.

⁶⁷ *ibid*. s. 13(1).

Act. The other exceptions are if they own the object, are acting with the permission of the owner, or it is due to an emergency.⁶⁸

State custodianship

The Museums Board of Victoria can act as a custodian for any cultural heritage transferred to it. It must keep any such cultural heritage at the Museum of Victoria.⁶⁹

As mentioned above, section 31 of the Act also empowers the Minister to compulsorily acquire land on which irreplaceable Aboriginal cultural heritage is contained, for which no satisfactory alternative arrangements may be made. This land may be subsequently granted to an Aboriginal person or body.

Victorian Aboriginal Heritage Register

Division 3 of the A H Act establishes the Victorian Aboriginal Heritage Register. The Register is essentially a record of knowledge about Aboriginal cultural heritage in Victoria:

- (1) The Secretary must record details of the following in the Register—
 - (a) all known Aboriginal places in Victoria;
 - (b) all known private collections of Aboriginal objects in Victoria;
 - (c) all Aboriginal human remains reported to the Secretary under this Act or delivered to the Secretary or known to be in the possession or under the control of any person;
 - (d) the name, area and contact details of each registered Aboriginal party;
 - (e) all cultural heritage permits, approved cultural heritage management plans and cultural heritage agreements;
 - (f) all stop orders, interim protection declarations and ongoing protection declarations issued or made under this Act.
- (2) The Secretary may record in the Register any other information regarding Aboriginal cultural heritage that the Secretary considers necessary in order to protect or manage Aboriginal cultural heritage.⁷⁰

Section 146 provides a list of the different groups and individuals who must be given access to the Register and the circumstances under which that access must be given. These include:

⁶⁸ *ibid.* s. 33.

⁶⁹ *ibid.* s. 26.

⁷⁰ *ibid.* s. 145.

- Registered Aboriginal parties or those authorised by them, in relation to the areas for which they are registered;
- Council members and public servants with responsibilities under the Act;
- Cultural heritage advisors for the purpose of undertaking a CHMP or heritage audit;
- Landowners, to obtain information on any Aboriginal cultural heritage that may be present on their property;
- Managers of Crown Land, in order to carry out their duties and functions;
- People with certain authorities under the *Local Government Act 1989* (Vic) in order to carry out their functions; or
- Heritage advisors, appointed by land owners and managers, for the purpose of determining what heritage may relate to that particular land.⁷¹

The only other circumstances under which the Register may be accessed are where there is no registered Aboriginal Party, or the written approval of the Council is provided.⁷²

However, section 147 allows for the Secretary to provide information to applicants so as to ascertain whether or not a record exists in the Register for a particular location. In doing so, the Secretary ‘must not provide any information if providing the information would be likely to endanger Aboriginal cultural heritage.’

Identification and consultation of appropriate Indigenous parties

Registered Aboriginal parties

Under the AH 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;

⁷¹ *ibid*, s. 146(1).

⁷² *ibid*, s. 146(2).

- (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'.⁷³

Registered Aboriginal Parties are consulted over a wide range of matters, these largely being in relation to permits, 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. They 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.⁷⁴

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; 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

⁷³ *ibid*, s. 4.

⁷⁴ *ibid*, s. 151(2).

interest and expertise in the heritage of the area.⁷⁵ It is also possible for more than one body to be registered as an 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.⁷⁶

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.⁷⁷

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.⁷⁸ 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.⁷⁹

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'. If the Secretary is the sponsor of the CHMP, then the Council may determine whether or not the plan should be approved.⁸⁰

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.⁸¹

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

⁷⁵ *ibid*, s. 151(3).

⁷⁶ *ibid*, s. 153.

⁷⁷ *ibid*, s. 39(1).

⁷⁸ *ibid*, ss. 54-55.

⁷⁹ *ibid*, s. 63(1).

⁸⁰ *ibid*, ss. 65, 66.

⁸¹ *ibid*, ss. 69(2), 72.

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.

Integration of native title issues

The definitions in section 4 of the A H Act cover several native title concepts. Essentially, it states that any references to native title or native title concepts carry the same meanings as they do in the *Native Title Act 1993* (Cth). 'Registered native title holder' refers to either a 'registered native title body corporate' or 'an entity...that is the subject of a determination of native title under the Native Title Act and is registered on the National Native Title Register...as holding native title rights and interests'.⁸²

As noted above, an entity's status as a 'native title party' for an area can help determine its status as a registered Aboriginal party under the A H 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.⁸³

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

⁸² *ibid*, s. 4.

⁸³ *ibid*, s. 6(1).

(2) A registered native title claimant or a person referred to in sub-section (1)(b) is a native title party for the whole area included within the outer boundaries of the area in relation to which the application was made under the Native Title Act for a determination of native title, regardless of the nature and extent of the claimant's claims in relation to any particular part of the whole area.

(3) A registered native title holder or a person referred to in sub-section (1)(d) is a native title party for the whole area included within the outer boundaries of the area in relation to which the application was made under the Native Title Act for a determination of native title, regardless of the extent to which native title was found to exist in relation to any particular part of the whole area.⁸⁴

The Act also states that nothing within the Act is intended to or should be interpreted in a way that would prejudice or affect any native title rights and interests.⁸⁵

Views on the Victorian heritage regime

The Aboriginal Heritage Act has been in force for just under three years; this makes it somewhat difficult to gather a great deal of meaningful information about its overall performance. At the time of its enactment, and even during the pre-enactment phase, response was largely mixed. In general, it was welcomed for its promises of certainty and consistency in contrast to the old system. However, despite the inadequacies of the old regime, by introducing new consulting processes and potentially new Aboriginal representatives into the system, these changes have threatened to upset the delicate balance of consultation and involvement of traditional owners with heritage matters that had developed over time via the consultation policies of Aboriginal Affairs Victoria.

Aboriginal social justice group ANTaR (Australians for Native Title and Reconciliation) 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, which is not an Aboriginal body and lacks the local knowledge and expertise of Traditional Owners

⁸⁴ *ibid*, s. 6(2), (3).

⁸⁵ *ibid*, s. 10.

- 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.⁸⁶

Bob Nicholls, Graham Atkinson and Mark Brett of the Land Justice Group also expressed concern about the role of VCAT in the appeals process, noting that VCAT is obliged to consider the interests of developers and that VCAT has 'considerable experience with developers and minimal experience with Aboriginal cultural heritage.'⁸⁷

A more in-depth critique of the legislation has been made by non-Indigenous heritage lawyer Leonie Kelleher.⁸⁸ One of Kelleher's four major criticisms of the current Act is that in practical, decision-making terms, its definition of cultural heritage significance is still centred on ground disturbance and thus the 'bones and stones' mindset of the relics Acts era:

"Significant ground disturbance" means disturbance of ... the topsoil or surface rock layer of the ground or a waterway by machinery in the course of grading, excavating, digging or dredging but does not include ploughing other than deep ripping". Where land has such disturbance, it is mostly automatically excluded as an area of cultural heritage significance.

⁸⁶ <http://www.antarvictoria.org.au/culturalheritage/> (accessed 4 May 2009).

⁸⁷ Nicholls, B, Atkinson, G. and M. Brett, 2006. 'Native Title and Land Justice': the Victorian Traditional Owners Land Justice Group'. Paper presented to the Native Title Conference, Darwin, May 2006.

⁸⁸ Kelleher, L. 2008. '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.
<http://www.tasa.org.au/conferencepapers08/Indigenous/LeonieKelleherPaper.pdf> (accessed 29 April 2009).

Categorising complex heritage via such earthy, mechanical means identifies an archaeological perspective. It silences a concept of Aboriginal heritage as the story of the land and its people, including the tangible, intangible and spiritual. It focuses on 'bones and stones', not the holistic humanist culture.⁸⁹

Her second criticism is that the process of creating registered Aboriginal parties (RAPs) essentially excludes some Aboriginal people from the process:

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 existed⁹⁰, 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.⁹¹

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.⁹²

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.⁹³

⁸⁹ *ibid*, pp. 10-11.

