



22 October 2020

The Hon Warren Entsch MP
Chair
Joint Standing Committee on Northern Australia
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: jscna@aph.gov.au

Dear Chair

SUPPLEMENTARY SUBMISSION: INQUIRY INTO THE DESTRUCTION OF 46,000 YEAR OLD CAVES AT THE JUUKAN GORGE IN THE PILBARA REGION OF WESTERN AUSTRALIA

On 2 October 2020, the Law Council of Australia (**the Law Council**) appeared via teleconference before the Joint Standing Committee on Northern Australia (**the Committee**) as part of a public hearing for the inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia (**the Inquiry**).

In the course of its appearance, the Law Council was asked whether it might have further information it wished to provide to assist the Committee in its deliberations, including on examples of best practice and on how cultural heritage legislation might be better aligned with the *Native Title Act 1993* (Cth) (**the Native Title Act**). This supplementary submission addresses that request for further information. It also responds to Senator Dodson's additional Questions on Notice which were relayed to the Law Council on 12 October 2020.

Native Title and Cultural Heritage Alignment

Context

The Native Title Act is one legislative model that flowed from the High Court's decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (**Mabo**) that Aboriginal and Torres Strait Islander people have rights and interests to lands and waters because of their own laws and customs, and that these rights and interests existed before, and were not abolished by, British arrival. The High Court held that the common law, which recognises a variety of interests in land, such as the freehold, leasehold and easement, also recognises native title to land.¹

¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('Mabo'). See also Professor Michael Crommelin, '[Mabo: The Decision and the Debate](#)' (Papers on Parliament No 22, February 1994).

In the opinion of the Law Council, the recognition of native title in 1992 could have precipitated significant developments in the legal apparatus for protecting Aboriginal cultural heritage, but this promise has not been properly realised to date.

The Australian Human Rights Commission (**AHRC**) sketched the link between land, Indigenous culture, native title recognition and Indigenous heritage protection, and the potential for more comprehensive protection of both land rights and heritage rights inherent in this link, in its Native Title Report 2000, including through the following statements:

Native title is a legal right comparable to any other interest in land. Native title has its origins in the culture and traditions of Indigenous people. That is what gives the title its content. It follows that Indigenous heritage, as a subset of Indigenous culture, is included in the concept of native title and capable of being protected in the same way that other common law titles to land are protected.²

Moreover, positioning heritage protection with the laws that protect Indigenous title to land better reflects the centrality of land to the vitality and survival of Indigenous heritage and culture.³

Under the concept of native title it is possible that sacred and significant sites and objects might be protected, not within the historical category of Aboriginal heritage, but as matters valued in contemporary Indigenous culture with current significance to a people whose culture is ongoing. In addition, under native title such protection could be provided, not as an act of beneficence by government, but as a matter of legal right. ... The recognition of native title is an opportunity to re-frame the protection of Indigenous heritage within the broader framework of a human right to enjoy one's culture. However, developments within the common law of native title, and amendments to the Native Title Act have placed heritage protection outside this broader frame.⁴

In its original submission to this Inquiry, the Law Council similarly describes a structural disconnect and a failure to recognise the paradigmatic change precipitated by Mabo through the incorporation of First Nations ownership of lands and waters in cultural heritage protection laws.⁵

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**) was enacted before the recognition of native title. The legislative regimes in the states and territories also predated the Mabo decision, although the original Queensland, Victorian and South Australian statutes have since been replaced and amended respectively, and review and reform processes are currently underway in Western Australia and Queensland.

While the ATSIHP Act was originally 'proposed as a temporary measure, pending the forthcoming introduction of national land rights legislation', more effective federal protection

² Human Rights and Equal Opportunity Commission, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000* (23 February 2001) 123 (see also 117, 118 and 124) <https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/nt-report2000.pdf>.

³ Ibid.

⁴ Ibid 117-118.

⁵ Law Council of Australia, Submission No 120 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* (21 August 2020) 21 <<https://www.lawcouncil.asn.au/publicassets/24891840-2ef3-ea11-9434-005056be13b5/3864%20-%20Juukan%20Caves%20Submission.pdf>>.

for Indigenous cultural heritage never eventuated.⁶ In 1993, the Native Title Act was developed as an attempt by government to codify the Mabo decision and administer the claims arising from it. However, the procedural rights in the Native Title Act that might help Indigenous people protect their cultural heritage were substantially eroded through amendments in 1998, as well as common law decisions post Mabo. Since then, and despite a number of reviews recognising its shortcomings, the ATSIHP Act has never been properly reformed.

As a consequence, Australia's cultural heritage framework is not properly aligned with its native title framework, and neither the ATSIHP Act nor the Native Title Act adequately protect Indigenous cultural heritage. Nor does cultural heritage protection throughout the country at the state and territory level have appropriate regard to federal mechanisms or minimum standards. This leaves a situation where both the ATSIHP Act and the Native Title Act require review and reform to foster alignment, and particularly to ensure meaningful consultation with, and leadership by, Traditional Owners in decisions affecting their cultural heritage and their lands and waters – including proper rights of refusal and review.

The AHRC's Native Title Report 2000 again gives an illustrative snapshot of this state of misalignment:

The bundle of rights approach to native title has meant that contemporary practices of protecting and respecting significant or sacred sites are considered insufficiently connected to the actual practices of the original inhabitants to be included in native title determination. In addition, the amendments to the [Native Title Act] have significantly reduced the protection available to Indigenous heritage and the right of native title holders to participate in decisions about protecting their cultural heritage.⁷

In *Western Australia v Ward*⁸, the High Court majority held that rights and interests protected under the Native Title Act are rights in relation to land and water only, and that in so far as claims to protection of cultural knowledge go beyond denial or control of access to land or waters, they were not rights protected by the Native Title Act.⁹ The Australian Law Reform Commission (ALRC) has noted that this means that section 223(1) of the Native Title Act (concerning the meaning of native title) has been construed as not extending to recognition of rights to protect cultural knowledge.¹⁰ However, determinations of native title rights and interests under section 225 of the Native Title Act may, for example, comprise rights of access to sacred sites, and for groups to conduct ceremonies on traditional lands.¹¹ While

⁶ Human Rights and Equal Opportunity Commission, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000* (23 February 2001) 123.

