CAPE YORK LAND COUNCIL
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21 August 2020

Joint Standing Committee on Northern Australia
PO Box 6021
Parliament House
CANBERRA ACT 2600
jscna@aph.gov.au

Dear JSCNA

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

Cape York Land Council Aboriginal Corporation (CYLC) performs the functions of a Native Title Representative Body (NTRB) for the Cape York region pursuant to the *Native Title Act 1993* (Cth) (NTA). In our broader Land Council role we support, protect and promote Cape York Aboriginal peoples' interests in land and sea country to positively affect their social, economic, cultural and environmental circumstances. In these capacities CYLC welcomes the opportunity to provide this submission to the Inquiry into the destruction of 46,000-year-old caves at the Juukan Gorge in the Pilbara region of Western Australia (the Inquiry). We confine our comments to items (g), (h) and (i) of the Inquiry's Terms of Reference.

CYLC Key Recommendations

CYLC's key recommendations to improve the protection and management of Indigenous cultural heritage are:

1. CYLC is a member of the recently formed Indigenous cultural heritage alliance which includes land councils and other prominent Indigenous organisations from across Australia. CYLC notes that the alliance has called for Australian and State / Territory Governments to place a moratorium on approvals for mining and other developments until current legislative regimes have been reviewed and amended in partnership with Indigenous peoples to reflect best practice standards for cultural heritage protection and management. This moratorium is necessary so that further cultural heritage damage is not done whilst legislative reforms are considered and reform processes conducted.

2. CYLC supports that the Heritage Chairs and Officials of Australia and New Zealand's (HCOANZ) draft *Best Practice Standards in Indigenous Cultural Heritage Management and Legislation* is used to guide legislative reform.

3. Indigenous cultural heritage protection and management decisions associated with development or resource use proposals must no longer be made by politicians or bureaucrats. Instead, Indigenous cultural heritage protection and management decisions must be made through objective, transparent and nationally consistent processes that prioritise Indigenous cultural heritage values, the right of relevant Indigenous people to make informed decisions, and an independent regulator to oversee and engage in statutory processes.

4. Indigenous cultural heritage protection and management processes must be administered through a new, independent, statutorily based, Indigenous cultural heritage regulatory authority established with national responsibility to facilitate and determine, including by arbitration if necessary, approval or not of Cultural Heritage Management Plan (CHMPs). The statutory authority must be staffed by people with Indigenous cultural heritage management expertise.

5. The proposed Indigenous cultural heritage regulatory authority must also be empowered to work with Indigenous people across Australia to proactively identify cultural heritage locations of high value, such as sacred sites or places of national / international / intergenerational significance (such as Juukan Gorge caves), that must not be damaged under any circumstances. The regulatory authority must be empowered to proactively develop and maintain a register of these sites and ensure that no approvals for damaging developments are given, even in the event that development proponents were able to induce the relevant Indigenous people to provide their Free, Prior and Informed Consent (FPIC) for the development and damage to the sites.

6. Australian and Queensland (and other State / Territory) legislation concerned with authorising development or resource use must be amended to introduce a dual authorisation requirement whereby the Minister or other decision maker may not authorise the development or resource use unless Traditional Owner FPIC has been provided for the project's management of Indigenous cultural heritage, as demonstrated through an agreed CHMP. A model best practice agreement should be used as the basis for the preparation of a CHMP and negotiation of FPIC.

7. The proposed Indigenous cultural heritage regulatory authority would provide the final advice to the Minister regarding whether FPIC has been provided, or not, depending upon whether a CHMP could be successfully agreed or arbitrated. Traditional Owner FPIC must therefore precede, and be a condition of, Ministerial or other decision maker authorisation of development or resource use projects.

8. The proposed Indigenous cultural heritage regulatory authority must also be empowered to enforce the conditions of approved CHMPs. Statutory enforcement powers and penalties must be increased so that the Indigenous cultural heritage regulatory authority can apply substantial penalties for non-compliance with CHMPs, including stop work orders, substantial fines and suspension or cancelation of the proponent's authority to operate. The regulatory authority should also have powers to delegate compliance monitoring responsibilities, and provide resources as necessary, to relevant Traditional Owners so that they monitor and report to the regulatory authority about any CHMP compliance issues that may require further investigation and enforcement or penalty.

