Attachment

Aboriginal Cultural Heritage Bill 2020 – A Summary & Commentary

Introduction

1. The Aboriginal Cultural Heritage Bill 2020 (WA) creates a multitude of new and improved processes, compared to the *Aboriginal Heritage Act 1972* (WA) ("AHA WA"). It picks up a significant number of concepts not previously in the AHA WA, some of which bear some similarity to those existing in other State legislation –

   - Aboriginal cultural heritage is defined as including tangible and intangible elements important to Aboriginal people of the State and spiritual, historic, scientific and aesthetic perspectives (cl 10)

   - Local Aboriginal cultural heritage services ("LACHS") (cl 30-45)

   - Protection of remains (cl 49)

   - Secret/sacred object protection, including possession and control to the Aboriginal owner (cl 56)

   - Protected areas of outstanding significance (cl 63)

   - A definition of harm, which excludes an expression of opinion disrespecting Aboriginal cultural heritage, and imports qualifications on the concepts of harm: 'serious harm' being harm which is irreversible, high impact, wide scale or to a protected area, and 'material harm', being harm which is not trivial or negligible (cl 80-83)

   - Penalties for harm, including imprisonment for individuals and fines up to $1m for corporations

   - Defences to harm, including due diligence assessments and reasonable steps to avoid harm (cl 87)

   - Management of activities which may harm and principles of co-operation and mutual advantage (cl 90)

   - Due diligence assessments (cl 93)

   - Notification and consultation in relation to Aboriginal parties (cl 97)

   - Minimal impact activities (cl 104)

   - Low impact activity permits (cl 105)

- Management Plans in relation to medium to high impact activities (cl 122) which may be agreed and approved and may incorporate native title agreement provisions (cl 124) and be approved (cl 130, 144) or authorised by the Minister, if not agreed (cl 147)

- A Definition of informed consent for the purposes of agreement to a Management Plan (cl 130)

- Aboriginal Cultural Material determined to be of State significance (cl 153)

- A Directory of heritage (cl 162)

- Stop activity orders (cl 176)

- Prohibition orders (cl 182)

- Remediation Orders (cl 186)

- Aboriginal Inspectors (cl 204)

- SAT Review procedures for parties affected by Ministerial decisions, including Aboriginal parties to Management Plans (cl 258).

The Bill effectively replaces the single offence provision in s 17 of the AHA WA which has one defence of lack of knowledge (s 62) with a three layered distinction as to harm which is serious, which is material or which is not material and several layers of defences: exempt activities, authorisation, due diligence assessments, reasonable steps to avoid or minimise and minimal impact confirmations. It replaces the single consent to uses provision in s 18 of the AHA WA, based on a recommendation as to the importance and significance of a site and 'the general interest of the community' with permits for Low impact activities, and Management Plans for medium or high impact activities authorised by the Minister, subject to being satisfied as to avoidance or minimisation of risk of harm to ACH and the interests of the State.

2. While the Bill makes many improvements upon the current legislation, its implementation will require significant increased resources both within the responsible Department and It needs to be clarified by the Government where the resources are coming from for the LACHS to be established and perform the onerous statutory functions imposed upon them by the ACH Bill.

Beneficial legislation

3. In *Robert Tickner v. Robert Bropho*[1] Black CJ said of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth):

> 29. The Act is clear in its purposes, broad in its application and powerful in the provision it makes for the achievement of its purposes.

[1] [1993] FCA 306; (1993) 114 ALR 409; (1993) 40 FCR 183.

30. The long title of the Act is: "An Act to preserve and protect places, areas and objects of particular significance to Aboriginals, and for related purposes." The purposes of the Act are spelt out in s. 4. They are:

> "...the preservation and protection from injury of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition."

…

38. … an Act described in the then Minister's second reading speech (H of R Deb. 9.5.84 p 2133) as **beneficial legislation**, remedying social disadvantage of Aboriginals and Islanders, and of having the effect, by preserving and protecting an ancient culture from destructive processes and of enriching the heritage of all Australians, an Act described in the then Minister's second reading speech (H of R Deb. 9.5.84 p 2133) as beneficial legislation, remedying social disadvantage of Aboriginals and Islanders, and of having the effect, by preserving and protecting an ancient culture from destructive processes and of enriching the heritage of all Australians, … (emphasis added)

4. The apparent intent of the ACH Bill is that is to be similarly regarded as 'beneficial legislation'. Identifying a beneficial or remedial purpose of legislation invokes, as a statutory interpretation tool, the principle that legislation with a beneficial or remedial purpose will be construed according to that purpose, giving the legislation a 'fair, large and liberal' interpretation, rather than one which is 'literal or technical'.[2] That tool is most effective as a means of statutory interpretation where provisions are ambiguous or have more than one open construction.

5. The beneficial intent of the ACH Bill is reflected in the objects at cl 8 which, in particular at cl 8(1)(c), cites as an object –

> to manage activities that may harm Aboriginal cultural heritage so as to achieve clarity, confidence and certainty in providing balanced and beneficial outcomes for Aboriginal people and the wider Western Australian community; …

6. It is reinforced by clause 46, which sets out principles relating to the custodianship, ownership, possession and control of Aboriginal cultural heritage, including, at sub-clause (f), that –

> it is important for Aboriginal people and the wider community that Aboriginal cultural heritage is protected and preserved.

7. Further to that, the Bill also adopts, in sub-clause 91(d), the principle that –

> where possible, in utilising land for the maximum benefit of the people of Western Australia, that valuing Aboriginal cultural heritage should be prioritised in managing activities that may harm that cultural heritage.

Aboriginal cultural heritage defined

8. 'Aboriginal cultural heritage' ("ACH") is defined in clause 10 of the Bill in broad terms, as follows -

> *Aboriginal cultural heritage* means the tangible and intangible elements that are important to the Aboriginal people of the State, recognised through social, spiritual, historical, scientific or aesthetic

[2] *W v City of Perth* (1997) 191 CLR 1, 12 per Brennan CJ and McHugh J, 39 per Gummow J; See also AB v Western Australia (2011) 244 CLR 390, [24].

perspectives (including contemporary perspectives), as part of their traditional and living cultural heritage and includes —
(a) an area that is composed of or contains tangible elements of that cultural heritage (an ***Aboriginal place***);
(b) an object that is a tangible element of that cultural heritage (***Aboriginal object***);
(c) a group of areas (a ***cultural landscape***) interconnected through tangible or intangible elements of that cultural heritage;
(d) any bodily remains of a deceased Aboriginal person (***Aboriginal ancestral remains***), other than remains that —
(i) are buried in a cemetery where non-Aboriginal persons are also buried; or
(ii) have been dealt with or are to be dealt with under a law of the State relating to the burial of the bodies of deceased persons.

9. The AHA WA did not use the term 'Aboriginal cultural heritage'. It used the term 'Aboriginal cultural material', which it defined in s 4 to mean 'an object of Aboriginal origin that has been declared to be so classified under section 40'. Section 40 allows for that classification to be made by the Governor upon recommendation by the Aboriginal Cultural Material Committee ("ACMC") that an object or class of objects of Aboriginal origin is –

(a) of sacred, ritual or ceremonial importance;

(b) of anthropological, archaeological, ethnographical or other special national or local interest; or

(c) of outstanding aesthetic value,

10. That provision of the AHA WA has not been used to any great extent, probably because section 6 of the AHA WA declares that –

this Act applies to all objects, whether natural or artificial and irrespective of where found or situated in the State, which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which are or were used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people past or present.

11. The AHA WA also declares, in s 5, that it applies to –

(a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;

(b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;

(c) any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;

(d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.

12. The ACH Bill, in proposing the definition of ACH which it does, is adding a description of what might be included within the concept of culture, including the possibility of intangible elements, adopting a broader notion of place than exists under the AHA WA including the notion of a group of places and extends protection to ancestral remains.

