



## **Joint Standing Committee on Northern Australia**

### **Inquiry into the destruction of 46,000 year old caves at Juukan Gorge**

## **Submission by BHP**

**7 August 2020**



## Introduction

BHP welcomes the opportunity to participate in the Inquiry. The Inquiry is a valuable opportunity to examine issues relating to cultural heritage, and the effectiveness of State and Federal laws relating to Aboriginal and Torres Strait Islander cultural heritage.

Indigenous Peoples are critical partners in many of BHP's operations both within Australia and around the world. Many of our operations are located on or near lands traditionally owned by or under the customary use of traditional owner groups, and the long-term nature of our operations allows us to establish long lasting relationships with those communities. Engaging with the traditional owners of the land and managing cultural heritage matters is therefore an integral part of our business. Traditional owners often reach agreements through native title and heritage processes that facilitate mining activity taking place on their lands, and the impacts that go with that. BHP recognises that in doing so, the traditional owners make a significant contribution to the national economic prosperity brought about by mining.

BHP considers that in order to properly address cultural heritage matters when making land use decisions, it is necessary to take into account the views of the traditional owners of the lands where that cultural heritage is located. Consideration of traditional owners' views is the driver for the suggestions made in this Submission by BHP. Traditional owner involvement will be enhanced, and carry weight, if appropriate mechanisms are put in place in the legislation for this to happen. These mechanisms include agreement-making processes and appropriate consultation rights.

Commonwealth laws play an important role in protecting cultural heritage that is of national or international significance. This should continue as the primary focus of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) in relation to Indigenous heritage, enabling State or Territory legislation to be tailored to the context, tenement, planning and environmental regulatory framework of the particular State or Territory.

In this Submission we comment on (i) measures that we believe will enhance the legislative framework for protecting and managing cultural heritage in Western Australia, and (ii) the interplay between State and Federal laws in addressing cultural heritage matters.

## Western Australia – Current approach to cultural heritage and suggested improvements

The *Aboriginal Heritage Act 1972 (WA)* (**AHA (WA)**) has regulated the preservation and management of cultural heritage in Western Australia for almost 50 years. The Western Australian Government is currently undertaking a legislative review process with the intention of reforming and updating the legislation. BHP supports the reform process and provided a submission to the WA Department of Planning, Lands and Heritage in May 2019 in which it made suggestions on particular areas for review. Based on the proposals published by the Western Australian Government in the consultation materials, BHP believes that the reform of the AHA (WA) has the potential to improve protections for the cultural heritage of the traditional owners, especially by adopting mechanisms that give traditional owners a greater say in their own cultural heritage matters.

In order to enhance the operation and safeguards provided by the AHA (WA), BHP is supportive of the following measures being incorporated into the new legislation to replace the AHA (WA):

- (a) Statutory recognition of consent based agreements between land users and traditional owners: Although heritage agreement-making is an established practice in Western Australia (and in other States), the AHA (WA) does not contain mechanisms to recognise heritage agreements or agreed heritage outcomes between land users and traditional owners. The entry into agreements empowers the traditional owners of the land to have a greater say in the activities that take place on their lands. They also provide land users with a framework for their relationship with the



traditional owners, providing the necessary level of confidence for them to commit to sizeable, long term investments on those lands.

Our view is that the Western Australian legislation would be improved if it specifically recognised and accommodated agreements reached between land users and traditional owners on cultural heritage matters. Consistent with the approach taken in legislation in other states, these agreements should include processes for working together with traditional owners to identify cultural heritage (including through surveys), assess its significance and set out the period over which land use activities will occur. They should also include agreed processes for avoidance of impacts on areas of cultural significance, consulting with traditional owners prior to any disturbance and measures that are to be taken in connection with any disturbance, such as relocation or preservation of cultural heritage items and sites. Agreements are also able to contain mechanisms that would operate in the event that new cultural heritage items or sites are discovered or if new information arises.

In order to ensure accountability and public confidence in the agreement-making process, BHP considers that agreements should require endorsement by the Minister, who will assess those agreements against content requirements (such as the minimum content provisions currently set out in Reg 5 of the *Aboriginal Heritage Regulations 2017 (SA)*). Further, the process for submitting, assessing and approving these agreements should be public and transparent.

For clarity, the fact that the legislation accommodates agreement making does not mean that a statutory process for seeking approval for the disturbance of heritage sites is no longer necessary and should be removed from the legislation. There are a variety of circumstances where a statutory approval process will still be required even though agreement-making might be recognised and accommodated by the new legislation. Ministerial approval of land use that might disturb a heritage site will continue to be needed, unless an agreement provides for an agreed land use outcome and that agreement has been endorsed by the Minister. This might occur, for example, in relation to legacy agreements which have not had Ministerial endorsement, or in relation to early-stage exploration work.