9. Legislation concerned with authorising development or resource use must be amended to require a CHMP for all activities with potential to affect Indigenous cultural heritage, rather than only those activities that trigger an Environmental Impact Statement, as Queensland's Indigenous cultural heritage legislation currently provides. The relevant development and resource use activities that require a CHMP should be listed in the legislation.

10. Statutory definitions of Indigenous cultural heritage must be amended to ensure they encompass the full breadth and depth of tangible and intangible cultural heritage, as contemporaneously perceived by Australia's Indigenous people.

11. FPIC also requires that support must be provided for Traditional Owners to participate equally and effectively in statutory cultural heritage protection and management processes. Support must also be provided to the regional and sub regional organisations that support Traditional Owners to engage in cultural heritage processes, including corporations established pursuant to the *Native Title Act 1993,* such as Native Title Representative Bodies (NTRBs) and Registered Native Title Bodies Corporate (RNTBCs).

12. Indigenous regional (such as NTRBs) and sub regional (such as RNTBCs) corporations must be delegated statutory responsibilities related to supporting local Traditional Owner group engagement in cultural heritage protection and management processes under State / Territory and Federal legislation. Financial resources must be provided by governments and/or proponents to regional, sub regional and local Indigenous corporations to implement these responsibilities. Regional – sub regional – local Indigenous land and sea governance structures must be formally recognised, resourced and engaged so that Indigenous participation in State / Territory and Federal statutory process may be adequately facilitated, and cultural heritage processes and decisions are rigorous and valid.

If you wish to discuss any aspect of this submission please do not hesitate to contact me.

Yours sincerely

Richie Ah Mat
Chair
Cape York Land Council

Detailed Response to Terms of Reference (g) – (i)

(g) the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;

The destruction of caves at Juukan Gorge was a touchstone moment in Australia's history that highlighted how inadequate and ineffective Australia's Indigenous cultural heritage statutory protection regimes actually are. Juukan Gorge caves, an internationally valuable 46,000-year-old record of human culture, amongst the oldest on earth, was not protected by either State or Commonwealth statutory processes. Unfortunately, the destruction of caves at Juukan Gorge was not a one-off accident or exceptional circumstance that slipped through the protection regime, because the destruction was in fact legally authorised. The legally sanctioned destruction of Indigenous cultural heritage across Australia by mining and other land use activities is no rare event.

It is impossible to quantify the full extent of destruction of Indigenous cultural heritage in Queensland, including Cape York, resulting from land use and development. Mining, agriculture, urban development, infrastructure and other land uses have taken a huge toll on Indigenous cultural heritage. No comprehensive official record of the damage and destruction has been maintained. The destruction has been ongoing since colonisation and is too extensive, pervasive, unrecorded, qualitative and personal to accurately measure. Every Queensland Traditional Owner group is likely to have had aspects of their cultural heritage damaged, and if their traditional country is in an area subject to intensive development, such as a mine, then the level of damage and destruction will be extreme and extensive.

Our great concern is that the damage and destruction of Aboriginal cultural heritage on Cape York is ongoing, and most alarmingly, is often legally sanctioned pursuant to the provisions of the *Aboriginal Cultural Heritage Act 2003* (ACHA), Queensland's principal Aboriginal cultural heritage protection legislation. Our experience has been that non-Indigenous land use and development is routinely prioritised as more valuable than Indigenous cultural heritage, and Indigenous cultural heritage is expendable if it gets in the way of development. In this way the ACHA is frequently used as a tool to facilitate, manage, regulate and legally approve damage to Aboriginal cultural heritage rather than to protect it.

Queensland is not alone in this regard. It has been reported that the Western Australian Environment Minister approved the destruction by BHP of 80 Aboriginal cultural heritage sites just three days after Rio Tinto destroyed the sites at Juukan Gorge. Other miners are awaiting approval to destroy cultural heritage sites, and State Governments, including the Queensland Government, are following the processes of their cultural heritage legislation to decide what is in the best interests of Indigenous people for the management of their cultural heritage. Under the ACHA Indigenous Queenslanders do not have the right to decide how their cultural heritage is managed through the negotiation of an agreement. Queensland's ACHA is clearly not effective or appropriate to protect Aboriginal cultural heritage on Cape York.

Cape York's Aboriginal cultural heritage is offered little protection by the Federal regime either. The Federal Environment Minister has powers to issue emergency declarations under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHPA) but this power is rarely used. Since 1984, 539 applications have been made across Australia for urgent Ministerial intervention to protect Indigenous cultural heritage under ATSIHPA, including 200 applications for long term protection, yet only seven declarations have been made and only two remain in place.

