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spirit of Change

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Committee Secretariat
Joint Standing Committee on Northern Australia
PO Box 6021
Parliament House
CANBERRA
Canberra ACT 2600

Via Email: jscna@aph.gov.au

Dear Committee

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

The NNTC welcomes the opportunity to provide a submission to the Inquiry into the destruction of 46,000 year old caves at Juukan Gorge.

A copy of our submission is attached for the consideration of the Committee. I trust these comments are useful for your deliberations, however if you have any queries or require any further information, please do not hesitate to contact me at your convenience.

Yours sincerely

Jamie Lowe
Chief Executive Officer

National Native Title Council

Submission to the Joint Standing Committee on Northern Australia's Inquiry into the destruction of Juukan Gorge and Associated Matters

Introduction

The National Native Title Council (**NNTC**) welcomes the opportunity to make this submission to the Joint Standing Committee on Northern Australia Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia**.**

The NNTC is the peak body for Australia's Native Title Sector. Our members include:

- Prescribed Bodies Corporate established under section 55 of the *Native Title Act 1993* (**Native Title Act**), including The PKKP Aboriginal Corporation, and equivalent Traditional Owner Corporations such as those under the *Traditional Owner Settlement Act 2010* (Vic) (together "**PBCs"**); and

- Native Title Representative Bodies and Service Providers recognised under sections 203AD and 203FE of the Native Title Act, organisations that are tasked with representing native title holders and PBCs in relation to a number of issues, including negotiation of Indigenous Land Use Agreements and other agreements with mining companies for mineral exploration and extraction. These agreements often include provisions for the protection or management of cultural heritage.

The objects of the NNTC are, amongst other things, to provide a national voice for the Indigenous native title sector on matters of national significance affecting the native title rights and interests of Aboriginal and Torres Strait Islander people. Protecting, caring for and respecting culturally significant or sacred sites and landscapes form part of the native title rights and interests subject to section 211 of the Native Title Act. Such practices also form part of the evidentiary basis of native title claims.

The NNTC cannot speak directly to the consultation process undertaken by Rio Tinto with the Puutu, Kunti Kurrama and Pinikura People, the relationship between Rio Tinto and The PKKP Aboriginal Corporation, the agreement struck in relation to works undertaken at Juukan Gorge, or the heritage or preservation work conducted at the site (Inquiry Terms of Reference (b)-(e)). This submission notes, however, that the matter of Juukan Gorge shines a light on the ongoing disempowerment of Traditional Owners by laws that purport to protect their

interests and their cultural heritage, laws that fail spectacularly to approximate the right to self-determination and of Free Prior and Informed Consent.

The submission will focus on the Inquiry Terms of Reference (a), (f) – (j). Specifically:

> (a) the operation of the *Aboriginal Heritage Act 1972* (WA) and approvals provided under that Act;
>
> (f) the interaction, of state indigenous heritage regulations with Commonwealth laws;
>
> (g) the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;
>
> (h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;
>
> (i) opportunities to improve indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999 (**EPBC Act**); and
>
> (j) any other related matters.

In summary, this submission sets out the following points.

1. The NNTC notes that primary legislative responsibility for tangible Indigenous cultural heritage management and protection lies with the States and Territories across nine pieces of legislation, with some overlap with a further four Commonwealth Acts, resulting in substantial gaps and policy failures in Indigenous cultural heritage protection.

2. The NNTC notes that it is the expectation of the International community that national governments facilitate the right of Traditional Owners to manage and protect their cultural heritage (Articles 31.1 and Articles 32.1, United Nations Declaration of the Rights of Indigenous People, outlined below);

3. The NNTC submits that Commonwealth government give consideration to implementing a national regime for Indigenous cultural heritage in line with the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation (**Best Practice Standards**)[1] that are attached and described below;

4. The NNTC supports proposals that the national regime for Indigenous cultural heritage protection could be meaningfully incorporated as a matter of national

[1] The Best Practise Standards were developed by the Indigenous members for the Australian Heritage Council (AHC) and Heritage Chairs and Officials of Australia and New Zealand (HCOANZ), in consultation with the NNTC

"environmental" significance under the EPBC Act[2], and further supports the findings of the Interim Report into the EPBC Act by Professor Graeme Samuel AC[3], that:

i. The Act has not only "failed to fulfil its objectives as they relate to Indigenous Australians"[4], but entrenches "a culture of tokenism and symbolism, rather than one of genuine inclusion of Indigenous Australians"[5].

ii. Indigenous Australians seek, and are entitled to expect, stronger national-level protection of their cultural heritage[6] and that the government should consider the role of the Act (or new set of related Acts) in providing national level protections[7];

iii. Reforms to the Act as they relate to Indigenous heritage protection and Traditional owner management of their land must be designed with Indigenous Australians;[8]

iv. The Best Practice Standards (attached) provide a "basis on which to comprehensively review how Indigenous heritage is protected by national laws in Australia, and how national laws should interact with state-based arrangements".[9]

5. The NNTC supports proposals that any such national Indigenous cultural heritage regime include:

i. Blanket protection for Indigenous cultural heritage subject only to authorisations for disturbances granted with the consent of affected Indigenous communities;

ii. Accreditation of State and Territory Indigenous cultural heritage regimes where they operate to the standard of the Best Practice Standards;

iii. That any authorisation for an action that could significantly impact upon Indigenous cultural heritage would require authorisation gained in one of three ways:

[2] Victorian Aboriginal Heritage Council, Initial Submission to the Independent Review of the EPBC Act, 2020
[3] Interim Report into the Independent Review of the EPBC Act, Professor Graeme Samuel AC June 2020
[4] Ibid page 1
[5] Ibid page 32
[6] Ibid
[7] Ibid page 6
[8] Ibid pages 35-36
[9] Ibid page 38

- through approval under an accredited state or territory Indigenous cultural heritage legislation;

- in jurisdictions without accredited State or Territory legislative regimes, through approval subsequent to referral to existing Indigenous structures such as that under the Commonwealth's Native Title Act (so as to ensure satisfaction of the requirements of the principles of self-determination); or,

- in jurisdictions without accredited state or territory legislative regimes and in areas where there is no relevant existing structure under the Native Title Act through approval by the Minister subsequent to referral to appropriate accountable Indigenous decision-making structures established for the purposes of the Act.

iv. That the national legislation recognises the status of Traditional Owners, of items of movable cultural heritage, including Ancestral Remains, and the commercial exploitation of intangible Indigenous cultural heritage.[10]

Current State

<u>The example of Juukan Gorge</u>

As stated, the NNTC will not make submissions in relation to Inquiry Terms of Reference (b)-(e): the consultation processes undertaken by Rio Tinto in relation to Juukan Gorge, the relationship between Rio Tinto and The PKKP Aboriginal Corporation, the agreement struck between the parties, or the heritage or preservation work conducted at the site.