⁷ Ibid 118.

⁸ (2002) 213 CLR 1 (**Ward HCA**).

⁹ *Ward HCA* [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁰ ALRC, *Connection to Country: Review of the Native Title Act 1993* (Cth), ALRC Report No 126, 262, citing *Ward HCA*, [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹¹ Ibid, citing eg, for NSW, *Phyball on behalf of the Gumbaynggirr People v A-G (NSW)* [2014] FCA 851 (15 August 2014); for Vic: *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932 (27 July 2011); for Qld: *Smith on behalf of the Kullilli People v State of Queensland* [2014] FCA 691 (2 July 2014); for WA: *Watson on behalf of the Nyikina Mangala People v State of Western Australia (No 6)* [2014] FCA 545 (29 May 2014); for SA: *Ah Chee v South Australia* [2014] FCA 1048 (3 October 2014); *Starkey v South Australia* [2011] FCA 456 (9 May 2011); for NT: *Apetyarr v Northern Territory of Australia* [2014] FCA 1088 (14 October 2014).

a number of respondents to the ALRC's review supported the possible inclusion of the protection or exercise of cultural knowledge in the indicative list in a revised section 223(2)(b),¹² the ALRC considered that the question of how cultural knowledge might be protected and any potential rights to its exercise and economic utilisation governed by the Australian legal system would be best addressed by a separate review.¹³

Representation of Traditional Owners

What the Law Council suggests might usefully be taken from the Native Title Act and incorporated into cultural heritage protection is a system of representative bodies with strong knowledge bases and links with Traditional Owners, set up to navigate the legal system on behalf of Traditional Owners. The Native Title Act requires native title holders to establish Prescribed Bodies Corporate (**PBC**), which, when officially registered with the National Native Title Tribunal (**NNTT**), become Registered Native Title Bodies Corporate (**RNTBC**). PBCs manage native title rights and interests on behalf of native title holders and, under the Native Title Act, are required to consult with and obtain consent from Traditional Owners regarding decisions affecting these rights and interests. As the Law Council notes in its original submission, it appears anomalous that the Commonwealth should have established representative bodies to assist native title claimants throughout the country, but allows the continuation of a cultural heritage protection system that does not facilitate, much less require, consultation with such representative bodies and the Traditional Owners they represent.¹⁴ Where a PBC does not already exist, or in jurisdictions where there are few or no successful native title claims (eg Victoria, the Australian Capital Territory), then legislation should allow for the recognition or creation of another body, appropriately representative of Traditional Owners, to fill that role, which is not merely consultative but actually makes decisions about First Nations cultural heritage.

This proposal is underpinned by the principles that decision-making is an act of self-determination for First Nations; that First Nations have a right to participate in decision-making through their chosen representatives and to maintain their own decision-making institutions; that their free, prior and informed consent must be obtained before adopting legislative or administrative measures that may affect them; and that consultation with First Nations is an ongoing process.

Determination of the Traditional Owners of a place or object of cultural heritage must be the primary starting point in ensuring cultural heritage protection. The process for establishing a PBC under the Native Title Act ensures that such bodies, where they exist, satisfy the criteria for a body appropriately representative of Traditional Owners, and are therefore well placed to control management of cultural heritage.

That is, there must be a tiered approach to appointing the body with primary decision-making capacity on cultural heritage, with the order of priority of appointment correlating to representation of the appropriate Traditional Owners.

Victoria is often pointed to as an example of best practice in this area. Aboriginal Victoria, in its submission to this Inquiry, provides the following summary of the Victorian scheme:

¹² Including the Law Council: Ibid, 263.

¹³ Ibid.

¹⁴ Law Council of Australia, Submission No 120 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* (21 August 2020) 24.

It is important that the right Traditional Owners are empowered to make informed cultural heritage management decisions. In Victoria, the Victorian Aboriginal Heritage Council (VAHC), an expert advisory council comprising 11 Victorian Traditional Owners appointed by the Minister for Aboriginal Affairs, receives applications from Traditional Owner corporations to become Registered Aboriginal Parties (RAPs) for their traditional areas. Government plays no role in evaluating RAP applications, it is an entirely Traditional Owner-controlled process. Once a RAP, it is empowered under the AHA to make statutory decisions about their cultural heritage. RAPs are required to be representative of all Traditional Owners within their RAP area, and are required to be a corporation registered under the Commonwealth Corporations (Aboriginal and Torres Strait Islander) Act 2006. Traditional Owners in Victoria also have the ability to apply for native title under the [Native Title] Act. To avoid confusion and duplication of process, the AHA requires that, where a native title holder applies to the VAHC to become a RAP, the VAHC must appoint it for its native title area. This is an exclusive appointment and ousts any prior RAPs which may have existed over that area. ...¹⁵

However, these bodies are underfunded. If asked to take on further statutory responsibilities, PBCs or their alternative must be appropriately resourced. Rules that allow government departments and agencies to avail themselves of the services of PBCs without providing payment should also be reversed. Even in Victoria, underfunding of RAPS is noted as a shortcoming of a regime that is otherwise seen as a significant improvement on other jurisdictions, though not perfect.¹⁶

National Reform Process

The Law Council reiterates that in its view, there is currently a pivotal opportunity not only to 'modernise' cultural heritage federal, state and territory legislation, but to actively reform it so that it achieves its beneficial purpose of protecting First Nations culture, both ancient and living, in practice. This is not being achieved under existing legislation – not only in Western Australia, but in most other jurisdictions. For example, New South Wales has no legislative framework requiring Indigenous involvement in decisions regarding Aboriginal cultural heritage, there is no clear path for Aboriginal people to say no to the destruction of their Aboriginal heritage, and (unlike the proponent) no appeal mechanism is available to Aboriginal people regarding decisions taken.