The Australian and Queensland statutory regimes are inadequate to protect Indigenous cultural heritage, as is clearly demonstrated by their ineffectiveness. CYLC is a member of the recently formed Indigenous cultural heritage alliance which includes land councils and other prominent Indigenous organisations from across Australia. CYLC notes that the alliance has called for Australian and State / Territory Governments to place a moratorium on approvals for mining and other developments until current legislative regimes concerned with development assessment or resource use have been reviewed and amended in partnership with Indigenous peoples to reflect best practice standards for cultural heritage protection and management.

Cape York Land Council supports the Heritage Chairs and Officials of Australia and New Zealand's (HCOANZ) adoption of the "Darwin Statement" which commits to best practice cultural heritage principles, including the inclusion and engagement of Aboriginal and Torres Strait Island peoples. To articulate this commitment the HCOANZ, in consultation with the National Native Title Council, has produced the draft *Best Practice Standards in Indigenous Cultural Heritage Management and Legislation* (best practice standards) with an objective *"to facilitate Indigenous cultural heritage legislation and policy across the country that is consistently of the highest standards and are based on Australia's acceptance of the United National Declarations of the Rights of Indigenous Peoples and, more generally, the obligation to ensure the Free Prior and Informed Consent of affected Indigenous Peoples before the approval of any project that affects Indigenous Peoples' lands and their cultural heritage".* See Attachment 1 to this submission for a copy of these draft best practice standards.

CYLC supports the HCOANZ best practice standards and considers that all State / Territory and Federal laws relating to Aboriginal and Torres Strait Islander cultural heritage must be reviewed against these standards and amended as necessary to bring them into compliance with best practice. This point is further articulated in our response to ToR (h) below.

Regardless of statutory reviews and amendments, the effectiveness and adequacy of State / Territory and Federal laws to protect and manage Indigenous cultural heritage will remain inadequate and unsatisfactory as long as these laws provide powers to politicians and bureaucrats to make decisions about Indigenous cultural heritage. A new approach must be taken where an independent specialist body is empowered to make these decisions. CYLC strongly advocates that a new, independent, statutorily based, Indigenous cultural heritage regulatory authority is established with national responsibility for Indigenous cultural heritage protection and management.

The statutory functions of the Indigenous cultural heritage regulatory authority should include:

- to oversee cultural heritage management planning processes to ensure Traditional Owners are properly engaged and their FPIC is sought;
- to arbitrate on CHMPs where agreement cannot be reached between Traditional Owners and proponents;
- to advise the Minister or other decision maker about whether cultural heritage FPIC has been achieved and therefore if the decision maker may approve the overall project;
- to enforce the conditions of CHMPs, including through the recruitment of Traditional Owners to monitor and report on compliance, and have powers to penalise project operators for non-compliance, including through fines, stop work orders, and ultimately the removal of authority to operate; and
- to proactively work with Traditional Owners across Australia to identify sites of high significance that should not be damaged and record these sites on a national register.

CYLC notes the arrangements in the Northern Territory where the Aboriginal Areas Protection Authority has been established as an independent statutory authority under the Northern Territory

Aboriginal Sacred Sites Act. The Authority is responsible for overseeing the protection of Aboriginal sacred sites on land and sea across the Northern Territory.

The broad purpose of the Northern Territory Aboriginal Sacred Sites Act is to:
'...effect a practical balance between the recognised need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Territory and the aspirations of the Aboriginal and all other peoples of the Territory for their economic, cultural and social advancement...'

CYLC encourages the Inquiry to consider the Aboriginal Areas Protection Authority in more detail with a view to extending similar arrangements across Australia under the proposed Indigenous cultural heritage regulatory authority.

(h) how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;

The HCOANZ draft best practice standards outline key standards that State / Territory and Federal Indigenous cultural heritage laws must reflect to provide effective cultural heritage protection and management. The best practice standards relate to matters including:

- Basic Principles;
- Basic Structures;
- Definitions;
- Incorporation of Principles of Self Determination;
- Process;
- Resourcing, engagement and enforcement;
- Indigenous Ancestral Remains;
- Secret and Sacred Objects;
- Management of Frontier Conflict Sites; and
- National Legislation and Intangible Cultural Heritage.

