SUPPLEMENTARY SUBMISSION

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

Review of the WA Aboriginal Cultural Heritage Bill 2020

October 2020

1. Introduction

During the appearance of the National Native Title Council (NNTC) before the Joint Standing Committee on Northern Australia's Inquiry into the destruction of Juukan Gorge (**Senate Inquiry**), the NNTC undertook to review the current WA *Aboriginal Cultural Heritage Bill 2020* (**WA Bill**) against the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation (**Standards**), developed by the Heritage Chairs and Officials of Australia and New Zealand, as endorsed by the NNTC.

The Standards are consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and provide clear guidance on: basic principles to underpin legislation; basic structures of legislation; definitions of Indigenous cultural heritage; how to incorporate principles of self-determination; resourcing participation; resourcing compliance and enforcement; Indigenous ancestral remains; and secret and sacred objects. It is important to emphasise that UNDRIP does not create new rights but simply articulates existing international human rights norms and principles as they apply to Indigenous peoples.

It is noted that many aspects of the scheme proposed in the WA Bill remain opaque, as important aspects are not included in the WA Bill but are instead left for regulation and policy which have not yet been released.

However, without being able to assess the scheme in its entirety, the NNTC can say that the WA Bill falls significantly short in many respects of the Standards, particularly with regard to the principle of self-determination, the requirement of free prior and informed consent and a failure to adequately resource Traditional Owner groups and organisations to engage with proponents let alone perform their most basic statutory functions. In short, the WA Bill does little to redress the legislative pitfalls and significant power imbalance that exists between mining companies and Traditional Owners that led to the destruction of Juukan Gorge.

2. Basic Principles

The Standards state, that 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 United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**). The key to UNDRIP is the principle of self-determination. In the context of Indigenous Cultural Heritage, this principle requires that the affected Traditional Owners must be the ultimate decision makers in relation to the management of the Indigenous Cultural Heritage aspects of any proposal that will impact that heritage.

The relevant Articles of UNDRIP are attached to the Standards and will not be replicated here. However, critically, they raise the following questions in relation to the WA Bill, and the WA Bill fails in relation to all three questions.

(a) Does the WA Bill recognise the right of Indigenous people to maintain, protect, control and develop their cultural heritage?

(b) Does the WA Bill ensure that Indigenous cultural heritage cannot be interfered with without the free, prior and informed consent of Traditional Owners?

(c) In particular, does the WA Bill provide that the government will consult and cooperate in good faith with the relevant Traditional Owners 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?

The failure of the WA Bill to recognise the right of Traditional Owners to maintain, protect, control and develop their cultural heritage is clear from its Overview of Act (Part 2) and Objects (s8). The Overview of Act recognises "the *special interests* Aboriginal people have in protecting, preserving and managing Aboriginal cultural heritage" (emphasis added) (s4) and the Objects (s8) recognise "the fundamental importance to Aboriginal people of Aboriginal cultural heritage" and that "Aboriginal people have custodianship of Aboriginal cultural heritage". While the Objects also include "to recognise protect and preserve Aboriginal cultural heritage" they do not recognise the right of relevant Traditional Owners to protect that heritage.

Section 5, 6 and 7 examine in more detail the failure of the WA Bill to meet the requirements of free, prior and informed consent.

3. Model or structure of legislation

The Standards require a 'prohibition of harm unless authorised' model of Indigenous Cultural Heritage legislation, as opposed to a model that prohibits harm to Indigenous Cultural Heritage only when there is a particular declaration in force. This model prohibits any interference to Indigenous Cultural Heritage that satisfies the statutory definition *unless* there is a statutory authorisation in place.

For the 'prohibition of harm unless authorised' model to be effective there must be a comprehensive definition of Indigenous Cultural Heritage and the relevant statutory authorisation must be provided by the affected Traditional Owners.