As discussed at the recent hearing, the Law Council considers that national principles should be enshrined in federal legislation as minimum standards, with state and territory legislative reforms to follow. The concept of Commonwealth-legislated minimum standards that states and territories must meet through their own reforms has been previously proposed, although not adopted, with respect to land rights and native title.¹⁷

More recently, in his interim report regarding the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) (**the Interim Report**), Professor Samuel has

¹⁵ Aboriginal Victoria, Submission No 91 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* (July 2020) 6.

¹⁶ Law Council of Australia, Submission No 120 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* (21 August 2020) 67-68.

¹⁷ Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27(2) *Melbourne University Law Review* 523.

relevantly proposed the development of legally enforceable Commonwealth National Environmental Standards to set clear standards and set the benchmark for the protection of Matters of National Environmental Significance and ultimately improve outcomes for Australia's biodiversity and heritage.¹⁸ Professor Samuel has also proposed that the National Environmental Standards form the basis for a greater devolution of decision making to states and territories under the EPBC Act through the incorporation of National Environmental Standards into bilateral agreements between the Commonwealth and individual state and territory governments. A vital element of the devolved model proposed by Professor Samuel is a transparent assurance framework that provides confidence that National Environmental Standards are being met and includes a mechanism for the Commonwealth to step in when those Standards are not being met and it is in the national interest to do so.¹⁹ The Law Council considers that a similar model (national standards within a broader assurance framework) should be considered for the protection of First Nations cultural heritage protection.

Similarly, the national principles (or minimum standards) legislated by the Commonwealth must be strong, effective and uphold First Nations decision-making and self-determination as core principles. They should be agreed with appropriate First Nations peak bodies and ideally, the Ministerial Indigenous Heritage Roundtable,²⁰ and enshrined in primary legislation. Once legislated, a process of independent accreditation of state and territory legislation should occur against the principles, again with First Nations representatives central to such decision-making. Once accredited, a state or territory could then pursue a bilateral arrangement whereby a new cultural heritage matter would be generally dealt with under its own legislation.

Need for Ongoing, Reformed Standalone Federal Legislation

Notwithstanding its proposed directions above, the Law Council emphasises that standalone federal legislation must be both retained and reformed to protect First Nations cultural heritage. This should occur whether or not national principles are also adopted in such legislation.

It is necessary to retain Commonwealth legislation because:

- the Commonwealth must remain at the forefront of leadership with respect to meeting Australia's international human rights obligations, environmental and cultural heritage treaties and standards. These responsibilities should not be devolved to the states and territories;²¹
- it is unlikely that all state and territory legislation will be reformed to the minimum standards set by the new Commonwealth national principles, which means that Commonwealth legislation must retain a vital role going forward; and

¹⁸ Professor Graeme Samuel AC, *Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2020), Executive Summary and Chapter 1.

¹⁹ Professor Graeme Samuel AC, *Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2020), Executive Summary and Chapter 4.

²⁰ While there is overlap, the Law Council considers that the national principles would go beyond the *Best Practice Standards for Indigenous Cultural Heritage Management and Legislation* considered by the Roundtable – for example, with respect to decision-making processes, criteria, review requirements. It refers to its original submission which identifies the possible content of such national principles (at 70-71).

²¹ See Law Council of Australia, Submission No 120 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* (21 August 2020) 14-19.

- even if state and territory legislation is so reformed, federal legislation will continue to be needed to address legacy approvals. For example, the proposed Aboriginal Cultural Heritage Bill 2020 (WA) will not cure all defects flowing from the existing *Aboriginal Heritage Act 1972* (WA) (**the WA Act**). For example, more than 460 applications have been made under section 18 to impact Aboriginal heritage sites on mining leases over the last ten years, and, up until recent events, all have been approved.²² These approvals will remain in place should the Western Australian Bill be passed.²³ Commonwealth legislation must provide an essential safeguard under which declarations can be sought to protect Indigenous cultural heritage that has not been properly recognised under the existing Western Australian Act, which is widely acknowledged to be substandard.

It is necessary to reform Commonwealth legislation because:

- as discussed in the Law Council's original submission, the ATSIHP Act is defective on several fronts: the definition is anachronistic; the Minister holds ultimate discretionary power including as to the significance afforded to a place; there is no requirement to consult any First Nations land-owning body such as a PBC; there is no presumption in favour of protection of an area; and few statutory criteria guiding decision-making. In addition to these concerns, the Law Council adds that intangible cultural heritage is not protected as under the Victorian legislation, First Nations bodies hold no place in decision-making under the ATSIHP Act, and there is no right to, eg, merits review for such bodies to challenge decisions made. With respect to the 'consultation' requirement, this only extends to publishing a notice in the Gazette and local newspaper (which may not be read by Traditional Owners who may speak several languages other than English).²⁴ In contrast, there is a much stronger requirement to consult the relevant state or territory Minister prior to making a declaration.²⁵ Further, it is incongruous that the Minister entrusted with the protection of First Nations cultural heritage, which is a beneficial piece of legislation aimed at preserving and protecting areas and objects of particular significance to First Nations Australians,²⁶ is the Minister for the Environment, rather than the Minister for Indigenous Australians. This does not reflect the principle that First Nations people themselves should be making such decisions; and
- due to such factors, the ATSIHP Act has been – unsurprisingly – ineffective. As detailed in the Department's submission, of 541 applications received under the ATSIHP Act since 1984, only 28 declarations have been made (with two long term declarations remaining).²⁷

A further contributing issue is that the processes supporting the ATSIHP Act's operation also appear to be flawed. For example, it is possible to make oral, instead of written,

²² Minister for Environment representing the Minister for Aboriginal Affairs, Response to Question on Notice No 2878 asked in the Legislative Council on 18 March 2020 by Hon Robin Chapple <<https://www.parliament.wa.gov.au/parliament/pquest.nsf/a02db76382427ad84825718e0018e9c9/9966d00fe004109a4825852f00217000?OpenDocument>>. See also Senator Siewert, Amendment to General Business Notice of Motion No 608 (11 June 2020).