We submit, however, that the matter of Juukan Gorge shines light on the ongoing disempowerment of Traditional Owners by laws that purport to protect their interests and their cultural heritage, laws that fail spectacularly to approximate the right to self-determination and of Free Prior and Informed Consent.

In Western Australia, Traditional Owners are faced with the combination of the *Aboriginal Heritage Act 1972* (WA), which provides no decision making power to Traditional Owners in relation to their cultural heritage and is arguably a law designed to systematise destruction, and the Native Title Act that provides a 6 month window in which they must negotiate with mining companies or face an arbitral outcome that permits mining projects to proceed without any benefits.

This means that the lack of equal bargaining power extends beyond the obvious inequality of resources, it is entrenched by a legal framework that renders Traditional Owners reliant on the benevolence of industry standards and practice. It results in agreements that can and do make

[10] Victorian Aboriginal Heritage Council, Initial Submission to the Independent Review of the EPBC Act, 2020

provision for protection of cultural heritage but also enables the pretence that when destruction is authorised under agreement, it is what Traditional Owners would have agreed had legislation given them the right to say no. This system not only destroys cultural heritage, but it is corrosive of the very basis and identity of Traditional Owner groups, their capacity to protect what is theirs, to make decisions about matters that affect their lives and communities. The deep psychological and spiritual impact of this destruction cannot be underestimated.

In situations such as Juukan Gorge, the Commonwealth Indigenous cultural heritage regime, specifically through the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**), operates as a mechanism of last resort when State and Territory legislation fails to protect the relevant cultural heritage. The operation of the ATSIHP Act is dealt with below.

States and Territories

This situation is repeated across Australia to varying degrees. In general, primary legislative responsibility for tangible Indigenous cultural heritage management and protection lies in State and Territory legislation, including the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT); *Aboriginal Cultural Heritage Act 2003* (Qld); *Torres Strait Islander Cultural Heritage Act 2003* (Qld); *Aboriginal Heritage Act 1972* (SA); *Aboriginal Relics Act 1975* (Tas); *Aboriginal Heritage Act 2006* (Vic) and the *Aboriginal Heritage Act 1972* (WA). In New South Wales and the Australian Capital Territory the *National Parks and Wildlife Act 1974* (NSW) and the *Heritage Act 2004* (ACT) also contain provisions that deal specifically with Aboriginal cultural heritage management.

Of these Acts, the Victorian *Aboriginal Heritage Act 2006* comes closest to embedding the legal norms contained in the UNDRIP in particular, the right of Traditional Owners to maintain, control, protect and develop their cultural heritage, and the requirement of Free, Prior and Informed Consent. It is also the only State or Territory legislation with a regime directly applicable to intangible heritage. At the other end of the spectrum lies the Western Australian *Aboriginal Heritage Act 1972,* an Act that remains obdurately and egregiously out of step with modern standards of heritage management, but also and more importantly, the rights and reasonable expectations of Aboriginal people and the broader Australian public.

The WA Aboriginal Heritage Act predates native title and the *Racial Discrimination Act 1975* (Cth). The Western Australian government's Discussion Paper on the review of the Act in 2019[11] states:

> The overwhelming weight of stakeholder feedback is that the current Aboriginal Heritage Act 1972 neither reflects the changed social and legal landscape that has led to the formal recognition of Aboriginal people's deep connections to the land and their culture, nor modern approaches to heritage management generally. Indeed, many of these concepts cannot be comfortably incorporated into the scheme of the current Act, which envisages only a limited formal role for Aboriginal people in its workings. Consequently, modernising the system of

[11] Review of the Aboriginal Heritage Act 1972, Discussion Paper March 2019, Government of Western Australia

protection for Aboriginal heritage in Western Australia needs more than amendment to the existing Act: a new Act is required.[12]

The following observations have been longstanding in relation to the WA Aboriginal Heritage Act:

- There is no statutory requirement for Traditional Owners to participate in decisions in relation to their own cultural heritage;
- The Act does not encourage protection of Aboriginal heritage through co-existence with compatible land uses or modification of proposals to avoid impacts.
- The Act does not recognise the heritage outcomes resulting from agreements made under the Native Title Act between land use proponents and Native Title holders.
- The Act does not provide for any right of appeal by Aboriginal people in relation to decisions about their cultural heritage, whereas developers have long enjoyed the right under the Act to apply for ministerial consent to "disturb" any Aboriginal site in the state and the right to appeal such ministerial decisions.

The NNTC supports calls to the Western Australian Government that the WA Aboriginal Heritage Act is completely out of step with Indigenous rights' protections and modern heritage practices and that the Western Australian government should be encouraged to repeal and replace that legislation in its entirety.[13]

However, for the purposes of this submission, the NNTC notes that it is the expectation of the International community that **national** governments facilitate the rights of Traditional Owners to manage and protect their cultural heritage. On this basis the Commonwealth government is encouraged to enact a national regime of Indigenous cultural heritage protections as set out in the Best Practice Standards.

Commonwealth

The Commonwealth Indigenous cultural heritage regime largely exists in two Acts, being the EPBC Act and the ATSIHP Act.[14]

The EPBC Act provides protection to those places or objects that are listed on the National Heritage List and the Commonwealth Heritage List, and are therefore deemed to be of "national environmental significance".[15] "National heritage" value equates to "outstanding heritage value to the nation" because of, inter alia, the place's importance in Australia's history, or because of its unique aesthetic

[12] ibid
[13] Review of the Aboriginal Heritage Act 1972, Discussion Paper March 2019. Western Australian Government Department Planning Lands and Heritage
[14] A further two Commonwealth Acts dealing with cultural heritage are The *Movable Cultural Heritage Act 1986* (Cth) deals (inter alia) with non-land based (movable) tangible Indigenous cultural heritage. The *Copyright Act 1968* (Cth) deals (again inter-alia) with some aspects of intangible Indigenous cultural heritage.
[15] EPBC Act s3(1)

characteristics valued by a particular cultural group. Any action which would have "significant impact" within or outside National Heritage places requires approval under the EPBC Act.[16] To gain a place on the Commonwealth Heritage List, the item must have "Commonwealth heritage values," which equates to "significant heritage value" and must be within a Commonwealth area or, if outside Australian jurisdiction, owned or leased by the Commonwealth.[17] The threshold for heritage protection under this legislation is very high.