While the WA Bill appears to move towards the model of 'prohibition of harm unless authorised' and contains a sufficiently broad definition of "Aboriginal cultural heritage" (see section 4 of this Submission), it fails in that the relevant statutory authorisation does not require the affected Traditional Owners to be the ultimate decision makers

Furthermore, as set out in detail in Section 5 below, the WA Bill:

- Fails in that the process to determine the authorisation required in relation to the management of Indigenous Cultural Heritage that may be harmed by an activity, turns not on the Indigenous Cultural Heritage itself, but on the level of "ground disturbing activity" the proponent intends to carry out;
- Fails in that it gifts to the proponent the power of assessing the likely impact of their proposed activity, whether there is Aboriginal cultural heritage in the area and whether it will be harmed thus allowing the proponent to determine the procedural rights to be afforded to Traditional Owners. Determining the location Aboriginal cultural heritage and whether it will be impacted by an activity should only be undertaken by Traditional Owners; and
- In critical respects falls below the already poor standards set by the existing *Aboriginal Heritage Act 1972 (*WA), by exempting or otherwise excluding entire categories of activities from the need to obtain any kind of consent to harm caused to cultural heritage, or even notify Traditional Owners these activities will be taking place.

4. Statutory definition of Indigenous Cultural Heritage

The Standards provide that for the legislation to be effective it must contain a comprehensive definition of Indigenous Cultural Heritage consistent with how Traditional Owners *today* understand their cultural heritage and their traditions. To be comprehensive

it must include definitions of “cultural heritage”, “tradition”, “Aboriginal place”, “Aboriginal site”, “Aboriginal object”, “intangible heritage”, “Indigenous Ancestral remains”.

The WA Bill appears to contain a sufficiently broad definition of “cultural heritage”.

Aboriginal cultural heritage is defined at s10(1) and is a comprehensive definition. It includes tangible and intangible heritage important to Aboriginal people “recognised through social, spiritual, historical, scientific or aesthetic perspectives (including contemporary perspectives).”

The definitions include the following:

- ***Aboriginal place*** and ***Aboriginal object*** are included in the definition but are defined by reference to tangible heritage only;
- ***Cultural landscapes*** is defined by both tangible and intangible heritage;
- ***Aboriginal ancestral remains*** is defined broadly to include “any bodily remains” but excludes those buried in a cemetery where non-Aboriginal people are buried or those that have been dealt with under the law of WA relating to burial of deceased people.
- ***Aboriginal tradition*** is defined broadly and is not limited to a historic understanding of “tradition”. It “means the traditions, observances, customs, beliefs, values, knowledge and skills of Aboriginal people of the State generally, or of a particular community or group of Aboriginal people of the State, and includes any such traditions, observances, customs, beliefs, values, knowledge and skills relating to particular persons, areas, objects or relationships.”

5. Incorporating self-determination: Statutory authorisation & Representative organisations

As stated in Section 2 of this Submission, the Standards raise the question of whether the WA Bill provides that the government will consult and cooperate in good faith with the relevant Traditional Owners through their own representative institutions in order to obtain their free prior 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. This requirement is drawn directly from Article 32 of the UNDRIP.

The Standards provide that for Australian legislation to meet this requirement it should utilise Indigenous representative institutions already recognised under rigorous processes such as a Prescribed Bodies Corporate (**PBCs**) under the *Native Title Act 1993* (Cth), a Traditional Owner Corporation under the Victorian *Aboriginal Heritage Act 2006,* or Land

Councils under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The Standards further provide that where such Indigenous representative organisations do not yet exist, the legislation should provide for mechanisms for the identification and appointment of such organisations to undertake this role.

(a) Affected Indigenous community is not the ultimate decision maker

To begin, it is important to recognise that under the WA Bill the affected Traditional Owners are not the ultimate decision makers in relation to any proposal that will affect their Indigenous Cultural Heritage. As stated, there is no requirement for the free prior and informed consent of the affected Traditional Owners. The ultimate decision maker is the Minister.

The regime proposed by the WA Bill is as follows:

- the Minister as ultimate decision maker;
- the Aboriginal Cultural Heritage Council advisor to the Minister under the WA Bill and decision maker in certain circumstances; and
- provisions for recognition of representative organisations of the affected Indigenous communities, called "Local Aboriginal Cultural Heritage Services" (**LACHS**).