²³ The transitional provisions will deem them to be approved Aboriginal Cultural Heritage management plans.

²⁴ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 10.

²⁵ *Ibid* s 13.

²⁶ *Ibid* s 4.

²⁷ Australian Government, Department of Agriculture, Water and the Environment, Submission No 23 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* (July 2020) 9.

applications for both emergency and longer-term declarations under the ATSIHP Act.²⁸ However, there does not appear to be a sufficiently clear published procedure by which oral applications are made, including one which ensures clear communication between the Department and the Minister's office regarding such an application. A checklist for evidence is available,²⁹ which requires substantial written evidence. This checklist confirms that:

- applications can be made orally, but will be recorded in writing by departmental staff; and
- the Minister or Department may need to provide all or part of the information that is provided and/or gathered to other parties for reasons of procedural fairness, as part of a review process and/or in the case of a declaration being made.

However, it is unclear how often this occurs in practice. The Department's evidence to this Inquiry also indicates that there is a usual preference towards encouraging written applications.³⁰ It further indicates that a key reason for the low success rate of applications made under the Act is that lack of sufficient evidence is brought before the Minister, and that 'Indigenous applicants themselves may not have been able to adequately articulate the significance of the area to the point of the Minister being satisfied that it was significant for the purposes of the Act'.³¹ The Departmental or Ministerial role in facilitating an application is not canvassed.

Possible Reform Model

While the Law Council would need to consult further on the details of a precise model for reform, it notes with interest the submission of Aboriginal Victoria to the current inquiry, which sets out some possible key elements of one model that largely aligns with and augments the Law Council's proposals above.³² This proposes that standalone Commonwealth Aboriginal cultural heritage legislation should:

- establish national accreditation thresholds for State Aboriginal heritage legislation which, if satisfied, means that the Commonwealth will not intervene in Aboriginal cultural heritage matters;
- establish a National Heritage Council (**the Council**) comprised of representatives of Traditional Owner groups from all States and Territories;
- provide the Council with the power to accredit State and Territory Aboriginal heritage legislation in accordance with agreed minimum standards;

²⁸ See, eg, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss 9, 10.

²⁹ Australian Government, Department of Agriculture, Water and the Environment, *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth): Checklist: Information to be submitted at time of application* <<https://www.environment.gov.au/system/files/pages/6af7fbb4-fe32-4f42-b602-8e4badc726c8/files/checklist-atsihp-application.pdf>>.

³⁰ Commonwealth of Australia, Committee Hansard, 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*, Friday 7 August 2020, Canberra, 16-17 (Mr Stephen Oxley).

³¹ Ibid.

³² Aboriginal Victoria, Submission No 91 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* (July 2020).

- provide this Council with all of the current functions of the Commonwealth Minister under the ATSIHP Act and specifically the power to make declarations of protection in states and territories without accredited Aboriginal cultural heritage legislation;³³
- establish a national process for dealing with Aboriginal ancestral remains matters which cross state borders, administered by the Council;
- establish a national Aboriginal intangible heritage agreement process which aligns with Commonwealth intellectual property, patent and copyright legislation administered by this Council; and
- establish a national process for addressing matters relating to the movement of portable Aboriginal heritage under the *Protection of Moveable Cultural Heritage Act 1986* (Cth) administered by this Council.³⁴

The Law Council considers that there may be merit in such proposals, noting that Victoria has the most advanced legislative model of First Nations cultural heritage protection available. As such, it may be well placed to offer insights into how an effective national scheme could operate.

Aboriginal Cultural Heritage Bill 2020 (WA)

During the course of providing evidence to the Committee, Law Council representative Mr Greg McIntyre SC, undertook to provide to the Committee a copy of a submission regarding the Aboriginal Cultural Heritage Bill 2020 (WA) (**the Bill**) being prepared on behalf of a group of Pilbara and Western Desert Native Title Bodies.³⁵ This submission, which has now been finalised and submitted to the Western Australian Government along with the group's additional specific comments on the Bill, is **attached**.

Senator Dodson - Questions on Notice – Agreement Making

Can you share your view further on the impact and consequences of these matters of agreement making?

The Law Council notes that its answers on agreement making below are confined to cultural heritage issues. However, the Committee may wish to seek further submissions in relation to potential reforms regarding the right to negotiate and Indigenous Land Use Agreements under the Native Title Act more generally.

Agreements entered into between mining companies and native title parties typically contain covenants binding native title parties, in return for the monetary consideration promised by the mining company party, to refrain from objecting or commenting upon applications by the mining company for consent under section 18 of the *Aboriginal Heritage Act 1972* (WA). The same clauses usually also prohibit the native title party from seeking a declaration

³³ The Law Council notes, however, that such powers would also need to be available on an ongoing basis with respect to approvals provided under state and territory cultural heritage legislation that were granted prior to any reforms and accreditations taking place.

³⁴ Aboriginal Victoria, Submission No 91 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* (July 2020) 4-5.

³⁵ Commonwealth of Australia, Committee Hansard, 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*, Friday 2 October 2020, Canberra, 13 (Mr Greg McIntyre SC).

under the ATSIHP Act seeking intervention by the responsible Commonwealth Minister stopping damage to an area of significance.

Negotiating a native title or heritage agreement with such covenants is not presently prohibited by law, so such clauses are able to be negotiated and are legally binding and enforceable by mining parties against the native title parties. The 'appropriateness' of such clauses is more a moral issue than a legal one. Policy makers and legislators could well take the view that, where there is an imbalance in power between the negotiating parties, it is a legitimate approach in the public interest for laws to be enacted which redress that imbalance by enacting laws which prohibit the more powerful party taking advantage of that power in dealings with the more vulnerable party. That approach is reflected, for example, in provisions in employment law, workers compensation law, consumer law and landlord and tenant law, where the usual principle of freedom of contract is tempered by statutory provisions defining the rights of the more vulnerable party imposing specific prohibitions on the conduct of the more powerful party and standards which must be observed by the more powerful party in arriving at agreements.