13. However, the only apparent application of the concept of intangible heritage in the operative provisions of the Bill is in relation to protecting an area of outstanding significance (cl 63(b)) including a group of areas which may be connected by an intangible link to form a cultural landscape (cl 10(1)(c)). By way of contrast the *Aboriginal Heritage Act 2006* (Vic) ("AHA Vic") sections 79A to 79L sets out a process for registration of Aboriginal intangible heritage, offences for using intangible heritage for commercial purposes and Aboriginal intangible heritage agreements and their registration. 'Intangible heritage' is defined in the AHA Vic, s 79B as follows –

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

Aboriginal Cultural Heritage Council ("ACH Council")

14. The ACH Council is effectively a replacement body for the Aboriginal Cultural Material Committee under the AHA WA.

15. The membership of the ACH Council is likely to have more Aboriginal members than the ACMC. The ACH Bill cl 17 provides that –

> (1) The ACH Council is to consist of —
> (a) a chairperson, who is an Aboriginal person, appointed by the Minister…
>
> (3) The Minister is to ensure that —
> …
> (b) as far as practicable, preference is given to appointing Aboriginal people as members of the ACH Council…

16. That contrasts with the AHA WA ACMC membership, constituted as follows:

> **28. Aboriginal Cultural Material Committee**
>
> (2) The membership of the Committee consists of —
>
> (a) appointed members…; and
>
> (b) ex-officio members.
>
> (3) Of the appointed members, one shall be a person recognised as having specialised experience in the field of anthropology as related to the Aboriginal inhabitants of Australia and shall be appointed by the Minister after consultation with the persons responsible for the study of anthropology at such of the establishments of tertiary education situate in the State as the Minister thinks fit.
>
> (4) Subject to subsection (3), the appointed members shall be selected from amongst persons, whether or not of Aboriginal descent, having special knowledge, experience or responsibility which in the opinion of the Minister will assist the Committee in relation to the recognition and evaluation of the cultural significance of matters coming before the Committee, and shall be appointed by the Minister from a panel of names submitted for the purposes of this Act by the Registrar.
>
> (5) The Minister shall appoint the Chairman of the Committee from amongst the members of the Committee,

29. Ex-officio members

The following persons, namely —

(a) the person appointed Director of the Museum;

(b) the person immediately responsible to a Minister of the Crown for the administration of Aboriginal affairs and the support of traditional Aboriginal culture;

(c) an authorised land officer within the meaning of the *Land Administration Act 1997* for the time being nominated for the purposes of this section by the Minister to whom the administration of that Act is for the time being committed by the Governor,

are members of the Committee by virtue of their office referred to in paragraph (a) or (b) or nomination referred to in paragraph (c), as the case requires, and while either of those offices is vacant the person acting in that office is thereby constituted a member while so acting.

17. The functions of the ACH Council are also described in clause 18(1) in a way which places more emphasis upon the involvement of Aboriginal people. They include -

b) to promote the role of Aboriginal people in —
(i) the recognition, protection and preservation of 18 Aboriginal cultural heritage; and
(ii) the management of activities that may harm Aboriginal cultural heritage; and
(iii) the administration of this Act; …

Local Aboriginal cultural heritage services ("LACHS")

18. The ACH Bill creates in the form of LACHS a type of entity which does not exist under the AHA WA. They are conceptually similar to Recognised Aboriginal Representative Bodies provided for under the *Aboriginal Heritage Act 1988* (SA) ("AHA SA") as follows:

19B—Recognised Aboriginal Representative Bodies

(1) For the purposes of this Act, the ***Recognised Aboriginal Representative Body*** for—

(a) a specified area; or

(b) a specified Aboriginal site or sites; or

(c) a specified Aboriginal object or objects; or

(d) specified Aboriginal remains,

is to be determined in accordance with this Part.

(2) Anangu Pitjantjatjara Yankunytjatjara will be taken to be the Recognised Aboriginal Representative Body in respect of the lands (within the meaning of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981*).

(3) Maralinga Tjarutja will be taken to be the Recognised Aboriginal Representative Body in respect of the lands (within the meaning of the *Maralinga Tjarutja Land Rights Act 1984*).

(4) Subject to this Part, a registered native title body corporate (within the meaning of the *Native Title Act 1993* of the Commonwealth) will be taken to be appointed as the Recognised Aboriginal Representative Body in respect of the area that is the subject of the relevant native title determination under that Act (including, to avoid doubt, areas within that area in which native title has been extinguished or suppressed).

(5) However, an appointment under subsection (4) will only have effect if the appointment is approved by the Committee (and, to avoid doubt, the Committee may refuse to approve an appointment for any reason the Committee thinks fit).

(6) If the Committee refuses to approve an appointment under subsection (4), that subsection will be taken to no longer apply in respect of the area that is the subject of the relevant native title determination.

(7) A registered native title body corporate that would, but for this subsection, be taken to be appointed as the Recognised Aboriginal Representative Body in respect of a particular area may, by notice given in a manner and form determined by the Committee, elect not to be the Recognised Aboriginal Representative Body in respect of the area, a specified part of the area or a specified Aboriginal site, object or remains within the area.

19. The South Australian model more strongly gravitates towards bodies existing under the *Native Title Act 1993* (Cth) ("NTA"), but retains an approval process for the Aboriginal Heritage Committee, which is a body equivalent to the ACH Council under the ACH Bill: see AHA SA s 7 and 8.

By way of comparison, the *Aboriginal Heritage Act 2006* (Vic) (as amended in 2016), at s 148, uses the model of a registered Aboriginal party with the following functions—

(a) to act as a primary source of advice and knowledge for the Minister, Secretary and Council on matters relating to Aboriginal places located in or Aboriginal objects originating from the area for which the party is registered;

(b) to advise the Minister regarding, and to negotiate, the return of Aboriginal cultural heritage that relates to the area for which the party is registered;

(c) to consider and advise on applications for cultural heritage permits;

(d) to evaluate and approve or refuse to approve cultural heritage management plans that relate to the area for which the party is registered;

(e) to enter into cultural heritage agreements;

(f) to apply for interim and ongoing protection declarations;

(fa) to provide general advice regarding Aboriginal cultural heritage relating to the area for which the party is registered;

(fb) to perform functions under this Act in relation to cultural heritage management plans, cultural heritage permits, cultural heritage agreements, preliminary Aboriginal heritage tests, Aboriginal cultural heritage land management agreements and Aboriginal intangible heritage agreements;

(fc) to perform functions under this Act in relation to cultural heritage permits, including the granting of permits;

(fd) to advise the Minister administering the **Planning and Environment Act 1987** on proposed amendments to planning schemes which may affect the protection, management or conservation of places or objects of Aboriginal cultural heritage significance;

(fe) to report to the Council annually on the performance of its functions under this Act, including any fees and charges paid to or imposed by the party in respect of the year;

(ff) to nominate information about Aboriginal cultural heritage to be restricted information on the Register;

(g) to carry out any other functions conferred on registered Aboriginal parties by or under this Act.

20. The Victorian model also provides (at s 132) for an Aboriginal Heritage Council with the following functions –

(aa) to be the central coordinating body responsible for the overseeing, monitoring, managing, reporting and returning of Aboriginal ancestral remains in Victoria;

(a) to advise the Minister in relation to the protection of Aboriginal cultural heritage in Victoria, including advising the Minister about—

(i) the cultural heritage significance of any Aboriginal ancestral remains or Aboriginal place or object;

(ii) measures for the effective protection and management of Aboriginal cultural heritage in Victoria, including the management of culturally sensitive information relating to that heritage;

(iii) measures to promote the role of Aboriginal people in the protection and management of Aboriginal cultural heritage and in the administration of this Act;

(iv) the standards of knowledge, experience, conduct and practice required of persons engaged in research into Aboriginal cultural heritage;

(v) the training and appointment of authorised officers under this Act;

(vi) any other matters referred to the Council by the Minister;

(b) at the Minister's request, to advise and make recommendations to the Minister on the exercise of his or her powers under this Act, including advising the Minister about—

(i) the application of interim or ongoing protection declarations;

(ii) a proposal by the Minister to require a cultural heritage management plan to be prepared;

(iii) whether a cultural heritage audit is necessary;

(iv) whether the compulsory acquisition of land is appropriate in any particular case;

(v) any other matter relating to the exercise of his or her powers under this Act that the Minister requests the Council to consider;

(c) to advise the Secretary—

(i) on measures to establish appropriate standards and guidelines for the payment to registered Aboriginal parties of fees for doing anything referred to in section 60;

(ii) at the Secretary's request, on the exercise of his or her powers under this Act in relation to cultural heritage permits, cultural heritage management plans and cultural heritage agreements.