Furthermore, the regime provides proponents with considerable power. As set out in Section 5(f) below, it is the responsibility of the proponent to use the "ACH Management Code" for "carrying out a due diligence assessment for a proposed activity". This gifts to the proponent the power of assessing the likely impact of their proposed activity, whether there is Aboriginal cultural heritage in the area and whether it will be harmed thus allowing the proponent to determine the procedural rights to be afforded to Traditional Owners.

The WA Bill provides for no right of review or scrutiny of the proponent's assessment. If the level of assessment is wrongly set, and harm is done to Aboriginal cultural heritage, the Department may investigate and prosecute. However, after the fact decisions to prosecute which are left solely within the discretion of a government department are not sufficient protection or reassurance for Traditional Owners in the face of the irreversible harm that can be done to their cultural heritage and the commercial drivers that will influence decisions made by the proponent in determining the rights of Traditional Owners in the process and the costs that they (the proponent) can bear in the form of fines or penalties.

It is highly inappropriate that proponents are afforded these rights. Determining the location of Aboriginal cultural heritage and whether it will be impacted by an activity is work which can only be undertaken by Traditional Owners. If the purpose of the due diligence process is to place an onus on proponents, the onus should be that they are required to

engage Traditional Owners (through their representative organisation) to undertake cultural heritage assessments of the areas on which the activity is proposed to take.

(b) Aboriginal Cultural Heritage Council (AHC Council)

The ACH Council is appointed by the Minister, will have an Aboriginal Chair with the remainder of appointees to have relevant "knowledge, experience and skills as the Minister considers appropriate" with preference given to Aboriginal appointments "as far as practicable" (s17). The ACH Council advises the Minister "in relation to recognition, protection, preservation and management of Aboriginal cultural heritage" (s18(2)) and is responsible for appointing the LACHS (s31).

Given the significant role and power proposed to reside with the ACH Council, the NNTC supports calls for the ACH Council to be constituted of majority Aboriginal council members (with those individuals nominated regionally) with additional seats open to other expert members (Aboriginal or non-Aboriginal). This type of representation should be mandated in the legislation. Anything less than regionally selected, majority Aboriginal seats on the ACH Council is contrary to the principle of self-determination.[1]

(c) LACHS

Section 33 of the WA Bill sets out the appointment process of a LACHS, and priority is given to "native title parties" defined to include PBCs and registered native title claimants. Corporations representing Aboriginal communities and native title representative bodies will also be considered.

The recognition of LACHS and prioritisation of native title parties, is consistent with the recommendation in the Standards for legislation to provide for the recognition of Traditional Owner representative institutions. However, the WA Bill does not provide that the LACHS are the bodies through which free prior and informed consent of affected Traditional Owners is obtained.

The powers and functions of the LACHS (outlined in section 32 and throughout Part 8) are limited in a manner mimicking the pitfalls of the *Native Title Act 1993* (Cth), in that they only have rights, in relation to certain classes of activities, to be notified, be consulted or to negotiate agreements within a prescribed timeframe about the management of Aboriginal cultural heritage affected by a particular activity. Failure to reach agreement with a proponent within the prescribed timeframe results in the matter being pushed up the line

[1] Joint Submission on the review of the Aboriginal Heritage Act 1972 (WA) from Nyamba Buru Yawuru Ltd, Karajarri Traditional Lands Association Aboriginal Corporation RNTBC, Walalakoo Aboriginal Corporation RNTBC and Kimberley Land Council Aboriginal Corporation 31 May 2019 in response to the Minister's Consultation Paper March 2019

to the ACH Council and the Minister. Like the *Native Title Act 1993,* consent of the affected Traditional Owners is ultimately not required.

As outlined in the NNTC's Submission to the Senate Inquiry, under the *Native Title Act 1993,* 6 months is provided for the proponent and native title party to reach an agreement and failure to reach agreement in that timeframe means that the proponent can seek a determination from the National Native Title Tribunal that the activity can proceed without agreement.[2] 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 three occasions has there been a determination in favour of a native title party that the grant of a mining title could not proceed.[3] This process forms part of Subdivision P of the *Native Title Act 1993*, that was introduced into that Act by amendment in 1998. These amendments and processes have been criticised by the United Nations as contrary to Australia's international obligations[4] and it is unclear as to why the WA Government would seek to replicate it in new legislation.