State / Territory and Federal Indigenous cultural heritage laws, including Queensland's ACHA, do not reflect best practice as articulated by the HCOANZ standards and must be amended to do so. Some of the ACHA's inadequacies and inconsistencies with best practice standards are outlined below.

Basic Principle – UNDRIP and Free, Prior and Informed Consent
A Basic Principle that Australia's Indigenous peoples are entitled to expect is that Indigenous cultural heritage legislation will uphold the international norms contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), to which Australia is a signatory. An important UNDRIP provision is the requirement for the Free, Prior and Informed Consent (FPIC) of affected Indigenous peoples before the approval of any project that affects their lands or resources. However, the ACHA does not include a requirement for FPIC, and must be amended to do so.

The requirement for FPIC is the most important reform that must be introduced to the ACHA. Currently, the Minister administering the ACHA has powers to authorise Cultural Heritage Management Plans (CHMPs) that may include proposals for damage or destruction to Aboriginal cultural heritage. Aboriginal Traditional Owners are involved by project proponents in the preparation of CHMPs but their consent for damage to their cultural heritage is ultimately not required. The Minister may authorise damage or destruction to Aboriginal cultural heritage regardless of Traditional Owners' lack of consent. Political or bureaucratic decision making about Indigenous cultural heritage management in statutory regimes must be replaced with the FPIC of Traditional Owners.

Development and resource use legislation must be amended to introduce a dual authorisation requirement whereby a project may not be approved by the Minister or other decision maker unless Traditional Owners have provided their FPIC for the project's CHMP. In the event that agreement about the CHMP cannot be reached between Traditional Owners and the project proponent, the proposed Indigenous cultural heritage regulatory authority should have power to arbitrate agreement or not for the CHMP. To articulate the process by which project proponents and Traditional Owners negotiate agreement about a CHMP, including for damage to cultural heritage, a model best practice agreement must be prepared and used as the basis for negotiation. The successful negotiation or arbitration of an agreed CHMP must precede, and be a condition of, authorisation of a project.

The ACHA must also be amended to require a CHMP for all activities with potential to affect Aboriginal cultural heritage, regardless of whether the existence of Aboriginal cultural heritage is known or not. The threshold trigger for a mandatory CHMP must be lowered from projects that require an Environmental Impact Statement (EIS) to projects that involve undertaking high impact activities, as identified by a prescribed list. This would be consistent with the Victorian model which includes high impact activities such as mining, construction, residential development, subdivision of land and quarrying as activities that require a CHMP regardless of whether EIS is required. The prescribed list should also include any activities that involve significant land clearing or excavation, especially in previously undisturbed areas, but also in previously disturbed areas. Therefore the 'self-assessment' duty of care under the ACHA should no longer apply to high impact activities, but consultation and agreement with Traditional Owners through the negotiation or arbitration of FPIC for a CHMP should be the only option for high impact activities.

Basic Structure

The Basic Structure of the ACHA is that interference with Aboriginal cultural heritage, as defined by the ACHA, is an offence unless there is a statutory authorisation in place. This basic structure is supported and should be retained in the ACHA, but its effectiveness at providing adequate cultural heritage protection is dependent upon Traditional Owners' FPIC, as discussed above, and the definition of what constitutes Aboriginal cultural heritage, as discussed below.

However, the basic structure of the ACHA should be amended to provide that only the proposed Indigenous cultural heritage regulatory authority has authority to decide, including through arbitration, whether FPIC has been provided, rather than a Minister, bureaucrat or other party making these decisions.

Definitions

CYLC considers that the definition of cultural heritage in the ACHA is too narrow and can be interpreted to exclude things that should be rightly recognised and protected as Aboriginal cultural heritage. The definition in the ACHA should be amended so that it encompasses the full breadth and depth of cultural heritage, as contemporaneously perceived by Queensland's Aboriginal people.

Aboriginal cultural heritage may include a range of tangible and intangible things that do not readily fit within the definition of "an object" provided in the ACHA, such as foods, a plant or animal, a totem, or intangible heritage such as knowledge, tradition or song lines. CYLC supports that the United Nations Educational, Scientific and Cultural Organisation's (UNESCO) convention definition (or similar) of intangible heritage should be adopted as the definition in the ACHA because it includes oral traditions, performing arts, rituals, festivals and traditional crafts, and these types of things are considered by Aboriginal people to be a part of their broader intangible cultural heritage.