(2) The Council has the following additional functions—

(a) to receive and determine applications for the registration of Aboriginal parties under Part 10;

(b) to consider for approval proposed cultural heritage management plans for which the Secretary is the sponsor, in the circumstances set out in section 66;

(c) to promote public awareness and understanding of Aboriginal cultural heritage in Victoria;

(ca) to report to the Minister annually on the performance of its functions, including a summary of any reports received by the Council from registered Aboriginal parties;

(cb) to advise the Minister administering the **Planning and Environment Act 1987** on proposed amendments to planning schemes which may affect the protection, management or conservation of places or objects of Aboriginal cultural heritage significance;

(cc) to oversee and monitor the system of reporting and returning Aboriginal ancestral remains and secret or sacred objects;

(cd) to advise the Secretary on cultural heritage permits and cultural heritage management plans related to Aboriginal ancestral remains in areas without a registered Aboriginal party;

(ce) to perform functions under this Act in relation to cultural heritage permits, including the granting of permits;

(cf) to manage the Aboriginal Cultural Heritage Fund;

(cg) to provide advice regarding Aboriginal cultural heritage, including to the Minister and the Secretary;

(ch) to manage, oversee and supervise the operations of registered Aboriginal parties;

(ci) to promote and facilitate research into the Aboriginal cultural heritage of Victoria;

(cj) to nominate information about Aboriginal ancestral remains, Aboriginal secret or sacred objects and Aboriginal places and objects to be restricted information on the Register;

(ck) to publish policy guidelines consistent with the functions of the Council;

(cl) to report to the Minister every 5 years on the state of Victoria's Aboriginal cultural heritage;

(d) to carry out any other functions conferred on the Council under this Act.

21. As can be seen from the description of their respective functions, the Victorian legislation gives the registered Aboriginal parties the deliberative functions which the Western Australian ACH Bill gives to a State wide Aboriginal Heritage Council and the Victorian Aboriginal Heritage Council is more of an overview body. The Victorian legislation results in a greater devolution of power to local Aboriginal decision- makers than the Western Australian ACH Bill.

22. The ACH Council is directed by the Bill to appoint a LACHS for different areas of the State, but one LACHS may serve more than one area (cl 31(1) and (2)).

23. The functions of a LACHS are:

(a) to facilitate consultation with native title parties and other knowledge holders who have relevant knowledge of Aboriginal cultural heritage in the area;
(b) to make, or to facilitate the making of, agreements about the management of Aboriginal cultural heritage in the area;
(c) to give effect to agreements about the management of Aboriginal cultural heritage that apply in respect of the area, whether or not the local ACH service is a party to the agreement;
(d) to provide evidence to the ACH Council of Aboriginal cultural heritage in the area and the importance of that heritage;
(e) to make submissions, and to provide information, to the ACH Council about proposals for activities to be carried out in the area and the management of those activities so as to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage;
(f) to assist in improving the accuracy of the ACH Directory by providing accurate evidence and data about Aboriginal cultural heritage in the area;
(g) to consult with other local ACH services, native title parties and knowledge holders who are not native title parties about Aboriginal cultural heritage that extends beyond the geographic boundaries of the area;
(h) 1 to undertake, either directly or indirectly, on-ground identification, maintenance and conservation of Aboriginal cultural heritage in the area;
(i) to report to the ACH Council about matters related to the performance of the functions of the local ACH service as required by the regulations;
(j) other functions, if any, that are prescribed (cl 32).

24. Those qualified to be appointed are:

(a) a native title party for the area;
(b) a CATSI Act corporation —
(i) that represents the Aboriginal community in the area; or
(ii) the majority of the members of which are knowledge holders for the area;
(c) a Corporations Act corporation —
(i) that represents the Aboriginal community in the area; or
(ii) the majority of the members of which are knowledge holders for the area;
(d) a native title representative body for the area.

25. A LACHS, in order to be appointed, must have the following qualities:

(a) has comprehensive knowledge of the local Aboriginal community in the area; and
(b) has the endorsement of any native title party, or parties, for the area or part of the area; and
(c) has sufficient support of the local Aboriginal community in the area to ensure that all the persons to be consulted are consulted as required; and
(d) has the necessary skills to promote negotiations between people who propose to carry out activities in the area and knowledge holders for the area where it is proposed that the activities will be carried out; and
(e) is impartial; and
(f) has sufficient skills and resources to undertake the functions of a local ACH service; and
(g) has in place a reasonable fee structure for the fees to be charged in connection with the carrying out of the functions of a local ACH service; and
(h) satisfies other requirements, if any, that are prescribed.

26. The appointment of a LACHS is for as long as the corporation remains registered under the CATSI Act or *Corporations Act 2001* (Cth) or the appointment is cancelled under s 37(2) (cl 36). The ACH Council may cancel the appointment on request by the LACHS or suspend or cancel it if the Council or Minister are no longer satisfied that it meets the requirements for appointment (cl 37(2)) and may amend the area of the LACHS on request or of its own initiative after giving notice and receiving submissions (cl 38). Objections may be made to the Minister about these decisions by the ACH Council and the Minister, after considering the information provided to the ACH Council and any further information, may confirm the ACH Council decision or make another decision (cl 40).

27. A LACHS is entitled to charge a fee for services in accordance with its fee structure, as indicated at the time of applying to be appointed or any variation approved by the ACH Council, but may not charge a fee for services to the Department or ACH Council (clauses 41-2). The Bill does not indicate where the fee for services is to come from or how a LACHS is otherwise to be resourced. Discussions with the Department have suggested the possibility that the State may provide some start-up funding for a LACHS. Otherwise it has been suggested that there is an expectation that a LACHS will need to negotiate with proponents to reach agreement on a fee for service to carry out the agreement related functions associated with each particular proposal which may affect ACH in the area for which the LACHS is responsible. Those functions, however, represent only some of the statutory functions of a LACHS, as outlined above. Unless the State financially resources the balance of the functions of LACHS, then the system proposed by the Bill is likely to be ineffective and will comprise a hollow appearance of shifting of the Aboriginal cultural protection process to engagement of local Aboriginal knowledge holders but that not occurring in reality because the LACHS will not have the capacity to perform its functions.

Aboriginal ancestral remains

28. The ACH Bill, clause 49(1) introduces the concept that –

> An Aboriginal person, group or community that has, in accordance with Aboriginal tradition, rights, interests and responsibilities in respect of an area in which Aboriginal ancestral remains are located, or are reasonably believed to have originated from, is a custodian of the ancestral remains and is entitled to possession and control of those remains.

29. It creates a duty (subject to fines for non-compliance with the duty) of 'individuals' or 'organisations' in possession of Aboriginal ancestral remains to give notice of that to the ACH Council (cl 50) and for organisations to return them to custodians entitled to them and notify the ACH Council of that (clause 51). The duty of individuals (clause 52) and the Coroner (clause 53) is to return the remains to the ACH Council and the Council then has power to return them to custodians (clause 54). It is not clear why the duties are differentiated in that way.

30. The ACH Bill makes it an offence to disturb or remove or disturb Aboriginal remains (cl 55(1), but Aboriginal persons dealing with them in accordance with Aboriginal tradition are excepted from that provision (cl 55(2)).

Secret or sacred objects

31. The ACH Bill, in Part 5, Division 3, also has provisions relating to the return of 'secret or sacred' objects to a 'custodian and rightful owner' of the object entitled to its 'possession and control' (cl 57(1)). It is a stated principle of the ACH Bill that –

> secret or sacred objects should, where practicable, be under the custodianship, ownership, possession and control of Aboriginal people (cl 46(d)).

32. The provisions in this Division are an improvement upon sections 41 to 48 of the AHA WA, which require a person with custody or control of an object 'of a kind classified as Aboriginal cultural material' to give notice of it to the Minister, produce it to the Minister, if required by the Minister, , who may retain it. Under the AHA WA objects classified as Aboriginal cultural material may not be sold, except by an Aboriginal person acting in a manner sanctioned by Aboriginal custom or provided it has been offered for sale to the Minister. The Minister can choose to purchase the object at an agreed price or one set upon application to the Local Court. There is little evidence of those provisions being used.