In their evidence to this Committee, the PKKP have raised significant concerns about their unequal negotiating position compared to RT and that the Participation Agreement they entered into with RT included unfair restrictions on their legal rights to object and ability to comment publicly on the plans to destroy the Juukan Gorge. In your understanding, are these kinds of restrictions common in agreements between TOs and mining companies?

The six month time limit on negotiation of a native title agreement referred to in the PKKP submissions arises out of section 35 of the Native Title Act, which provides that when at least 6 months have passed since the 'notification day' specified under section 29(4), being the day the Government party has given notice of an intention to do an act, such as grant a mining lease, and no agreement has been reached, any negotiating party may apply to the arbitral body for a determination under section 38 that the 'act must not be done', 'may be done' or 'may be done subject to conditions'. Section 31(1)(b) provides that 'the negotiating parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to:

- (i) the doing of the act; or
- (ii) the doing of the act subject to conditions to be complied with by any of the parties.'

Burnside, in an Issues Paper entitled 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis'³⁶ has summarised the origins of good faith negotiations as follows:

In a free market system, private contractual relations are rarely regulated; there is a presumption that contracting parties operate at arms' length and act in their own best interests. Absent allegations of unconscionability or fraud, the courts generally will not enquire into the circumstances in which a private contract was created. The concept of a statutory obligation to negotiate capable of enforcement is therefore somewhat unusual. The right to bargain originated in American workplace relations law, with the 1935 National Labor Relations Act making it an unfair labor practice for an employer to refuse to bargain collectively with employees' representatives. The requirement of 'good faith' – a common law concept – was inserted to overcome the problem

³⁶ Sarah Burnside, '[Negotiation in Good Faith under the Native Title Act: A Critical Analysis](#)' in AIATSIS Native Title Research Unit, *Land, Rights, Laws: Issues of Native Title*, Vol 4, October 2009 Issue Paper No 3 (Sarah Burnside, 'Negotiation in Good Faith').

presented by those employers who were 'tempted to engage in the forms of collective bargaining without the substance'. The right to bargain and the duty to negotiate in good faith were also included in the former Industrial Relations Act 1988 (Cth) and the new Fair Work Act 2009 (Cth) [citations removed].

The NNTT, acting as the arbitral body under the Native Title Act is only empowered to make a determination if it is satisfied that there has been negotiation in good faith.³⁷ The Native Title Act³⁸ places an 'evidential burden' on the party alleging lack of good faith negotiations.³⁹

The NNTT, in a series of decisions, has reached conclusions as to what may comprise good faith negotiations, by asking whether, 'viewing the negotiations overall...the negotiation parties [acted] honestly and reasonably'.⁴⁰ The NNTT has provided indications (commonly known as the 'Njamal indicia') of what might be termed 'bad faith', such as the adoption of a rigid non-negotiable position, a failure to make counter-proposals, or a tendency to shift position just as an agreement seems within reach. In *Western Australia v Taylor*⁴¹ the following indicia were set out: unreasonable delay in initiating communications in the first instance; failure to make proposals in the first place; the unexplained failure to communicate.

The Federal Court has found that good faith does not require a grantee party to make 'reasonable substantive offers or concessions to reach agreement'.⁴²

Further, Burnside, writing in 2009, has noted that⁴³ –

The financial capacity of native title claimants and holders to engage in negotiations is also limited. In the recent Native Title Payments Report, the Government-appointed Working Group noted the 'foundation principle in any significant future act negotiation...that the traditional owners should have available to them advice and representation of a similar quality as the mining company or other proponent'. This goal of a 'level playing field' is currently unachievable by virtue of the significant under-resourcing of Native Title Representative Bodies (NTRBs) and Prescribed Bodies Corporate (PBCs). The Working Group noted that in some cases, proponents are 'left with no practical choice other than to meet the costs of both parties in the negotiations', with these financial contributions constituting 'an important top-up'. It is generally accepted good practice within the mining industry for proponents to fund the negotiation process. In a recent decision, the Tribunal indicated that a grantee party which reneged on a commitment to fund negotiations would not be acting in good faith. Absent an agreement to the contrary, however, good faith negotiation does not require a proponent to fund the negotiating process. The overall concept of reasonableness 'does not require a grantee party to engage

³⁷ NTA, s 36(2); *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 (**FMG v Cox**) at [11].

³⁸ NTA, s 36(2).

³⁹ *Strategic Minerals Corporation NL/ Allan Kyuna and Ors on behalf of the Woolgar Group/ Queensland* [2003] NNTA 83 at [7].

⁴⁰ *Gulliver Productions Pty Ltd v Western Desert Lands Aboriginal Corporation* (2005) 96 FLR 52 (Deputy President Sumner).

⁴¹ (1996) 134 FLR 211 ('Taylor').

⁴² *Strickland & Anor v Western Australia* (1998) 85 FCR 303. Nicholson J held that it was not for the Tribunal to assess the reasonableness of offers made during the negotiations. The Tribunal is, however, 'permitted to have regard to the reasonableness or otherwise of [offers] if it assists in the overall assessment of a party's negotiating behaviour': *Placer (Granny Smith) v Western Australia* (1999) 163 FLR 87 per Deputy President Sumner at [93]-[94].

⁴³ Sarah Burnside, 'Negotiation in Good Faith', 6.

in altruistic behaviour or to make concessions not warranted by standard commercial practices' [citations removed].

Burnside, has said⁴⁴ –

Although native title parties have alleged a lack of good faith in nearly 30 cases, in only four instances has the Tribunal found that a grantee or government party has not acted in good faith. Further, having found that good faith negotiation and other procedural requirements have been complied with, the Tribunal has only once made a determination that a future act must not be done. It must be noted that the Tribunal is restricted by the evidence presented to it and, crucially, by the terms of the Native Title Act. The Native Title Act was premised on the continued ability of industry to access and utilise land subject to claims; the paucity of decisions in favour of native title parties reflects the Act's focus on speed and the facilitation of development.