Similarly, the definition of "an area" can be interpreted too narrowly and perceived as applying to a relatively small area such as a ceremonial place, a birthing place, a burial place or the site of a massacre, as per the examples given in the ACHA. The perception that areas with Aboriginal cultural heritage significance are always relatively small is incorrect and the definition in the ACHA should be recast to recognise the significance of broader cultural landscapes. This would allow broad landscape features, songlines, connected areas, story places, etc to fall within the definition of an area. Story places (sometimes referred to as sacred sites) are afforded a great deal of significance in Aboriginal law and custom and reflect a far reaching and rich cultural heritage that should be both protected and enriched as a vital part of any cultural heritage management framework.

The proposed Indigenous cultural heritage regulatory authority must be empowered to work with Indigenous people across Australia to proactively identify cultural heritage locations of high value, such as sacred sites or places of national / international / intergenerational significance (such as Juukan Gorge caves), that must not be damaged under any circumstances. The regulatory authority must be empowered to proactively develop and maintain a register of these sites and ensure that no approvals for damaging developments are given, even in the event that development proponents were able to induce the relevant Indigenous people to provide their FPIC for the development and damage to the sites.

Incorporation of Principles of Self Determination
UNDRIP supports the principle of self-determination for Indigenous people. Therefore, for cultural heritage management, the potentially affected Traditional Owners must be the arbiters of the management of their cultural heritage, and no interference with cultural heritage should occur without the FPIC of these Traditional Owners.

However, Traditional Owners' participation in cultural heritage protection, management and agreement processes may require assistance from an organisation to help them represent their interests. CYLC supports that where a Registered Native Title Body Corporate (RNTBC) has been established pursuant to the *Native Title Act 1993* (Cth) (NTA) to hold or manage native title rights and interests, then this organisation should also be recognised pursuant to the ACHA as the Aboriginal Cultural Heritage Body (ACHB) to identify the relevant Traditional Owner group for an area. In addition to being resourced to support the management of native title rights, the RNTBC should also be resourced to fulfil ACHB functions and to support Traditional Owners to engage in ACHA cultural heritage management processes.

Where a RNTBC has not been established, the relevant NTRB (such as CYLC for the Cape York region) should identify and assist Traditional Owners to engage in ACHA cultural heritage management processes until such time as a RNTBC is established, or permanently for those areas where native title has been extinguished. NTRBs should also support RNTBCs in cultural heritage processes with legal advice, maintain cultural heritage databases and anthropological records to inform cultural heritage processes, and possibly also provide cultural heritage surveying and reporting services to support Traditional Owners to identify and articulate their cultural heritage interests.

A major failing of Queensland's ACHA however is that it is not linked to the Commonwealth's NTA, and does not recognise the connection between native title rights and interests and cultural heritage rights and interests. Nor does the ACHA provide, or require any assistance to be provided, to Aboriginal parties to engage in ACHA processes. To support the principle of self-determination, the ACHA must be amended to provide resources to assist Traditional Owners to participate in ACHA statutory processes, and recognise that organisations established pursuant to the NTA, such as NTRBs and RNTBCs, are the best placed organisations to be resourced to support Traditional Owners' participation.

Process
FPIC requires that affected Traditional Owners are provided adequate information and adequate time and resources to engage effectively in cultural heritage protection, management and agreement processes, such as the negotiation of a CHMP. ACHA processes must be amended to ensure information and time provided to Traditional Owners are adequate for this purpose.

Cultural heritage management and protection processes must also be flexible and responsive to cultural heritage information as it becomes available. Traditional Owner FPIC may change if previously unknown cultural heritage is revealed by land disturbance or further research. This can often be the case if, for example, cultural heritage objects are unearthed as land is disturbed for development. In the Juukan Gorge case, additional information about the significance of the cave sites was not established until after the Traditional Owners' agreement with the miner, and the Minister's approval of the sites' destruction. However, no process was available to review the Traditional Owner agreement or Ministerial decision in light of the new information. All cultural heritage legislation must include processes to adjust cultural heritage agreements and CHMPs if understanding about the presence or significance of cultural heritage values changes before or during the implementation of a project.