33. The definition in the AHA Bill of 'secret or sacred object' is 'an object that is secret or sacred to Aboriginal people in accordance with Aboriginal tradition',[3] there is no description of what makes an object secret or sacred and no specification of the criteria by which an object is to be judged to fit into that category or specification of who is to decide whether an object fits into that category.

34. The Bill is apparently intended to only vest custody in Aboriginal people of a sub-category of objects which form part of the ACH described in clause 10(b) as an 'Aboriginal object'.

35. In terms of Aboriginal self-determination, it could be said that the provisions in the Division should apply to all objects forming part of ACH and not be limited to so-called 'sacred or secret objects'.

36. If Part V Division 4 is to apply to a sub-group of Aboriginal objects it needs to include a procedure for determining which Aboriginal objects fit into that category. The present structure of the Bill suggests that the ACH Council should manage that procedure. The functions of the ACH Council include –

> to promote the role of Aboriginal people in —
> (i) the recognition, protection and preservation of Aboriginal cultural heritage; [4]

37. That, plus the likely culturally sensitive nature of the task of determining which objects fit into the sub-category, suggests delegation of that task[5] to 'knowledge holders',[6] i.e. –

> (a) for an area, means an Aboriginal person who, in accordance with Aboriginal tradition —
> (i) holds particular knowledge about the Aboriginal cultural heritage of the area; or
> (ii) has rights, interests and responsibilities in respect of Aboriginal places located in, or Aboriginal objects located in or reasonably believed to have originated from, the area;
> (b) for Aboriginal cultural heritage, means an Aboriginal person who, in accordance with Aboriginal tradition —
> (i) holds particular knowledge about the Aboriginal cultural heritage; and
> (ii) has rights, interests and responsibilities for the Aboriginal cultural heritage.

38. The ACH Bill includes a duty, with criminal penalties for its breach, not to sell or remove from the State or conceal secret or sacred objects (cl 61).

Exclusions from duty to return?

39. The duty to return secret sacred objects, falls on 'a person' (cl 58) and 'a prescribed public authority' (cl 59), which distinguishes it from the duty to return Ancestral remains, which applies to 'an organisation or individual' (cl 50). The *Interpretation Act 1984* (WA), s 8 provides that ***'person*** or any word or expression descriptive of a person includes a public body, company, or association or body of persons, corporate or unincorporate'. It follows that the use of the word person is comprehensive of an organisation and a public authority.

40. The reason for the distinction appears to be revealed in the definition of 'organisation' in cl 47 as meaning –

> any person other than the following —

[3] Clause 9.
[4] Clause 18(1)(b).
[5] The delegation could be pursuant to the power to delegate to a committee in cl 20(1)(c); unless the 'committee' referred to in that provision is interpreted as limited to a sub-group of the ACH Council.
[6] As defined in cl 9.

(a) an individual;
(b) the WA Museum.

41. The effect is that the WA Museum has no obligation to return Ancestral remains in its possession. The DHLP advise that no statutory obligation has been placed on the Museum to return remains because they have in place a policy of return of remains.

42. A similar effect may have been intended in clause 56, in relation to return of 'secret or sacred objects', by defining *prescribed public authority* as meaning –

any public authority other than the following —
(a) the WA Museum;
(b) a university listed in the *Public Sector Management Act 1994* Schedule 1.

43. However, the WA Museum and universities are arguably obliged to return such objects by clause 58, which applies to 'a person' and so, in accordance with the *Interpretation Act 1984* (WA), includes public bodies such as the WA Museum and universities.

Protected areas

44. A declaration of an area as a 'protected area' is declared to be for the purpose of providing 'a higher level of protection' to ACH.

45. There are number of limitations in the ACH Bill upon ACL achieving 'protected area' status:

- 'Protected areas' can only exist in relation to areas of 'outstanding significance' (cl 63-64);
- 'Outstanding significance' is defined as meaning –
  (a) that the cultural heritage is of outstanding significance to Aboriginal people including to an individual, community or group; and
  (b) that the significance is recognised through social, spiritual, historical, scientific or aesthetic perspectives (including contemporary perspectives).
- Only a knowledge holder is empowered to make an application for an area to be declared as a 'protected area' (cl 65(1));
- An application must not include any area to which an ACH permit relates, without the agreement of the permit holder to exclude that area from the permit area (cl 65(3));
- An application must not include any area to which an ACH management plan relates, without the agreement of the parties to the ACH management plan to exclude that area from the permit area (cl 65(4));
- The ACH Council is obliged to consider the ACH and it significance 'to the knowledge holders for the cultural heritage' (cl 69(1)(c)), but, if it forms a preliminary view that an area is of outstanding significance to the knowledge holders (cl 69(2)) and should be declared a protected area is obliged to give notice to and receive submissions from any person it considers has an interest in the area (cl 70) and retains an unfettered and undirected discretion as to weighing of those submissions and to form a view that an area should not be declared a protected area (cl 71(1));
- The Minister has an unfettered and undirected power to reverse or confirm the view of the ACH Council that an area should not be declared a protected area (cl 71(3) and (4));
- The Minister is the ultimate arbiter of what comprises a 'protected area', after taking into account a recommendation of the ACH Council that an area be declared a protected area (clauses 72(2) and 74(2)(a)) and 'the interests of the State' (cl 71(2)(b)).

46. It appears that 'protected areas' are likely to include only areas in which nobody but knowledge holders have any interest and which they can demonstrate are outstanding from the point of view of the State.

47. Further, the Bill only protects 'cultural landscapes' from harm within 'protected areas' (cl 80(d)).

48. The only effect of an area being declared as a 'protected area' is that the area may –

> be made subject to conditions relating to any of the following —
> (a) the management of the area;
> (b) access to the area;
> (c) any other matters, if any, that are prescribed.[7]

49. Whether an area being declared a 'protected area' will achieve the purpose of 'a higher level of protection' is in part dependent upon how the Minister exercises the unfettered and undirected discretion the Minister has to place conditions upon the areas declared. Part 6 would come closer to its declared purpose if it set out mandatory relevant considerations related to how the ACH might be protected for the Minister to take into account in exercising his discretion whether or not to make the declaration and the conditions to place on the area.

50. The significance of a protected area is that harm to such areas cannot be the subject of 'authorised', 'medium impact', 'minimal impact', 'low impact' or 'medium to high impact' activities, as discussed below in relation to the defences to crimes or offences of harm.

Harming offences

51. The ACH Bill protects from harm, by creating offences which attract penalties –

- *Aboriginal places*, being areas containing tangible elements of cultural heritage (clauses 9 and 10(1)(a)); and
- *Aboriginal objects*, being tangible elements of cultural heritage (clauses 9 and 10(1)(b)); but
- only protects 'cultural landscapes' from harm within 'protected areas' (cl 80(d)); and
- does not protect ACH from an act comprising the expression of

  > an opinion or belief, that —
  > (i) demonstrates disrespect for the importance of Aboriginal cultural heritage to Aboriginal people; or
  > (ii) diminishes or otherwise affects the value of Aboriginal cultural heritage to Aboriginal people;
  > Or
- otherwise protect any intangible elements of ACH.

52. The Bill (reasonably, but perhaps unnecessarily) excludes from the possibility of causing harm an Aboriginal person acting in accordance with Aboriginal tradition (cl 81(2)).

53. The Bill creates a hierarchy of harm and penalties:

- *Harm*, which comprises an offence and attracts a fine for an individual up to $25,000 and for a body corporate up to $250,000, with daily penalties for continuing offences (cl 86);
- *Material harm*, being harm which is neither trivial nor negligible (cl 82(2)), which comprises an offence and attracts a fine for an individual up to $100,000 and for a body corporate up to $1,000,000, with daily penalties for continuing offences (cl 85);

[7] Clause 74(4).