⁹⁰ The Aboriginal Affairs Victoria web site states that there were in fact seven registered Aboriginal parties as of October 2008:

<http://www.aboriginalaffairs.vic.gov.au/web7/AAVMain.nsf/allDocs/RWP81CE52EC216D5CBBCA2574DA00268098> (accessed 1 May 2009).

⁹¹ Kelleher, *ibid*, p. 11.

⁹² *ibid*, p. 12.

⁹³ *ibid*, p. 13.

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
- 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.⁹⁴

Kelleher’s final major criticism of the Act was in regard to the role of VCAT. Despite the Act’s requirement for VCAT to include on its membership someone with ‘sound knowledge of and experience in’ Aboriginal heritage matters, ‘VCAT’s planning division will handle AHAct matters although its routine work arises from vastly different legislation whose objectives include facilitating development and whose day-to-day work is the robust consideration of development applications.’⁹⁵

⁹⁴ *ibid*, p. 13.

⁹⁵ *ibid*, p. 14.

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.

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). Although a considerable improvement on the relics Acts, the Cultural Record Act was still criticised for its overt focus on the archaeological nature of heritage, at the expense of any extensive consideration of Aboriginal or Torres Strait Islander cultural values.⁹⁶

Furthermore, while there was some mention of Indigenous tradition, the Cultural Record Act was not a dedicated Indigenous heritage law; Indigenous places were largely incorporated by virtue of the Act's blanket inclusion of objects and sites of over 30 years of age, whether of Indigenous or non-Indigenous origin. Archaeologist and cultural heritage academic Annie Ross labelled the legislation 'confusing and cumbersome', as well as 'contradictory.'⁹⁷

The extensive consultation process conducted in anticipation of a new heritage scheme raised significantly the expectations of the State's Indigenous community. However, as initial drafts of the legislation appeared, there was a sense that both much and very little had changed with respect to the protection of Indigenous heritage, and the involvement of Indigenous people in the protection of their own heritage.⁹⁸

⁹⁶ See Evatt, E, 1998, 'Overview of state and territory Aboriginal heritage legislation'. *Indigenous Law Bulletin* 4(16): 4-8.

⁹⁷ Ross, *op. cit.*

⁹⁸ Queensland Indigenous Working Group (QIWG), n. d., 'The proposed Queensland Aboriginal Cultural Heritage Bill 2002: no progress – no respect'. Briefing paper produced by the QIWG.

The ACH Act and the TSICH Act form the overall basis of Queensland's Indigenous heritage protection scheme. Although, other statutes do have some active effects, including the *Nature Conservation Act 1992* (Qld), which provides for the 'cultural and natural resources' of a national park or protected area to be protected from damage, destruction or removal,⁹⁹ 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.'¹⁰⁰

The analysis of the Queensland Indigenous heritage regime below refers only to the ACH Act. The TSICH Act is essentially identical, and thus reference to one should be regarded as inclusive of the other.

Definitions and categories of heritage covered

According to section 4 of the Act, its purpose is 'to provide effective recognition, protection and conservation of Aboriginal cultural heritage.'

The Act's underlying principles state that:

- (a) the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices;
- (b) Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;
- (c) it is important to respect, preserve and maintain knowledge, innovations and practices of Aboriginal communities and to promote understanding of Aboriginal cultural heritage;
- (d) activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to 'law and country';
- (e) there is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage.¹⁰¹

The Act proposes to achieve these principles via recognition of Indigenous peoples and their rights, roles and responsibilities in relation to their own heritage:

- (a) recognising Aboriginal ownership of Aboriginal human remains wherever held;

⁹⁹ *Nature Conservation Act 1992* (Qld), s.61.

¹⁰⁰ *ibid.*, Schedule Dictionary.

¹⁰¹ *Aboriginal Cultural Heritage Act 2003* (Qld), s. 5.

- (b) recognising Aboriginal ownership of Aboriginal cultural heritage of a secret or sacred nature held in State collections;
- (c) recognising Aboriginal ownership of Aboriginal cultural heritage that is lawfully taken away from an area by an Aboriginal party for the area;
- (d) establishing a duty of care for activities that may harm Aboriginal cultural heritage;
- (e) establishing powers of protection, investigation and enforcement;
- (f) establishing a database and a register for recording Aboriginal cultural heritage;
- (g) ensuring Aboriginal people are involved in processes for managing the recognition, protection and conservation of Aboriginal cultural heritage;
- (h) establishing a process for the comprehensive study of Aboriginal cultural heritage;
- (i) establishing processes for the timely and efficient management of activities to avoid or minimise harm to Aboriginal cultural heritage.¹⁰²

Similar to previous ‘relics’ Acts and the *Cultural Record Act (1986)*, the current Act includes ‘evidence, of archaeological or historic significance, of Aboriginal occupation of an area of Queensland’ as one defining element of Aboriginal heritage. However, it complements this definition with the addition of ‘a significant Aboriginal area in Queensland’ and ‘a significant Aboriginal object’ as other key meanings.¹⁰³

The Act defines an ‘Aboriginal place’ or an ‘Aboriginal object’ as a place or object ‘of particular significance to Aboriginal people’ because of either ‘Aboriginal tradition’ or its association with the ‘history, including contemporary history, of an Aboriginal party for an area.’¹⁰⁴

The Act also states that a significant Aboriginal place does not need to ‘contain markings or other physical evidence indicating Aboriginal occupation or otherwise denoting the area’s significance.’¹⁰⁵ The Act presents birthing places, burial places and massacre sites as examples of such places. Conversely, an area may be regarded as significant as a direct result of its association with an important Aboriginal object.¹⁰⁶

Protective and conservation measures

Cultural heritage duty of care

¹⁰² *ibid.*, s. 6.

¹⁰³ *ibid.*, s. 8.

¹⁰⁴ *ibid.*, s. 10.

¹⁰⁵ *ibid.*, s. 12(2).

¹⁰⁶ *ibid.*, s. 12(4).

The key factor in the conservation and protection measures employed by the Act is that it dispenses with the former system of applications for permits or for clearances for actions with the potential to adversely affect heritage. Instead, it establishes a 'cultural heritage duty of care' that places the onus on the proponents, rather than a government agency, to decide how to best protect heritage values from being damaged or destroyed.

The cultural heritage duty of care is defined thus:

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*).¹⁰⁷

In deciding whether or not the proponent has met its duty of care, the Act identifies a number of factors to consider, including the nature of the cultural heritage, completion of a heritage survey (if warranted), and the extent to which Aboriginal parties were consulted about the action. In addition, the Act refers to a set of 'cultural heritage duty of care guidelines', which were released by the Department of Resources and Mines shortly after the Act came into force.¹⁰⁸ Contravening the duty of care carries maximum penalties of \$75,000 for individuals and \$750,000 for corporations.

The duty of care guidelines reiterate much of what is in the Act, but also set down a set of processes which, while not prescriptive, are designed to assist proponents to ensure that they have met their duty of care obligations. The guidelines set down five categories of actions, and suggest the minimum actions required to satisfy the duty of care for each. These categories can be summarised as:

1. Activities involving no surface disturbance;
2. Activities involving no additional surface disturbance to what has already occurred;
3. Activities in developed areas;
4. Activities in areas previously subjected to significant ground disturbance;
5. Activities causing additional surface disturbance (including anything not covered by categories 1-4).¹⁰⁹

¹⁰⁷ *ibid.*, s. 23(1).

¹⁰⁸ *Aboriginal Cultural Heritage Act 2003 s.28 Duty of Care Guidelines*, gazette date 16 April 2004. Accessible at http://www.nrw.qld.gov.au/cultural_heritage/pdf/duty_of_care_guidelines.pdf (accessed 4 May 2009).

¹⁰⁹ *ibid.*

Categories 1-4 require little to no action on the part of proponent because these activities are deemed to require few mitigation measures relating to ground disturbance. For each of these categories, the guidelines place an obligation on people to cease work and contact Aboriginal parties or the government agency if heritage items are discovered that may be impacted by the activity.