The ATSIHP Act was always intended as legislation of "last resort" only deployed when relevant state and territory legislation failed in addressing Indigenous concerns regarding the injury or desecration of an Aboriginal object or area of significance.[18] The Act allows the Commonwealth Minister for the Environment to declare an area "of particular significance" to Aboriginal people[19] to be preserved under the Act in order to protect them from serious and immediate threats of injury or desecration.[20] The declaration can only be made in response to a request from an Indigenous person,[21] where there is no State or Territory law to protect that site or object.[22] These declarations can only stop activities; they cannot compel conservation or repairs to damaged areas.

Multiple reviews of the ATSIHP Act point to its low record of protection and question the acceptability of the Commonwealth to limit itself to "last resort" cultural heritage legislation. A Commonwealth review of the ATSIHP Act in 2009, found that the ATSIHP Act had not proven to be an effective means of protecting traditional areas and objects, with 93% of approximately 320 applications received since the Act commenced in 1984, not resulting in declarations.[23] A further report in 2017, found that between 2011 and 2016, 61 applications were received under ss. 9, 10 or 12 of the Act with no declarations made.[24]

The Commonwealth regime leaves a substantial gap between the protections afforded by the EPBC Act (and its high thresholds for placement on either the National or Commonwealth Heritage Lists) and the ATSIHP Act that operates as legislation of last resort and has a poor record of protection. This places a heavy reliance on inconsistent and often similarly out of date State and Territory Indigenous cultural heritage protections. The resulting gaps and policy failures of Indigenous cultural heritage protection can be articulated as a by-product of our Federal structure, whereby State and Territories are, for the most part, responsible for Indigenous cultural heritage protection. However, this misses the point, Indigenous cultural heritage protection is and should be the responsibility of Traditional

[16] EPBC Act s341D
[17] EPBC Act s341C
[18] Graeme Neate, "Power, Policy, Politics and Persuasion – Protecting Aboriginal Heritage under Federal Laws" (1989) *Environment and Planning Law Journal,* 214 – 248 at, 223 citing *Hansard,* House of Representatives 9 May 1984 p 2129; Senate 6 June 1984, p 2587.
[19] ATSIHP Act ss 3, 9(1)(b)(i)
[20] ATSIHP Act ss9, 10
[21] ATSIHP Act s9(1)(a)
[22] ATSIHP Act ss7, 13(2),
[23] Hawke, A "The Australian Environment Act: Report of the Independent Review of the EPBC Act 1999" 2009, p294
[24] Richard Mackay, *Australia State of the Environment 2016 – Heritage*, Commonwealth of Australia, Canberra 2017, 84.

Owners and it is the expectation of the International community that national governments facilitate Traditional Owner rights to manage and protect their cultural heritage.

Subsequent to the calling of this Inquiry, Professor Graeme Samuel AC released his Interim Report into the EPBC Act.[25] That report is scathing of the operation of the EPBC Act across all of its functions including as to how it protects, or indeed fails to protect, Indigenous cultural heritage. In particular, the NNTC supports the following findings of Professor Samuel's report.

- The Act has not only "failed to fulfil its objectives as they relate to Indigenous Australians"[26], but entrenches "a culture of tokenism and symbolism, rather than one of genuine inclusion of Indigenous Australians" and "does not have the mechanisms to require explicit consideration of Indigenous community values and Indigenous knowledge in environmental and heritage management decisions" [27].

- The Act "is complex, its construction is archaic, and does not meet best practice for modern regulation… comprehensive redrafting of the Act (or new set of related Acts) is required" [28].

- Indigenous Australians seek, and are entitled to expect, stronger national-level protection of their cultural heritage[29] and that the government should explicitly consider the role of the Act (or new set of related Acts) in providing national level protections[30].

- Reforms to the Act as they relate to Indigenous heritage protection and Traditional owner management of their land must be designed with Indigenous Australians.[31]

- A National Environmental Standard for best-practice Indigenous engagement is required to ensure that Indigenous Australians that speak for Country have had the proper opportunity to do so, and for their views to be explicitly considered in decisions. The proposed National Environmental Standard for best practice Indigenous engagement should be developed in close collaboration with Indigenous Australians and be applied to all aspects of decision-making under the Act.[32]

[25] Loc it
[26] Ibid page 1
[27] Ibid p32
[28] Ibid page 6
[29] Ibid
[30] Ibid page 6
[31] Ibid pages 35-36
[32] Ibid pages 36-37

The NNTC further notes that Professor Samuels expressly refers to the Best Practice Standards (attached) as a "basis on which to comprehensively review how Indigenous heritage is protected by national laws in Australia, and how national laws should interact with state-based arrangements".[33]

Native Title

Native Title does little to alter this situation and only applies where native title rights are judicially recognised or at least registered. Where they are recognised, native title rights will rarely amount to rights of exclusive possession sufficient to allow Traditional Owners to effectively protect their cultural heritage.

*Under the Native Title Act, significant land use proposals (such as the grant of mining rights) trigger the Act's "right to negotiate" provisions. This is a negotiation procedure whereby the developer or miner has 6 months to negotiate with native title holders to reach agreement about the proposed land use. However, if agreement is not reached within 6 months either party can take the matter to arbitration to the National Native Title Tribunal (**NNTT**) to determine whether the proposed land use can proceed. While the parties are under an obligation to negotiate "in good faith" prior to taking the matter to arbitration, "good faith" has revealed itself a low bar with the NNTT most often finding in favour of the developer or miner and allowing the proposed land use to proceed with few conditions. (*Between 2009 and 2017 the NNTT dealt with over 100 applications to arbitrate the grant of a mining title because agreement could not be reached between the parties. On only two occasions has there been a determination that the grant of a mining title could not proceed.[34]) *It is noted that the NNTT is expressly prohibited from making any conditions relating to royalties (or equivalents) in its determination (s38(2)).*