- *Serious harm*, which comprises a crime and attracts, for an individual, imprisonment for up to 4 years or a fine up to $500,000, or both and for a body corporate up to $5,000,000, with daily penalties for continuing offences (cl 85) being harm which is –

> (a) irreversible or of a high impact or on a wide scale; or
> (b) to Aboriginal cultural heritage that is —
> (i) a protected area; or
> (ii) within a protected area.[8]

54. It is somewhat surprising that a penalty attaches to harm which is not material or serious and thus is in the category of being 'trivial or negligible'. However, there is no indication of the standard by which that description is to be applied. It must be assumed that it is to be applied by a Court in accordance with an objective test. Given that ACH is defined in cl 10(1) as elements which 'are important to Aboriginal people' it would be expected that the objective test would be applied by attributing to the ordinary reasonable Aboriginal person of a not overly sensitive disposition and by that standard reaching a conclusion as to whether harm has occurred.[9] There may be a good policy reason for sanctioning even trivial or negligible harm which has occurred by reason of activity which, though it has caused such limited harm, has not fallen into the arena of being sanctioned by array of defences available under the Bill which provide a means of avoiding any penalty. It penalises those who do not seek to avail themselves of the protections which the Bill provides those who harm ACH. It also penalises a failure to provide advance notice of ACH harm to those who may be concerned about such harm.

Defences

55. Accident, as defined in *The Criminal Code* S 23B(2) is excluded as a defence to the crime of serious harm (cl 84(2)).

56. The Bill provides for specific defences –

(1) Authorisation under Part 8 (cl 87):

- Authorisation to carry out an 'exempt activity', not in a protected area (cl 100)
- Authorisation to carry out a 'minimal impact activity', not in a protected area, following a due diligence assessment and having taken reasonable steps to minimise risk of harm (clauses 101 and 104)
- Authorisation to carry out a 'low impact activity', not in a protected area, in accordance with an ACH permit or an approved or authorised ACH management plan (clauses 102, 105 to 121)
- Authorisation to carry out a 'medium to high impact activity', not in a protected area, in accordance with an ACH permit or an approved or authorised ACH management plan (clauses 103, 122 to 155)

(2) In accordance with -

- Protected area order (cl 88(a)); or
- Regulations applicable to a protected area (cl 88(b)).

[8] Clause 82(1).

[9] See a similar approach to determining whether racial vilification has occurred under s 18C of the *Racial Discrimination Act 1975* (Cth): *Prior v Queensland University of Technology & Ors* [2016] FCCA 285 [46]-[49]; *Prior v Wood* [2017] FCA 193.

(3) Acts in accordance with a stop activity order, prohibition order or remediation order under Part 10 of the Bill (cl 89(a)); or
(4) Acts following a due diligence assessment that does not identify the ACH and taking all reasonable steps to avoid or minimise harm (cl 89(b)); or
(5) Acts in accordance with the *Coroners Act 1996* determining Aboriginal ancestral remains (cl 89(c); or
(6) Acts in accordance with the *Emergency Management Act 2005* dealing with an emergency (cl 89(d); or
(7) Prescribed persons carrying out prescribed acts.

Managing activities

57. The ACH Bill, at Part 8, under heading of 'Managing activities that may cause harm to Aboriginal heritage' provides for –

- Due diligence assessments (Div 2)
- Notification of Aboriginal parties (Div 3)
- Authority to harm (Div 4)
- Minimal impact activities (Div 5)
- ACH permits (Div 6)
- ACH Management plans (Div 7)

58. The Bill sets out principles of cooperation and mutual advantage relating to activities that may harm ACH and, in particular, at cl 91(d) suggests that –

> where possible, in utilising land for the maximum benefit of the people of Western Australia, that valuing Aboriginal cultural heritage should be prioritised in managing activities that may harm that cultural heritage.

59. It reflects the tension between economic 'beneficial use' of land the harm it can cause to cultural heritage and does not identify how one can take precedence over another.

60. Clause 92 sets out procedural requirements of the consultation which is prescribed as a prelude to ACH harming activities.

Due diligence assessments

61. Due diligence assessments are a process for classifying levels of harm of ACH: minimal, low or medium to high (cl 93(b)) and identifying who the Bill requires to be notified (cl 93(c)). A Code apparently will be established as to how to do the assessments (cl 95). A previous agreement may be enough to answer the question whether ACH may be harmed (cl 96 and 93(a)).

Notification and consultation

62. In relation to low or medium to high impact activity a proponent must notify each local ACH service for the area or, in the absence of a local ACH service, each native title party and knowledge holder who is not a native title party for the area or, in their absence, the Native Title Representative Body for the area (cl 97).

Parties to ACH management plan

63. The parties to an ACH Management plan are each local ACH service for the area or, in the absence of a local ACH service, each native title party and knowledge holder who is not a native title party for the area or, in their absence, the Native Title Representative Body for the area (cl 98).

Authority to harm

64. The various circumstances in which a person may be authorised to harm ACH by exempt or low, medium or high impact activities are outlined above when discussing the defences to harming offences. Those authorisations apply in relation to an ***exempt activity*** that is defined in cl 90 as –

> a) construction or renovation of a residential building or ancillary building on a lot that is less than 1 100m2 in accordance with the *Planning and Development Act 2005*;
> (b) development of a prescribed type carried out in accordance with the *Planning and Development Act 2005*;
> (c) a subdivision of not more than 5 lots in accordance with the *Planning and Development Act 2005*;
> (d) travelling on an existing road or track;
> (e) taking photographs for a recreational purpose;
> (f) recreational activities carried out on or in public waters or on a public place;
> (g) clearing of native vegetation in accordance with a clearing permit granted and in force under the *Environmental Protection Act 1986* Part V Division 2;
> (h) burning that is done —
> (i) for fire prevention or control purposes or other fire management works on Crown land; and
> (ii) by the FES Commissioner as defined in the *Fire and Emergency Services Act 1998* section 3;
> (i) reploughing or reclearing an established fire-break;
> (j) any other prescribed activity;

65. The most concerning exempt activities are recreational activities, which could include a broad range of activities which could have a substantial harmful effect on ACH and clearing vegetation, which could impact things such as trees with high cultural significance.

66. The concepts of 'low', 'medium', 'high' and 'minimal' impact activities are not defined in cl 91. The definitions repeat the words they purport to define and so are to be given their ordinary dictionary meanings, but limit their application to activities involving '**ground disturbance** that is prescribed'. That limitation renders irrelevant the definition of ACL as including intangible elements. It also leaves obscure, at least until regulations are promulgated, what levels of harm are to be the subject of a permit or to be the subject of a management plan.

67. The exemptions and authorisations to harm ACL under the Bill do little more than create compartmentalised categories of the process which exists under the AHA WA s 18 for consent to be given to the excavation, damage destruction, concealment or alteration of an Aboriginal site.

68. In addition, a proponent can obtain a letter of advice from the CEO of the Department responsible for administering the Act that an activity is a minimal impact activity (cl 104). It reflects the authority which the public service, rather than knowledge holders will have under this Bill to determine what ACL will survive land use in the State. The letter of advice "may be used in evidence in proceedings for an offence under Part 7 Division 2" (cl 104(4)). The Bill does not identify a CEO's letter of advice as a complete defence to a prosecution for causing harm. Perhaps it will serve as a plea in mitigation when a prosecution proceeds for causing harm which is 'trivial or negligible'.

ACH permits

69. When a proponent intends to carry out a low impact activity notice must be given to the parties identified in clause 97 (see [46] above), who then have an opportunity to state their views on the impact of the activity on ACH within a prescribed period (cl 105). The proponent may use a previous agreement as a substitute for that notice and presumably for the expression of views on the impact of the activity on ACH (cl 106).

70. At the end of the prescribed period for submissions the proponent applies to the ACH Council for the permit, including any submissions received (cl 107). The ACH Council gives notice of the application and

> any Aboriginal person may s submit to the ACH Council, within a prescribed period, a statement about their views on the impact of the proposed activity on Aboriginal cultural heritage. (cl 108)

71. The ACH Council then assesses the application and has power to grant the permit if all procedural steps have been taken and –

> there are reasonable steps in place for the activity to be carried out so as to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage by the activity (cl 112(c)).

72. In other words, a permit will be granted to impact the ACH provided the ACH Council is of the view that will have a low impact in terms of ground disturbance and something has been done to minimise harm.

73. A permit's 2 year term (cl 113) may be extended, following a similar procedure to the original grant (clauses 114-116) and may be transferred provided the ACH Council is advised (cl 117), without any power to decline to permit the transfer, despite the fact that the identity of the original applicant was an essential part of permit granted (cl 112(a)). However, it is consistent with a general deficiency in the Bill that there is no vetting of the applicant to determine prospects of compliance with the legislation or its principles.