This replication further entrenches the power imbalance of the *Native Title Act 1993* outlined in multiple submissions to the Senate Inquiry, including the submission of the NNTC. If it is almost guaranteed that a proponent will get approval to do what it wants without the agreement of Aboriginal people, then the affected Traditional Owners are more likely to sign up to the best agreement that they can secure. This is not genuine "consent", it is harm mitigation.

An additional issue arises throughout Part 8, in relation to persons to be consulted or notified (sections 90 and 97) about the different levels of activities. In each case, the LACHS is the party to be notified or consulted but where there is no LACHS for the area then the persons to be notified or consulted are any native title party and "knowledge holder". Knowledge holder is defined broadly (section 9). This opens the possibility that where PBC is not the LACHS, the PBC will be required to consult with and include in negotiations the views of "knowledge holders" who will likely include past Aboriginal respondents to their native title claim, that is people who may have knowledge or assert knowledge of a place within the determination area but do not meet the *Native Title Act* definition of a member

[2] National Native Title Council "Submission to the Joint Standing Committee on Northern Australia's Inquiry into the destruction of Juukan Gorge and Associated Matters" page 10

[3] Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji, [2011] NNTTA 172 (21 September 2011); Western Desert Lands Aboriginal Corporation (Jamukurnu - Yapalikunu)/Western Australia/Holocene Pty Ltd, [2009] NNTTA 49 (27 May 2009); Seven Star Investments Group Pty Ltd/Western Australia/Wilma Freddie and Others on behalf of Wiluna, [2011] NNTTA 53; (2011) 257 FLR 175 (24 March 2011)

4 Committee on the Elimination of Racial Discrimination Sixty-sixth session March 2005 "Concluding observations of the Committee on Australia" CERD/C/AUS/CO/14

of the native title holding group. This has the capacity re-open or exacerbate extant conflicts that otherwise would have been resolved by the native title determination.

(d) Authorisation Regime

Part 8 provides for the authorisation and management of activities that may cause harm to Aboriginal cultural heritage. It defines activities that "may cause harm to Aboriginal cultural heritage", in terms of minimal, low, medium-high impact activities and the different types of authorisation relating to each type of activity. The focus of this approach is the activity and its relative level of ground disturbance rather than the cultural heritage. This raises a number of issues. First, it assumes that an examination of the activity in this way will allow a reliable assessment of the impact of that activity on any existing cultural heritage without reference to that cultural heritage, when in reality impact can only be assessed when the location and cultural heritage to be impacted is taken into consideration. A second issue, is the need for clarity around what constitutes minimal and low-level ground disturbance, and the classification of minimal-high impact activities has been left to the as yet unseen regulations.

The WA Bill classifies activities as follows.

- Exempt activities are defined in section 90 and include a range of "prescribed activities" that could impact significantly on Aboriginal cultural heritage, including construction of residential buildings and developments, including of subdivisions, under the *Planning and Development Act 2005* (WA). Proponents are authorised under the WA Bill to undertake these activities without any requirement of notification or consultation (section 100).

- Minimal impact activities: native title parties, "knowledge holders" and LACHS are not required to be notified or consulted in relation to a "minimal impact activity" "that may harm Aboriginal cultural heritage". The proponent may carry out the activity without notifying or consulting the LACHS so long as they undertake a due diligence assessment (section 101).

- Low impact activities: native title parties, "knowledge holders" and LACHS are included within the definition of "persons to be notified" (s92) by proponents about the proposed activity and must be given the opportunity to provide their views on the impact of the proposed activity (s105). Authorisation to undertake the activity is via:
    - an ACH Permit granted or refused by the ACH Council upon application by the proponent (ss107-112); or

- an ACH Management Plan approved by the ACH Council under s134(1) or authorised by the Minister upon recommendation of the ACH Council under 147(1) (see below).

It is noted that this process is almost identical to the disastrous s18 process under the existing *Aboriginal Heritage Act 1972 (*WA) that led to the destruction of Juukan Gorge, differing only in that it requires notification of native title parties, "knowledge holders" and LACHS.