It is only really in the fifth category that the duty of care requires significant and extensive action by the proponent. Category 5 acts – essentially any acts that do not fall into categories 1-4 – are regarded as presenting a higher overall risk of harming heritage. According to the guidelines, any action in this category ‘should not proceed without cultural heritage assessment.’¹¹⁰ Cultural heritage assessments help determine if there are features of cultural heritage significance, and if so, how to best manage the action so that harm to any Aboriginal heritage is minimised. In order to do so, determining the level of significance of the feature is crucial, obliging proponents to contact the relevant Aboriginal parties so as to seek:

- (a) Advice as to whether the feature constitutes Aboriginal cultural heritage; and
- (b) If it does, agreement as to how best the activity may be managed to avoid or minimise harm to any Aboriginal cultural heritage.¹¹¹

Where agreement cannot be reached, the duty of care remains, and the proponent ‘must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage including, where necessary, through the development of a Cultural Heritage Management Plan’.¹¹²

Throughout the guidelines, such plans (or CHMPs) are mentioned as an alternative where agreement with Aboriginal groups cannot be reached. While this potentially provides proponents with an option to break off consultations with Aboriginal parties, Part 7 of the Act, which outlines the CHMP procedure, also requires public notification as well as an invitation to participate to be given to Aboriginal parties in the development of the plan. In addition, 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.’¹¹³

In section 23(b), the Act identifies a suite of indicators that a ‘court may consider’ in deciding that a person has complied with their cultural heritage duty of care. These are listed as:

¹¹⁰ *Duty of Care Guidelines*, s. 5.14

¹¹¹ *ibid.*, s. 5.16.

¹¹² *ibid.*, s. 5.19.

¹¹³ *ibid.*, s. 7.1.

- (a) the nature of the activity, and the likelihood of its causing harm to Aboriginal cultural heritage;
- (b) the nature of the Aboriginal cultural heritage likely to be harmed by the activity;
- (c) the extent to which the person consulted with Aboriginal parties about the carrying out of the activity, and the results of the consultation;
- (d) whether the person carried out a study or survey, of any type, of the area affected by the activity to find out the location and extent of Aboriginal cultural heritage, and the extent of the study or survey;
- (e) whether the person searched the database and register for information about the area affected by the activity;
- (f) the extent to which the person has complied with cultural heritage duty of care guidelines.¹¹⁴

The 'nature of Aboriginal cultural heritage likely to be harmed' identified in section 23(b) is further amplified in the duty of care guidelines, which provide a list of features which 'are highly likely to have cultural heritage significance':

- Ceremonial places
- Scarred or carved trees
- Burials
- Rock art
- Fish traps and weirs
- Occupation sites
- Quarries and artefact scatters
- Grinding grooves
- Contact sites
- Wells ¹¹⁵

In addition, some landscape features 'may' have cultural heritage significance:

- Rock outcrops
- Caves
- Foreshores and coastal dunes
- Sand hills
- Areas of biogeographical significance (eg natural wetlands)
- Water holes and natural springs
- Certain types of native vegetation

¹¹⁴ *ibid.*, s. 23(b).

¹¹⁵ *Duty of Care Guidelines*, s. 6.1.

- Some hill and mound formations¹¹⁶

The guidelines also stress that the ‘views of the Aboriginal Party for an area are key in helping assess the Aboriginal cultural heritage significance of these kinds of features.’¹¹⁷

Furthermore, the Act stresses agreement-making with Indigenous groups as a key method for meeting the duty of care. Under section 23(3)(a)(i) the duty of care will be deemed to have been met if, among other things, the proponent is acting under a native title or other agreement with an Aboriginal party, except where Aboriginal heritage is expressly excluded from the agreement.

Against the backdrop of the duty of care concept, the Act imposes potentially significant penalties for individuals and corporations who ‘harm Aboriginal cultural heritage if the person knows or ought reasonably to know that it is Aboriginal cultural heritage.’¹¹⁸ Penalties are also imposed for unauthorised excavation and removal, and the unlawful possession of Aboriginal cultural heritage.¹¹⁹ In essence, the onus is on proponents to do their research and determine and appreciate heritage issues prior to commencing works.

Stop orders and acquisitions

In addition to the duty of care on proponents, an onus for protection and conservation of Aboriginal cultural heritage is also placed on the Minister. In the first instance, the Minister may issue a ‘stop order’ in circumstances where the Minister is satisfied that:

- (b) either or both of the following apply—
 - i. in carrying out the activity, the person is or will be harming Aboriginal cultural heritage;
 - ii. the carrying out of the activity is having or will have a significant adverse impact on the cultural heritage value of Aboriginal cultural heritage.¹²⁰

A stop order, which effectively requires the act to be ceased immediately, is effective for up to 30 days, with the option for a single further 30 day extension.

¹¹⁶ *Duty of Care Guidelines*, s. 6.2.

¹¹⁷ *Duty of Care Guidelines*, s. 6.3.

¹¹⁸ ACH Act, s. 24(1).

¹¹⁹ *ibid.*, ss. 25-26.

¹²⁰ *ibid.*, s. 32.

The Minister also has the power to ‘acquire by purchase or gift Aboriginal cultural heritage for the purpose of its preservation’.¹²¹ The Minister may also compulsorily acquire property ‘if the Minister is satisfied that the State’s purchase or compulsory acquisition of the land is necessary to manage, preserve or protect Aboriginal cultural heritage.’¹²²

Cultural heritage management plans (CHMPs)

Part 7 of the Act sets out rules relating to the development and implementation of cultural heritage management plans. A CHMP is mandatory for any project that requires an Environmental Impact Statement to be completed under other legislation such as the *Integrated Planning Act 1997* (Qld), and to meet the duty of care established under the ACH Act.

The sponsor for a CHMP must give notice to various parties, and in the case of Aboriginal parties, provide them with the opportunity to advise that they wish to participate in the development of the plan.¹²³

The methodology for undertaking a CHMP is provided in the *Cultural Heritage Management Plan Guidelines*, released in April 2005.¹²⁴ The guidelines define a CHMP under section 7 of the ACH Act as:

...a State-approved agreement between the sponsor of the plan and an Aboriginal party about how a project is to be managed to avoid harm to Aboriginal cultural heritage and, to the extent that harm cannot reasonably be avoided, to minimise harm to Aboriginal cultural heritage.¹²⁵

Explaining that the legislation ‘requires each party to negotiate and make every reasonable effort to reach agreement about the provisions of the plan’, the guidelines state that a CHMP can only receive the government’s approval if ‘it has complied with the statutory process set out in Part 7 of the legislation.’¹²⁶ There is no set structure or form for a CHMP, as it is solely intended to ‘address the assessment and management of Aboriginal cultural heritage in relation to land use activities of the sponsor.’¹²⁷

¹²¹ *ibid.*, s. 33(a).

¹²² *ibid.*, s. 155(1).

¹²³ *ibid.*, s. 94.

¹²⁴ *Aboriginal Cultural Heritage Act 2003 s.85 Cultural Heritage Management Plan Guidelines*, gazette date 22 April 2005. Accessible at http://www.nrw.qld.gov.au/cultural_heritage/pdf/chmpguidlines.pdf (accessed 4 May 2009).

¹²⁵ *ibid.*, s. 1.1.

¹²⁶ *ibid.*

¹²⁷ *ibid.*

Importantly, for proponents, having an approved CHMP provides ‘a complete defence under the legislation in relation to any activity undertaken in accordance’ with the plan.¹²⁸ Moreover, where agreement cannot be reached between parties to the plan, the dispute can be referred to the Land Court, which can make a recommendation to the Minister, or delegated officer, for decision.¹²⁹

Administrative arrangements

The Minister

As in the case of the Victorian Act, the Minister responsible for the administration of the ACH Act has a number of significant responsibilities within the Queensland regime. This responsibility currently stands with the Minister for Natural Resources and Mines. The Minister largely stands as a final authority and decision-maker in several areas, with roles including:

- Issuing stop orders where there is harm or potential harm to Aboriginal cultural heritage
- Overseeing the registration of Aboriginal Cultural Heritage Bodies
- Overseeing the Aboriginal Cultural Heritage Register, including deciding whether or not to enter the results of a cultural heritage study
- Providing guidelines in relation to matters such as the duty of care, preparation of CHMPs and the undertaking of cultural heritage studies
- Acting as final arbiter in disputes between proponents and other bodies, including Aboriginal groups, in relation to cultural heritage studies and CHMPs
- Approving or rejecting CHMPs.