74. In recognition of the circumstances which applied in relation to the s 18 consent granted to Ri Tinto Iron Ore to destroy the Juukan Caves in the Pilbara, it is proposed in clause 118(1) that there be a condition on ACH permits requiring notification of 'new information' –

> a) that identifies Aboriginal cultural heritage in the area to which the permit relates that was not identified at the time the permit was granted; or
> (b) about the significance of Aboriginal cultural heritage in the area to which the permit relates that was identified at the time the permit was granted.

75. Paragraph (b) caters for the extraordinary situation which apparently obtained in relation to the Juukan Gorge caves where the Archaeologist who had conducted excavation work on the cave had identified and was aware of the significance of the site at the time the s 18 consent was recommended by the ACMC[10] and granted by the Minister, but that information was apparently not conveyed to the ACMC or Minister.

76. If the provision is to be fully protective of areas it should have added to it a sub-paragraph (c) requiring notification of new information about the **significance** of Aboriginal cultural heritage in the area to which the permit relates that was **not** identified at the time the permit was granted.

[10] See http:www.abc.net.au/news/2020-06-06/rio-tinto-knew-6-yeqars-ago-about-46000yo-rock-caves-it-blasted/12319334.

77. This same set of words used in cl 118 is used in relation to 'new information' in cl 123(1)(c) relating to Management Plans and cl 176(1)(b)(ii)(II) relating to 'stop activity orders', which will be discussed further below. The same additional sub-paragraph should be added to those provisions as well.

78. The effect under clause 118 of notification of 'new information' is that the ACH Council may amend a condition of a permit to avoid or minimise the risk of harm to the ACH. If a similar provision had been in existence in the AHA WA it would not have been sufficient to avoid the destruction of the Juukan caves.

79. It is an offence for a person not to comply with the conditions of an ACH permit, with a penalty of $20,000 (cl 158(1).

80. The power of the ACH Council to revoke conditions on an ACH permit (cl 118(6)) may be exercised at the ACH Council's initiative or that of the permit holder (cl 118(7)). However, there is no process for a local ACH service, native title party, 'knowledge holder' of cultural heritage or native title representative body to initiate a consideration by the ACH Council of revocation of permit conditions. Similarly, if the ACH Council is exercising suspension, cancellation or refusal powers or the Minister is considering objections to the same, there is no role for interested Aboriginal parties to participate in that process (clauses 120-121.)

81. There is no process in Part 8 Div 6 for Aboriginal parties notified of an application for an ACH permit to challenge, in the SAT or elsewhere, a decision to grant an ACH permit or relating to the conditions attached to a permit. So, they will be forced to go to the Supreme Court, as they now have to do, in order to challenge section 18 decisions under the current *Aboriginal Heritage Act 1972* (WA).

ACH management plans

82. An ACH management plan ("ACHMP") is said to be required as the pre-requisite to causing harm by medium to high impact activity (cl 122(1)). In other words, it another form of licence or consent to harm ACH.

83. The ACHMP has to include a process to be followed if 'new information' is identified (cl 123(c)). The provision has the same two categories of new information as in cl 118(1) and requires a third category of new information about the significance of ACH which was not known at the time of the establishment of the ACHMP. The Bill does not prescribe a specific consequence of identifying new information.

84. An ACHMP is obliged by cl 123(1) to –

> (d) set out the methods by which the activity is to be managed so as to avoid, or minimise, the risk of harm being caused to Aboriginal cultural heritage; and
> (e) set out the extent to which harm is authorised to be caused to Aboriginal cultural heritage; and
> (f) set out any conditions to be complied with before, during and after the activity is carried out; and
> (g) specify the period for which the plan is to have effect; and
> (h) include or set out other matters, if any, that are prescribed.

85. The ACH Bill (at cl 124) makes Indigenous Land Use Agreements capable of being incorporated into an ACH Management Plan, probably to satisfy the requirement that an ACH Management Plan sets out methods of harm minimisation and any agreed harm authorisation (see cl 123(1)(d) and (e)). The Bill does not have any effect on the validity or effect of Indigenous Land Use Agreements which mining companies have entered into which cover the native title claim areas of the various native title groups in the Pilbara. Those agreements are registered, valid and binding pursuant to the operation of the Native Title Act 1993 (Cth).

86. A proponent intending to carry out an activity in accordance with an ACHMP (being a medium to high impact activity) much consult with each local ACH service for the area or, in the absence of a local ACH service, each native title party and knowledge holder who is not a native title party for the area or, in their absence, the Native Title Representative Body for the area (clauses 125(1) and 97(3)). "Consultation is to be carried out within a reasonable time and in accordance with the consultation guidelines": cl 125(2). The proponent can substitute consultation which has occurred in accordance with a native title or heritage agreement (cl 126).

87. A proponent is obliged to use "best endeavours" to reach agreement on an ACHMP (cl 127(1)(b)) within a prescribed period (cl 127(2)). An ACHMP can been approved, if agreed, or authorised, if not agreed. Clause 130 sets out circumstances in which consent to an ACHMP is not informed consent and requires the application for approval to provide evidence that each Aboriginal party has given informed consent (cl 131(2)(c)). The ACH Council has power to refuse to consider an application not made in accordance with the Act (clause 133). So, if there is no evidence of informed consent there is a discretion not to consider the application for approval. The ACH Council's discretion to consider an approval application is focussed primarily on provision of the information prescribed in cl 131(2) related to the process of consultation and obtaining consent.

88. The timing of the decision-making of the ACH Council is controlled by prescription (cl 134(2) and (3)) and a power of Ministerial direction and over-ride, upon application by the proponent, if the Council does not make a decision within the period prescribed (cl 135(4)-(6)).

89. The decision to approve or refuse to approve an ACHMP (in accordance with cl 134(1) is based upon an obligation for the ACH Council to be:

> satisfied that —
> (a) the activity to which the plan relates is an activity that may harm Aboriginal cultural heritage; and
> (b) the heritage is not of State significance; and
> (c) there has been consultation with each person to be consulted about the activity; and
> (d) each Aboriginal party has given informed consent to the plan; and
> (e) in relation to the other matters, if any, that are prescribed (cl 135)

90. The ACH Council is to decide whether heritage is of State significance in accordance with guidelines it is to issue about factors to be considered (cl 151) and after giving public notice that it may be to local ACH services, native title parties, knowledge holders, landholders, public authorities and others with an interest in the area (cl 153) and considering submissions and the nature of the ACH and its significance to the State (cl 154).

91. It is an offence for a person not to comply with the conditions of an ACHMP permit, with a penalty of $100,000 (cl 158(2).

92. Both the applicant and an Aboriginal party may object to the Minister concerning a refusal to approve, or to suspend or cancel (pursuant to cl 137), an ACHMP by the ACH Council. The Bill does

not set out any grounds for the ACH Council to suspend or cancel an ACHMP, but the Minister's power in response to an objection to confirm the ACH Council's decision or make 'another decision' is to be made on the basis of his satisfaction as to the matters in clause 135 which the ACH Council was obliged to be satisfied about and 'what is in the interests of the State' (cl 139(6)). This echoes the criterion of 'interest of the community' which the Minister presently takes into account in granting AHA WA s 18 consent to a use likely to breach s 17 of the AHA WA.

93. An ACHMP may be recommended by the ACH Council for authorisation by the Minister where, following the proponent having used 'best endeavours to reach agreement with the Aboriginal parties (cl 127(1)(b)) the proponent has not been able to reach agreement with the Aboriginal party and the negotiation period has expired (cl 140(1)). To be authorised there is no pre-requisite that the heritage is not of 'State significance' (as in cl 135(b)) and, in place of 'informed consent' of Aboriginal parties (in cl 135(d)) the Council only needs to be satisfied –

> that there are reasonable steps in place for the activity to be carried out so as to avoid, or minimise, the risk of harm to Aboriginal cultural heritage by the activity (cl 146(1)(c).

94. The Minister's power to authorise an ACHMP is to be based on satisfaction as to the matters set out in clause 146(1) (cl 147(2)(a)), together with 'what is in the interests of the State' (cl 147(2)(b)) and is otherwise unfettered as to whether or not to authorise the recommended ACHMP, or another ACHMP (cl 147(1)). The Minister may also suspend or cancel an authorised ACHMP if no longer satisfied as to the matters set out in clause 146(1) (cl 149(2)).