- ACH Management Plans for medium to high activities: Native title parties, "knowledge holders" and LACHS are included within the definition "persons to be consulted" in relation to an ACH Management Plan (s92). "Persons who are to be the Aboriginal parties to an ACH management plan" are the LACHS where there is one, and where there is not then in following order a native title party, a knowledge holder or a native title representative body (s98).

There will be a prescribed timeframe in the regulations for an agreed ACH Management Plan to be negotiated. A proponent who intends to carry out an activity must notify the Aboriginal parties and then all parties must use best endeavours to reach an agreement within the prescribed period. If the parties agree on the plan, the plan then goes before the ACH Council for approval (s134(1)). If the parties do not agree within the prescribed timeframe, then the proponent may apply to the ACH Council for authorisation of the plan by the Minister 147(1).

It is noted that any plan that may harm Aboriginal cultural heritage of State significance (defined in section 90 as being of "exceptional importance to the cultural identity of the State") must be authorised by the Minister (s122(2)). Part 8, Subdivision 4 provides for the ACH Council to issue guidelines about the factors to be considered in determining whether Aboriginal cultural heritage is of "State significance" (s151) and that the ACH Council is the decisionmaker as to whether particular Aboriginal cultural heritage is of "State significance" (s152) and it is to be recorded within the ACH Directory (Part 9).

It is noted that no authorisations under Part 8 can be given for carrying out activities on "protected areas". Part 6 deals with recognition of a protected area "that contains or is part of Aboriginal cultural heritage of outstanding significance" (s64). However, Part 6, Division 6 provides that regulations may make provision for protected areas including in relation to activities that may be carried out on protected areas. We note that Part 6 sets a high bar for recognition as a protected area, and we cannot know what activities may be considered for these areas as the regulations have not been released.

(e) Exempt, minimal or low impact activities

Significant concerns have been raised in relation to the treatment of exempt, minimal or low impact activities under the WA Bill. As LACHS have no right to even be notified of minimal or exempt activities, and can only be notified of low impact activities, then a huge proportion of activities which can, and do, detrimentally interfere with Aboriginal cultural heritage could proceed on the basis that proponents undertake their own due diligence assessment.

The NNTC supports concerns raised in a Submission by the Nyamba Buru Yawuru Ltd, Karajarri Traditional Lands Association Aboriginal Corporation RNTBC, Walalakoo Aboriginal Corporation RNTBC and Kimberley Land Council Aboriginal Corporation (**KLC Submission**) that this scheme makes unfounded assumptions that such minimal or low activities can never have a significant impact on heritage.[5] This assumption is entirely baseless and, as highlighted by the KLC Submission, has been rejected on numerous occasions by the National Native Title Tribunal (**NNTT**) and Federal Court in the context of an assessment as to whether certain activities may nevertheless interfere with sites or areas of particular significance pursuant to section 237 of the *Native Title Act 1993*[6]. For clarity, both the NNTT and Federal Court have separately recognised that there may be sites or areas of particular significance where access alone may be sufficient to interfere with a site or where what might be considered as "trivial" by non-Aboriginal people will in fact have a substantial impact on cultural heritage.[7]

(f) ACH Management Code

It is the responsibility of the proponent to use the "ACH Management Code" for "carrying out a due diligence assessment for a proposed activity" when:

- assessing the activity for being minimal, low, medium or high impact;
- the extent of Aboriginal cultural heritage in the area;
- taking reasonable steps to minimise risk of harm to Aboriginal cultural heritage.

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[5] Submission by the Nyamba Buru Yawuru Ltd, Karajarri Traditional Lands Association Aboriginal Corporation RNTBC and Walalakoo Aboriginal Corporation RNTBC and Kimberley Land Council Aboriginal Corporation to the Review of the *Aboriginal Heritage Act 1972* dated 15 April 2020.