In this way, the Native Title Act entrenches inequality. *Both sides to the negotiation know that unless the native title holders acquiesce to the developer or miner's suggested terms the alternative is an arbitrated outcome, likely in the favour of the developer or miner without any provisions for the awarding of compensation, royalties or other arrangements for financial settlement.*

This analysis holds true whether or not land use proposals are negotiated as "right to negotiate" agreements (otherwise knowns as section 31 Agreements) or under the Native Title Act's alternative Indigenous Land Use Agreements (such as the one between the Rio Tinto with the Puutu, Kunti Kurrama and Pinikura People)*. This is because, should negotiations for an Indigenous Land Use Agreement stall, the developer or miner can seek for the relevant notification processes required to trigger the right to negotiate process, thereby falling within the NNTT's arbitral jurisdiction at the end of the six month timeframe.*

From this system emerge agreements that can and do make provision for protection of cultural heritage but there are many that allow for destruction of significant cultural heritage. Regardless of

[33] Ibid page 38

[34] Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji, [2011] NNTTA 172 (21 September 2011); and Western Desert Lands Aboriginal Corporation (Jamukurnu - Yapalikunu)/Western Australia/Holocene Pty Ltd, [2009] NNTTA 49 (27 May 2009).

outcomes, none of these agreements can be understood within a framework of true consent, or within the meaning of Free Prior and Informed Consent.

A large number of agreements between mining companies and Traditional Owners, have provisions that prevent Traditional Owners from objecting publicly about any action of the company, and further provisions release the company from any actions, objections or claims of any kind under Commonwealth and State laws. It might be assumed, therefore, that some of these agreements prevent Traditional Owners accessing the last resort measure in the ATSIHP Act.

The NNTC also understands that native title mining agreements in Western Australia may contain confidential restrictions on the way in which native title groups can communicate with public agencies and officials. For example, if a native title group believes an offence has been committed by a mining company they may be contractually bound not to report that offence to the relevant authority, without providing prior notification to the company and/or engaging in a protracted preliminary consultation process. Alternatively, where a public official (such as the Registrar under the *Aboriginal Heritage Act 1972* (WA)) requests information from the native title group, as part of a statutory process, the group may be contractually bound not to provide that information directly to the public official.

There has been a long-standing concern amongst legal advisors to native title groups in Western Australia that these kinds of restrictive contractual obligations are unlawful, or that inclusion of them in a contract may itself be an offence. For instance, such restrictive contractual obligations may:

- compound or conceal an offence, contrary to s136 of the *Criminal Code* (WA);
- be prejudicial to the administration of justice, at common law;
- be inconsistent with the native title group's right to make appropriate disclosures of public interest information under the *Public Interest Disclosure Act 2003* (WA);
- be contrary to s111A *Environmental Protection Act 1986* (WA); and/or
- be contrary to s54 *Aboriginal Heritage Act 1972* (WA).

A mechanism should be established to ensure that there is some oversight of the confidential terms of native title agreements to ensure compliance with the law. Without some level of transparency, some mining companies may use their negotiating leverage under the Native Title Act to insist on confidential terms that may place the parties to their agreements in breach of the law.

It is further noted, there are many land use proposals that do not trigger the right to negotiate. Many land use proposals only result in native title holders having a right to be consulted or sometimes simply to be notified in regard to a proposal.[35] Some of these works cause significant disruption to, and destruction of, cultural heritage.

Best Practice Standards

The Best Practice Standards were developed by the Indigenous members for the Australian Heritage Council (**AHC**) and Heritage Chairs and Officials of Australia and New Zealand (**HCOANZ**), in

[35] See Native Title Act s 24JA, 24JB(2) and 24KA.

consultation with the NNTC and the Victorian Aboriginal Heritage Council[36]. The Australian Heritage Council is established under the *Australian Heritage Council Act 2003* and is the principal adviser to the Australian Government on heritage matters under the EPBC Act. The HCOANZ is a regular forum of State and Territory (and NZ) heritage authority Chairs and their officials convened by the Commonwealth statutory authority, the Australian Heritage Council. The Best Practice Standards have been endorsed by the NNTC, the VAHC, the HCOANZ and the AHC.

The Best Practice Standards are drafted on the foundational principle that Australia's Indigenous Peoples are entitled to expect that Indigenous cultural heritage legislation will uphold the legal norms contained in the United Nations Declaration on the Rights of Indigenous Peoples.[37] This principle is missing from the WA Aboriginal Heritage Act and most other Australian legislation that determines the capacity of Indigenous Australians to protect their cultural heritage.

It is worth emphasising the following from the Best Practice Standards:

> The United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) was adopted by the UN General Assembly on 13 September 2007. The Commonwealth Government announced its support for the declaration in 2009. The UNDRIP does not impose new international legal obligations on states. Rather, it restates existing international legal obligations but framed in the specific context of Indigenous Peoples. The UNDRIP is widely understood by the world's Indigenous Peoples as articulating the minimum standards for the survival, dignity, security and well-being of Indigenous Peoples worldwide. [38]

The Best Practice Standards sets out Articles of UNDRIP that directly relate to the enjoyment, management and protection of Indigenous Cultural Heritage.[39] Critically, Articles 31.1 and Article 32.2, provide:

> Article 31.1
>
> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage.
>
> Article 32.1
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Acceptance of the UNDRIP obligations is increasingly a requirement of the processes of many multi-national agencies and organisations. The International Finance Corporation, the Equator Principles,

[36] established under s 130 of the *Aboriginal Heritage Act 2006* (Vic.)
[37] *Best Practice Standards in Indigenous Cultural Heritage Management and Legislation*, HCOANZ page 2
[38] *ibid*
[39] *Ibid* and by Annexure.

the International Council of Mines and Metals and the UN Guiding Principles on Business and Human Rights are merely some examples of this general acceptance.[40]

In summary, the Best Practice Standards provide for:

1. A comprehensive definition of Indigenous cultural heritage that recognises that Indigenous cultural heritage is a living phenomenon;

2. Legislation that is structured so that it provides a blanket protection for Indigenous cultural heritage subject only to authorisations granted with the consent of affected Indigenous communities;

3. Authorisations for disturbances of Indigenous cultural heritage to be made by an Indigenous organisation that is genuinely representative of Traditional Owners. Legislation should include mechanisms for the identification and appointment of an organisation that can genuinely be accepted as the 'representative organisation' of the affected community to undertake this role;

4. Indigenous cultural heritage issues to be considered early in any development process;

5. Indigenous communities to be provided with adequate resources to manage Indigenous cultural heritage processes;

6. Enforcement regimes that are effective and broadly uniform;

7. Regimes for the management of Indigenous ancestral remains and secret or sacred objects based on the primacy of Traditional Owners;

8. Recognition of frontier conflict sites is undertaken only with the participation and agreement of affected Indigenous communities.