95. An amended ACHMP may also be authorised, as if it was a new ACHMP, if the parties do not agree on the amendments or the ACH has been determined to be of State significance (cl 150), except that the application does not need to include information about consultation between the parties (cl 150(3), 140(2)(d) and (e) and 146(1)(b)).

ACH Directory

96. There is to be an ACH Directory of information of permits, ACHMPs, strop orders, prohibition orders, remediation orders, Aboriginal parties and those consulted and notified in relation to ACHMPs, knowledge holders for areas or ACH, ACH of the State and historical and other information relevant to ACH (clauses 163-4).

97. The ACH Council is obliged to ensure that the Directory is accurate (cl 165(1)). However, the Directory information is not obliged to be up-to-date, comprehensive or accurate (cl 165(3)).

98. Information about ACH on the Directory must be available to Aboriginal people with traditional rights, interests or responsibilities in relation to it (cl 167) and is available to the public to inform the public about protected areas and ACHMPs (cl 169), inform persons proposing activities which may harm ACH (cl 170) and for the purposes of research into ACH (cl 171).

Stop activity order

99. A 60 day (cl 176(3)) stop activity order may be given by the Minister to the person who has control of an activity (cl 176(2)) –

(i) harming ACH;
(ii) involving an imminent risk of harm to ACH; or
(iii) which will be carried out imminently and will involve a risk of harm to, ACH (cl 176(1)(a);

provided it is not authorised or is authorised under an ACH permit or ACHMP but new information has emerged –

> (I) that identifies Aboriginal cultural heritage that was not identified at the time the permit was granted or the plan was approved or authorised; or
> (II) about the significance of Aboriginal cultural heritage that was identified at the time the permit was granted or the plan was approved or authorised.

100. This is a provision catering for the circumstances relating to the Juukan Gorge caves destruction which needs to go further and add another sub-paragraph –

> (III) about the significance of Aboriginal cultural heritage that was **not** identified at the time the permit was granted or the plan was approved or authorised

101. The stop activity order may prohibit a specified activity being carried out in a specified way or for a specified period (cl 177(b)).

102. The ACH Council is obliged to consider, while the stop activity order is in force, whether the ACH requires the protection of a protection order and whether or not to recommend that to the Minister cl 179(1). It is to give notice of that consideration and the period the order is proposed to be in force to persons in control of the activity, the local ACH service or native title party and knowledge holders or NTRB and provide an opportunity for submissions (cl 180).

Prohibition order

103. The Minister may give a prohibition order upon the ACH Council's recommendation or the Minister's initiative in relation to an activity that is the subject of a stop activity order on the grounds that the grounds for the stop activity order still exist and 'what is in the interests of the State' (cl 181). The 'interests of the State' are undefined and allow the government of the day to take into account a wide variety of political and economic considerations which may be inconsistent with protection of ACH.

104. The Minister may extend a prohibition order after giving notice of a proposal to do so and providing an opportunity for submissions (clauses 184-5).

105. If the Minister proposes to amend or cancel a prohibition order after giving notice and receiving submissions (clauses 197-8).

Remediation order

106. The ACH Council may recommend and the Minister may make a remediation order and give it to the person in control of the activity which caused harm (clauses 186-8. Compliance is enforced by fines (cl 189). The Minister may authorise another person to carry out the remediation directed and may recover the cost of the remediation from the person to whom the remediation order was given (cl 190(2).

Securing compliance

107. Extensive provisions and processes in Part 11 of the Bill are devoted to securing compliance with the legislation, including Inspectors with powers to stop vehicles, secure records, seize things, forensically examine things, entry warrants, directions by inspectors and reasonably necessary use of force.

108. The ACH Bill, at clause 204, provides that inspectors with compliance enforcement powers may include Aboriginal inspectors for specified areas appointed by the CEO. This is an innovation in Western Australia. The Bill does not include any requirement for specific knowledge or qualifications other than that the person appointed is 'an Aboriginal person'.

109. In Victoria there is a provision for Aboriginal heritage officers (s 165A) whose functions are more specifically described as including –

> (a) monitoring compliance of cultural heritage management plans, cultural heritage permits and Aboriginal cultural heritage land management agreements; and
>
> (b) issuing and delivering 24-hour stop orders under Part 6.

110. In South Australia Inspectors have compliance functions for particular areas, but the legislation does not specifically mention that they may be Aboriginal. Indeed, at s 15 of the *Aboriginal Heritage Act 1988* (SA) it is provided that –

> (3) The traditional owners of an Aboriginal site or object may inform the Minister, by notice in writing, that they object to an inspector named in the notice exercising powers under this Act in relation to the site or object, and, in that event, the inspector must not exercise those powers in relation to the site or object.

111. That tends to suggest that South Australian Inspectors are more likely than not to be persons who are not Aboriginal persons. However, it also indicates involvement of local Aboriginal people in the appointment process, which is something which should be added to the ACH Bill.

Legal proceedings

112. Part 12 deals with powers to commence legal proceedings for offences, liability of employees, officers of a body corporate and partners in a partnership. And evidentiary provisions.

Review by State Administrative Tribunal ("SAT")

113. Part 12 sets out the decisions under the legislation which may be the subject of a merits review by the SAT. The only right of merits review which an Aboriginal person concerned about ACH protection has is as a party to an ACHMP.

CONCLUSIONS

A. Offences and defences

The Bill effectively replaces the single offence provision in s 17 of the AHA WA relating to any alteration of a site or object, which has one defence of lack of knowledge (s 62) with a three-layered distinction as to harm which is –

- Serious;
- Material; or
- not material

to -

(a) an Aboriginal place;
(b) an Aboriginal object;
(c) Aboriginal ancestral remains; or
(d) Cultural landscape in a declared protected area

and several layers of defences (with a specific exclusion of accident as a defence to serious harm (cl 84(2)) comprising:

- exempt activities;
- authorisation;
- due diligence assessments and reasonable steps to avoid or minimise risk of harm; and
- minimal impact confirmations.

It replaces the single consent to uses provision in s 18 of the AHA WA, based on an ACMC recommendation as to the importance and significance of a site and 'the general interest of the community' with –

- permits for Low impact activities; and
- Management Plans for medium or high impact activities authorised by the Minister, subject to being satisfied as to avoidance or minimisation of risk of harm to ACH and the interests of the State.

B. *Encouragement of management plans*:

The exclusion of the defence of accident in relation to serious harm provides an incentive to mining companies and property developers to engage in due diligence assessments where there is a possibility that their activities may cause serious harm to ACH. If they are risk averse they may take the precautionary approach to avoiding prosecution for accidentally causing harm and seek to develop an agreed and approved or authorised ACH management plan applicable to all significant activity in which they engage.

The likelihood that an Aboriginal party will agree to a management plan when the subject matter of a management plan necessarily involves a 'medium to high impact activity that may harm' ACH (cl 122(1)) and the management plan is to 'set out the extent to which harm is authorised to be caused to' ACH (CL 123(e)). It would be surprising if any Aboriginal party would contemplate agreeing to harm ACH, particularly the degree of harm likely to arise from a 'medium to high impact activity'. So, the most frequent management plans are likely to be those authorised by the Minister without the consent of Aboriginal parties.

C. Agreements stopping complaints about ACH harm:

The ACH Council approval process in relation to ACH management plans and the recording of information about plans on the ACH Directory may go some way towards eliminating the capacity of mining companies and developers to negotiate agreements, in the course of agreeing on a management plan, of obliging Aboriginal parties not to publicly reveal concerns about impending harm to ACH to relevant authorities. That is, unless confidentiality obligations in relation to harm to ACH are still able to be included in agreements with Aboriginal parties under the cloak of 'details of commercial arrangements between a proponent and an Aboriginal party' which an ACH

management plan is not required to set out (cl 123(2)). The approval of an ACH management plan and information concerning it on the ACH Directory, even if it incorporates a 'native title agreement or previous heritage agreement' (as permitted under cl 124), does not eliminate (and no other provision in the ACH Bill eliminates) the effect of existing clauses in such agreements which bind native title parties not to reveal information concerning potential harm to ACH or otherwise take action to protect ACH. The inclusion of such clauses in heritage agreements and Indigenous Land Use Agreements entered into and/or registered pursuant to negotiate processes arising under the NTA are not susceptible to being interfered with by State legislation and the effect of such clauses could only be invalidated by the Commonwealth Parliament passing legislation invalidating or prohibiting the enforcement of such contractual prohibitions. That is because it is beyond the Constitutional power of the States to enact legislation affecting the field of matters related to native title which has been covered by the Commonwealth Parliament by enacting the NTA and providing for rights to negotiate in relation to matters including Aboriginal heritage, thus invoking s 109 of the *Constitution* which would invalidate any State legislation trespassing into that field.