Statutory recognition of agreements is not a novel concept. It is used in other State jurisdictions to facilitate agreed outcomes between the land user and traditional owners. In South Australia the *Aboriginal Heritage Act 1988 (SA)* (**AHA (SA)**) makes specific provision for agreement-making. The AHA (SA) allows for agreements between project proponents and traditional owners to replace the need for Ministerial approvals in certain circumstances. In Queensland the *Aboriginal Cultural Heritage Act 2003 (Qld)* (**ACHA (Qld)**) also facilitates the making of agreements. The ACHA (Qld) does this by imposing a “cultural heritage duty of care”, which may be met by land users consulting with and entering into a plan or agreement with Aboriginal or Torres Strait Islander parties when undertaking activities that will impact on Aboriginal cultural heritage.

- (b) Traditional owner consultation: The AHA (WA) does not have a statutory requirement for a land user or decision-maker to consult with traditional owners in relation to proposals affecting their lands. It is acknowledged that as a matter of practice, the Aboriginal Cultural Material Committee (**ACMC**) does require evidence of adequate consultation with the relevant traditional owners when making recommendations relating to Section 18 approvals. Nonetheless, BHP believes that the right of the traditional owners to be consulted should be entrenched in the statutory provisions in the new legislation dealing with land disturbance (currently section 18). This consultation should take place between the proponent and the traditional owner representative body in accordance with a (preferably) endorsed agreement and prior to the submission of the application to disturb the relevant site. The Minister (through the Department) should be satisfied that adequate consultation has taken place.

Consultation with traditional owners in relation to decisions about heritage protection and land use is catered for in comparable legislation in other states. Depending on the jurisdiction, this



consultation occurs either through agreements between traditional owners and land users, and also via direct comment to decision makers. In South Australia, under the AHA (SA) the Minister is required to consult with a range of Aboriginal persons and organisations before providing authorisation to disturb an Aboriginal site or object, unless an approved heritage agreement is in place. The Minister must also accept the views of traditional owners as to whether the land or object is of significance according to Aboriginal tradition. As noted above, in Queensland land users can discharge their “cultural heritage duty of care” under the ACHA (Qld) by consulting and reaching agreement with Aboriginal or Torres Strait Islander parties.

- (c) Representative bodies: If the new Western Australian legislation does contain embedded consultation rights (see (b) above) then BHP considers that the legislation should also provide for the establishment or recognition of the representative bodies with whom this consultation will take place. Heritage values are held by traditional owners as a community, who as a group should have the opportunity to make decisions about what those values are, and to provide the view on how they should be managed in light of land use proposals.

BHP considers that a recognised traditional owner representative body (generally the Registered Native Title Body Corporate (**RNTBC**)) should hold the rights to be consulted, to make submissions, to lodge appeals and to enter agreements that have statutory effect under the Act on behalf of the relevant traditional owner community. It should be the responsibility of the RNTBC to ensure that the right people have been consulted and shared their views about heritage values and the impact of a proposed land use. This promotes self-determination and will enable the RNTBC to provide the authorised view of the community about their heritage, and to resolve internal conflicts within the community. BHP also notes that the Western Australian Government has proposed the establishment of an Aboriginal Heritage Council to provide strategic oversight and advice on State cultural heritage matters, which we support.

Other State regimes also provide for the establishment or recognition of representative bodies as focal points for traditional owner consultation and for the purposes of agreement-making. Under the ACHA (Qld) the representative body will be the relevant native title party, being the registered native title claimant or RNTBC where a native title determination has been made. Similarly, in New South Wales under the *National Parks and Wildlife Act 1974 (NSW)* the representative body will be the RNTBC where a native title determination has been made. In South Australia the AHA (SA) provides instead for the creation of Regional Aboriginal Representative Bodies, which can be RNTBCs, which are able to enter into agreements and represent traditional owners in relation to cultural heritage for the geographic area for which they are responsible.

- (d) Appeal rights: A shortcoming of the AHA (WA) is that rights of appeal are not balanced. A land user is able to seek review of a refusal to grant a land use consent under section 18 and can seek a review of a declaration of an Aboriginal site as a protected area. However, the traditional owners do not have the same rights to seek review in the event that they wish to contest these decisions (in the event that the section 18 consent is granted or if there has been a refusal to declare a site as a protected area). The lack of specific appeal rights means that traditional owners instead are limited to judicial review or general law remedies to challenge a decision. BHP believes that where a merits review or appeal right is open to a land user under the new Act, the same right should be afforded to the traditional owners (through their representative body).
- (e) Determination of significance of cultural heritage: The AHA (WA) does not presently provide for traditional owners to determine the cultural importance of heritage sites on their lands. BHP would support amendments that enable a cultural group of Aboriginal people to determine that a particular place holds cultural importance for that group. BHP suggests that in order to meet the requirement for importance, the relevant area should be capable of being mapped, meet objective criteria for importance that have been developed with the advice of the Aboriginal Heritage Council and be important to the cultural group as a whole.