Proposed legislative structure

The NNTC supports the following proposal in relation to national Indigenous cultural heritage regime put forward by the Victorian Aboriginal Heritage Council.[41]

Accreditation of State and Territory Indigenous cultural heritage legislative regimes.

Accreditation of State and Territory Indigenous cultural heritage regimes where they operate to the standard of the Best Practice Standards and address practical requirements in relation to matters such as Definitions; Indigenous Self-Determination; Process; Indigenous Ancestral Remains; Secret and Sacred Indigenous cultural heritage; and Intangible Indigenous cultural heritage.

[40] *ibid*

[41] Victorian Aboriginal Heritage Council, Initial Submission to the Independent Review of the EPBC Act, 2020

Reference to Native Title Structures in Jurisdictions Without Accredited Regimes

The key to UNDRIP is the principle of self-determination. In the context of Indigenous cultural heritage this principle requires that the affected Indigenous Community itself should be the ultimate arbiter of the management of the Indigenous cultural heritage aspects of any proposal that will affect that heritage.

Application of the UNDRIP is, in a practical sense, dependent upon the ability of the affected Indigenous Peoples to act collectively and independently. Thus, in the crucial UNDRIP Article 32, reference is made to Indigenous Peoples acting through "their own representative organisations". Identification of the legitimate representative organisation of a particular Indigenous Peoples can, at times, be challenging, however, Australia has existing examples. In the context of Indigenous cultural heritage in Australia, the rigorous processes associated with the appointment of Prescribed Bodies Corporate (PBCs) under the *Native Title Act 1993* ensure that such organisations, where they exist, satisfy the definition of "representative organisations" under UNDRIP. In Victoria, the *Aboriginal Heritage Act 2006* provides for the legal recognition of Traditional Owner corporations with responsibilities for managing and protecting the cultural heritage of the Traditional Owners they represent. Further, in the Northern Territory, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) provides the Land Councils a statutory function to assist Traditional Owners to protect their sacred sites, both on and off Aboriginal land.

Thus, where an organisation that is representative of Traditional Owners exists, Indigenous cultural heritage legislation should vest in that organisation control of the management of the Indigenous cultural heritage aspects of any proposal that will impact upon the Indigenous cultural heritage of those Traditional Owners.

Where such an organisation does not yet exist, it may be that there are Traditional Owner organisations that can be legitimately characterised as "representative organisations". The Commonwealth Indigenous cultural heritage legislative regime should consider including mechanisms for the identification and appointment of such organisations to undertake this role. In areas where no PBC or other organisation representative of Traditional Owners has been established, a Native Title Representative Body may have authority to perform this role or, alternatively, to serve as the accountable Indigenous structure as discussed below.

Accountable Indigenous Structures in other circumstances

In jurisdictions where there is not an accredited State or Territory Indigenous cultural heritage legislative regime and in the areas of those jurisdictions where there is no PBC or other organisation representative of Traditional Owners a question arises as to how to ensure the necessary level of Traditional Owner control over decisions affecting their cultural heritage. Two potentially complementary approaches present themselves. The first, as alluded to above, is for the Commonwealth legislation to include a procedure for recognition of a Traditional Owner corporation for the purposes of Indigenous cultural heritage decision making either in its own right or through advice to the Minister.

Where there is no Traditional Owner corporation, the second approach would require a process for identifying the correct Traditional Owners for an area of country, or failing that, all Traditional Owners

who assert interests in that area of country. It is only those Traditional Owners who could made cultural heritage decisions in relation to that area of country. Of course, the challenge to be faced with both these approaches is in ensuring that whichever structure is utilized is in fact representative as far as possible of relevant Traditional Owners.

Conclusion

The NNTC appreciates the opportunity to make this submission to the Joint Standing Committee on Northern Australia about the issues of Indigenous cultural heritage raised in the Inquiry's terms of reference. As the peak body for Australia's Indigenous native title sector, we are well versed in the difficulties and manifest disempowerment faced by our PBC members when negotiating development and mining agreements that impact upon their cultural heritage. We reiterate, that it is our view that the Commonwealth government is best placed to implement an Indigenous cultural heritage regime capable of ensuring the right of Traditional Owners to manage and protect their cultural heritage, a view consistent with the expectations of the International community.

The NNTC is also appreciative of the work undertaken over the last two years by the Indigenous members for the Australian Heritage Council and Heritage Chairs and Officials of Australia and New Zealand on the development of the Best Practice Standards, and the additional work undertaken by the Victorian Aboriginal Heritage Council on the legislative structure for a national regime that could be considered for incorporation within the existing EPBC Act.

The NNTC commends both the Best Practice Standards and the proposed legislative structure to the Joint Standing Committee as part of its considerations of how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites and the opportunities to improve indigenous heritage protection through the EPBC Act or new set of related Acts.

Attachment

HERITAGE CHAIRS AND OFFICIALS OF AUSTRALIA AND NEW ZEALAND

Indigenous Chairs and Officials Paper

Best Practice Standards in Indigenous Cultural Heritage Management and Legislation

DRAFT ONLY (Revision #7 9/06/20)

Outline

1. **Background**
2. **Basic Principles**
3. **Best Practice Standard – Basic Structures**
4. **Best Practice Standard – Definitions**
5. **Best Practice Standard – Incorporation of Principles of Self Determination**
6. **Best Practice Standard – Process**
7. **Best Practice Standard – Resourcing; engagement and enforcement**
8. **Best Practice Standard – Indigenous Ancestral Remains**
9. **Best Practice Standard - Secret and Sacred Objects**
10. **Management of Frontier Conflict Sites**
11. **National Legislation and Intangible Indigenous Cultural Heritage**

Annexure – Extracted Articles from the UN Declaration on the Rights of Indigenous Peoples

1. Background

In Australia legislative responsibility for the protection, promotion and management of Indigenous Cultural Heritage is divided between the states and territories and the Commonwealth. This division has long been the foundation of aspirations to ensure consistency across jurisdictions while also ensuring that the level of protection of Indigenous Cultural Heritage (ICH) and the level of control over our cultural heritage enjoyed by Australia's First Peoples, is of the highest standard.