[6] Ibid refers to particular see recent Tribunal decisions in K*evin Allen & Others on behalf of Nyamal #1 v Peter Romeo Gianni and Another* [2019] NNTTA 70 at [72]-[75]; *Bunuba Dawangarri Aboriginal Corporation RNTBC v Oladipo Minerals Pty Ltd and Another* [2019] NNTTA 111 at [49]-[53]; *Shirley Purdie & Orson behalf of Yurriyangem Taam v WA Mining Resources Pty Ltd and Another* [2020] NNTTA 4 at [32]-[33]; *Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC v GE Resources Pty Ltd and Another* [2019] NNTTA 74, at [67]; Also see the decision of McKerracher J in *FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation RNTBC* [2014] FCA 1335 which outlines the relevant principles under Native Title Legislation regarding interference with sites of particular significance.

[7] Ibid refers to *FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation RNTBC* [2014] FCA 1335 at [75]

We have not seen the ACH Management Code and cannot comment on its requirements. However, the scheme requires proponents to undertake a self-assessment. This fundamentally undermines any principle that Aboriginal people can and should make decisions in relation to their own heritage. The decision as to whether or not there is Aboriginal cultural heritage within an area, whether that cultural heritage will be impacted by the proposed activity, and whether the proposed activity is exempt or is likely to have a minimal or low impact on Aboriginal Heritage should be made by the Traditional Owner groups through their representative organisation (usually their PBC), rather than being left to the proponent or department to assess in the absence of consultation.

(g) *Native Title Agreements*

Native title agreements are defined in section 90 to include Indigenous Land Use Agreements, and other agreements negotiated under the *Native Title Act 1993,* "that contain provisions about the management of Aboriginal cultural heritage". Several sections of the WA Bill permit native title agreements to satisfy various requirements under the authorisation regime. This includes to meet the due diligence and consultation requirements imposed on the proponent (sections 96 and 126), and allowing for provisions from native title agreements that deal with management of Aboriginal cultural heritage to be incorporated directly into ACH Management Plans (section 124).

The deficiencies and inequalities in the native title agreement process was the subject of multiple submissions at the Senate Inquiry. The wholesale incorporation of provisions from native title agreements into the ACH Management Plans without a substantive review of existing native title agreements, risks further entrenching those inequalities.

(h) Regulations and policy

As highlighted above, important aspects of how the new scheme will work are not included in the WA Bill but are instead left for regulation and policy which have not yet been released. These include the form of ACH Management Plans, the ACH Management Code, consultation guidelines, the classification of people as "knowledge holders", scales of fees for surveys by LACHS, activities permissible on protected areas and, most significantly, guidelines as to what constitutes "State significance", the impact assessment and classification of the impact of activities ('due diligence assessment'), which dictates the level of engagement and consultation with Aboriginal people.

6. Aboriginal Ancestral Remains

Part 5 of the WA Bill relates primarily to the rights of Aboriginal people in relation to ancestral remains and secret and sacred objects. Aboriginal ancestral remains is defined in section 10 of the WA Bill within the definition of "Aboriginal cultural heritage". The analysis

of this definition is outlined in Section 4 of this Submission and it appears to be sufficiently broad to the meet the Standards.

The WA Bill provides that Aboriginal people are the custodians of their ancestral remains and are entitled to possession and control of those remains, with this recognition applying to all remains regardless of who has possession of them prior to the commencement of the new legislation (section 49). It also imposes duties on people or organisations who have possession of Aboriginal remains to notify the ACH Council and return the remains to the rightful Aboriginal custodians (ss51-53). The bill also makes it an offence to disturb or remove ancestral remains on any land (s55).

Where the WA Bill does not meet the Standards, however, is that it allows for ancestral remains to be disturbed or removed if this occurs when a proponent is undertaking an authorised activity under Part 8. The problems with the Part 8 regime are described in Section 5 of this Submission. Critically, it means that the ability to disturb or remove ancestral remains is not dependent on the consent of the Aboriginal custodians of those remains.

The Standards provide that, "wherever possible, Aboriginal remains identified on country should be left on country and these resting places protected as "Aboriginal or Torres Strait Islander places" (howsoever described) in the legislation."