Queensland's land use planning and development assessment and approval legislation, primarily the *Planning Act 2016* (Qld), must also be amended and implemented so that Indigenous cultural heritage is identified in local government planning schemes, with protection of sensitive cultural heritage information as necessary. Development approvals under the *Planning Act 2016* must be conditional upon Traditional Owner agreement about the protection and management of cultural heritage in development processes. Local government planning schemes with good information about the general location and sensitivity of cultural heritage values will also assist development proponents in their early stage project planning to be aware of cultural heritage issues, how these issues could be potentially avoided through relocation or management of the project, and the need for these issues to be addressed with adequate information and time for Traditional Owners to consider their FPIC.

All Australian cultural heritage legislation must be amended to also articulate the role of the proposed Indigenous cultural heritage regulatory authority in overseeing processes to negotiate CHMPs, and in processes to arbitrate on CHMPs in the event that agreement cannot be reached between Traditional Owners and project proponents.

Resourcing, engagement and enforcement
In association with cultural heritage legislation being amended to establish and articulate the role of the proposed Indigenous cultural heritage regulatory authority, the resourcing required of this statutory authority and its functions must be calculated and resources made available to fund its operations.

Traditional Owners, and the regional and sub regional organisations supporting them such as NTRBs and RNTBCs, must also be appropriately resourced to engage in cultural heritage protection, management and agreement making processes, such as CHMP negotiations, as equal participants. Aboriginal parties will be engaged in processes required by statute so either the project proponent, or the State, or a contribution from both, must be required to resource Aboriginal party participation and their fulfilment of statutory requirements.

Similarly, Traditional Owners should be resourced to monitor compliance with cultural heritage agreements to ensure that what has been authorised by the approved CHMP is actually occurring.

This would be particularly appropriate and cost effective in remote and hard to access areas that are often subject to mining projects, such as on Cape York, and where compliance monitoring by regulatory bodies can be prohibitively expensive. Where the proposed Indigenous cultural heritage regulatory authority wishes to delegate compliance monitoring functions to Traditional Owners it should have sufficient resources to do this.

Protection of Indigenous cultural heritage and enforcement of CHMPs can only ever be effective where the penalties for damage and non-compliance are compelling on the land user. The penalties provided by Indigenous cultural heritage legislation across Australia must be reviewed and increased as necessary to create a significant disincentive for land users to cause any unauthorised harm to cultural heritage. Any funds raised through compliance enforcement actions should be reinvested into the protection and management of Indigenous cultural heritage.

Enforcement mechanisms available to the proposed Indigenous cultural heritage regulatory authority must include substantial fines, stop work orders, and ultimately the power to suspend or cancel the land users' authority to operate.

Indigenous Ancestral Remains
The HCOANZ identify the management of Indigenous Ancestral Remains (IAR) as being of such importance as to warrant particular attention in the draft best practice standards. The HCOANZ identifies two fundamental principles, the first being that wherever possible IAR identified in country should be left in country, and the second being that it is the right and duty of the Indigenous community of origin to manage the IAR if management is required. The ACHA must be reviewed and amended as necessary to ensure these two principles are adequately accommodated.

(i) opportunities to improve Indigenous heritage protection through the Environment Protection and Biodiversity Conservation Act 1999;

CYLC recently provided a submission to the EPBC Act Reviewer and Expert Panel regarding the independent review of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC). Amongst other things, the EPBC's Indigenous cultural heritage protection effectiveness is being considered as part of this review, and CYLC addressed this matter in our submission. CYLC's full submission may be viewed on the EPBC Act Review website. The EPBC Act Review Interim Report has been released and is highly critical of the EPBC Act's effectiveness. This Interim Report should be referred to by the JSCNA as part of this Inquiry, regarding its commentary on the ways in which the EPBC Act should be reformed, particularly in relation to Indigenous cultural heritage. See www.epbcactreview.environment.gov.au

Generally, the EPBC Act, like Queensland's ACHA and other State based cultural heritage legislation, should be reviewed against the HCOANZ best practice standards to identify how it could be improved. This would include compliance with the UNDRIP and its requirements for FPIC.

More specifically, CYLC has identified the EPBC Act could be improved in a number of ways. Matters of national environmental significance defined by the EPBC Act should be expanded to include Indigenous cultural heritage values that are not protected by State cultural heritage legislation. For example, culturally significant landscapes or sacred sites are not protected by Queensland's ACHA. The EPBC Act should provide a broad definition of Indigenous cultural heritage to ensure it covers any gaps in State cultural heritage legislation definitions, and have powers to override State legislation processes where they do not provide adequate cultural heritage protection. The proposed Indigenous cultural heritage regulatory authority should be empowered to proactively

identify Indigenous cultural heritage sites to be identified as matters of national environmental significance. Alternatively, the legislation that establishes the Indigenous cultural heritage regulatory authority could also provide for the establishment of an Indigenous cultural heritage register that identifies high value cultural heritage sites and provide mechanisms to protect them.