In May 2018 the Heritage Chairs and Officials of Australia and New Zealand adopted the "Darwin Statement". Under the Darwin Statement the members of the HCOANZ agreed to implement best practice cultural heritage principles including the inclusion and engagement of Aboriginal and Torres Strait Islander peoples. As part of the HCOANZ commitment to implementing the principles of the Darwin Statement, over 2019 and 2020 both in Australia and Aotearoa/New Zealand, HCOANZ engaged particularly with Indigenous Heritage Chairs and Officials and with many Indigenous organisations and leaders.

As a result of this engagement, the HCOANZ Indigenous Chairs group developed these *Best Practice Standards for Indigenous Cultural Heritage Legislation* (Standards). These Standards have been drafted by the Indigenous Chairs and officials who form part of the broader HCOANZ and brought forward by the Indigenous Chairs to HCOANZ. The objective of the Standards is to achieve the aspirations identified above; that is *to facilitate ICH Legislation and policy across the country that is consistently of the highest standards*.

2. Basic Principles

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly on 13 September 2007. The Commonwealth Government announced its support for the declaration in 2009. The UNDRIP does not impose new international legal obligations on states. Rather, it restates existing international legal obligations but framed in the specific context of Indigenous Peoples. The UNDRIP is widely understood by the world's Indigenous Peoples as articulating the minimum standards for the survival, dignity, security and well-being of Indigenous Peoples worldwide. Acceptance of the UNDRIP obligations is increasingly a requirement of the processes of many multi-national agencies and organisations. The International Finance Corporation, the Equator Principles, the International Council of Mines and Metals and the UN Guiding Principles on Business and Human Rights are merely some examples of this general acceptance.

A number of the provisions of UNDRIP directly address issues associated with the enjoyment, management and protection of ICH. Articles 11, 12, 13, 18, and 31 are examples of this. A number of other provisions of UNDRIP indirectly impact upon ICH. Provisions of UNDRIP that recognise the obligation to ensure the Free Prior and Informed Consent of affected Indigenous Peoples before the approval of any project that affects Indigenous Peoples' lands or the resources therein (particularly Article 32) are an example of this as is Article 40 dealing with dispute resolution. The relevant provisions of UNDRIP are attached as an annexure to this statement.

As a foundational principle, Australia's Indigenous Peoples are entitled to expect that Indigenous Cultural Heritage legislation will uphold the international legal norms contained in the UNDRIP.

The rights set out in UNDRIP are also recognised in a range of domestic legislation such as the *Human Rights Act 2019* (Qld) and the *Charter of Human Rights and Responsibilities 2006* (Vic.).

While the UNDRIP provides the foundational principles that all ICH legislation should uphold, the Declaration is not a comprehensive code or model legislation that addresses all matters that need to be included in ICH legislation. Therefore, the following Standards have been developed by the HCOANZ to identify some of these additional matters under the following headings: Definitions; Basic

Structures; Indigenous Self-Determination; Process; Resourcing; Indigenous Ancestral Remains; Secret and Sacred ICH; Frontier Conflict Sites; and, National Intangible ICH Legislation.

3. Best Practice Standard – Basic Structures

There are two basic models utilised in ICH legislation. The first prohibits harm to ICH only when there is a particular declaration in force in the place where the ICH is located. The second prohibits any interference to ICH that satisfies the statutory definition *unless* there is a statutory authorisation in place. The second model is by far the most effective and most ICH legislation operates on this basis, but this is not universally the case. There are examples, at both a state and Commonwealth level, of legislation that operates on the basis that ICH is only protected subsequent to some form of Ministerial declaration. ICH legislation structured only in this fashion cannot be seen as adequate. However, for the prohibition of harm unless authorised model to be effective there must be a comprehensive definition of ICH. This matter is considered in the following section of these Standards. Many of the following sections consider the appropriate structures and processes around the authorisation to interfere with ICH so defined.

4. Best Practice Standard – Definitions

ICH is at the heart of all Australian Heritage and should be celebrated by all Australians as the foundation of Australia's unique cultural heritage. However more than anything else ICH is the living phenomenon connecting Traditional Owners' culture today with the lives of our ancestors. In legislation, this connection is described in the definitions of key terms such as "Aboriginal or Torres Strait Islander cultural heritage" or "Aboriginal and Torres Strait Islander place". These definitions should recognise that an essential role of ICH is to recognise and support the *living* connection between Indigenous Peoples today, our ancestors and our lands. It is crucial that definitions of ICH within legislation should recognise the role of "tradition" as it is understood *today* in the definition of what is ICH.

In similar fashion, ICH legislation must comprehend that, while physical artefacts provide an important ongoing physical representation of Indigenous Peoples' connection to their country over time, definitions of the manifestations of ICH must also comprehend the importance of the *intangible* aspects of physical places. It is in this way that a physical landscape can be properly understood as a living place inhabited by our ancestors and creators. Likewise, intangible ICH not necessarily immediately connected to physical places must also be recognised in legislation.

The definitions in several pieces of existing legislation are a useful illustration of these concepts. For example, the *Aboriginal Heritage Act 2006* (Vic.) (AHA) has the following definitions:

> ***(AHA s 4) Aboriginal cultural heritage*** *means Aboriginal places, Aboriginal objects and Aboriginal ancestral remains;*
>
> ***(AHA s 5) What is an Aboriginal place?***

(1) *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 Aboriginal people generally or of a particular community or group of Aboriginal people in Victoria.*

(2) *For the purposes of subsection (1),* ***area*** *includes any one or more of the following—*

(a) *an area of land;*

(b) *an expanse of water;*

(c) *a natural feature, formation or landscape;*

(d) *an archaeological site, feature or deposit;*

(e) *the area immediately surrounding anything referred to in paragraphs (c) and (d), to the extent that it cannot be separated from the thing without diminishing or destroying the cultural heritage significance attached to the thing by Aboriginal people;*

(f) *land set aside for the purpose of enabling Aboriginal ancestral remains to be re-interred or otherwise deposited on a permanent basis;*

(g) *a building or structure.*

Aboriginal tradition *means—*

(a) *the body of traditions, knowledge, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people; and*

(b) *any such traditions, knowledge, observances, customs or beliefs relating to particular persons, areas, objects or relationships;*

The *Northern Territory Aboriginal Sacred Sites Act 1989* utilises the following definitions of "Aboriginal Tradition" and "Sacred Site"[42]

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

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSHIPA) adopts a similar definition of "Aboriginal tradition:"[43]

[42] These definitions are contained in s 4 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
[43] Noting that Aboriginal is defined to include Torres Strait Islander – ATSIHPA s 3(1).