The Minister has discretion to seek the views of others in making decisions in many circumstances, and has the discretion under section 152 to delegate his or her responsibilities to another Minister or a suitably qualified public servant. The Minister may also establish advisory committees at his or her discretion to assist with his or her decision making.¹³⁰

The Chief Executive

¹²⁸ *ibid.*, s. 1.2.

¹²⁹ *ibid.*, s. 1.3.

¹³⁰ ACH Act, s. 154.

The chief executive is the head of the Government agency responsible for administering the Act. He or she may act as the Minister's delegate in a number of situations, but also has his or her own responsibilities, largely in administering the Act and its requirements. Such responsibilities include:

- Ensuring that requirements relating to the ownership and custody of human remains are adhered to
- Ensuring that requirements relating to the ownership and management of cultural heritage information are adhered to
- Establishing and maintaining the Aboriginal Cultural Heritage Database and the Aboriginal Cultural Heritage Register
- Approving or rejecting CHMPs
- Appointing authorised officers in relation to the enforcement provisions of the Act
- Signing authorities and notices under the Act.

Authorised officers

Authorised officers are appointed by the chief executive under section 121, within Part 8 of the Act that addresses the investigation and enforcement powers of the legislation. Authorised officers have the power to enter places where invited, that are open to the public, or where the entry is authorised by a warrant.¹³¹ Once entry has been authorised, the officer may search, photograph and document the property for the purpose of enforcing the Act,¹³² and may seize evidence and obtain information as part of the investigation.¹³³

Queensland Museum

In terms of ownership and custody of Aboriginal heritage, section 22 of the Act essentially places the Queensland Museum and its collections under the authority of the *Queensland Museum Act 1970* (Qld). It also states that, at any time, the Museum may accept custody of Aboriginal heritage.

Dispute resolution

¹³¹ *ibid.*, s. 128.

¹³² *ibid.*, s. 134.

¹³³ *ibid.*, ss. 137, 145.

The legislation outlines several matters in which appeals or objections to decisions made under the Act are to be heard in the Land Court.¹³⁴ These include:

- the chief executive's decision not to record or not record the results of a cultural heritage study on the Register
- the chief executive's decision to approve or not approve a CHMP
- where parties cannot agree about a CHMP (mediation is also an option).

In such matters the Land Court does not decide on such disputes, but makes recommendations to the Minister, who makes the final decision.¹³⁵

Storage and ownership of information and material culture

According to section 5 of the Act, the legislation's defining principles include 'respect for Aboriginal knowledge, culture and traditional practices' and an acknowledgment that 'Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage.'¹³⁶ In addition:

- (d) activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to 'law and country.'¹³⁷

Whereas the Cultural Record Act of 1986 deemed all cultural heritage objects to be owned by the State, the current Act states that some significant categories of Aboriginal cultural heritage must remain in, be vested in, or be returned to, the ownership of the appropriate Aboriginal custodians. Section 14(3) states that:

- ...as far as practicable, Aboriginal cultural heritage should be owned and protected by Aboriginal people with traditional or familial links to the cultural heritage if it is comprised of any of the following—
- (a) Aboriginal human remains;
- (b) secret or sacred objects;
- (c) Aboriginal cultural heritage lawfully taken away from an area.

These provisions facilitate the ownership and return of such remains or objects to Aboriginal people with 'traditional or familial links' to heritage in the above

¹³⁴ <http://www.landcourt.qld.gov.au/>

¹³⁵ e.g. ACH Act, ss. 118-120.

¹³⁶ *ibid.*, ss. 5(a), 5(b).

¹³⁷ *ibid.*, s. 5(d).

categories, even if they are in the ownership of the State (most specifically, the Queensland Museum). However, essentially all other Aboriginal cultural heritage belongs to the State. According to section 20:

- (1) The following Aboriginal cultural heritage is not in the ownership of the State—
 - (a) human remains and secret or sacred objects owned by Aboriginal people under division 2 or 3;
 - (b) Aboriginal cultural heritage passing into the ownership of an Aboriginal party under this Act;
 - (c) Aboriginal cultural heritage owned by a person whose ownership is confirmed under a provision of this Act;
 - (d) Aboriginal cultural heritage owned by a person to whom ownership is lawfully transferred.
- (2) Otherwise, the State owns Aboriginal cultural heritage.
- (3) Subsection (2) applies to an object or evidence that is Aboriginal cultural heritage even if the object or evidence—
 - (a) forms, or has previously formed, part of land; or
 - (b) is located, or has previously been located, in, on or under land.

While the Act does not provide specifically for Aboriginal people to gain physical access to their cultural heritage it does note that no part of the legislation should be interpreted in a way that would prejudice:

- (b) a person's enjoyment or use of, or free access to, Aboriginal cultural heritage, if—
 - (i) the person usually lives according to Aboriginal tradition as it relates to a particular group of Aboriginal people; and
 - (ii) the access, enjoyment or use is sanctioned by the Aboriginal tradition; or
- (c) native title rights and interests.¹³⁸

The Act also formally establishes both the Aboriginal cultural heritage database and the Aboriginal cultural heritage register. While both are effectively devices for the storage of information about cultural heritage in the state, the information can be used for planning and research and is subject to some access restrictions.

Aboriginal cultural heritage database

Section 39 of the Act defines the purpose of the database thus:

- (1) The purpose of establishing the database is to assemble, in a central and accessible location, information about Aboriginal cultural heritage.

¹³⁸ *ibid.*, s. 13.

(2) The database is intended to be a research and planning tool to help Aboriginal parties, researchers and other persons in their consideration of the Aboriginal cultural heritage values of particular areas.

(3) The placing of information on the database is not intended to be conclusive about whether the information is up-to-date, comprehensive or otherwise accurate.

The information placed in the database is at the discretion of the chief executive, and may be contributed by anyone, the chief executive included.

The chief executive must provide information from the database pertaining to a particular area when requested by an Aboriginal party from that area. However, beyond this, general access to the database is restricted. Access can generally only be granted to a person acting in the process of satisfying a duty of care in relation to the Act,¹³⁹ or by researchers upon application.

According to the Queensland Department of Natural Resources and Water, the database consists of 'information on sites and places collected over a period of nearly forty years' of 'variable quality both in terms of description of places, accuracy of location and extent of site details.'¹⁴⁰

Aboriginal cultural heritage register

The register is a more generally accessible list. It contains information about cultural heritage studies, CHMPs, and the details of Aboriginal or Torres Strait Islander heritage bodies associated with an area.¹⁴¹ The primary purpose of the register is to assist with land use and land use planning, serving as 'a research and planning tool to help people in their consideration of the Aboriginal cultural heritage values of particular objects and areas.'¹⁴² Effectively, this places cultural heritage on record so that anyone seeking to fulfil their duty of care will be made aware of its presence and plan accordingly. .

Cultural heritage studies

To have a particular item of cultural heritage included in the register, a cultural heritage study is required. These are essentially an in-depth study of the heritage values of a particular area. Part 6 of the Act sets out the structure and processes required to undertake a cultural heritage study. Studies may be sponsored by

¹³⁹ *ibid.*, s. 44.

¹⁴⁰ http://www.nrw.qld.gov.au/cultural_heritage/search_request/accessing_data_guidelines.html (accessed 5 May 2009).

¹⁴¹ ACH Act, s. 47(1).

¹⁴² *ibid.*, s. 47(2).

anyone, including the Minister. The relevant Aboriginal party must be given the opportunity to participate. The party undertaking the study may appoint a suitably qualified cultural heritage assessor to assess the heritage value of the study area, which can include an Aboriginal person with knowledge of the Aboriginal traditions of the area. Section 53(2)(a) states that Aboriginal parties are responsible for determining the significance of any heritage objects and places found during a study.

When completed, the chief executive considers the report, and if necessary, seeks expert advice, and then decides to either include or to not include the results of the study in the register.