7. Secret and Sacred Objects

Part 5 Division 3 of the WA Bill deals with "Secret and Sacred Objects". The definition is consistent with the Standards which is defined in section 10 to mean "an Aboriginal object that is secret or sacred to Aboriginal people in accordance with Aboriginal tradition." The WA Bill also acknowledges that only the relevant Aboriginal person, group or community is the custodian and rightful owner of the object (s57),provides for mechanisms to achieve the repatriation of these objects, and prohibits their trade unless in accordance with the authority of its custodian (section 61).

However, the WA Museum and Australian Universities are expressly excluded from the organisations required to repatriate secret and sacred objects (sections 56 and 59). These are significant exclusions as these institutions hold enormous collections that Traditional Owners are seeking to have returned.

The WA Bill is silent on the ongoing practice of mining companies to store the sacred artefacts of Traditional Owners "recovered" from cultural sites for the purposes of mining, in shipping containers sometimes for well over a decade and occasionally in circumstances leading to their destruction. This issue was raised several times before the Senate Inquiry, including by Professor Marcia Langton and the Deputy Chair of the NNTC, Kado Muir. Such

manner of storage is not only grossly disrespectful, but it prevents Traditional Owners from maintaining, protecting, controlling and even seeing their artefacts and such a practice is not in accordance with the Standards or with the UNDRIP.

8. Compliance, enforcement and penalties

As stated, the WA Bill adopts the model "prohibition of harm unless authorised" as recommended by the Standards, albeit it fails in critical respects. Such models must be supported by enforcement of criminal sanction and penalty which the WA Bill provides throughout the draft bill but more particularly in Parts 7 and 11. However, the question arises, what is the point of significantly higher penalty provisions if the Department never makes a decision to prosecute?

The machinery under the WA Bill creates significant additional work for the Department and the ACH Council. If this work is not properly undertaken the protective measures available under the WA Bill will not be activated. The Department has a poor track record of enforcing the existing *Aboriginal Heritage Act 1972* (WA), with low rates of prosecution for offences. This has been, in part, blamed on lack of funding for implementation of the Act.

Part 11 provides for designated inspectors to be appointed by the CEO of the Department. Possible appointees include police officers and public servants and does include provision for the appointment of "any Aboriginal person" (s204). Inspectors have wide ranging powers of entry, search and seizure relating to anything controlled, regulated or managed under the WA Bill.

It is noted that the WA Bill does not appear to contemplate the significant extra work of monitoring of compliance with ACH Management Plans that will be required to undertaken by the LACHS and does not resource them to undertake this work.

9. Resourcing to perform statutory functions

The WA Bill does not meet the Standards as it fails to resource LACHS to undertake any of their statutory duties including to engage with proponents and assess their proposals and negotiate agreed ACH Management Plans, or to monitor compliance with those plans. In this way, it further entrenches the unequal bargaining power of the parties already inherent in the *Native Title Act 1993.*

Both the Commonwealth (under the *Native Title Act*) and the State need to recognise the role and statutory responsibilities they are imposing on PBCs and the proposed LACHS, and properly fund them. The corporations at the centre of both of these schemes do not receive enough funding to even ensure they meet basic corporate compliance obligations of

4 directors' meetings and 1 general meeting a year. The scheme and LACHS will fail if PBCs are not adequately funded to first of all remain compliant and registered under the *Corporations (Aboriginal and Torres Straits Islander) Act 2006*, and secondly to carry out their statutory functions under the WA Bill.

The WA Bill does provide for LACHS to charge fees for their services in accordance with the fee structure they had in place at the time of their appointment by the ACH Council and is permissible by the regulations. Fees structures can thereafter only be varied by approval of the ACH Council (s41). However, LACHS cannot charge the Department or the ACH Council for carrying out its functions under section 32 (s41(3)).

10. Conclusion

An assessment against the Standards demonstrates that the WA Bill falls significantly short, particularly in relation to the basic principles of self-determination, the requirement of free prior and informed consent and the failure to adequately resource Traditional Owner groups and their representative organisations to engage with proponents to perform their most basic statutory functions. The WA Bill does little to redress the entrenched inequality between Traditional Owners and those undertaking works on their lands, or to enable Traditional Owners to maintain, protect and control their cultural heritage.

The NNTC recommends that the WA Bill be redrafted in close consultation with Western Australian Traditional Owners and their representative organisations.