> …the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships.

The term "area" is defined to include a "site" and a "significant Aboriginal area" is relevantly defined to mean "an area of particular significance to Aboriginals in accordance with Aboriginal tradition". The term "significant aboriginal object" is defined in similar terms.

ATSHIPA subsections 3(2) and 3(3) provide the definitions of "injury" or "desecration" which also acknowledge that these acts should be determined by how Aboriginal or Torres Strait Islander people *today* perceive them. They are in the following terms:

> *(2) For the purposes of this Act, an area or object shall be taken to be injured or desecrated if:*
>
> *(a) in the case of an area:*
>
> *(i) it is used or treated in a manner inconsistent with Aboriginal tradition;*
>
> *(ii) by reason of anything done in, on or near the area, the use or significance of the area in accordance with Aboriginal tradition is adversely affected; or*
>
> *(iii) passage through or over, or entry upon, the area by any person occurs in a manner inconsistent with Aboriginal tradition; or*
>
> *(b) in the case of an object—it is used or treated in a manner inconsistent with Aboriginal tradition;*
>
> *and references in this Act to injury or desecration shall be construed accordingly.*

At times case law may have given an over emphasis to the historical components of tradition.[44] However, the essential aspect of the definitions provided, all of which were developed in consultation with Traditional Owners, is that the central lynchpin is how Traditional Owners *today* perceive their cultural heritage which is the crucial issue.

A similar issue arises in the context of intangible ICH. The only example of a legislative definition of intangible ICH in Australia is in s 5 of the Victorian AHA which (relevantly) provides:

> *(1) …**Aboriginal intangible heritage** means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public.*
>
> *(2) Aboriginal intangible heritage also includes any intellectual creation or innovation based on or derived from anything referred to in subsection.*

This definition then also adopts the key definition of "tradition" with its reliance on a contemporary Traditional Owner understanding of its content.

[44] *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106.

5. Best Practice Standard – Incorporation of Principles of Self Determination

The key to UNDRIP is the principle of self-determination. In the context of ICH, this principle requires that the affected Indigenous Community *itself* should be the ultimate arbiter of the management of the ICH aspects any proposal that will affect that heritage.

Application of the UNDRIP is, in a practical sense, dependent upon the ability of the affected Indigenous Peoples to act collectively and independently. Thus, in the crucial UNDRIP Article 32, reference is made to Indigenous Peoples acting through "their own representative organisations". Identification of the legitimate representative organisation of a particular Indigenous People can, at times, be challenging. Despite this the identification of a legitimate "representative organisation" capable of exercising an Indigenous community's rights and responsibilities with respect to their ICH is a fundamental component in any comprehensive ICH legislation

In the context of ICH in Australia, the rigorous processes associated with the appointment of Prescribed Bodies Corporate (PBCs) under the *Native Title Act 1993* (Cth) can ensure that such organisations, where they exist, satisfy the definition of "representative organisations" under UNDRIP. Thus, where a PBC exists, it would be expected that ICH legislation would vest in that PBC control of the management of the ICH aspects of any proposal that will impact upon the ICH of the PBC's native title holders.

Greater difficulty arises where a PBC does not yet exist. ICH legislation should include mechanisms for the identification and appointment of an organisation that can genuinely be accepted as the "representative organisation" of the affected Indigenous community to undertake this role.

6. Best Practice Standard – Process

The role of ICH in the process of consideration of development proposals in a jurisdiction is important. So, to is the process of consideration of the management of ICH in the context of a specific proposal. A central component of the principle of Free, Prior and Informed Consent under UNDRIP is that the affected Indigenous community has adequate information and adequate time to consider that information in making any decision that may affect their ICH. This fact impacts upon two aspects of a jurisdiction's development proposal consideration process. First, decisions regarding ICH management cannot be left to be the last consecutive approval required in the assessment of a development proposal. Rather, ICH consideration must be integrated as early as possible into development proposal assessment time frames. This ensures both adequate time to consider a proposal and that ICH considerations are not perceived as the "last impediment" to development proposal approval. This principle is already incorporated into many existing government policies. The Commonwealth Governments "*Engage Early - Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)*" is an example of such a policy.

This temporal integration of process should also strive to ensure that consideration of ICH is included as a component in other development proposal approval regimes such as town planning, environmental assessment and National Heritage considerations.

The second component is that, consistent with the principles of UNDRIP, the ultimate decision regarding whether an interference with ICH is acceptable or not, must rest with the affected Indigenous community. However, a jurisdiction's ICH regime can maximise the likelihood of consent to a development proposal being granted if the management regime within ICH legislation identifies interference with ICH, as a last resort in regime that requires identification, recognition, conservation and protection as preferable approaches to the management of ICH.

7. Best Practice Standard – Resourcing; participation and enforcement

A third component of the process around an effective ICH regime is of such importance as to warrant separate attention. This is the matter of resourcing. There are two aspects of this component.

First, there must be acceptance that the Indigenous representative organisation undertaking the engagement with a proponent and the assessment of their proposal is performing a statutory function under the relevant jurisdiction's project assessment and approval regime and must be adequately resourced to perform this function. An Indigenous representative organisation undertaking these functions should not be forced to subsidise these statutory obligations from their own resources. Desirably the undertaking of these statutory obligations should facilitate opportunities for the Indigenous representative organisation involved to develop its independent economic activities.

The second but existential aspect of the processes attached to ICH legislation is the regime around compliance and enforcement. In turn there are three issues in relation to this aspect. First, wherever possible, affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions. Second though, whatever agency is undertaking compliance and enforcement functions, the ICH legislative regime must take account of the fact that without a robust regime around compliance and enforcement, no legislative regime can be effective. Third there is a need to ensure there is national consistency in both the structure and penalty regime of ICH offence provisions.

8. Best Practice Standard – Indigenous Ancestral Remains

The presence of Indigenous Ancestral Remains (IAR) in country is the clearest and most poignant illustration of an Indigenous People's ongoing association with their traditional lands. As such IAR are an aspect of ICH of such importance as to warrant particular attention in these best practice standards. The issue of IAR are specifically addressed in UNDRIP Article 12.