Identification and consultation of appropriate Indigenous parties

Consultation and the duty of care

Consultation with relevant Indigenous parties is a significant element of the 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 so as to seek:

- (a) Advice as to whether the feature constitutes Aboriginal cultural heritage; and
- (b) If it does, agreement as to how best the activity may be managed to avoid or minimise harm to any Aboriginal cultural heritage.¹⁴³

Where agreement cannot be reached, however, the duty of care remains. As a consequence, the proponent can seek alternatives beyond agreements with Aboriginal parties, such as through the development of a CHMP. This could be viewed as offering proponents a detour around consultation processes, although CHMPs also require the sponsor to invite the relevant Aboriginal party to contribute to the plan.¹⁴⁴ 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

¹⁴³ *Duty of Care Guidelines*, item 5.16.

¹⁴⁴ ACH Act, s. 93.

likely to excavate, relocate, remove or harm Aboriginal Australian cultural heritage.’¹⁴⁵

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.’¹⁴⁶ 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;
 - (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.¹⁴⁷

¹⁴⁵ *Duty of Care Guidelines*, item 7.1.

¹⁴⁶ ACH Act, s. 35(1).

¹⁴⁷ *ibid.*, s. 34.

Native title claim boundaries generally include considerable areas where native title is extinguished or not claimable – particularly in relation to freehold land. However, the ACH 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.¹⁴⁸

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.¹⁴⁹

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.¹⁵⁰

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—

- (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.¹⁵¹

¹⁴⁸ *ibid.*, s. 35(3).

¹⁴⁹ *ibid.*, s. 35(7).

¹⁵⁰ *ibid.*, s. 36.

¹⁵¹ *ibid.*, s. 35(7).

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 has changed at the conservation coalface from the last five or six years of the Cultural Record Act. At 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.¹⁵²

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'.¹⁵³ 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 company indicating the activities permitted or prohibited in each zone.¹⁵⁴ 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

¹⁵² Godwin, L. 2003, 'Legislation, agreements and cultural practices'. Paper presented to 10th annual conference on Cultural Heritage and Native Title, Brisbane, 29 September 2003, p.4.

¹⁵³ 'QGC seals heritage agreement', 17 May 2005: <http://www.minebox.com/story.asp?articleId=5826> (accessed 6 May 2009).

¹⁵⁴ Godwin, *op. cit.*, p. 15.

would be managed during road construction and was written into the contract documentation, thus enabling the department and its contractors to meet their duty of care.¹⁵⁵

Integration of native title issues

As identified above, status as a 'native title party' carries significant influence for Aboriginal parties under the Act. In essence, participating in the native title process allows native title groups to "speak for country" in the context of cultural heritage conservation, including the ability to negotiate outcomes via the cultural heritage assessment and CHMP processes.

In addition to the above, the Act also deals with native title issues in the following provisions:

- No part of the Act should be interpreted in a way that is prejudicial to a person's native title rights and interests;¹⁵⁶
- Acting in accordance with native title agreements and native title protection conditions, unless heritage is expressly omitted, is a valid means of demonstrating compliance with the cultural heritage duty of care;¹⁵⁷
- A native title agreement is a valid alternative to a CHMP, except where cultural heritage is expressly excluded;¹⁵⁸
- Acting in compliance with native title agreements and native title protection conditions, unless heritage is expressly omitted, is a valid excuse for harming, excavating, relocating, removing or possessing Aboriginal cultural heritage;¹⁵⁹

Views on the Queensland heritage regime

After approximately five years of operation, Queensland's new Indigenous heritage regime has probably only now had sufficient time in which to allow

¹⁵⁵ Jones, R. 2007, 'Heritage Burial Cave'. *Queensland Roads* 4(September), pp. 49-51.

¹⁵⁶ *ibid.*, s. 13(c).

¹⁵⁷ *ibid.*, s. 23(3)(a).

¹⁵⁸ *ibid.*, s. 86(b).

¹⁵⁹ *ibid.*, ss. 24-26.

observers to build a measured opinion of its strengths and weaknesses. Indeed the Department of Natural Resources and Water has just undertaken a review of the ACH and TSICH Acts.¹⁶⁰ The response and outcomes of the review are yet to be released. It is expected to provide an important overview of how the system is working, and should identify its perceived efficacy in the eyes of a range of stakeholders.

At the time of its drafting, the ACH and TSIH 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.

By the time the legislation appeared, however, it had attracted a wide array of critics and sceptics. Possibly 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.¹⁶¹

The QIWG had concerns that the duty of care 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 [Cultural Record Act].'¹⁶² In addition, the QIWG also objected to:

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

¹⁶⁰ See <http://www.nrw.qld.gov.au/factsheets/pdf/land/1178.pdf> (accessed 7 May 2009).

¹⁶¹ QIWG, *op. cit.*, p. 2.

¹⁶² *ibid.*, p. 3.

- 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.¹⁶³

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.'¹⁶⁴ 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.'¹⁶⁵

From a different perspective, law firm Corrs Chambers Westgarth released an overview of the Act for the mining and exploration sectors. Their 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.'¹⁶⁶ They 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.'¹⁶⁷ They 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.'¹⁶⁸

Susan Shearing, from Macquarie University's Centre for Environmental Law, 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

¹⁶³ *ibid.*, pp. 3-4.

¹⁶⁴ Godwin, *op. cit.*, p. 2.

¹⁶⁵ *ibid.*, p. 5.

¹⁶⁶ Corrs Chambers Westgarth, 2003, *Queensland Mining* 29 October 2003, p. 1.

¹⁶⁷ *ibid.*, p. 3.

¹⁶⁸ *ibid.*

under section 23.’¹⁶⁹ 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.¹⁷⁰

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

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.¹⁷¹

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 Pacific Law*.¹⁷² Stephenson welcomed the legislation as a significant 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:

¹⁶⁹ Shearing, S. 2006, ‘One step forward: recent developments in Australian State and Territory Indigenous cultural heritage laws.’ *Macquarie Journal of International & Comparative Environmental Law* 3(1): 35-66.

¹⁷⁰ *ibid.*, p. 52.

¹⁷¹ <http://www.australianarchaeologicalassociation.com.au/node/3820> (accessed 5 May 2009).

¹⁷² Stephenson, M. 2006, ‘Queensland’s Indigenous cultural heritage legislation: a critique.’ *Journal of South Pacific Law* 10(2): 1-28.

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.¹⁷³

Stephenson also highlighted several areas of concern. One of these was in relation to the consultation processes built into the Act. Setting out the status of 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.'¹⁷⁴ 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.'¹⁷⁵

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.'¹⁷⁶

¹⁷³ *ibid.*, p. 4.

¹⁷⁴ *ibid.*, p. 11.

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*, p. 12.

Indigenous Heritage Protection in the Northern Territory

General overview and background

The Aboriginal heritage protection scheme in the Northern Territory differs from those of Victoria and Queensland on three levels. 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 via the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the Land Rights Act). It 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 Councils that exist in this jurisdiction. Putting the Land Rights Act to one side, the remainder of this analysis is largely restricted to legislation enacted by the Northern Territory Government.

On a second level the Indigenous heritage regime of the Northern Territory differs from Queensland and Victoria because it sits, at least in terms of legislation, outside the native title context.

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

Definitions and categories of heritage covered

HERITAGE CONSERVATION ACT

The main purpose of the Heritage Conservation Act is:

...to provide a system for the identification, assessment, recording, conservation and protection of places and objects of prehistoric, protohistoric, historic, social, aesthetic or scientific value, including geological structures, fossils, archaeological sites, ruins, buildings, gardens, landscapes, coastlines and plant and animal communities or ecosystems of the Territory.¹⁷⁷

¹⁷⁷ *Heritage Conservation Act 1991* (NT), s. 3.

It should also be noted that the Act pertains to Indigenous and non-Indigenous cultural heritage as well as natural heritage; essentially any heritage place that is assessed favourably against the assessment criteria can be included.