- (f) Penalties: BHP considers that penalties under the AHA (WA) are not proportionate to the potential harm that can be occasioned by breaches of the legislation. Currently, the greatest fine that can be imposed under the AHA (WA) is \$50,000 for the first offence by a body corporate, rising to \$100,000 for subsequent offences. BHP believes these fines do not reflect community concerns in relation to the preservation of cultural heritage, nor are they commensurate with the harm potentially suffered by traditional owner communities. The need for increased fines and penalties becomes evident when the AHA (WA) is compared to analogous legislation. The ACHA (Qld) provides for a maximum fine of \$1.33 million dollars in the event that a corporation does not take reasonable measures to avoid harming Aboriginal cultural heritage. Similarly, the *Heritage Act 2018* (WA) provides for a maximum penalty of \$1 million for unlawful damage to buildings that are protected under that Act. BHP supports a material increase in the fines and penalties under the AHA (WA) to reflect public concerns, act as a deterrent to unlawful damage and to reflect the unique nature of some cultural heritage sites that are protected by the Act.
- (g) Limitation periods: A further consideration is that the limitation period for commencing proceedings for breach of the AHA (WA) is currently one year. BHP considers that this period is too short to enable offences to be adequately identified, investigated and prosecuted, especially if they take place in remote parts of the State. In this respect, guidance can be taken from the *Heritage Act 2018* (WA), which provides for prosecutions under that Act to be commenced within three years after the relevant offence has been committed. BHP would support an increase in the limitation period to a duration that is commensurate with other analogous legislation.

BHP believes that these key reforms will modernise the AHA (WA), allow traditional owners to have greater legislated rights and input, provide recognition and protection for traditional owner interests and also facilitate appropriate land use decisions.

## The overall legislative framework

The Terms of Reference raise the question of the interaction of State and Federal cultural heritage laws and also whether the heritage protection should be improved through the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the **EPBC Act**).

Currently, State and Territory legislation is the primary means for regulating and protecting Aboriginal and Torres Strait Islander cultural heritage across Australia. BHP believes that this approach is effective and that the current balance between State and Federal cultural heritage laws should be maintained.

It is appropriate that cultural heritage matters are addressed through the State or Territory legislation, as this enables an approach that is tailored to the tenement, planning and environmental regulatory framework of the particular State or Territory. While there are differences in State and Territory legislation regarding cultural heritage, BHP's experience is that there is a commonality of principles between jurisdictions. Each jurisdiction achieves, in BHP's view, a balance between land use and the protection of cultural heritage sites, having regard to the interests of traditional owners and those of the broader community.

In this submission, BHP has referred to perceived shortcomings in the AHA (WA). We believe that Western Australian Government's current process of review and then introduction of new legislation is the preferable way of dealing with those shortcomings, as opposed to the introduction of new federal legislation that is motivated by issues in one jurisdiction but would have application in all jurisdictions. An expansion of Federal legislation would likely result in State/Territory and Federal regulation both covering the same cultural heritage matters. This risks duplicating or fragmenting regulatory processes, approvals and compliance requirements, which would increase the burden on both land users and traditional owners.

We consider that Commonwealth laws play an important role in protecting cultural heritage that is of national and world heritage significance, and in taking into account Indigenous values associated with





matters of national environmental significance. This, in our view, should continue as the primary focus of the EPBC Act in relation to Indigenous heritage.

BHP notes the recently released Interim Report on the independent review of the EPBC Act authored by Professor Graeme Samuel AC. Professor Samuel has stated that “more needs to be done to respectfully incorporate valuable Traditional Knowledge of Country in how the environment is managed”. We understand that Professor Samuel now intends to engage in targeted consultations with stakeholders over the coming three months to discuss the key reform directions proposed in the Interim Report, including the review of Australia’s Indigenous cultural heritage laws. BHP would be pleased to participate in this process if invited to do so.

BHP also considers that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the **ATSIHP Act**) provides a safeguard mechanism for protection of areas of particular significance in any instance where State or Territory laws are not effective. BHP supports the role played by the ATSIHP Act as a further line of protection in instances where a State or Territory authority fails to properly protect heritage values. This is an important and complimentary role for the Federal legislation to have, while also retaining the primary regulation of these matters within the States and Territories.

## Conclusion

BHP welcomes the Joint Standing Committee’s consideration of issues relating to the protection and management of cultural heritage. BHP values its relations with traditional owners and we reflect this in our processes and procedures for dealing with cultural heritage matters. In particular, we support steps to empower the traditional owners of the land to have a meaningful involvement in the management of cultural heritage sites on their land. A highly effective way of achieving this is to allow those traditional owners to make their own decisions about their cultural heritage and to then reach binding agreements with land users that entrench those decisions. For good governance, these agreements should be subject to review and endorsement by the appropriate State or Territory Minister in a transparent manner. A legislative system that facilitates this approach to self-determination and agreement-making will advance the dual aims of protecting cultural heritage and enabling land use for the wider community benefit.

BHP also recognises that more work remains to be done to understand where there might be shortcomings in the legislative framework. The current review of the AHA (WA) by the Western Australian Government is an example of this. Similarly, BHP is very supportive of the work of the Joint Standing Committee to review the national framework and we are receptive to any changes that may arise from the Committee’s recommendations.