The EPBC Act must also be amended to support self-determination for Traditional Owners, and this must also involve supporting the Indigenous governance structures that support Traditional Owners. The EPBC Act should require that Aboriginal Cultural Heritage Bodies (ACHBs), as provided for under the ACHA in Queensland, are engaged as part of EPBC Act processes for assessing the cultural heritage values of an area. ACHBs are responsible to identify Traditional Owners for an area for ACHA cultural heritage protection purposes. On Cape York, CYLC supports an arrangement where the RNTBC that holds or manages native title rights, and possibly also Aboriginal freehold tenure rights, is also the ACHB. After their identification by the RNTBC / ACHB, the Traditional Owners of the area identify cultural heritage values associated with their land and participate in the negotiation of CHMPs under the ACHA, with their involvement often supported by the ACHB. The EPBC Act should be amended to require a similar process, utilising the same ACHBs recognised for ACHA purposes.

Where a RNTBC has not been established, the relevant NTRB (such as CYLC for Cape York) should assist Traditional Owners to engage in EPBC cultural heritage management processes until a RNTBC is established. For those areas where native title has been extinguished and a RNTBC will not be established, the NTRB should provide this support to Traditional Owners on a permanent basis.

CYLC's proposed amendments to the EPBC Act highlight that Indigenous cultural heritage protection, similar to environment protection and biodiversity conservation, would be enhanced by formally recognising and supporting a three level Indigenous governance structure which engages relevant matters at the appropriate governance level. The three-level structure should operate at the Regional (NTRBs such as CYLC), Sub Regional (Aboriginal land and sea rights and interests holding corporations such as RNTBCs), and Local (Traditional Owner group) levels. Support for and engagement with this governance structure would ensure appropriate Indigenous engagement and satisfy the engagement requirement of multiple Federal and State statutory regimes, including Indigenous cultural heritage protection regimes.

The regional level would respond to regional issues, and provide professional services and support to assist the functions of sub regional Aboriginal corporations such as RNTBCs in their role as an ACHB and in support of cultural heritage management. CYLC operates at the regional level. Indigenous Land Councils, such as CYLC, should be recognised and resourced to deliver legal advice and maintain cultural heritage databases and anthropological records to inform cultural heritage processes, and other relevant services such as cultural heritage surveying and reporting services.

The sub regional level includes governance structures such as an RNTBC, Aboriginal corporation and/or Land Trust, which hold and/or manage rights and interests in land, including native title, and/or statutory land rights (such as Aboriginal freehold in Queensland), and should also be the ACHB for their area. In a region such as Cape York there are many sub regional structures. The sub regional structure should be positioned with responsibility as the portal between Traditional Owners and the rest of the world for cultural heritage matters. As such, one of the sub regional organisation's main roles would be to identify the relevant Traditional Owner group for native title, land rights and cultural heritage issues. The sub regional organisations do not make decisions about land use or cultural heritage protection, instead they identify Traditional Owners and facilitate processes to assist Traditional Owners to speak for their country's cultural heritage and make decisions about its management. When Traditional Owners make decisions about their country or

cultural heritage, the sub regional organisation takes actions to communicate and administer the decision.

The local level is the Traditional Owner group for an area of land or sea. Several Traditional Owner groups are likely to exist within a sub regional area. Traditional Owner groups exercise their own governance processes to "speak for country" – ie make decisions about how their native title, land rights, and cultural heritage rights and interests are exercised, such as to identify their cultural heritage and decide how it should be managed through a CHMP.

This three-level (regional - sub regional - local) Indigenous land governance structure provides the most appropriate vehicle to engage Indigenous Australians in EPBC Act, and cultural heritage management processes, to be actively involved in on ground management activities, and to contribute traditional knowledge to management practices. Many elements of the Indigenous land governance structure already exist and it would not be a difficult or expensive exercise to formally recognise this structure and support its operations and engagement in multiple statutory processes, including EPBC and State based legislation, such as Queensland's ACHA.