However, archaeological places and objects are also addressed separately within a distinct part of the Act. The Act defines archaeological objects specifically as items pertaining to the past occupation of the Territory by Aboriginal or Macassan people,¹⁷⁸ explicitly including sacred objects and human remains:

- (a) an artifact or thing of any material given shape to by man;
- (b) a natural portable object of any material sacred according to Aboriginal tradition;
- (c) human or animal skeletal remains; or
- (d) such objects, or objects of a class of objects, as are prescribed'.¹⁷⁹

Similarly, an archaeological place is defined as a 'place pertaining to the past occupation by Aboriginal or Macassan people that has been modified by the activity of such people and in or on which the evidence of such activity exists'.¹⁸⁰

SACRED SITES ACT

The purpose of the Sacred Sites Act is:

...to effect a practical balance between the recognized need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement, by establishing a procedure for the protection and registration of sacred sites, providing for entry onto sacred sites and the conditions to which such entry is subject, establishing a procedure for the avoidance of sacred sites in the development and use of land and establishing an Authority for the purposes of the Act and a procedure for the review of decisions of the Authority by the Minister, and for related purposes.¹⁸¹

While the mechanisms identified for the protection of sacred sites are generically similar to those in the Heritage Conservation Act, the overall intent focuses more on balancing aspirations between Indigenous culture and the broader development and economic aspirations of the Territory as a whole.

¹⁷⁸ No specific mention is made within the legislation or regulations regarding historical archaeological sites with no Aboriginal or Macassan associations; these are presumably covered under the general heritage criteria listed further below.

¹⁷⁹ *ibid.*, s. 4(1).

¹⁸⁰ *ibid.*

¹⁸¹ *Northern Territory Aboriginal Sacred Sites Act 1989 (NT)*, preamble.

The Sacred Sites Act refers the reader to the Land Rights Act for a definition of a sacred site.¹⁸² That definition says:

sacred site means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.¹⁸³

The Sacred Sites Act also refers the reader to the Land Rights Act for a definition of 'Aboriginal Tradition', which, under the Sacred Sites Act, is the primary basis for determining the custodianship of sacred sites.

Protective and conservation measures

HERITAGE CONSERVATION ACT

In terms of Indigenous cultural heritage, the Heritage Conservation Act works according to the nomination / assessment model, whereby items are identified and assessed for significance in order to be declared as a heritage object or place. However, there is a slightly different approach for archaeological sites and objects, with automatic interim protection, pending significance assessment.

Declaration of heritage places and objects

According to section 21, places and objects can be declared as heritage places and objects via written application (i.e. nomination) to the Heritage Advisory Council in a prescribed format. The Council will then assess the place 'by applying the relevant heritage assessment criteria' and recommend to the Minister whether or not a declaration should be made.¹⁸⁴

The Council itself may also nominate and assess places and objects of its own volition.

The assessment of places and objects is subject to a set of criteria, broadly outlined by the Act and produced by the Heritage Advisory Council in the Regulations. These include, as may be relevant to Aboriginal places and objects:

The criteria to be used in assessing whether or not a place or object should be recommended for declaration under Part 4 of the Act as a heritage place or a heritage object are whether or not the object or place (as the case may be) has special significance in the Territory –

¹⁸² *ibid.*, s. 3.

¹⁸³ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s. 3(1).

¹⁸⁴ *Heritage Conservation Act 1991* (NT), s. 22(1).

- (b) because of the diversity or richness of its flora, fauna, landscapes or cultural features;
- (h) by virtue of its association with events, developments or cultural phases in human occupation and evolution;
- (j) by providing information contributing to a broader understanding of the history of human occupation;
- (k) in demonstrating a way of life, custom, process, land use, function or design no longer practised, in danger of being lost or of exceptional interest;
- (m) in demonstrating the principal characteristics of the range of human activities which take or have taken place in the Territory, including ways of life, customs, processes, land uses, functions, designs or techniques;
- (n) by virtue of aesthetic characteristics or through technical, creative, design or artistic excellence, innovation or achievement held in high esteem or otherwise valued by a community;
- (p) in being highly valued by a community for religious, spiritual, symbolic, cultural, educational or social associations; or
- (q) through its close association with individuals whose activities have been significant in the history of the Territory.¹⁸⁵

Upon receipt of the Council's recommendations, the Minister has 90 days to decide whether or not to declare a heritage object or place. Interim conservation orders can also be declared by the Minister over heritage that has not been assessed and declared. This essentially creates a 90 day window for heritage to be assessed for significance and a formal declaration to be made.¹⁸⁶

Conservation management plans (CMPs)

Conservation management plans can be prepared for declared places and objects which contain: 'a description of work to be permitted to be carried out on a heritage place or heritage object and the places where the heritage object may be located and the conditions, if any, subject to which the work may be carried out or object moved from one place to another.'¹⁸⁷ A completed CMP must be either approved or disapproved by the Legislative Assembly before it can take effect.¹⁸⁸

Prescribed archaeological places and objects

Part 6 of the Act supplies certain 'prescribed' archaeological places and objects with automatic protection via an interim protection order:

¹⁸⁵ *Heritage Conservation Regulations (NT)*, as at 1 August 2007, regulation 5.

¹⁸⁶ *Heritage Conservation Act 1991 (NT)*, s. 28.

¹⁸⁷ *ibid.* s. 30(2).

¹⁸⁸ *ibid.* s. 31.

A prescribed archaeological place or prescribed archaeological object shall, for the purposes of sections 29 and 34, be deemed to be a place or object in respect of which an interim conservation order is in force and shall be deemed to remain so until the Minister, as the result of an application made under section 21, makes or refuses to make a declaration under section 26(1) in respect of the place or object.¹⁸⁹

The types of archaeological places that are 'prescribed' are listed in the Regulations as places containing rock paintings and engravings, prehistoric or protohistoric occupation sites and places (other than formal cemeteries) containing human remains and burial artefacts.¹⁹⁰ Prescribed archaeological objects are 'Aboriginal portable cultural objects (including but not limited to secret and ceremonial objects, log or bark coffins, human remains, portable rock or wood carvings or engravings or stone tools).'¹⁹¹

According to the Regulations, a person must report the discovery of an archaeological place or object 'as soon as practicable', with failure to do so incurring a penalty of up to \$1000.¹⁹²

Protection and enforcement

The Act provides penalties for damaging, destroying or desecrating a declared heritage object or place, or removing an associated heritage object from a heritage place, or for removing a heritage object from the Northern Territory. Penalties range from \$1,000 to \$10,000 or up to 12 months imprisonment for individuals, and fines of \$20,000 to \$200,000 for a body corporate.¹⁹³ Similar breaches and penalties apply to interim conservation orders.

The Minister may also direct the owner of a heritage item to maintain or repair a place or object, subject to penalties for non-compliance.¹⁹⁴

Conservation agreements

Conservation agreements can be made between the Minister and the lawful owner of a heritage place or object. Where relating to land, such agreements can act as

¹⁸⁹ *ibid.* s. 39(1).

¹⁹⁰ *Heritage Conservation Regulations (NT)*, as at 1 August 2007, regulation 3.

¹⁹¹ *ibid.*

¹⁹² *ibid.*, regulation 4(1).

¹⁹³ *Heritage Conservation Act 1991 (NT)*, s. 33.

¹⁹⁴ *ibid.*, s. 49.

restrictive covenants which, if enforced by the Minister, can be binding on subsequent owners as registered interests under the *Land Title Act 2000* (NT).¹⁹⁵

Approvals process

Owners of a heritage place or object can apply to the Minister for permission to perform works, alter, damage or destroy the heritage place, or to remove an object from the Territory. The Minister must refer such matters to the Heritage Advisory Council for comment before authorising such actions.¹⁹⁶ The Minister may also authorise similar works to be carried out on heritage items on Crown land after having sought comment from the Council on the proposed action.