The fundamental principle applicable to this area is that, *wherever possible*, IAR identified in country should be left in country and these resting places protected as "Aboriginal or Torres Strait Islander places" (howsoever described) in the legislation. Processes and protocols with agencies involved with the management of IAR must be built around this principle and adequate resources must be allocated

to accommodate the effective implementation of these processes and protocols. Implementation of these measures may require review and amendment of other legislation (for example coronial) and processes.

The second fundamental principle in regard to IAR is that their management is the right and duty of the Indigenous community of origin of the ancestor in question. Again, processes, protocols and resources must be incorporated within an IAR regime to accommodate this principle. So to must the principle of self-determination; such that where there is no possible alternative to the relocation of IAR, this relocation takes places in accordance with the wishes of the affected community. Attention also needs to be paid to the care of IAR where no Indigenous community of origin can be immediately identified.

A further issue that arises with regard to IAR is the definitional one. Existing legislation in various jurisdictions provides various examples of definitions of IAR. The Victorian AHA provides one of the most comprehensive and yet workable definition. The relevant provision (in s 4) is as follows:

> ***Aboriginal ancestral remains*** *means the whole or part of the bodily remains of an Aboriginal person but does not include—*
>
> *(a) a body, or the remains of a body, buried in a public cemetery that is still used for the interment of human remains; or*
>
> *(b) an object made from human hair or from any other bodily material that is not readily recognisable as being bodily material; or*
>
> *(c) any human tissue—*
>
> *(i)dealt with or to be dealt with in accordance with the* ***Human Tissue Act 1982*** *or any other law of a State, a Territory or the Commonwealth relating to medical treatment or the use of human tissue; or*
>
> *(ii)otherwise lawfully removed from an Aboriginal person;*

The Victorian definition was adapted from the very similar definition in ATSHIPA. (Although note in ATSHIPA Aboriginal ancestral remains are managed within the regime applicable to Aboriginal objects).

Finally, the IAR regime included within ICH legislation must provide an effective regime for the expeditious return to the affected communities of IAR held in institutional and other "collections". Wherever possible such provisions should have extra-jurisdictional application.

9. Best Practice Standard - Secret and Sacred Objects

Some movable ICH (objects) will be considered secret or sacred by the Indigenous community of origin. It is inconceivable that ICH that is secret or sacred could ever have legitimately entered the realm of commercial transactions. It is for this reason that in addition to the relevant provisions of UNDRIP a body of internal law has developed around this topic. The 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural*

Property as to is the 1995 *UNIDROIT Convention on the Return of Stolen or Illegally Exported Cultural Objects.*[45]

As such, ICH legislative regimes must acknowledge that property in secret and sacred objects can only legitimately vest in the community of origin of the object and deploy mechanisms to achieve the repatriation of these objects. The ICH regime must acknowledge the role of Indigenous tradition as understood today in the definition of secret or sacred for these purposes. The Victorian AHA (s 4) provides a further example that incorporates the earlier definition of Aboriginal tradition:

> ***sacred*** *means sacred according to Aboriginal tradition;*
>
> ***secret*** *means secret according to Aboriginal tradition;*

The (practically) similar definition of significant Aboriginal object in ATSHIPA has been noted above.

Further, ICH legislative regimes regarding regulation of the trade in movable ICH must incorporate mechanisms to prohibit trade in secret or sacred objects and to allow a potentially affected community to determine the status of an object proposed to be traded. To be effective these mechanisms must be nationally uniform or supported by Commonwealth legislation or both.

10. Management of Frontier Conflict Sites

Frontier Conflict Sites represent a complex juxtaposition of Indigenous and Non-Indigenous heritage and history. On the one hand they represent an opportunity to present and analyse the full history of the dispossession of Australia's Indigenous peoples by the forces of colonial (and post-colonial) authorities. They can also represent an opportunity to reflect on the bravery, tenacity and tragedy of the Indigenous resistance to that dispossession. On the other hand, Frontier Conflict Sites are the places where murder and massacre took place and care must be taken that these sites are never glorified.

In considering the treatment of Frontier Conflict Sites the fundamental principle is that the wishes of the affected Indigenous community are paramount. Beyond this, jurisdictions may wish to consider whether the issue of Frontier Conflict Sites require particular attention in ICH legislation, cultural heritage legislation of broader application or both, and, alternatively whether the management of this issue is best undertaken through the adoption of particular protocols without need for specific legislative references. Subject to the incorporation of the fundamental principle of the paramountcy of the wishes of the affected Indigenous community jurisdictions should develop appropriate methods to address the issue of Frontier Conflict Sites with the active participation of relevant Indigenous representatives.

11. National Legislation and Intangible Indigenous Cultural Heritage

Intangible ICH can exist independently of the association of this ICH with particular lands. The management, protection and promotion of this form of cultural heritage can provide particular challenges in a legislative context. This noted, the importance of this manifestation of ICH is indicated by the number of international instruments, in addition to UNDRIP,[46] that address this topic. The *2003*

[45] Opened for signature 24 June 1995, 34 ILM 1322 (1995) (entered into force 1 July 1998).
[46] See Articles 11,12,13,14 and 31.

UNESCO Convention for the Safeguarding of the Intangible Heritage[47], the *Convention of Biological Diversity*,[48] and (to some extent) the 1996 *WIPO Performances and Phonograms Treaty*[49] are examples of this international attention.

The Indigenous Chairs recommend that HCOANZ state its belief that it is desirable that this form of ICH be recognised and protected by Indigenous communities for their benefit and that of the broader community, and that HCOANZ congratulate those jurisdictions that have established regimes for the recognition and protection of intangible ICH. However, the Indigenous Chairs also acknowledge that, given the constitutional arrangements in Australia, it is desirable that measures in this respect are supported by the Commonwealth legislation, and recommend that the HCOANZ states of its support for the development of national legislation in regard to the recognition and protection of intangible ICH.

[47] *2003 UNESCO Convention for the Safeguarding of the Intangible Heritage* Opened for signature 17 October 2003, 2368 UNTS 3 (entered into force on 20 April 2006).
[48] *Convention on Biological Diversity* of 5 June 1992 (*1760 U.N.T.S. 69*).
[49] Signed 20 December 1996, TRT/WPPT/001 (entered into force 20 May 2002) Articles 5–10.

Cultural Heritage Relevant Provisions of UNDRIP

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

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

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including 14 those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language

Article 31

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

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.