D. *Stop activity orders*

A stop activity order ("SAO") is a significant addition to the tools available to protect ACH, which is not available under the AHA WA. It is similar in operation to an emergency declaration under section 9 of the Commonwealth ATSIHP Act. An SAO may last 60 days (twice as long as an emergency declaration under the ATSIHP Act) and may be give rise to a prohibition order of fixed or unlimited duration (cl 182(d)). The discretions the ACH Council has to recommend, and the Minister has to make, a protection order are based on harm or risk of harm to ACH (cl 176(1), 179(3), 181(2)). However, the Minister is also empowered to take into account 'what is in the interests of the State' (cl.181(2)(b)). So, whether or not a protection order is made is open to be determined on similar criteria to those applied in making a s18 decision under the AHA WA, i.e., taking into account the commercial interests of the State.

The SAO provisions take into account a circumstance similar to that in the Juukan caves situation, allowing for a SAO where an activity has been authorised or approved but–

(a) new information has identified ACH not identified at the time of the authorisation or approval (cl 176(b)(ii)(I); or
(b) new information has emerged 'about the significance of Aboriginal cultural heritage that was identified at the time the permit was granted or the plan was approved or authorised' (cl. 176(b)(ii)(II)).

The second of those categories describes the exact situation in relation to the Juukan Caves where information was identified by an Archaeological study conducted, for the information of Rio Tinto Iron Ore, about the significance of ACH material at the time the s 18 AHA WA consent was given, but that information about the significance of the material did not emerge into the public arena or come to the attention of the State until after the consent to destroy the site was given. It is likely that it is intended by the Government that the Bill also cover the situation where the **significance** of the ACH was not identified by anyone at the time of the grant of a permit or approval or authorisation of a management plan. If that is the case, that intent would be made clearer by changing the wording of cl 176(b)(ii)(II) to say –

> about the significance of Aboriginal cultural material that was **Aboriginal cultural material** identified at the time the permit was granted or the plan was approved or authorised.

Alternatively, a third alternative could be added in the following terms –

> about the significance of Aboriginal cultural material that was **not** identified at the time the permit was granted or the plan was approved or authorised.

E. *LACHS*

The provision for a LACHS for various areas of the State is to be welcomed as a mechanism for consultation with local Aboriginal knowledge holders which does not exist under the AHA WA.

A LACHS under the Bill has not had delegated to it any decision-making powers, as has been provided for under equivalent Aboriginal heritage legislation in Victoria. LACHS functions are limited to facilitation consultation with native title parties and knowledge holders and agreements on an ACH Management Plan and an advisory role to the ACH Council.

The advisory and information gathering functions imposed upon a LACHS by the Bill (cl 32(d)-(i)) creates obligations, for which the Bill prohibits the LACHS charging the Government (cl 41(3)). It appears to be assumed that the LACHS may charge fees to proponents for facilitating consultation leading to agreements about management plans and giving effect to agreements, which fees will be controlled by the ACH Council (cl 42). How a LACHS is to fund its other functions is not identified in the Bill. Advice from the responsible Minister and Department is that funding for some functions of LACHS will be budgeted for by the State and that it will also seek a contribution from the Commonwealth with respect to Commonwealth native title corporations.

F. *Protected areas*

The declaration of Protection areas appears to be likely to have the same level of limited utility in protecting ACH which it has occupied under the AHA WA. Declarations of Protected areas are reserved to areas of 'outstanding significance' where there is no permit or management plan. The possibility of a protection order under the AHA WA was not sufficient to save the Juukan caves.

Cultural landscape protection is also limited to areas which have been declared to be a Protected area, so the introduction of a concept of cultural landscape into ACH protection is likely to be of limited significance in protecting ACH.

G. *Return of ACH*

The Bill introduces obligations to return Aboriginal ancestral remains and 'secret or sacred objects' to Aboriginal persons with traditional entitlements to them which do not exist under the AHA WA. The Bill stops short of obliging return of objects which are not 'secret or sacred'. The attempt to exclude the WA Museum and universities from this obligation may arguably be ineffective, as the Bill is currently drafted.

Summary of recommendations

- The Western Australian ACH Bill should replicate the *Aboriginal Heritage Act 2006* (Vic) model of Registered Aboriginal Parties which results in a greater devolution of functions and power to local Aboriginal decision- makers in protecting ACH than the WA ACH Bill.

- It needs to be clarified by the Government where the resources are coming from for the LACHS to be established and perform the onerous statutory functions imposed upon them by the ACH Bill.

- Given that the concepts of 'low', 'medium', 'high' and 'minimal' impact activities are not defined, other than to limit their application to activities involving 'ground disturbance', that limitation renders irrelevant the definition of ACL as including intangible elements and results in no apparent application of the concept of 'intangible heritage' in the operative provisions of the Bill, the Bill should adopt provisions similar to those in the *Aboriginal Heritage Act 2006* (Vic) sections 79A to 79L , which set out a process for registration of Aboriginal intangible heritage, offences for using intangible heritage for commercial purposes, Aboriginal intangible heritage agreements and their registration.

- If Part 6 of the Bill is to achieve its declared purpose of 'a higher level of protection' of ACH by declaring 'protected areas', the Minister's unfettered and undirected discretion to place conditions upon the areas declared as protected areas should be qualified by mandatory relevant considerations related to how the ACH might be protected for the Minister to take into account in exercising his discretion whether or not to make the declaration of a protected area and the conditions to place on the area.

- If there is to be a penalty attached to conduct resulting in harm to ACH which is not material or serious and thus is in the category of being 'trivial or negligible', a standard needs to be prescribed by which the concept of harm *simpliciter* is to be applied.

- If the provisions in relation to 'new information' in cl 118(1)(b), relating to permits, in cl 123(1)(c) relating to Management Plans and in cl 176(1)(b)(ii)(II) relating to 'stop activity orders', are to be fully protective of areas then they should be re-worded to say -

  > about the significance of Aboriginal cultural material that was **Aboriginal cultural material** identified at the time the permit was granted or the plan was approved or authorised.

  Alternatively, an additional sub-paragraph should be added in the following terms –

  > about the significance of Aboriginal cultural material that was **not** identified at the time the permit was granted or the plan was approved or authorised.

- they should have added to them a sub-paragraph (c), requiring notification of new information about the **significance** of Aboriginal cultural heritage in the area to which the permit relates that was **not** identified at the time the permit was granted, management plan was approved or authorised or stop activity order was made.

- There should be a process in Part 8 Div 6 for Aboriginal parties notified of an application for an ACH permit to challenge, in the SAT or elsewhere, a decision to grant an ACH permit or relating to the conditions attached to a permit, avoiding the need for them to go to the Supreme Court, as they now have to do, in order to challenge section 18 decisions under the current *Aboriginal Heritage Act 1972* (WA).

- Given that the Minister's power to authorise an ACHMP is to be based on satisfaction as to the matters set out in clause 146(1) (cl 147(2)(a)), together with 'what is in the interests of the State' (cl 147(2)(b)) and is otherwise unfettered as to whether or not to authorise the

recommended ACHMP, or 'another' ACHMP (cl 147(1)), the Minister's discretion should be qualified by mandatory relevant criteria by which to authorise 'another' ACHMP.

- Local Aboriginal people should be involved in the selection of local Aboriginal people as inspectors in local areas and only local Aboriginal people should be eligible for appointment.

- Merits review in the SAT upon the application of Aboriginal knowledge holders should be extended to all discretionary decisions by the Minister and ACH Council.

- If 'secret or sacred objects' are to be adequately protected, then the Bill needs to description what makes an object secret or sacred and specify the criteria by which an object is to be judged to fit into that category and who is to decide whether an object fits into that category.