SACRED SITES ACT

Following on from the previous 1979 Act, the current Sacred Sites Act establishes the Aboriginal Areas Protection Authority, to whom those wishing to carry out works on land in the Northern Territory may apply for an Authority Certificate. The Act divides applications for certificates into 'standard' and 'non-standard' applications.¹⁹⁷ The criteria for determining standard and non-standard applications are set out in the Regulations.¹⁹⁸ Non-standard applications are those involving:

- Large areas of land: one or more contiguous properties amounting to a total perimeter of 20 km or more
- Substantial projects:
 - requiring an environmental impact study
 - a complex development such as a resort, mine or major horticultural development or any project using an area of seaor
 - involving the acquisition or surrendering of native title rights.
- Aboriginal Land, as under either the Land Rights Act or the *Aboriginal Land Act 1992* (NT)
- Sacred sites: on a sacred site or a restricted zone identified by a previous certificate

¹⁹⁵ *ibid.*, s. 37.

¹⁹⁶ *ibid.*, s. 39K(5).

¹⁹⁷ *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), ss. 19A-19C.

¹⁹⁸ *Northern Territory Sacred Sites Regulations*, as at 1 April 2004, Schedule 1.

- The need for the Authority to use special expertise or equipment in deciding the application

and

- Other circumstances in which the scope or location of the project is remote or too broadly defined or the nature of the work is insufficiently disclosed in the application.

All other applications are regarded as 'standard' applications. The Authority has the power to determine and levy to the applicant the costs of considering and deciding non-standard applications beyond the standard fees.¹⁹⁹

Authority certificate

An Authority Certificate is granted where the Authority is satisfied that the application poses no 'substantive risk of damage to or interference with a sacred site on or in the vicinity of the land' or where 'an agreement has been reached between the custodians and the applicant.'²⁰⁰ The certificate must specify the particular parts or areas of the land where an activity may be carried out, and any specific conditions as the Authority believes the custodians wish, or as per any agreement reached.²⁰¹ Work to issue an Authority Certificate is conducted by a suitably qualified employee or consultant employed by the Authority, and is done in consultation with the custodians of any sacred sites affected by the proposed works or use.

Protection and enforcement

Beyond any allowance made in the Sacred Sites Act or the Land Rights Act, an offence is committed by anyone entering, desecrating or working on a sacred site. The penalty is up to 400 penalty units for an individual, 2000 penalty units for a body corporate, and up to 2 years imprisonment.²⁰²

Contravening the conditions of an Authority certificate and thereby damaging a sacred site or causing distress to a custodian as a result is another offence,²⁰³ as is

¹⁹⁹ *Northern Territory Aboriginal Sacred Sites Act 1989 (NT)*, s. 19D.

²⁰⁰ *ibid.*, s. 22.

²⁰¹ *ibid.*

²⁰² *ibid.*, ss. 33-35.

²⁰³ *ibid.*, s. 37.

recording or revealing information of a secret nature or documentation produced or furnished for the purposes of the Act.²⁰⁴

Administrator's powers

The Act also provides powers to the Northern Territory Administrator to protect sacred sites in specific circumstances:

- (1) Without limiting the power of the Administrator to otherwise take steps to protect a sacred site, the Administrator may take, or promote, or cause to be taken, steps to protect sacred sites, under such laws in force in the Territory as the Administrator considers appropriate –
 - (a) by the acquisition of an area of land;
 - (b) by the reservation of an area of Crown land;
 - (c) by the vesting of title to an area of Crown land in the Authority;
 - (d) where land is vested in, or is under the care, control or management of, a statutory corporation, by recommending the taking of special measures, including the making of by-laws, for the protection of the site; and
 - (e) where a person has an estate or interest in land, by recommending, and assisting with the funding of, special measures for the protection of the site.²⁰⁵

Administrative arrangements

HERITAGE CONSERVATION ACT

The Minister

While the Heritage Advisory Council is the key body in terms of administering the Act, the Minister responsible for the Act, currently the Minister for Natural Resources, Environment and Heritage, is the final decision-making authority in most matters. The Minister's responsibilities include:

- Appointing members of the Heritage Advisory Council
- Deciding on applications for having places and objects declared as heritage places and objects
- Declaring interim protection orders
- Presenting CMPs to the Legislative Assembly for approval
- Deciding on whether or not to revoke declarations of heritage places and objects

²⁰⁴ *ibid.*, s. 38.

²⁰⁵ *ibid.*, s. 41.

and

- Deciding on whether or not to approve applications to carry out works, etc on declared places and objects.

The Director of the Department also has some powers under the Act in terms of carrying out the Minister's decisions and administering the Department's responsibilities.

Heritage Advisory Council

Apart from the Minister, the Heritage Advisory Council is the key authority under the Act. The nine-member Council is appointed by the Minister, and members must be drawn from several listed organisations, including one from the Museums and Art galleries Board and one from the Aboriginal Areas Protection Authority. The Minister may appoint five of the members according to the expertise believed necessary to fill the positions.²⁰⁶

The functions of the Council are:

- (a) to prepare criteria for the assessment of places and objects of heritage value in accordance with the objectives specified in section 18(3);
- (b) to carry out research into, and evaluate the heritage value of, places and objects;
- (c) to recommend to the Minister places and objects of heritage value for inclusion in the Register;
- (d) to recommend to the Minister the removal of places and objects from the Register;
- (e) to advise the Minister on the conservation and use of heritage places and heritage objects;
- (f) to promote as it thinks fit the public use and enjoyment of heritage places and heritage objects in a manner consistent with the conservation of their heritage value and facilitate relevant public education and programs;
- (g) to advise the Minister on financial incentives or concessions for heritage preservation;
- (h) to advise the Minister on all matters affecting the natural and cultural heritage of the Territory;
- (j) to make recommendations to the Minister on heritage agreements in general or particular agreements;
- (k) to recommend to the Minister the imposition of an interim conservation order for the protection of a place or object;

²⁰⁶ *Heritage Conservation Act 1991 (NT)*, s. 8.

- (m) to prepare conservation management plans in respect of heritage places; and
- (n) to perform such other functions as required by or under this or any other Act or as directed by the Minister.²⁰⁷

Officers

Part 7 of the legislation provides for the appointment of Heritage Officers 'to assist the Director with the protection and conservation of heritage places and heritage objects.'²⁰⁸ Heritage Officers have search powers that allow them to use reasonable force to enter premises without a warrant if they have 'reasonable grounds for suspecting that an offence against this Act has been, is being or is about to be committed,' and take reasonable steps to ensure that the commission of the offence is prevented.²⁰⁹

Appeals

An 'aggrieved person' can appeal a decision made under sections 26, 28, 39F or 49 to the Local Court, but only on questions of law.²¹⁰

SACRED SITES ACT

Aboriginal Areas Protection Authority

The Aboriginal Areas Protection Authority is established under Part II of the Act. The Authority comprises 12 people, at least ten members of which 'shall be custodians of sacred sites appointed in equal number from a panel of 10 male custodians and 10 female custodians nominated by the Land Councils.'²¹¹

The Act defines a 'custodian' as 'an Aboriginal who by Aboriginal tradition, has responsibility for that site and, in Part II, includes a custodian of any sacred site'.²¹² The Act refers the reader to the Land Rights Act for a definition of 'Aboriginal tradition':

"Aboriginal tradition" means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances,

²⁰⁷ *ibid.*, s. 12.

²⁰⁸ *ibid.*, s. 43.

²⁰⁹ *ibid.*, s. 45.

²¹⁰ *ibid.*, s. 48.

²¹¹ *Northern Territory Aboriginal Sacred Sites Act 1989 (NT)*, s. 6.

²¹² *ibid.*, s. 3.

customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.²¹³

The functions of the Authority are identified as:

- (a) 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;
- (b) to carry out research and keep records necessary to enable it to efficiently carry out its functions;
- (c) to establish such committees (including executive and regional committees), consisting of such members and other persons, as are necessary to enable it to carry out its functions;
- (d) to establish and maintain a register to be known as the Register of Sacred Sites and such other registers and records as required by or under this Act;
- (e) to examine and evaluate applications made under sections 19B and 27;
- (f) after considering an application under section 19B, and in accordance with Division 1 of Part III, to issue or refuse to issue an Authority Certificate;
- (g) to make available for public inspection the Register and records of all agreements, certificates and refusals except to the extent that such availability would disclose sensitive commercial information or matters required by Aboriginal tradition to be kept secret;
- (h) to make such recommendations to the Minister on the administration of this Act as it thinks fit;
- (j) to perform such other functions as are imposed on it by or under this or any other Act, or as directed by the Minister; and
- (k) to enforce this Act.²¹⁴

The Minister

Apart from his or her role in appointing the members of the Authority, the Minister's main role under the Act is to act as an avenue of referral or appeal. The Minister may receive requests from aggrieved persons regarding the Authority's decisions and, after considering the circumstances and the views of the Authority, either uphold or effectively amend the Authority's decision.²¹⁵

Administrator

The NT Administrator has powers to proactively protect sacred sites under section 41, as quoted above.