In a 2017 case the Federal Court in *Charles, on behalf of Mount Jowlaenga Polygon #2 v Sheffield Resources Limited*⁴⁵ confirmed that the obligation to negotiate in good faith continues to apply to voluntary negotiations that occur after an application for arbitral determination has been made.⁴⁶

The criteria for making an arbitral body determination are set out in section 39 of the Native Title Act, as follows:

- (1) In making its determination, the [arbitral body](#) must take into account the following:
- (a) the effect of the act on:
- (i) the enjoyment by the native title parties of their registered native title rights and [interests](#); and
 - (ii) the way of life, culture and traditions of any of those parties; and
 - (iii) the development of the social, cultural and economic structures of any of those parties; and
 - (iv) the freedom of access by any of those parties to the [land](#) or [waters](#) concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the [land](#) or [waters](#) in accordance with their traditions; and
 - (v) any area or site, on the [land](#) or [waters](#) concerned, of particular significance to the native title parties in accordance with their traditions;
- (b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;

⁴⁴ Ibid, 5.

⁴⁵ [2017] FCAFC 218.

⁴⁶ Castledine Gregory Law and Mediation, '[Federal Court extends good faith obligations in Native Title negotiations](#)' (undated).

- (c) *the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;*
- (e) *any public interest in the doing of the act;*
- (f) *any other matter that the arbitral body considers relevant.*

Existing non-native title [interests](#) etc.

(2) In determining the effect of the act as mentioned in [paragraph](#) (1)(a), the [arbitral body](#) must take into account the nature and extent of:

- (a) *existing non-native title rights and [interests](#) in relation to the [land](#) or [waters](#) concerned; and*
- (b) *existing use of the [land](#) or [waters](#) concerned by persons other than the native title parties.*

Laws protecting sites of significance etc. not affected

(3) Taking into account the effect of the act on areas or sites mentioned in subparagraph (1)(a)(v) does not affect the operation of any law of the Commonwealth, a State or Territory for the preservation or protection of those areas or sites.

The statistics identified by Burnside indicate that interests other than native title interests are given significant weight by the Tribunal.

The conclusion to be drawn is that, while the 6-month period in the Native Title Act for negotiation before an arbitral decision may be triggered is a pressure on native title parties, the factors giving effect to the inequality in negotiating power between the native title parties and grantee parties go beyond that and permeate into the arbitral decision-making process.

Can you share your views on the legality and appropriateness of these kinds of restrictions?

Claim-wide/project-wide agreements

Claim-wide or project-wide agreements are not inherently disadvantageous to native title parties, by comparison with tenement-by-tenement agreements. In fact, claim-wide or project-wide agreements provide for a greater possibility of more substantive financial and social benefits to be negotiated and to set appropriate standards of protection of heritage and processes for avoidance of harm to heritage, based on building a respectful relationship between the parties to such agreements, which would be more difficult to achieve with tenement-by-tenement agreements.

Consistently with the object of 'protection of native title' (which includes, as an interest in protecting Aboriginal cultural heritage) in section 3 of the Native Title Act and the objects of Commonwealth, state and territory heritage protection legislation, what needs to be prohibited, by an amendment to the Native Title Act, in claim-wide or project-wide agreements are 'no objection' clauses consenting to the grant of mining tenements which apply universally to all acts within a claim area or within a project area 'as if they were a

single act',⁴⁷ regardless of their impact upon Aboriginal cultural heritage. The right of native title parties to take all reasonable steps to protect their cultural heritage by all lawful means available to them under Commonwealth, state and territory law should be declared by the Native Title Act to be preserved and incapable of being a matter which has been or can be curtailed by agreement.

Do you have recommendations for reform that would specifically address these aspects of agreement making that led to such devastating consequences in this case?

The Law Council recommends that the right of native title parties to take all reasonable steps to protect their cultural heritage by all lawful means available to them under Commonwealth, state and territory law should be declared by an amendment to the Native Title Act and that right should be declared to be preserved and incapable of being a matter which has been or can be curtailed by agreement.

Senator Dodson - Questions on Notice – Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Can you elaborate on the current barriers, including resource barriers, that have prevented the proactive protection of Indigenous heritage sites through National Heritage listing?

As preliminary point, it should be noted that the National Heritage List was created to recognise and protection places with outstanding value to Australia as a whole. The complete list of criteria as set out in the Environment Protection and Biodiversity Conservation Regulations 2000 (Cth) (**the EPBC Regulations**) are set out below and clearly articulate the high standard that is required for inclusion on the National Heritage List.

According to the Department of Agriculture, Water and the Environment:

- Australia has 20 properties on the World Heritage List, of which five are recognised for their Indigenous cultural values; and
- there are 117 places on the National Heritage List. Of these, 19 are listed for their Indigenous values alone.⁴⁸

The Law Council does not advocate for a change to the standard that is applied for a place to be capable of inclusion on the National Heritage List. But that does explain one barrier that has prevented Indigenous heritage sites from being included. The time and financial and human resources involved in engaging in the nomination process (which is set out later in this supplementary submission) are considerable

For prescribed bodies corporate (**PBCs**) and other representative groups representing Indigenous traditional owners, precious, scarce funding often needs to be focused on high risk/high return areas. Using the EPBC Act to proactively protect Indigenous cultural

⁴⁷ Section 42A(2), which modifies the application of Part 2, Division 3 of the Native Title Act relating to future acts.

⁴⁸ In addition, seven places are listed for Indigenous/historic values, eight for Indigenous/natural values, and three for Indigenous/natural/historic values: Australian Government, Department of Agriculture, Water and the Environment, Submission No 23 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* (July 2020) 9.

heritage values using the rigorous heritage listing process is unlikely to be regarded as an efficient use of funding.

Another potential barrier is the lack of a general understanding that the EPBC Act is capable of protecting places of Indigenous cultural heritage and heritage values and that protection of sites is administered only at a state and territory level.

Further barriers are discussed below with respect to the nomination and listing process, as well as relevant criteria under the EPBC Act.