²¹³ *Aboriginal Land Rights (Northern Territory) Act 1976*, s. 3.

²¹⁴ *Northern Territory Aboriginal Sacred Sites Act 1989 (NT)*, s. 10.

²¹⁵ *ibid.*, ss. 19H, 30, 32.

Storage and ownership of information and material culture

HERITAGE CONSERVATION ACT

Ownership of heritage

There are no specific clauses in the Heritage Conservation Act that deal with the question of who owns heritage such as archaeological materials, sacred objects and human remains. It essentially pre-supposes that the owner of the land or object that is identified as a heritage place or object retains that status after its heritage value is declared. However, the Act instead places restrictions on the use, modification, removal or destruction of that heritage place or object, by virtue of sections 33-36, which require the Minister's consent for such actions.

There is no mention of the ownership status of heritage places or objects in the custodianship of the Northern Territory Government.

Section 29(2) of the Act makes some acknowledgement of traditional ownership of sacred objects, but for the purposes of consultation rather than actual ownership.

Register of Heritage Places

The Register of Heritage Places is essentially a list, compiled by the Council, in which is recorded:

...the decisions and actions of the Minister under section 26, details of all interim conservation orders, conservation management plans and heritage agreements, details of heritage places and heritage objects (except to the extent that they are required by Aboriginal tradition to be kept secret) and such other information as is required by or under this Act to be recorded.²¹⁶

The Register is open to general inspection, for the prescribed fee.

SACRED SITES ACT

Registering sacred sites

Division 2 of the Act describes the process for having a sacred site placed on the Register of Sacred Sites. The application, made by the custodian/s of the site and the Authority, in consultation with any other custodians, will assess:

²¹⁶ *Heritage Conservation Act 1991 (NT)*, s. 16(1).

- (a) the basis on and extent to which the applicant and other custodians, if any, are entrusted with responsibility for the site according to Aboriginal tradition;
- (b) the name or names and addresses of the custodian or custodians;
- (c) the story of the site according to Aboriginal tradition;
- (d) the location and extent of the site;
- (e) the restrictions, if any, according to Aboriginal tradition, on activities that may be carried out on or in the vicinity of the site;
- (f) the physical features that constitute the site;
- (g) whether, and if so to what extent, the period of the registration should be limited; and
- (h) the restrictions, if any, that should be applied to information about matters referred to in paragraph (c) or (f) divulged by the custodian or custodians.

The owners of the land on which the relevant sacred site is situated are contacted and invited to make written representations on issues of determent, which must be given due consideration before the registration is decided by the Board of the Authority.²¹⁷ Once a sacred site is registered, the Authority must maintain a public register that details the eight criteria detailed above, as subject to any restrictions placed by custodians on any sacred knowledge of the site.

Ownership of sacred sites

The Act clearly refers to “owners” in terms of the land-owners of the properties in which the sacred sites are situated, and to “custodians” in terms of responsibilities and obligations towards the sites themselves. In terms of the actual protection of the sites, custodians have significant influence within and over the process. The relative success of an application for an Authority certificate depends greatly on the wishes of the custodian/s of the site, or the applicant’s ability to negotiate appropriate outcomes directly with the custodians.²¹⁸ Custodians also have the right to approve or deny the entry of a person on a sacred site, in accordance with any relevant application.²¹⁹

Identification and consultation of appropriate Indigenous parties

HERITAGE CONSERVATION ACT

²¹⁷ *Northern Territory Aboriginal Sacred Sites Act 1989 (NT)*, s. 28.

²¹⁸ *ibid.*, s. 22.

²¹⁹ *ibid.*, ss. 43, 47.

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 Aboriginal Sacred Sites Act* given after consultation with those Aboriginals it considers to be the traditional owners of the object.²²⁰

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.²²¹

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 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.²²²

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.'²²³ 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

²²⁰ *Heritage Conservation Act 1991* (NT), s. 29(2).

²²¹ *ibid.*, s. 8(c).

²²² *Northern Territory Aboriginal Sacred Sites Act 1989* (NT), s. 10(a).

²²³ *ibid.*, s. 20.

an agreement between custodian and applicant, which can form and inform the conditions placed upon the certificate granted by the Authority.²²⁴

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.'²²⁵

Integration of native title issues

There is little acknowledgement of native title in either the Heritage Conservation Act or the Sacred Sites Act.

The Heritage Conservation Act pre-dates the Native Title Act and thus makes no mention of native title.

The Sacred Sites Act also pre-dates the Native Title Act and, despite amendments in 2002, makes no mention of native title. The Regulations, however, make a brief mention of native title in relation to determining whether an application for a certificate is standard or non-standard. The Regulations state that a project requiring the extinguishment of native title rights is classed as a 'substantial project' and thus a non-standard application.²²⁶

Views on the Northern Territory heritage regime

The Heritage Conservation Act has attracted considerable controversy since its inception, largely in the sphere of European / built heritage. A 2007 paper by NT historian and heritage professional Robyn Smith labelled it 'one of Parliament's most bizarre and contradictory Acts' and as 'unfinished business.'²²⁷ Smith cited the controversy in 1997 surrounding the proposed demolition of the Old Alice Springs Gaol as a turning point in that legislation. This is when the NT government forced through amendments in response to a Supreme Court injunction. By inserting the clauses at section 39J, the Minister was allowed to authorise the carrying out of work, alteration, damage or desecration of a

²²⁴ *ibid.*, s. 22(1).

²²⁵ *ibid.*, s. 42.

²²⁶ *Northern Territory Aboriginal Sacred Sites Regulations* as at May 2004, regulation 2.2.1.

²²⁷ Smith, R. 2007. 'Heritage or Damage?' *Origins* 1: 26-29.

heritage place or object at his or her discretion. The result, according to Smith, was that 'heritage conservation could include heritage obliteration' and that it 'so radically altered the legislation that its primary purpose – the conservation of heritage – was totally defeated by the amendment.'²²⁸

The NT government announced a review of the Heritage Conservation Act in 2002, with extensive consultations and submissions, but a new Bill has yet to materialise.

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:

...points concerning these arrangements for the protection of Aboriginal land interests need to be made here. The first relates to the intended complementary relationship between the two regimes just described. The ALRA [Aboriginal Land Rights Act] provided the definition of a sacred site as, in part, 'a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition' (Section 3), and further created the offence of unauthorised entry onto a sacred site (Section 69). The Northern Territory's own sacred sites legislation, however, had its policy genesis in a decision by the Federal Government not to provide for all relevant matters within its own land rights legislation, but to allow subsequent 'reciprocal' legislation (ALRA Section 73) to be passed by the Northern Territory Parliament, then approaching self-government. Administration of a sacred sites protection process was considered an appropriate area for such reciprocal legislation. This has been an object of criticism by Land Councils who resent the denial of jurisdiction over a matter they perceive as properly a part of land rights, and mistrust the placing of that jurisdiction in the hands of a Northern Territory government dominated, from self-government in 1978 until 2001, by an openly pro-development Country Liberal Party. Consequently, there has been within the NLC persistent doubt as to the ability or the willingness of the Sacred Sites Authority to stand up forthrightly for Aboriginal interests.

The common policy origin of land rights and sites protection also 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.

²²⁸ *ibid.*, p. 27.

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.²²⁹

At the time of writing this report there appears to have been no plans by the Territory government to review and update the Sacred Sites Act.

²²⁹ Levitus, R. 2007, '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.
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