As an immediate measure to improve protection under the EPBC Act, you've recommended a large-scale assessment of Indigenous sites that could qualify for National Heritage. Can you elaborate on what specific steps would be needed to achieve this?

Given the work that is required to identify and assess sites for potential inclusion on the National Heritage List, a new approach is needed under which governments work hand in hand with First Nations peak bodies, PBCs and representative groups strategically to identify and assess First Nations heritage with a view to identifying those sites that potentially meet the criteria for inclusion on the National Heritage List and ensuring that they are put forward for consideration by the Australian Heritage Council.

While not perfect (see our comments in response to the final question below), existing State and Territory heritage lists could be audited to identify potential sites. Aboriginal heritage bodies under state heritage legislation (where those bodies exist), such as Registered Aboriginal Parties under the Victorian Aboriginal Heritage Act, could also be consulted about sites that could meet the criteria for listing.

First Nations bodies – peak and local – may require dedicated additional resourcing towards this objective. Careful consideration would also be needed to ensure that the process of site identification, information sharing and listing addresses First Nations concerns regarding sacred or secret cultural heritage.

Are there other changes you would recommend to the current nomination and listing process under the EPBC Act to ensure more effective protection of Indigenous heritage sites?

The current nomination and listing process involves:

- the Minister may determine a heritage theme to be given priority during the assessment (section 324);
- public nominations are invited, and a minimum of 40 days will be allowed for nominations to be submitted (section 324J);
- all nominations are referred to the Australian Heritage Council (**AHC**) within 30 business days after the end of the nomination period (section 324J);
- the Minister may reject nominations which are vexation etc, or which do not contain sufficient information (section 324JA(4));
- the AHRC provides the Minister with a proposed priority assessment list of nominations within 40 business days (sections 324JB, 324JC and 324JD);

- the Minister may make changes and publishes the final priority list within 20 business days. The Minister may remove or add nominated places during this time (section 324JE);
- the AHC invites public comment on each nominated place in the finalised priority assessment list, with a minimum of 30 business days allowed for comments to be submitted (324JG); the Council provides assessments on nominated places at the conclusion of the assessment period (sections 324JH and 324JI);
- the Minister generally makes a decision within 90 business days (section 324JJ); and
- the Minister may include the place or part of the place and its values in the National Heritage List (section 324 JJ(1)(a)).

As is clear, one of the key roles of the AHC is to assess places for the National Heritage List (and the Commonwealth Heritage List), as well as nominating places for inclusion in these lists. The AHC is made up of the Chair, six other members and up to two associate members. At least two members must be Indigenous persons with substantial experience or expertise in Indigenous heritage.⁴⁹ The AHC must 'take all practical steps' to identify Indigenous people who have 'rights or interests' in place when the AHC considers a place might have an Indigenous heritage value, and to give them at least 20 business days to comment in writing whether the place should be included.⁵⁰ If it is satisfied that there is a body that can appropriately represent those Indigenous persons, it may provide the information to that body.

The Law Council also notes that a Guide for Indigenous communities regarding nominating places to the National Heritage List (**the Guide**) has been produced and is on the Department's website, which appears to be a positive step.⁵¹ The Guide addresses each of the criterion for nomination and listing and explains how that criterion can be met in the context of an Indigenous cultural heritage site. The Guide also notes that there are other ways of protecting Indigenous cultural heritage and provides information on state and territory legislation and regulatory agencies.

The Law Council makes the following comments about the nomination and listing process under the EPBC Act, while highlighting that the Committee should seek and obtain the views of First Nations peoples themselves on these issues:

- while that there may be processes of which the Law Council is unaware, it is unclear whether or how the Department or the AHRC proactively engages with First Nations peak bodies, PBCs or other local groups representing traditional owners to ensure that they are well informed about, and can actively participate in the nomination and listing process, beyond publishing the above Guide;
- it is unclear how notices published by the Minister are communicated to persons whose first language is not English, or who experience digital or literacy barriers. Some First Nations peoples, particularly in remote areas, may fall into this category. Further, nomination processes rely on written and online communication;

⁴⁹ Department of Agriculture, Water and the Environment, '[About the Heritage Council](#)'.

⁵⁰ EPBC Act, ss 324JH, 341JG.

⁵¹ Department of Environment and Energy (now Department of Agriculture, Water and the Environment), *Nominating places to the National Heritage List: A Guide for Indigenous communities*.

- given (as noted) that scarce resources are available to the above groups, there is a risk that both groups and individuals are unable to prioritise such nominations, or provide supporting information within required timeframes or the level of detail required, effectively. This may result in their applications being rejected or their views inadequately taken on board.
- In this context, it is noted that the Guide states that nominations must include a detailed comparative analysis against similar places elsewhere in Australia, and that it is insufficient to simply state that the nominated place is special.⁵² However, First Nations communities may a) not be well placed to assess a site comparatively in this way and b) may feel that it is inappropriate to comment on other places which are outside their country;
- The Indigenous Advisory Committee established under the EPBC Act does not have a role in this process. In this context, Professor Samuel has recently commented that its role is 'a broad advisory function and is not linked to specific decisions made'.⁵³

Attention should be given to how these barriers may impede Indigenous places of national cultural significance being successfully listed, and processes adjusted to better accommodate participants. While the heritage listing process was not considered in detail in the Interim Report for the review of the EPBC Act, the Law Council notes that Chapter 2 of the Interim Report contains some specific commentary and recommendations in relation to the incorporation of Indigenous knowledge and views into the regulatory processes in the EPBC Act. In particular, Professor Samuel recommended the drafting of a National Environment Standard for best-practice Indigenous engagement 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'.⁵⁴ The Law Council understands that the final report to be issued by Professor Samuel at the end of October 2020 will contain a form of draft Standard and this Standard and other recommendations in the final report may provide additional ideas for reform in this area.

The Law Council further notes that for section 324D of the Act, sub-regulation 10.01A(2) of the EPBC Regulations list the National Heritage criteria (with respect to natural heritage values, Indigenous heritage values and historic heritage values) for a place as any or all of the following:

- (a) the place has outstanding heritage value to the nation because of the place's importance in the course, or pattern, of Australia's natural or cultural history;
- (b) the place has outstanding heritage value to the nation because of the place's possession of uncommon, rare or endangered aspects of Australia's natural or cultural history;
- (c) the place has outstanding heritage value to the nation because of the place's potential to yield information that will contribute to an understanding of Australia's natural or cultural history;

⁵² Guide, <<https://www.environment.gov.au/system/files/pages/824056e4-b75c-43b2-b325-3149ccc745f8/files/nhl-nominating-places-guide.pdf>>.

⁵³ Professor Graeme Samuel AC, *Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2020), 31.

⁵⁴ Professor Graeme Samuel AC, *Interim Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2020), 36.

- (d) the place has outstanding heritage value to the nation because of the place's importance in demonstrating the principal characteristics of:
 - (i) a class of Australia's natural or cultural places; or
 - (ii) a class of Australia's natural or cultural environments;
- (e) the place has outstanding heritage value to the nation because of the place's importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;
- (f) the place has outstanding heritage value to the nation because of the place's importance in demonstrating a high degree of creative or technical achievement at a particular period;
- (g) the place has outstanding heritage value to the nation because of the place's strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;
- (h) the place has outstanding heritage value to the nation because of the place's special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history;
- (i) the place has outstanding heritage value to the nation because of the place's importance as part of indigenous tradition.

Sub-regulation 10.01A(3) states that for the purposes of 10.01A(2), the **cultural** aspect of a criterion means the Indigenous cultural aspect, the non-Indigenous cultural aspect, or both.

However, only sub-regulation 10.01A(2)(i), the last listed criterion, specifically refers to Indigenous cultural heritage. The Law Council considers that it deserves greater prominence and emphasis. Moreover, the definition should be updated and improved to reflect Indigenous cultural heritage as a living and thriving entity rather than one which is simply defined by 'tradition'.

In summary, while the Law Council maintains its view that separate, standalone federal legislation is needed to respond to Indigenous cultural heritage (or significant reforms to the ATSIHP Act), it suggests that:

- current nomination and listing processes be reviewed to ensure that they are effective – that is, Indigenous persons are well-informed and able to make successful nominations under National Heritage listings. The final report on the review of the EPBC Act to be released at the end of October 2020 may provide further guidance in this regard;
- greater resources be made available to appropriate Indigenous representative groups to ensure that they are in a position to apply for National Heritage listing in practice, and to inform and engage Indigenous communities in this process; and
- amending the National Heritage criteria under the Regulations to give appropriate prominence and meaning to Indigenous cultural heritage.

Are there also steps that could be taken at a State and Territory level to improve the identification and registration of Indigenous heritage sites, such as on state registers of culturally and historically significant sites? How does this protection compare with protection of National Heritage listing?

The Law Council's submission noted that current practices under state and territory with respect to the identification and registration of Indigenous heritage sites often fall short. For example, with respect to the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act (NSW)**), it noted that while the Minister has the power to declare a place of specific significance with respect to Aboriginal culture,⁵⁵ this is infrequent. The New South Wales (**NSW**) Aboriginal Land Council has noted that despite hundreds of thousands of Aboriginal sites across NSW, only about 100 Aboriginal places are formally protected under these provisions.⁵⁶

It is also aware that while there is provision in the existing WA Act for declaring protected areas, this has been little used.⁵⁷ Anecdotally, the Law Council understands that there may only be two declared protected areas under those provisions in WA.

The current Victorian example was put to the Law Council as one strong existing example which may inform broader reform in this area, as discussed in its primary submission.⁵⁸ This occurs under a system of automatic protection for Aboriginal cultural heritage. In this context Aboriginal Victoria has noted that:

Any Aboriginal cultural heritage systems applying blanket protection and harm offences requires secure and comprehensive information databases with controlled access. A key provision in the [Victorian legislation] is its establishment of a register, the purposes of which are specified and include acting as a repository for all information about Aboriginal cultural heritage. The Register holds all information about known Aboriginal heritage places, objects, ancestral remains and intangible Aboriginal heritage. It is open for particular categories of people and for particular purposes only but otherwise closed without RAP or Council permission. There is an offence relating to misuse of information.

*The Register is backed up by state of the art GIS and mapping programs, with information digitally available online through a user interface... Heritage Advisors acting for proponents of activities are the primary users of the Register, from which they can access information about known heritage to inform the preparation of CHMPs. Information is also important for land use planning and more strategic heritage management decisions.*⁵⁹

In addition to the above, the Law Council also notes that at the federal level, there are 78 (and 12 proposed new) Indigenous Protected Areas.⁶⁰ The number and spread of areas could be also increased with more resources and an integration with State and Territory Indigenous heritage protection processes. As noted in an earlier review of the EPBC Act,

⁵⁵ NPW Act (NSW), s 84.

⁵⁶ NSW Aboriginal Land Council, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*, Submission to the Joint Standing Committee on Northern Australia, 20 July 2020.

⁵⁷ WA Act, ss 19-26.

⁵⁸ Law Council of Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*, Submission to the Joint Standing Committee on Northern Australia, 67.

⁵⁹ Aboriginal Victoria, Submission No 91 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* (July 2020) 14.

⁶⁰ Department of Agriculture, Water and the Environment, '[Indigenous Protected Areas](#)'.

there is no statutory base for the identification or protection of Indigenous Protected Areas, except as a possible elevation to National Heritage listing.⁶¹ This discussion identifies the current confusing interaction between Commonwealth, State and Territory legislation and processes dealing with environmental, heritage protection and native title.

Contact

The Law Council thanks the Committee for the opportunity to lodge this supplementary submission.

Yours sincerely

Pauline Wright
President

⁶¹ Australian Government Department of the Environment, Water, Heritage and the Arts, *Independent Review of the Environment Protection Biodiversity Conservation Act 1999* (2009), Ch 17.